

# DEBATE IN THE SENATE ON THE USA PATRIOT ACT OF 2001

[Selections from debate]

October 25, 2001

SEN. RUSS FEINGOLD (D-WI): Madam President, I have asked for this time to speak about the antiterrorism bill, H.R. 3162. As we address this bill, of course, we are especially mindful of the terrible events of September 11 and beyond, which led to this bill's proposal and its quick consideration in the Congress.

This has been a tragic time in our country. Before I discuss this bill, let me first pause to remember, through one small story, how September 11 has irrevocably changed so many lives. In a letter to the Washington Post recently, a man, as he went jogging near the Pentagon, came across the makeshift memorial built for those who lost their lives. He slowed to a walk as he took in the sight before him, the red, white, and blue flowers covering the structure. Off to the side, was a smaller memorial with a card that read: "Happy birthday, Mommy. Although you died and are no longer with me, I feel as if I still have you in my life. I think about you every day."

After reading the card, the man felt as if he were "drowning in the names of dead mothers, fathers, sons, and daughters." The author of this letter shared a moment in his own life that so many of us have had, the moment where televised pictures of the destruction are made painfully real to us. You read a card, see the anguished face of a loved one, and then, suddenly, we feel the enormity of what has happened to so many American families and to all of us as a people.

We also had our initial reactions to the attack. My first and most powerful emotion was a solemn resolve to stop these terrorists. That remains my principal reaction to these events. But I also quickly realized, as many did, that two cautions were necessary. I raised them on the Senate floor the day after the attacks. [...]

I suppose I was reacting instinctively to the unfolding events in the spirit of the Irish statesman John Philpot Curran, who said: "The condition upon which God hath given liberty to man is eternal vigilance."

During those first few hours after the attacks, I kept remembering a sentence from a case I had studied in law school. Not surprisingly, I didn't remember which case it was, who wrote the opinion, or what it was about, but I did remember these words: "While the Constitution protects against invasions of individual rights, it is not a suicide pact." I took these words as a challenge to my concerns about civil liberties at such a momentous time in our history; that we must be careful to not take civil liberties so literally that we allow ourselves to be destroyed. But upon reviewing the case itself, *Kennedy v. Mendoza-Martinez*, I found that Justice Arthur Goldberg had made this statement but then ruled in favor of the civil liberties position in the case, which was about draft evasion. He elaborated: "It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action."

The Justice continued: "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances .... In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." I have approached the events of the past month and my role in proposing and reviewing legislation relating to it in this spirit. I believe we must, we must, redouble our vigilance. We must redouble our vigilance to ensure our security and to prevent further acts of terror. But we must also redouble our vigilance to preserve our values and the basic rights that make us who we are. [...]

I have concluded that this bill still does not strike the right balance between empowering law enforcement and protecting civil liberties. [...]

First, the bill contains some very significant changes in criminal procedure that will apply to every federal criminal investigation in this country, not just those involving terrorism. One provision would greatly expand the circumstances in which law enforcement agencies can search homes and offices without notifying the owner prior to the search. The longstanding practice under the fourth amendment of serving a warrant prior to executing a search could be easily avoided in virtually every case, because the government would simply have to show that it had "reasonable cause to

believe” that providing notice ‘may’ seriously jeopardize an investigation.” This is a significant infringement on personal liberty.

Notice is a key element of fourth amendment protections. It allows a person to point out mistakes in a warrant and to make sure that a search is limited to the terms of a warrant. Just think about the possibility of the police showing up at your door with a warrant to search your house. You look at the warrant and say, “yes, that’s my address, but the name on the warrant isn’t me.” And the police realize a mistake has been made and go away. If you’re not home, and the police have received permission to do a “sneak and peek” search, they can come in your house, look around, and leave, and may never have to tell you that ever happened. [...]

Another very troubling provision has to do with the effort to combat computer crime. I want the effort to stop computer crime. The bill allows law enforcement to monitor a computer with the permission of its owner or operator, without the need to get a warrant or show probable cause. [...]

