

PATRIOT ACT

Mr. KYL. Mr. President, this resumes our discussion of the PATRIOT Act, which we were discussing before this little interlude. Since much of the attention has been focused on section 215 of the PATRIOT Act, I want to discuss that for a little bit.

The Senator from Illinois, for example, was talking about that just before we broke and, specifically, talked about the subject of section 215, which includes financial records, library records. Incidentally, “library” is never mentioned in the PATRIOT Act. It is just that library records are included in the general definition of business records. As a result, people have focused on that. So we are going to talk about that for just a little bit.

As he pointed out, the standard for a court to issue a warrant is relevance. That is the same standard that is used in all the other civil subpoenas. It is a standard that the courts had begun to impose since we did not have a standard within the law itself. Given the fact that is the standard the courts began to impose—and it is a reasonable standard—we amended that into the law. Part of what passed the Senate unanimously was a relevance standard. So there is nothing wrong with having a relevance standard. I would think those who are weary of the application of the PATRIOT Act would agree this was a good addition. It is an additional safeguard to have a relevant standard.

What exactly is section 215? That is what I would like to address. What it allows is for the FBI to seek an order from the Foreign Intelligence Surveillance Act Court for the production of tangible things—that is the definition—including books, records, papers, documents, and other items for an investigation to obtain foreign intelligence information. That is the key. You are before the Foreign Intelligence Surveillance Act Court, and you are asking for information that pertains to an investigation of foreign intelligence information. That is further defined in the act as information relating to foreign espionage, foreign sabotage or international terrorism.

It is impossible to get from the court—talking about getting an order from a judge—anything that isn't relevant to foreign espionage, foreign sabotage or international terrorism. All of this concern about wanting to find out what kind of books you checked out from the library is simply wrong. Anybody who talks about it in those terms and knows what I have said cannot be serious about objecting to section 215 of the PATRIOT Act.

Let's put it in context. There are 335 administrative subpoenas authorized for our Government. For example, if you are suspected of Medicare fraud, the Department of Health and Human Services has to issue an administrative subpoena to get information relating to whether you might be guilty of Medicare fraud, such as your business records or somebody else's business

records that would perhaps go to proving that case. Or perhaps bank fraud, you could get the bank records that might pertain to that. In none of these other 335 cases is it necessary to go to a court first. There is only one exception. Under the PATRIOT Act, you are required to go to the FISA Court in order to get a subpoena with respect to terrorism. One would think that given the seriousness of terrorism and sometimes the emergency nature of it, it would be easier to get a subpoena dealing with terrorism than it would Medicare fraud or bank fraud. That is not the case. We care so much about civil liberties, we added this requirement that you have to go to court first in order to get the subpoena. This is not a search warrant. This is a subpoena. It is merely a request for information. Unlike a warrant, a subpoena does not allow the Government to enter someone's home or business or property to take things. It is only a request. If the recipient objects to it, the Government has to go to court and defend the subpoena and seek an order for its enforcement. That, too, is where I disagree with my friend from Illinois. There is an ability to say, no, we will not submit the records, in which case the Government has to prove them in court.

Most Government agencies already have the authority to issue subpoenas, and there are 335 of them in the code. It is interesting. If Mohamed Atta were suspected of Medicare fraud, then the Department of Health and Human Services could get a subpoena into business records that might demonstrate whether he is connected with that Medicare fraud. It seems to me to be a little bit incongruous not to allow the Department of Justice to go to the FISA Court and ask for a subpoena in the event that they suspect him of terrorism, especially when we have added the other protections in here that the conference report has added—the relevancy standard and an additional three-part test that makes it clear that it has to relate to foreign espionage or terrorism.

Some people say: The section 215 subpoena is a little different because these other subpoenas relate to regulated industries. Even subpoenas that are involved in investigating industries that are used to get information from citizens outside the regulated industry use it in a situation where people are outside of the industry and not just the regulated industry itself. For example, if you are talking about some kind of business fraud, if the SBA is seeking an administrative subpoena, they are not just subpoenaing the beneficiary itself. They can subpoena others doing business with the entity under investigation. In one important way, the PATRIOT Act has more protections in it than any of the others because you are required to go to court first. I dare say that most of the people who are raising questions about this don't advertise the fact that you have to go to court, you have to get approval from a judge first.

Even a subpoena to appear before a grand jury is issued without going to the judge. There may be a misconception about that, but all the prosecutor has to do is write out the subpoena and you have to supply these business records in accordance with the law to the grand jury. You never have to go to a court first. The only time you have to go to court first is a subpoena invoked under section 215.

