

STATEMENT ON THE USA PATRIOT ACT

October 22, 2003

MR. FEINGOLD. Mr. President, October 26 will mark the second anniversary of the enactment of the USA-PATRIOT Act. I want to speak today about the continuing and growing controversy surrounding that law, which was passed just six weeks after the September 11th terrorist attacks.

I was the only Senator to vote against the PATRIOT Act. As I said during the debate in the fall of 2001, the Act did contain many provisions that were necessary and appropriate to help protect our nation against terrorism. I still believe that. But I also argued that the PATRIOT Act went too far, that it threatened our citizens' constitutional rights and liberties. That is why I could not support it and why I insisted on offering amendments to the bill on this floor. Today, two years later, I still believe that as well.

An increasing number of Americans agree and have expressed their concerns that certain provisions of the PATRIOT Act threaten the rights and liberties guaranteed by our Constitution for over 200 years. The chorus of voices of doubt has grown so loud that the Bush Administration has responded -- but not, I am sorry to say, by addressing these concerns in a constructive and open way.

Rather, the Administration has initiated what seems to be a public relations campaign in recent weeks to defend the PATRIOT Act. The Attorney General has gone on the road and on the Internet to extol the virtues of the law. Speaking before handpicked audiences of law enforcement personnel, he has ridiculed and dismissed those who have raised concerns about the law. Just a few weeks ago, he denounced "the charges of the hysterics" as "castles in the air. Built on misrepresentation. Supported by unfounded fear. Held aloft by hysteria."

I think these words are unfortunate. In its zeal to defend the PATRIOT Act, the Administration appears unwilling to even acknowledge the legitimate concerns of many Americans. And it objects to common sense proposals to protect privacy and civil liberties that would not in any way undermine the fight against terrorism. Proposals such as my bill, the Library, Bookseller, and Personal Records Privacy Act, and Senator Craig's bill, the SAFE Act, which I also strongly support, would protect the constitutional rights of innocent citizens, while still allowing the FBI to do its job to protect our nation from another terrorist attack.

As members of Congress, we have taken a solemn oath to uphold the Constitution of the United States. The President and executive branch officials take this same oath. The burden is on the Administration, which sought the powers included in the PATRIOT

Act and which now seeks even more powers, to show that the current law and proposed new laws are consistent with the Constitution.

Mr. President, let me take a moment to remind my colleagues how a commitment to individual rights became part of the founding principles of our nation and enshrined as the Bill of Rights.

In 1787, in the halls of the State House of Pennsylvania in Philadelphia, General George Washington, who led our nation to victory during the Revolution, convened the Constitutional Convention. A number of great political figures were delegates to that great convention. Joining George Washington were other distinguished Americans such as James Madison, Benjamin Franklin, Alexander Hamilton, and George Mason. Mason participated in the convention, but he was concerned that the deliberations would result in a Constitution creating a central government with too much power over the states and individuals.

Mason, a patriotic American who loved his newly found freedom from British rule, had reservations when he made the trip to Philadelphia. Prior to the convention, Mason had written a bill of rights for the state constitution of Virginia. He urged delegates to the convention to include a bill of rights in the national Constitution.

But a majority of delegates initially disagreed with Mason. When the draft of the Constitution was released, it failed to contain a bill of rights or any other explicit protection for the rights of individuals. Mason was bitterly disappointed.

Mason was concerned that without any explicit protection for individual liberties, the Constitution would open the doors to tyranny by a central government. Why? Because our experience with British rule, in which the colonial power was able to infringe on individual rights, was still very much on his mind. So after the Constitutional Convention adjourned, Mason continued to push for a bill of rights.

During the next two years, as the Constitution made its way to the states for consideration and ratification, the American people came to agree with Mason, and he prevailed.

Thomas Jefferson wrote to Madison that a bill of rights was “what the people are entitled to against every government on earth.”

Another statesman, Richard Henry Lee, who was one of the signers of the Declaration of Independence, said provisions were needed to protect “those essential rights of mankind without which liberty cannot exist.”

Madison, who was initially opposed to including a bill of rights, was persuaded. An explicit protection for the rights of the people, or a bill of rights, was needed in our nation’s governing document.

So, Mr. President, on September 25, 1789 – almost exactly 214 years ago -- the First Congress of the United States proposed twelve amendments to the Constitution. Ten of these amendments were ratified two years later by the legislatures of at least three-fourths of the states. The remaining two amendments -- relating to compensation for members of Congress and the number of constituents per Representative -- were not ratified at that time.

The first ten amendments to the Constitution are, of course, what Americans now know as the “Bill of Rights.” The First Amendment guarantees freedom of speech, freedom of religion, and freedom of association. The Second Amendment guarantees the right to bear arms. The Fourth Amendment protects against unreasonable searches and seizures. The Fifth Amendment ensures that no person shall be deprived of life, liberty, or property without due process of law. The Sixth Amendment guarantees a right to counsel and a right to trial by jury to those charged with crimes.