But we tried to point out as calmly and as constructively as possible on the floor that, as drafted in this bill, the provision might permit an employer to give permission to the police to monitor the e-mails of an employee who has used her computer at work to shop for Christmas gifts. She violated the rules of her employer regarding personal use of the computer. Or someone who uses a computer at a library or at a school and happens to go to a gambling or pornography site in violation of the Internet use policies of the library or the university might also be subjected to Government surveillance—without probable cause and without any time limit at all. With this one provision, fourth amendment protections are potentially eliminated for a broad spectrum of electronic communications.

I am also very troubled by the broad expansion of Government power under the Foreign Intelligence Surveillance Act, known as FISA. When Congress passed FISA in 1978, it granted to the executive branch the power to conduct surveillance in foreign intelligence investigations without having to meet the rigorous probable cause standard under the fourth amendment that is required for criminal investigations. There is a lower threshold for obtaining a wiretap order from the FISA court because the FBI is not investigating a crime, it is investigating foreign intelligence activities. But the law currently requires that intelligence gathering be the primary purpose of the investigation in order for this much lower standard to apply.

The bill changes that requirement. The Government now will only have to show that intelligence is a “significant purpose” of the investigation. So even if the primary purpose is a criminal investigation, the heightened protections of the fourth amendment will not apply. [...]

Under this bill, the Government can compel the disclosure of the personal records of anyone—perhaps someone who worked with, or lived next door to, or went to school with, or sat on an airplane with, or had been seen in the company of, or whose phone number was called by—the target of the investigation. [...]

We are not talking about terrorist suspects, we are talking about people who just may have come into some kind of casual contact with the person in that situation. This is an enormous expansion of authority under a law that provides only minimal judicial supervision.

Under this provision, the Government can apparently go on a fishing expedition and collect information on virtually anyone. All it has to allege, in order to get an order for these records from the court, is that the information is sought for an investigation of international terrorism or clandestine intelligence gathering. That is it. They just have to say that. On that minimal showing, in an ex parte application to a secret court, with no showing even that the information is relevant to the investigation, the Government can lawfully compel a doctor or a hospital to release medical records or a library to release circulation records. This is truly a breathtaking expansion of police power.

Let me turn to a final area of real concern about this legislation, which I think brings us full circle to the cautions I expressed on the day after the attacks. These are two very troubling provisions dealing with our immigration laws in the bill. [...]

The bill continues to allow the Attorney General to detain persons based on mere suspicion. Our system normally requires higher standards of proof for a deprivation of liberty. For example, deportation proceedings themselves are subject to a clear and convincing evidence standard. And, of course, criminal convictions require proof beyond a reasonable doubt. The bill also continues to deny detained persons a trial or a hearing where the Government would be required to prove that that person is, in fact, engaged in terrorist activity. I think this is unjust and inconsistent with the values of our system of justice that we hold dearly. [...]

I think this language creates a very real risk that truly innocent individuals could be deported for innocent associations with humanitarian or political groups that the Government later chooses to regard as terrorist organizations. [...]

Under this bill, a lawful permanent resident who makes a controversial speech that the Government deems to be supportive of terrorism might be barred from returning to his or her family after taking a trip abroad. [...]

We must maintain our vigilance to preserve our laws and our basic rights. We in this body have a duty to analyze, to test, to weigh new laws that the zealous and often sincere advocates of security would suggest to us. That is what I have tried to do with the anti-terrorism bill, and that is why I will vote against this bill when the roll is called.

Protecting the safety of the American people is a solemn duty of the Congress. We must work tirelessly to prevent more tragedies like the devastating attacks of September 11. We must prevent more children from losing their mothers, more wives from losing their husbands, and more firefighters from losing their heroic colleagues. But the Congress will fulfill its duty only when it protects both the American people and the freedoms at the foundation of American society.

So let us preserve our heritage of basic rights. Let us practice as well as preach that liberty, and let us fight to maintain that freedom that we call America.

