

# ON PATRIOTS AND JUSTICE: FEINGOLD AIMS FOR JUSTICE

Over the last two days, I described what Patrick Leahy's bill renewing the PATRIOT Act does and noted Russ Feingold's complaints that, thus far, the debate on PATRIOT is happening without we citizens knowing how PATRIOT (and FISA) have been used. Today, I wanted to talk about how I think Leahy's PATRIOT renewal (and a bill to reverse retroactive immunity) appears to be an attempt to forestall Feingold's efforts to roll back those unrevealed uses of PATRIOT and FISA.

Before I get into what is in Feingold's JUSTICE bill, first understand the timing. Feingold introduced his bill before Leahy (with Ed Kaufman, the Vice President's stand-in, co-sponsoring) introduced PATRIOT renewal. Leahy explicitly integrated select aspects of Feingold's bill into the PATRIOT renewal. And tomorrow, the Senate Judiciary Committee will mark up the PATRIOT renewal. Since Feingold's JUSTICE is premised on improving FISA while renewing PATRIOT, Feingold's measures that don't get included in tomorrow's markup will be much more difficult to pass.

As a reminder, here was my summary of Leahy's bill:

So to summarize, the Leahy bill (which is co-sponsored by Ben Cardin, Ed Kaufman, and Bernie Sanders) would do the following:

- *Extend the roving wiretap, Section 215 (tangible things), and "lone wolf" provisions of the PATRIOT Act to 2013*
- *Mandate further audits*

*of some of these provisions, such as the use of pen registers*

- *Give the Court oversight over the minimization procedures for the use of Section 215 and pen register and trap and trace devices*
- *Require that Section 215 and pen registers only be granted if authorities can show that the requested information has ties to terrorism*
- *Gives recipients of NSLs and Section 215 orders greater means to appeal the gag order associated with it*

In his testimony at last week's hearing, Leahy had the following to say about Feingold's bill:

I have consulted with Senators Feingold and Durbin, who introduced a more expansive bill last week, and, with their encouragement, borrowed a few accountability provisions from their proposal.

[snip]

Requiring FISA Court approval of minimization procedures would simply bring Section 215 orders in line with other FISA authorities – such as wiretaps, physical searches, and pen register and trap and trace devices –

that already require FISA court approval of minimization procedures. This is another common sense modification to the law that was drafted in consultation with Senators Feingold and Durbin. If we are to allow personal information to be collected in secret, the court must be more involved in making sure the authorities are used responsibly and that Americans' information and personal privacy are protected.

That is, in a bid to pitch his bill as a "balance" between what Feingold and Durbin advocate and what DiFi (as Chair of SSCI) and the Republicans want, Leahy pointedly integrated aspects of Feingold's bill into his own.

This is a superb discussion of the two bills. It describes these things that JUSTICE does that Leahy's bill does not:

- Adds a "least intrusive means" to Section 215 orders
- Sharply curtails the kinds of records available through National Security Letters
- Limits the use of "sneak and peak" powers
- Restricts "material support" charges for terrorism to those who knowingly do so
- Prohibits bulk collection of data under FISA
- Prohibits reverse targeting under FISA
- Repeals retroactive immunity for telecoms that helped Bush break the law with warrantless wiretapping

Now, as I pointed out the other day, Leahy and

Feingold (and Dodd and Merkeley) introduced a stand-alone bill repealing retroactive immunity, which leaves these other six bullets as the main aspects of JUSTICE that Leahy, the Chair of SJC, has not explicitly included in his "balanced" approach to reauthorizing PATRIOT.

Now, I'm going to do some more work on these two efforts. But in the meantime, please call the following members of SJC to encourage them to support integrating measures from Feingold's JUSTICE in tomorrow's mark-up. (Dick Durbin is cosponsor of Feingold's JUSTICE bill, so he's not on this list.)

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