STATEMENT OF U.S. SENATOR RUSS FEINGOLD FROM THE SENATE FLOOR ON THE ANTI-TERRORISM BILL

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Statement Of U.S. Senator Russ Feingold From The Senate Floor

On The ***Anti-Terrorism Bill***

Mr. President, I have asked for this time to speak about the ***anti- terrorism bill*** before us, H.R. 3162. As we address this ***bill***, we are especially mindful of the terrible events of September 11 and beyond, which led to the ***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 11th has irrevocably changed so many lives. In a letter to The Washington Post recently, a man wrote that as he went jogging near the Pentagon, he came across the makeshift memorial built for those who lost their lives there. He slowed to a walk as he took in the sight before him - the red, white and blue flowers covering the structure, and then, off to the side, a second, smaller memorial with a card.

The card 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. We read a card, or see the anguished face of a grieving loved one, and we suddenly feel the enormity of what has happened to so many American families, and to all of us as a people.

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

The first caution was that we must continue to respect our Constitution and protect our civil liberties in the wake of the attacks. As the chairman of the Constitution Subcommittee of the Judiciary Committee, I recognize that this is a different world with different technologies, different issues, and different threats. Yet we must examine every item that is proposed in response to these events to be sure we are not rewarding these terrorists and weakening ourselves by giving up the cherished freedoms that they seek to destroy.

The second caution I issued was a warning against the mistreatment of Arab Americans, Muslim Americans, South Asians, or others in this country. Already, one day after the attacks, we were hearing news reports that misguided anger against people of these backgrounds had led to harassment, violence, and even death.

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 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.

The Founders who wrote our Constitution and ***Bill*** of Rights exercised that vigilance even though they had recently fought and won the Revolutionary War. They did not live in comfortable and easy times of hypothetical enemies. They wrote a Constitution of limited powers and an explicit ***Bill*** of Rights to protect liberty in times of war, as well as in times of peace.

There have been periods in our nation's history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese-Americans, German- Americans, and Italian-Americans during World War II, the blacklisting of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of antiwar protesters, including Dr. Martin Luther King Jr., during the Vietnam War. We must not allow these pieces of our past to become prologue.

Mr. President, even in our great land, wartime has sometimes brought us the greatest tests of our ***Bill*** of Rights. For example, during the Civil War, the government arrested some 13,000 civilians, implementing a system akin to martial law. President Lincoln issued a proclamation ordering the arrest and military trial of any persons "discouraging volunteer enlistments, or resisting militia drafts." Wisconsin provided one of the first challenges of this order. Draft protests rose up in Milwaukee and Sheboygan. And an ***anti***-draft riot broke out among Germans and Luxembourgers in Port Washington, Wisconsin. When the government arrested one of the leaders of the riot, his attorney sought a writ of habeas corpus. His military captors said that the President had abolished the writ. The Wisconsin Supreme Court was among the first to rule that the President had exceeded his authority.

In 1917, the Postmaster General revoked the mailing privileges of the newspaper the Milwaukee Leader because he felt that some of its articles impeded the war effort and the draft. Articles called the President an aristocrat and called the draft oppressive. Over dissents by Justices Brandeis and Holmes, the Supreme Court upheld the action.

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During World War II, President Roosevelt signed orders to incarcerate more than 110,000 people of Japanese origin, as well as some roughly 11,000 of German origin and 3,000 of Italian origin.

Earlier this year, I introduced legislation to set up a commission to review the wartime treatment of Germans, Italians, and other Europeans during that period. That ***bill*** came out of heartfelt meetings in which constituents told me their stories. They were German-Americans, who came to me with some trepidation. They had waited 50 years to raise the issue with a member of Congress. They did not want compensation. But they had seen the government's commission on the wartime internment of people of Japanese origin, and they wanted their story to be told, and an official acknowledgment as well. I hope, Mr. President, that we will move to pass this important legislation early next year. We must deal with our nation's past, even as we move to ensure our nation's future.

Now some may say, indeed we may hope, that we have come a long way since the those days of infringements on civil liberties. But there is ample reason for concern. And I have been troubled in the past six weeks by the potential loss of commitment in the Congress and the country to traditional civil liberties.

As it seeks to combat ***terrorism***, the Justice Department is making extraordinary use of its power to arrest and ***detain*** individuals, jailing hundreds of people on immigration violations and arresting more than a dozen "material witnesses" not charged with any crime. Although the government has used these authorities before, it has not done so on such a broad scale. Judging from government announcements, the government has not brought any criminal charges related to the attacks with regard to the overwhelming majority of these detainees.