SEN. ORRIN HATCH (R-UT): I rise to address briefly a couple of the points made by the distinguished Senator from Wisconsin.

First, what he called a “sneak and peek” search warrant, these warrants are already used throughout the United States, throughout our whole country. The bill simply codifies and clarifies the practice making certain that only a Federal court, not an agent or prosecutor, can authorize such a warrant.

Let me be clear. Courts already allow warrants under our fourth amendment. It is totally constitutional. It has been held so almost from the beginning of this country; some will say from the beginning of this country. Together with Senator Leahy, we carefully drafted a provision that standardizes this widely accepted practice.

Second, to respond to the suggestion that the legislation is not properly mindful of our constitutional liberties—my friend from Wisconsin talks theoretically about maybe the loss of some civil liberties—I would like to talk concretely about the loss of liberty of almost 6,000 people [sic] because of the terrorist acts on September 11. I am a little bit more concerned right now about their loss of life. I am even more concerned now that they have lost their lives that thousands of other Americans don't lose their lives because we fail to act and fail to give law enforcement the tools that are essential.

It is a nice thing to talk about theory. But we have to talk about reality. We have written this bill so the constitutional realities are that the Constitution is not infringed upon and civil liberties are not infringed upon except to the extent that the Constitution permits law enforcement to correct difficulties.

Yes, I think we must protect the Constitution, and that has been at the top of my list all through my 25 years in the Congress. This bill does just that. Nothing in this bill undermines constitutional liberty. Nothing in this bill comes remotely close to the Alien and Sedition Act, which, of course, was held to be unconstitutional, or the internment of Japanese prisoners of war, which was a disgrace—there is no question about it, but at that point it was held to be constitutional—or the other outrages that have occurred in the past that were mentioned by the distinguished Senator from Wisconsin.

The tools we are promoting in this legislation have been carefully crafted to protect civil liberties. In addition to protecting civil liberties, give law enforcement the tools they need so we, to the extent we possibly can, will be able to protect our citizens from events and actions such as happened on September 11 of this year.

Thousands of Americans died that day, thousands. That is real. We have been told there may be some other actions taken by terrorists. That may be real. To the extent that may be real, we sure want to make sure our law enforcement people, within the constraints of the Constitution, have the optimum law enforcement tools they need to do the job. [...]

SEN. PAUL WELLSTONE (I-MN): [...] Our challenge is to balance our security with our liberties. While it is not perfect, I believe we are doing that in this bill.

Madam President, it is a jarring analogy, but I use it to explain how I arrived at my decision on this legislation. In 1940 and 1941, the Germans engaged in an unprecedented attack on the civilian population of Great Britain. The goal was to weaken citizens in their fight against Nazism. At the end of that attack, 20,000 people were killed. On September 11 in our country, close to 6,000 innocent people were massacred. [...]

I do wish some of the provisions were more tightly targeted to address only actions directly related to terrorism or suspected terrorism. It is for this reason that I think it is critically important each and every Senator and Representative monitor the use of new authorities provided to the law enforcement agency to conduct surveillance. [...]

The sunset provision is critically important. Ultimately, where I come down is if we do not take some of these steps with some of the provisions I have outlined, which are very important, very positive in protecting people, and more people are killed and there is more loss of life of innocent people, you cannot bring those lives back. [...]

I wish we did not even have to consider this legislation. I wish we were not even living in these times. I believe terrorism is going to be a part of our lives. I think it is going to be a part of our children's lives. I think it is going to be a part of our grandchildren's lives. I think this is going to be the struggle for several generations to come. No one action and no one step is going to end it. I think that is now the world, unfortunately, in which we live. That is now the world in which all of God's children live.

There are some things we are going to have to do differently and, as I said, we must be vigilant. Where there are excesses, we need to change that. I do believe this legislation is an important step in the direction of trying to prevent this and providing protection to our citizens.

Source: Yale Law School Avalon Project  
[http://avalon.law.yale.edu/sept11/house\\_proc\\_hr3162.asp](http://avalon.law.yale.edu/sept11/house_proc_hr3162.asp)