During the debate on the Constitution, our nation was at a critical juncture. Do we follow a path toward a highly centralized government with the potential for tyranny? Or do we follow a path toward a government with checks and balances, respect for the states in a federal system, and protections of individual rights and liberties? The decisions made in the first days of the Republic have stood the test of time; they created the greatest democracy on earth and a governmental structure that is the most protective of individual freedom and liberty in history.

Now, today, Mr. President, we stand at another critical crossroads. As our nation faces new terrorist threats, we must respond to those threats without compromising the civil liberties that are the bedrock of our country. We must balance the legitimate needs of law enforcement against the privacy and freedom of all Americans.

That is not an easy task. But one thing I know -- the solution is not simply to grant the federal government more and more power to conduct surveillance, eavesdrop, and collect information on law-abiding Americans.

The debate about the PATRIOT Act echoes the debate over two centuries ago in the halls of the State House in Philadelphia.

Today, as then, we must take from our experience as a nation. We must remember the critical role that the Constitution, and in particular the Bill of Rights, has had in guiding our country through national crises, war, and armed conflicts at home and abroad, including the War of 1812, the Civil War, two World Wars, and the Cold War. The Constitution has survived and flourished throughout our history, and respect for individual freedom and privacy has steadily advanced.

In the immediate aftermath of the September 11, 2001, terrorist attacks, there was, understandably, a great desire to give the Administration the tools it said it needed to fight terrorism and prevent another terrorist attack. But with time to study and reflect after the enactment of the PATRIOT Act two years ago, many Americans have now paused and come to see a very real potential for abuse of power and infringement of privacy and civil liberties unleashed by this law.

There is strong and growing bipartisan support for changes to the Act to protect our rights and liberties. I am confident that this right-left-moderate coalition of support will continue to grow and eventually occupy the center, as more and more Americans learn what the law means. The coalition includes Americans for Tax Reform, the American Conservative Union, and the Free Congress Foundation, as well as the ACLU and the Open Society Policy Center.

At the state and local level, 3 states and over 180 cities and counties have enacted resolutions expressing concern with the PATRIOT Act. These states and communities represent over 25 million residents. And these localities are not just left-leaning college towns such as Madison and Berkeley, but also right-leaning, libertarian regions of the country, such as Flagstaff, Arizona, Boise, Idaho, and the state of Alaska.

Here, in Congress, several legislative proposals have now been introduced proposing changes to the PATRIOT Act to protect privacy and civil liberties. During its consideration of the Commerce-Justice-State appropriations legislation, the House adopted an amendment by Representative Otter to restrict the FBI's use of the 'sneak and peek' power granted by the PATRIOT Act. The Otter amendment received overwhelming support, including 113 votes from Republican members.

In the Senate, Senator Murkowski of Alaska and Senator Wyden of Oregon have introduced a bill, S. 1552, proposing to modify a number of provisions of the PATRIOT Act.

Mr. President, as I mentioned earlier, I have introduced the Library, Bookseller, and Personal Records Privacy Act, S. 1507.

And now, there is the SAFE Act, S. 1709, which I also mentioned earlier. I am pleased to join my colleagues Senators Craig, Durbin, Crapo, Sununu, Wyden, and Bingaman in supporting this bill. The SAFE Act does not repeal the PATRIOT Act. It simply proposes reasonable modifications to four particularly troubling PATRIOT Act provisions. These modifications will help to protect civil liberties and privacy by strengthening the role of judges in approving certain kinds of search and surveillance authority expanded by the PATRIOT Act. Specifically, the SAFE Act would strengthen the role of the courts in approving delayed notice searches; requests for access to library, medical, and other records containing sensitive, personal information; and roving wiretaps in FISA cases.

Mr. President, these were issues I first raised in the fall of 2001 as the main reasons why I believed the PATRIOT Act was flawed and threatened fundamental constitutional rights and protections. For me and those few of my colleagues who supported my business records and roving wiretaps amendments to the PATRIOT Act, it sure was a lonely feeling in October 2001. I must say, Mr. President, I did not imagine at that time that reasonable minds would begin to prevail so soon. Now, two years later, we have a strong bipartisan effort to change these provisions. I am pleased to see that, and I look forward to working with Senator Craig and my other colleagues on both sides of the aisle to get this bill passed.

But, Mr. President, I am very troubled by the Administration's response to legislative efforts like those I just mentioned and to the public's outcry to repeal or modify the PATRIOT Act. The Administration has launched an effort to defend the PATRIOT Act, but its defense only tells the American people half the story, at best. Its p.r. campaign eagerly describes the new powers the PATRIOT Act gives to law enforcement, but it doesn't say what the law potentially takes from the American people: our liberty and privacy.