For example, the FBI arrested as a material witness the San Antonio radiologist Albader Al-Hazmi, who has a name like two of the hijackers, and who tried to book a flight to San Diego for a medical conference. According to his lawyer, the government held Al-Hazmi incommunicado after his arrest, and it took six days for lawyers to get access to him. After the FBI released him, his lawyer said, "This is a good lesson about how frail our processes are. It's how we treat people in difficult times like these that is the true test of the democracy and civil liberties that we brag so much about throughout the world." I agree with those statements.

Now, it so happens that since early 1999, I have been working on another ***bill*** that is poignantly relevant to recent events: legislation to prohibit racial profiling, especially the practice of targeting pedestrians or drivers for stops and searches based on the color of their skin. Before September 11th, people spoke of the issue mostly in the context of African-Americans and Latino-Americans who had been profiled. But after September 11, the issue has taken on a new context and a new urgency.

Even as America addresses the demanding security challenges before us, we must strive mightily also to guard our values and basic rights. We must guard against racism and ethnic discrimination against people of Arab and South Asian origin and those who are Muslim.

We who don't have Arabic names or don't wear turbans or headscarves may not feel the weight of these times as much as Americans from the Middle East and South Asia do. But as the great jurist Learned Hand said in a speech in New York's Central Park during World War II: "The spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own ***without*** bias . . . ."

Was it not at least partially bias, however, when passengers on a Northwest Airlines flight in Minneapolis three weeks ago insisted that Northwest remove from the plane three Arab men who had cleared security?

Of course, given the enormous anxiety and fears generated by the events of September 11th, it would not have been difficult to anticipate some of these reactions, both by our government and some of our people. Some have said rather cavalierly that in these difficult times we must accept some reduction in our civil liberties in order to be secure.

Of course, there is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed

the government to open your mail, eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists.

But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America.

Preserving our freedom is one of the main reasons that we are now engaged in this new war on ***terrorism***. We will lose that war ***without*** firing a shot if we sacrifice the liberties of the American people.

That is why I found the antiterrorism ***bill*** originally proposed by Attorney General Ashcroft and President Bush to be troubling.

The Administration's proposed ***bill*** contained vast new powers for law enforcement, some seemingly drafted in haste and others that came from the FBI's wish list that Congress has rejected in the past. You may remember that the Attorney General announced his intention to introduce a ***bill*** shortly after the September 11 attacks. He provided the text of the ***bill*** the following Wednesday, and urged Congress to enact it by the end of the week. That was plainly impossible, but the pressure to move on this ***bill*** quickly, ***without*** deliberation and debate, has been relentless ever since.

It is one thing to shortcut the legislative process in order to get federal financial aid to the cities hit by ***terrorism***. We did that, and no one complained that we moved too quickly. It is quite another to press for the enactment of sweeping new powers for law enforcement that directly affect the civil liberties of the American people ***without*** due deliberation by the peoples' elected representatives.

Fortunately, cooler heads prevailed at least to some extent, and while this ***bill*** has been on a fast track, there has been time to make some changes and reach agreement on a ***bill*** that is less objectionable than the ***bill*** that the Administration originally proposed.

As I will discuss in a moment, I have concluded that this ***bill*** still does not strike the right balance between empowering law enforcement and protecting civil liberties. But that does not mean that I oppose everything in the ***bill***. Indeed many of its provisions are entirely reasonable, and I hope they will help law enforcement more effectively counter the threat of ***terrorism***.

For example, it is entirely appropriate that with a warrant the FBI be able to seize voice mail messages as well as tap a phone. It is also reasonable, even necessary, to update the federal criminal offense relating to possession and use of biological weapons. It made sense to make sure that phone conversations carried over cables would not have more protection from surveillance than conversations carried over phone lines. And it made sense to stiffen penalties and lengthen or eliminate statutes of limitation for certain terrorist crimes.

There are other non-controversial provisions in the ***bill*** that I support - those to assist the victims of crime, to streamline the application process for public safety officers benefits and increase those benefits, to provide more funds to strengthen immigration controls at our Northern borders, to expedite the hiring of translators at the FBI, and many others.

In the end, however, my ***focus*** on this ***bill***, as Chair of the Constitution Subcommittee of the Judiciary Committee in the Senate, was on those provisions that implicate our constitutional freedoms. And it was in reviewing those provisions that I came to feel that the Administration's demand for haste was inappropriate; indeed, it was dangerous. Our process in the Senate, as truncated as it was, did lead to the elimination or significant rewriting of a number of audacious proposals that I and many other members found objectionable.

For example, the original Administration proposal contained a provision that would have allowed the use in U.S. criminal proceedings against U.S. citizens of information obtained by foreign law enforcement agencies in wiretaps

that would be illegal in this country. In other words, evidence obtained in an unconstitutional search overseas was to be allowed in a U.S. court.

