Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 3, 2011

Opening Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Executive Business Meeting
March 3, 2011

I begin by commending the members of this Committee for their work on the America Invents Act, which has been before the Senate all week. Because Senate consideration is not yet complete and will resume at 11 this morning, we will need to hold a shorter meeting than I would have liked, and will have to complete action on the agenda next week. Today we will report those nominations that we can and hold over those nominees for whom additional time is requested.

We will hold over Senator Whitehouse's bill on foreclosure mitigation. We may be able to complete action on Senator Kohl's railroad antitrust bill which we have previously considered.

With respect to the USA PATRIOT Act, I am disappointed that we will not be able to complete our consideration today. I expect that we will do so next week.

When Senator Grassley asked for additional time and a briefing before consideration of the USA PATRIOT Act extension, after consideration had already been delayed several weeks, I worked with the Department of Justice to schedule a classified briefing. That briefing was held on Monday, and without going into the classified discussion, I can say that I believe that the administration's previous public statements that there were not operational concerns raised by the bill remain accurate. The administration's previously stated support for the provisions of the bill remains the administration's position. The language in the bill was carefully negotiated with the FBI and the intelligence community in 2009 and it has not changed.

I was particularly pleased that Attorney General Holder reaffirmed his support for the bill this week at a House hearing, where he described the administration's support for extending the USA PATRIOT Act authorities and increased civil liberties protections, and described our Senate bill as striking "a good balance," in that it extends those authorities "but also dials in civil liberties protections."

I want to make clear that all of the misconceptions about the bill expressed two weeks ago when we last met were refuted in a classified briefing this past Monday. Officials from the National Security Division of the Department of Justice, the FBI, the Office of the Director of National Intelligence and the National Security Agency briefed Senators Grassley, Hatch, Cornyn, Lee, Feinstein, Whitehouse and Blumenthal. I arranged this briefing at the request of Senator Grassley and we heard from top-level officials with direct operational experience with the surveillance

authorities addressed in this bill. As I have said, that briefing just this week confirmed, once again, that the prior letters of endorsement from the Attorney General and the Director of National Intelligence remain in force, and that the bill poses no operational concerns.

I am dismayed that some have sought to use the delay occasioned by that briefing request to file more and more amendments to the bill - the majority of which have absolutely nothing to do with the surveillance authorities addressed in the USA PATRIOT Act. This is an important matter and should not be filibustered by amendment. I urge Senators to rethink their strategy and come to our meeting next week prepared to debate and vote on amendments they believe necessary for our consideration. We should delay no longer and should report the bill to the Senate for its consideration next week.

I will correct for the record certain issues that can be discussed in public with respect to data retention requirements for National Security Letters (NSLs), the standard for section 215 and pen register trap and trace orders, minimization for pen trap orders, and challenges to nondisclosure requirements.

Data Retention Requirements for NSLs:
In our last markup, a Senator expressed concern that Section 7 of the bill will burden the FBI by requiring it to collect and retain new information when it issues a National Security Letter. That is not the case. The bill simply codifies what the FBI is already doing by requiring an agent to enter into the FBI's computer system a written statement of facts showing relevance. It does not require "specific and articulable facts." The language in the bill has no effect on the relevance standard and does not change current FBI practice.

The Bill Does Not Raise the Standard for Section 215 and Pen Register/Trap & Trace Orders:
Two Senators said in our last meeting that the bill raises the standards for Section 215 orders and orders for pen registers or trap and trace devices. They took issue with the language in Sections 2 and 3 of the bill that would modify the statute to require "a statement of the facts and circumstances relied upon by the applicant to justify the belief that" the information sought is relevant.

The language in the bill was described as vague, untested, and never before interpreted by the FISA court. Yet identical language was included in FISA when it was first enacted in 1978, and the standard is still used in current FISA law - including section 104, which governs electronic surveillance, and section 303, which covers physical searches.

I originally added this language to the bill at the request of a Senator who wanted consistency of language across FISA. The administration endorsed the bill in 2009 and 2010 when the bill contained this language. The administration has stated that the bill poses no operational concerns, and I recently confirmed that the Department of Justice does not oppose this language.

Minimization for Pen/Trap Orders
In the last markup, a Senator expressed concern over the bill's minimization procedures for certain pen/trap data collection. This topic was discussed at length in our briefing on Monday. The language in this section was carefully negotiated with the FBI and the Intelligence

Community in 2009 and it has not changed. The officials at the briefing reiterated that this section of the bill does not pose any operational concerns and simply reflects current practice.

Unlimited Challenges to Nondisclosure Requirements
Finally, one Senator claimed that the bill would allow unlimited legal challenges to nondisclosure orders that are issued with NSLs or Section 215 orders. With regard to NSLs, the bill simply codifies current FBI practice, which was revised to comply with the 2008 Second Circuit ruling in Doe v. Mukasey. That language is utterly uncontroversial. In fact, a Doe v. Mukasey fix was included in a bill introduced by Senator Sessions and Senator Bond in 2009.

With regard to nondisclosure orders on Section 215 orders, the bill does make an important change to current law. It repeals the one year waiting period before a recipient of a Section 215 order can challenge the associated gag order. The Attorney General has not expressed any concern that repealing the one year period would result in a flood, or even a trickle, of litigation. And the Department has repeatedly stated that this change would pose no operational concern.

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