Perhaps most disturbing, the Administration's campaign fails to seriously address section 215, which I have long seen as one of the Act's most troubling provisions. Both my bill and the Craig bill contain the same proposal to modify this provision. Section 215 allows the FBI access to the private details of the lives of law-abiding Americans – which books we have checked out from the library, what our medical records reveal, and what charges we have made on our credit cards. Americans reasonably expect the details

of their private lives, from what they read to what drugs they have been prescribed, to remain just that – private. The PATRIOT Act undermines that expectation.

Under section 215, all the FBI has to do is assert that the records are “sought for” an international terrorism or foreign intelligence investigation. As long as the FBI makes such an assertion, and it’s just an assertion, the secret foreign intelligence court is required to issue an order allowing access to those records. The court cannot review the merits of the subpoena request.

Both my bill and the Craig bill would simply require the FBI to set forth specific facts showing that the records sought relate to a suspected terrorist or spy. Thus, the government could not ask, say, Amazon.com or e-Bay to turn over the records of law-abiding customers. It could, however, obtain records of those customers who were actually suspected terrorists. My bill would allow the FBI to follow up on legitimate leads, while also respecting the privacy and civil liberties of law-abiding Americans.

Now, the Administration has recently asserted that criticism of section 215 is baseless because this section has not yet been used since it was enacted. The Administration says that librarians concerned about access to Americans’ reading records are “hysterics” and have been “duped” by civil rights advocates and members of Congress.

Mr. President, I am disappointed that the Administration would use such rhetoric. No one has been “duped” and the people concerned about their privacy are not “hysterics.” They are simply worried, as I am, about the government possessing a power that has the potential to intrude on their civil liberties – particularly since the statute itself prohibits a library, bookseller, or anyone else who has been served a subpoena from making that information public.

What I said before the PATRIOT Act was passed, and continue to maintain now, is that section 215 presents the potential for abuse. Mr. President, I’ll say it again, because I cannot emphasize this enough. Section 215 presents the potential for abuse. Regardless of whether the provision has yet been used, that potential still exists, and the public has a reason to be concerned. No amount of ridicule or spin can change that.

The recent disclosure that Section 215 has never been used does not address the concern that it could be used in a way that would violate the privacy of innocent Americans. But it does raise another question: If the section has never been used in the two years since the bill was passed, the two years immediately following the September 11th attacks when concern over terrorism has been at its peak, including numerous periods

of orange alert status, then why is this provision even on the books? Or at the least, what possible objection could there be to modifying it so that the potential for abuse is eliminated?

Both my bill and the Craig bill would protect the rights of law-abiding citizens by limiting the FBI's access only to information that pertains to suspected terrorists or spies. Our legislation recognizes the legitimate uses of section 215 and would not interfere with the use of the provision to investigate and prevent terrorism.

So, I urge the administration to open an honest dialogue with Congress and the American people to address the PATRIOT Act's specific problems instead of just continuing to try to sell it. We don't need a government that forces its authority on the people and rejects and ridicules legitimate, heartfelt, and principled criticism of its actions and its laws. That's what our founding fathers strived to ensure would never happen again. The federal government should be responsive and accountable to the people. But most importantly, the federal government should respect and uphold the Constitution.

Unfortunately, Mr. President, the Administration has not only failed to engage in an honest dialogue about the PATRIOT Act, but it now proposes that Congress grant to it even more power. The American people have expressed very legitimate and sincerely held concerns about the PATRIOT Act. The Administration should answer those concerns honestly and forthrightly before seeking more power.

The administration has announced its support for three legislative proposals to expand executive branch power and diminish the role of judges, an essential part of our nation's system of checks and balance. One proposal grants the Attorney General significant power to compel people to testify or the production of documents, all without prior court approval. A second proposal broadens the presumption of pretrial detention to cases that may not even involve terrorism. Finally, the third proposal expands the federal death penalty.

Criticism of the PATRIOT Act appears to have had the effect of influencing the Administration's strategy to secure this new power, but not the substance of its effort. Rather than proposing a single bill with various provisions to expand the PATRIOT Act, the administration now appears instead to have given its blessing to many little "PATRIOT IIs."

The Administration is apparently reluctant to allow these proposals to be linked to the PATRIOT Act. In fact, I've even heard the President say he doesn't want people

calling this second set of proposals “PATRIOT II.” The Justice Department has also tried to suggest that they are unrelated. No one is fooled, however – least of all the American people. The fact is that these proposals did appear in the draft “PATRIOT II” leaked earlier this year and entitled the “Domestic Security Enhancement Act.”

Mr. President, “PATRIOT II,” whether contained in one bill or a series of bills, is the wrong response at the wrong time. An increasing number of Americans want to know exactly how this Administration is using the powers it already has and want the PATRIOT Act to be amended to protect privacy and civil liberties.

The burden is on the Administration to show Congress and the American people why current law is inadequate, why it needs even more power, and how the powers it already has and the new powers it seeks are consistent with the Constitution and Bill of Rights.

That, Mr. President, would be the patriotic thing to do.

Thank you, Mr. President. I yield the floor.