One of the complaints is that 215 can be used to obtain books from libraries or other kinds of business records. Of course, to the extent library records are business records, that is true. But it does not, obviously, allow the FBI to simply go into a library and figure out what somebody is reading. It can be used to get library records but only if they are relevant to an investigation into foreign espionage or terrorism.

Let me give an example. Some people remember the case of the Unabomber, Ted Kaczynski. This was an example given by the Justice Department because his brother had actually relayed to Federal agents his suspicion that Ted Kaczynski was behind the decades-long string of attacks. Remember the mail bomb attacks? At the time, the Unabomber had published his manifesto in the New York Times which cited several obscure, even ancient texts. In order to confirm the brother's suspicions, Federal agents subpoenaed Ted Kaczynski's library records and discovered that he had, in fact, checked out the obscure texts that had been cited in the manifesto, thus helping lead them to Ted Kaczynski as the Unabomber. Is there anything wrong with that? Would anybody have an objection to that? That didn't even require going to a court to get the subpoena.

Section 215 also could have been used directly in investigating the conspirators who acted on September 11. How so? We now know that in August of 2001, a month before September 11, individuals using Internet accounts registered to Nawaf al Hazmi and Khalid al Midhar had used public access computers in the library of a State college in New Jersey. The computers in the library were used to shop for and review airline tickets on the Internet travel reservation site. Al Hazmi and al Midhar were hijackers aboard American Airlines Flight 77, the flight that took off from Dulles Airport and crashed into the Pentagon. The last documented visit to the library occurred on August 30, 2001, a dozen or so days before that fateful day. On that occasion, records indicate that a person using al Hazmi's account used the library's computer to review September 11 reservations he had previously booked.

I hope the significance of this sinks in. Library records confirmed airline reservations on September 11. During that same month, August of 2001, Federal agents knew that al Midhar and al Hazmi had entered the United States and initiated a search for those two

known associates of al-Qaida. Had the investigators caught the trail of these individuals and had the PATRIOT Act already been law, the investigators likely would have used section 215 to review the library's records of their Internet usage. Imagine if we had then picked them up, how the course of history might have changed.

This is the use of section 215 relative to library records. It has nothing to do with you and me, nothing to do with what we read in the library. It has to do with determining whether there is information relevant to a foreign terrorist or international espionage, nothing more. It could theoretically have had an impact on the course of events that occurred on September 11, had we been able to use it in connection with al Hazmi and al Midhar. I also want to mention the fact that over half a dozen reports submitted by the inspector general of the Department of Justice have uncovered no instances of abuse of this section. The latest public report indicates that the authority had been used approximately three dozen times and that it had not been found to have been abused. Moreover, in the conference report which was filibustered, the one we would like to be able to vote on so that the act could be reauthorized, we require reports every 6 months to the Congress. These reports are very specific as to the kinds of information with respect to section 215 that we want to review, including whether, as a result of the audits done by the inspector general, there is any potential abuse or there was any potential abuse of this section.

So, Mr. President, we have the original section 215, which already had protections that are unlike any other use of an administrative subpoena; added onto that is the requirement that you have to go to the FISA Court, that it must relate and must be relevant to an investigation into espionage or terrorism. And we have an after-the-fact report so that if anything went wrong, or that the inspector general had reason to suspect. That information comes to the Members of Congress every 6 months. It seems to me that any fair reading and fair consideration of section 215 would lead to the conclusion that it is an authority that we need, that it is an important tool for law enforcement, that it has adequate protections built into it, and that all of the hype that surrounds this is, frankly, just exactly that—that it is an effort to draw some kind of conclusion, create some kind of confusion here that something is wrong with the law, that it is potentially used to eavesdrop on American citizens or somehow sneak their records in a way that could nefariously be used by the U.S. Government.

There is not one example where this has occurred or where anybody is complaining about the use of section 215 that harmed them. With all of the protections we have built in, I ask my colleagues, what else exactly do you want? What could you do? How would

you change this? What would be different? Why isn't the bill that is before us adequate to both protect American civil liberties and, importantly, protect all of our freedoms by giving law enforcement and intelligence agencies the ability they need to carry out their mission?

Let me conclude with respect to this argument that if we just had a little bit more time, maybe we could reopen this and resolve issues. First of all, the conference committee is closed. As a matter of procedure, we cannot just reopen a conference committee. Secondly, a lot of things could have been raised or were raised in conference committee that would be revisited.

I will tell you what some of those things would be in the event you are interested in having these things revisited. I wanted to include a provision relating to terrorist hoaxes. That is not in here. We know when somebody phones in with a hoax, the police or the fire department or the bomb squad or the hazardous material squad need to be sent out. It can be a horrible drain on law enforcement, and there ought to be a way to deal with these hoaxes in a much more serious way.

