Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Statement of U.S. Senator Russ Feingold
On Reauthorization of the USA PATRIOT Act
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"When Congress reconsidered the sunsetting provisions of the Patriot Act reauthorization four years ago, I was unable to support the final reauthorization package because I did not believe that it contained adequate oversight and safeguards for some very intrusive surveillance powers. "But I have to acknowledge that Congress did some things right back in 2005 and 2006. First and most importantly, it included new sunsets for three provisions, which is why we are here today. Although it is my preference to pass the right law in the first place, sunsets at least require us to reconsider laws that are controversial or have been passed in haste, as the original Patriot Act was.

"Second, during the 2005 reauthorization process, Congress looked at the list of sunsetting provisions and recognized that there were other controversial surveillance laws that had been broadened or codified by the Patriot Act that did not sunset, but that were nonetheless worthy of attention. So Congress did not limit its reconsideration to the sunsetting provisions. It also took up 'sneak and peek' criminal search warrants and National Security Letters, neither of which was subject to a sunset. I believe Congress should similarly take a comprehensive approach to the reauthorization process this year, and should take this opportunity to revisit not just the three expiring provisions, but rather a broad range of surveillance laws enacted in recent years to assess what additional safeguards are needed.

"Finally, as you well know, early during the reauthorization process in 2005 the members of this committee were able to reach a compromise and report out a bill 18 to zero. It was a difficult negotiation and the bill was far from perfect, but it included enough privacy protections that I was able to support it. That bill went on to pass the Senate by unanimous consent. During the conference process, key elements of that carefully negotiated package were removed. But that 2005 Senate bill nonetheless proved that unanimous bipartisan agreement is possible on these complex issues.

"I fear that is not how the process is going to play out this year, but I think it is worth recalling the agreement we were able to reach then.

"As members of the committee know, Senator Durbin and I, along with eight other Senators, recently introduced the JUSTICE Act, which takes the kind of comprehensive approach to fixing

the USA PATRIOT Act and the FISA Amendments Act that I mentioned. It permits the government to conduct necessary surveillance, but within a framework of accountability and oversight. It ensures both that our government has the tools to keep us safe, and that the privacy and civil liberties of innocent Americans will be protected. These are not mutually exclusive goals. We can and must do both.

"Indeed, the Department of Justice has acknowledged as much. I was heartened that in the testimony of Assistant Attorney General Kris last week, he said, 'The protection of privacy and civil liberties is of deep and abiding concern to the Department of Justice, and to the Administration as a whole. We are ready and willing to work with Members on any specific proposals you may have to craft legislation that both provides effective investigative authorities and protects privacy and civil liberties.'

"This is our chance to craft that legislation. That's exactly why the sunsets were put in place. And we need to take this opportunity to revisit the highly controversial FISA Amendments Act as well. The Majority Leader specifically stated on the floor of the Senate during consideration of that bill that the issues it addresses could be reconsidered during the Senate's development of Patriot Act reauthorization legislation this year. Here's what he said:

Congress should not wait until the 2012 expiration to improve this legislation. I will work to ensure that Congress revisits FISA well before 2012, informed by the oversight that will be conducted in the coming months by the Judiciary Committee and the Intelligence Committees and by the reports of the inspectors general. Next year, for example, Congress will be required to revisit a number of provisions of the PATRIOT Act . That may provide a suitable occasion to review the related issues in this FISA legislation.

"Let me say to my colleagues on this committee, we must not continue to kick this can down the road. The rights and freedoms of innocent Americans are at stake.

"I remain concerned that critical information about the implementation of the Patriot Act remains classified - information that I believe would have a significant impact on the debate. As a first step, the Justice Department recently made public that the so-called 'lone wolf' authority has never been used. That was a good start, since this is a key fact as we consider whether to extend or modify that power.

"But there also is information about the use of Section 215 orders that I believe Congress and the American people deserve to know. It is unfortunate that we cannot discuss this information today. We must find a way to have an open and honest debate about the nature of these government powers, while still protecting national security secrets, and under current conditions that simply isn't possible.

"As I'm sure you well remember, during the 2005 reauthorization process the question was often asked of those of us advocating reforms, 'Where are the abuses?' At the time all we could say was that most Patriot Act authorities were used secretly and people who were targeted would likely never learn that their phones were tapped or their personal records were seized. And that still holds true in some regards. But thanks in large part to the work of the Justice Department

Inspector General on National Security Letters, the public is now aware of one significant area where there most definitely were abuses.

"After the IG's audits of NSLs, which the chairman worked so hard to include in the 2006 reauthorization legislation, there can be no question that statutory changes to our surveillance laws are necessary. In reports issued in 2007 and 2008, the Department of Justice Inspector General carefully documented rampant misuse and abuse of the National Security Letter authority by the FBI. The Inspector General found - as he put it - 'widespread and serious misuse of the FBI's national security letter authorities.' The FBI's apparently lax attitude and in some cases grave misuse of these potentially very intrusive authorities is attributable in no small part to the USA PATRIOT Act. That flawed legislation greatly expanded the NSL authorities, essentially granting the FBI a blank check to obtain some very sensitive records about Americans, including people not under any suspicion of wrong-doing, without judicial approval. Congress gave the FBI very few rules to follow, so we shouldn't be surprised at the result.

"Since the Patriot Act was first passed in 2001, we have learned some important lessons. Perhaps the most important of all is that Congress cannot grant the government overly broad authorities and just keep its fingers crossed that they won't be misused, or interpreted by aggressive executive branch lawyers in as broad a way as possible. Congress has the responsibility to put appropriate limits on government authorities - limits that allow agents to actively pursue criminals, terrorists and spies, but that also protect the privacy of innocent Americans.

"We also now know that lawyers in the Office of Legal Counsel looked for every possible loophole in statutory language in order to justify what I believe were clearly illegal wiretapping and interrogation programs. That should also teach us that we must be extraordinarily careful in how we draft these laws: We must say exactly what we mean.

"I want to commend you and the other cosponsors for your bill, the USA Patriot Act Sunset Extension Act, which you introduced last week. It is a thoughtful bill, and I appreciate that you incorporated some aspects of the JUSTICE Act, which Senator Durbin and I introduced a few weeks ago with support from eight other Senators.

"That said, I understand that a complete substitute has been circulated that takes out some of the key provisions of your bill. I appreciate that the chairman is trying to address concerns that have been raised, but I am disappointed that the substitute does not include the clear standard for Section 215 orders that was passed by a vote of 18 to zero by this committee and again unanimously by the full Senate in 2005. I am sure we will have the opportunity to discuss that issue further, and I will have other amendments to offer as well."