Law enforcement would like to have a better definition of "material support." This is used in statutes to deal with people who are providing support—the accessory before the fact kind of situation. Because of the kind of support that can be provided to terrorists, that section probably could stand some further definition. I would like to be able to do that in another conference committee.

The Classified Information Procedures Act is something that was initially considered and should be considered again if a new conference committee is opened. Frankly, the House was asked to eliminate an important death penalty provision, and they did that in conference, as well as some other provisions that I very strongly would like to have in the bill.

Let it be clear that if a new conference committee were created, there would be all sorts of issues that would be brought to bear, and negotiation is a two-way street. There are other ways we could improve on by strengthening the PATRIOT Act. I would want to be sure that those things are developed and are brought to bear.

Finally is this matter that has been brought up regarding eavesdropping on the citizens of the United States. A couple of my colleagues, just before the vote on the PATRIOT Act on the cloture motion, said they had been going back and forth on whether to support it. They read the article in the New York Times and that was dispositive in their minds that they had to vote against cloture. Bear it in mind, it has nothing to do with the PATRIOT Act. In other words, the disclosure of this kind of intelligence gathering that has been in the news in the last 72 hours or so has nothing whatsoever to do with the PATRIOT Act. I gather there is a

view that, well, if the administration does one kind of thing, they might therefore be willing to abuse the law in another situation. That is exactly why all of these protections have been built into the PATRIOT Act.

I would think my colleagues would want to pass the PATRIOT Act, make sure that it is now the law, rather than leaving the PATRIOT Act the way it is today. They asked for an extension. Yet if they wanted to improve it and add additional protections, one would think they would want to act quickly to get these protections into the law. Congress will, in fact, obviously, be looking into these new allegations. I urge my colleagues, as well as the American citizens, to think about two things. First of all, the question of whether anybody has complained during the time, under both President Clinton and President Bush, the procedures have been in effect for us to be able to gather certain kinds of information and to do so under the powers of the President. When we are at war, he has ability to accept communications of the enemy. Nobody has to point to a section of the law that gives him some kind of search warrant authority to go to a judge and ask for the ability to do that. All Presidents have always used that authority in a time of war. The President relies upon that authority in this particular case. Members of Congress had been briefed on that for years.

Only until this New York Times article came out did Members of Congress find themselves absolutely shocked that this kind of activity might be going on and, furthermore, that it caused them to vote against consideration of the PATRIOT Act, which that has nothing to do with. I will say it again.

These stories in the media have nothing to do with the PATRIOT Act. So it seems to me that that is not a good excuse for not being able to vote on the PATRIOT Act.

The second thing I want to say with respect to that is—and I certainly do not refer to any of my colleagues in the Senate when I make this comment—but there is in the media a significant degree of hypocrisy. I note some of the stories day after day were focused on the improper disclosure of the identity of a person working for the CIA, as if this is about the worst thing that could ever occur. "How dare anybody leak classified information" was the mantra day after day. How indeed.

But have you heard anybody raise the question of the appropriateness of the leaking of this very highly classified program that is now out in the media and discussed by American citizens, about the collection of information that relates to terrorists? It is called eavesdropping on American citizens, but that is not what it is. The President made clear in his press conference this morning that we are talking about communicating with terrorists or people who have connections

with known terrorists. If you call one of those people, you might expect that somebody might want to know about that. Or if they call you. In that case, I guess you might consider yourself vulnerable to the U.S. Government being interested in what you are doing talking to a terrorist. But we are not eavesdropping on American citizens.

The real question I ask is, where is the outrage with respect to the release of this classified information, disclosure of this highly classified program which, as the President noted this morning, can greatly degrade our intelligence capability and harm our ability to fight the war on terrorism? He was asked to give an example, and he did. He gave the example of how it used to be that we knew how Osama bin Laden was communicating. He was communicating pursuant to a certain device. Somebody leaked to media that we had the ability to intercept the communications from that particular device. Guess what he did. He stopped using it. He went underground, and we could no longer listen in to what he was saying. What he was saying beforehand was very helpful. Now we cannot hear anything.

The same thing is true here. Somebody, in order to hurt the administration, I gather, decided it would be a really dandy thing to leak to the public a highly sophisticated program used to gather information from terrorists, to help us protect the American people in the war on terrorism. Have you heard any condemnation of that on the Senate floor? Have you heard any condemnation of it in the mainstream media? No, they were very concerned when the identity of a CIA agent who is known anyway, I gather, was released. I guess that is high dudgeon. I have not heard a peep out of anybody in the mainstream media criticizing whoever it was that leaked this highly classified program, that is now out in the public.

Mr. President, this leaker has to be brought to justice, and the President this morning said he gathered that the usual processes in the Department of Justice to look after such things were in place and were being pursued. I certainly hope so because every time a leak such as this occurs, it degrades the country's ability to protect the citizens of the United States. Whatever this collection methodology is—and thankfully it hasn't been described in much more detail, but whatever it is, we don't want the other side to stop doing it or that is another avenue of information that is closed off to us.

So why would we want to make a big public disclosure of all of this? At a minimum, when those of us in the Congress look into this further, as we surely will, we will need to do this in a classified setting. I wonder how much of that will remain classified. I wonder whether we are able to keep a secret around here.

If we are going to fight the war on terror, let's remember, unless we want

to fight it on the battlefields of Afghanistan or the streets of Baghdad, the best way to defeat the terrorists is through intelligence-gathering agencies. What that means is having the capability to find out what the other side is doing so we can try to stop it by infiltrating their organization, by compromising it in one way or another. That is critical to fighting the war on terror.

Intelligence is our main method of dealing with this war. If we keep compromising our capability because people feel compelled to breach our national security, to violate the law because they want to bring information out that will embarrass the administration or that will affect the PATRIOT Act—the article, remember, according to some was written a year before the New York Times published it on the day we had the vote on the PATRIOT Act. Perhaps coincidence. But unless we are going to start objecting to that kind of behavior, it will continue. Then we will wonder why our intelligence agencies and law enforcement agencies were not better able to protect us when there is another attack.

I urge my colleagues, as well as the American people, to consider the losses we will suffer as a result of this kind of behavior and to try to bring to account those who engage in this kind of behavior, not to condone it.

We in the Congress will do everything we can to make sure all authorities are used legally. The President can be assured of that. But in the meantime, it seems to me we ought to feel a little bit more secure that we have great capabilities collecting intelligence, and we need the ability to do that in order to protect the American people.

I hope we will have another opportunity to take a vote on the PATRIOT Act, that we can extend it, we can re-authorize it so it can again be used to protect the American people from this evil of terrorism that we face.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Massachusetts.

Mr. KERRY. Mr. President, I ask unanimous consent that I be permitted to proceed for such time as I use.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE PATRIOT ACT AND DEFENSE APPROPRIATIONS ACT

Mr. KERRY. Mr. President, I listened carefully, as others have, to the distinguished Senator from Arizona. I guess we certainly all agree with his last statement about dealing with the evil of terrorism. We are all united in that effort, and all of us are pledged to do so according to the resolution we passed in the aftermath of 9/11, giving the President extraordinary power and authority to respond to those attacks. We are united in our efforts to deal with terrorism.

What we are not evidently as united on is our efforts to protect the Constitution of the United States of America, to protect the rights of individual Americans. On that there is a division between the House and the Senate.

I remind my colleague from Arizona, I think it was a couple of hours ago when he was talking about this subject, that he talked about how we don't want to see the PATRIOT Act further degraded; in other words, somehow implying that if we go back to what we passed in the Senate unanimously, we would somehow be degrading the PATRIOT Act. We were admonished not to "hide behind the filibuster," that somehow people are hiding behind the filibuster which is the same thing as voting against the PATRIOT Act.

With all due respect, I never heard a more absurd or insulting argument to the rules of the Senate and to the nature of the Senate. In the 21 years I have been here, I have seen Jesse Helms and countless others stand up on the other side, in the minority or otherwise, and employ the rules of the Senate which allow the Senate to take a little bit longer to consider issues. That is always what has separated us from the House and, indeed, which has provided a measure of safety with respect to the legislation we pass for the country.

The fact is that what he has termed degrading the PATRIOT Act for many of us is protecting the PATRIOT Act, protecting the Constitution, protecting the country, protecting individual citizens. The fact is the Senate unanimously passed a PATRIOT Act that went over to the House with adequate, better protections for the citizens of our country.

Let me be more specific about that for a minute, if I may, and I didn't intend to speak about the PATRIOT Act. I intended to talk about this morass we find ourselves in with respect to the Defense appropriations bill and the Arctic National Wildlife Refuge, and I will talk about that in a minute. But I want to talk about the PATRIOT Act for a minute.

Every single one of us in the Senate joined together a few months ago—in July, I think, precisely—to unanimously allow the PATRIOT Act to be passed. We supported the PATRIOT Act, and we supported it because we know we need to give the President the tools to fight terror and it would be irresponsible not to do certain things in the current threat we face to respond appropriately. But we also have an obligation to protect the privacy rights of Americans.

Americans all across this country increasingly are concerned about medical records that find their way into the public sector, financial records that are lost, banking records that turn up in public, about the theft of identity, Social Security numbers that are stolen. The constant invasion on the privacy of Americans is something that ought to concern all of us, and there ought to be a balance as we fight terror.