Another provision would have broadened the criminal forfeiture laws to permit - prior to conviction - the freezing of assets entirely unrelated to an alleged crime. The Justice Department has wanted this authority for years, and Congress has never been willing to give it. For one thing, it touches on the right to counsel, since assets that are frozen cannot be used to pay a lawyer. The courts have almost uniformly rejected efforts to restrain assets before conviction unless they are assets gained in the alleged criminal enterprise. This proposal, in my view, was simply an effort on the part of the Department to take advantage of the emergency situation and get something that they've wanted to get for a long time.

The foreign wiretap and criminal forfeiture provisions were dropped from the ***bill*** that we considered in the Senate. Other provisions were rewritten based on objections that I and others raised about them. For example, the original ***bill*** contained sweeping permission for the Attorney General to get copies of educational records ***without*** a court order. The final ***bill*** requires a court order and a certification by the Attorney General that he has reason to believe that the records contain information that is relevant to an investigation of ***terrorism***.

So the ***bill*** before us is certainly improved from the ***bill*** that the Administration sent to us on September 19, and wanted us to pass on September 21. But again, in my judgement, it does not strike the right balance between empowering law enforcement and protecting constitutional freedoms. Let me take a moment to discuss some of the shortcomings of the ***bill***.

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 has "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 an go away. If you're not home, and the police have received permission to do a "sneak and peak" search, they can come in your house, look around, and leave, and may never have to tell you.

Another very troubling provision has to do with the effort to combat 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. That's fine in the case of a so called "denial of service attack" or plain old computer hacking. A computer owner should be able to give the police permission to monitor communications coming from what amounts to a trespasser on the computer.

As drafted in the Senate ***bill***, however, 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. Or someone who uses a computer at a library or at 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. 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*** meeting 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 lower standard to apply.

This ***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 won't apply.

It seems obvious that with this lower standard, the FBI will try to use FISA as much as it can. And of course, with ***terrorism*** investigations that won't be difficult, because the terrorists are apparently sponsored or at least supported by foreign governments. This means that the fourth amendment rights will be significantly curtailed in many investigations of terrorist acts.

The significance of the breakdown of the distinction between intelligence and criminal investigations becomes apparent when you see the other expansions of government power under FISA in this ***bill***. One provision that troubles me a great deal is a provision that permits the government under FISA to compel the production of records from any business regarding any person, if that information is sought in connection with an investigation of ***terrorism*** or espionage.

Now we're not talking here about travel records pertaining to a terrorist suspect, which we all can see can be highly relevant to an investigation of a terrorist plot. FISA already gives the FBI the power to get airline, train, hotel, car rental and other records of a suspect.

But 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 has been seen in the company of, or whose phone number was called by -- the target of the investigation.

And under this new provisions all business records can be compelled, including those containing sensitive personal information like medical records from hospitals or doctors, or educational records, or records of what books someone has taken out of the library. 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's it. 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 hospital to release medical records, or a library to release circulation records. This is a truly 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. There are two very troubling provisions dealing with our immigration laws in this ***bill***.

First, the Administration's original proposal would have granted the Attorney General extraordinary powers to ***detain immigrants*** indefinitely, including legal permanent residents. The Attorney General could do so based on mere suspicion that the person is engaged in ***terrorism***. I believe the Administration was really over-reaching here, and I am pleased that Senator Leahy was able to negotiate some protections. The Senate ***bill*** now requires the Attorney General to charge the ***immigrant*** within seven days with a criminal offense or immigration violation. In the event that the Attorney General does not charge the ***immigrant***, the ***immigrant*** must be released.

While this protection is an improvement, the provision remains fundamentally flawed. Even with this seven-day charging requirement, the ***bill*** would nevertheless continue to permit the indefinite ***detention*** in two situations. First, ***immigrants*** who win their deportation cases could continue to be held if the Attorney General continues to have suspicions. Second, this provision creates a deep unfairness to ***immigrants*** who are found not to be deportable for

terrorism but have an immigration status violation, such as overstaying a visa. If the immigration judge finds that they are eligible for relief from deportation, and therefore can stay in the country because, for example, they have longstanding family ties here, the Attorney General could continue to hold them.

Now, I am pleased that the final version of the legislation includes a few improvements over the ***bill*** that passed the Senate. In particular, the ***bill*** would require the Attorney General to review the ***detention*** decision every six months and would allow only the Attorney General or Deputy Attorney General, not lower level officials, to make that determination. While I am pleased these provisions are included in the ***bill***, I believe it still falls short of meeting even basic constitutional standards of due process and fairness. The ***bill*** continues to allow the Attorney General to ***detain*** persons based on mere suspicion. Our system normally requireshigher standards of proof for a deprivation of liberty. For example, deportation proceedings are subject to a clear and convincing evidence standard. Criminal convictions, of course, require proof beyond a reasonable doubt.

The ***bill*** also continues to deny ***detained*** persons a trial or hearing where the government would be required to prove that the person is, in fact, engaged in terrorist activity. This is unjust and inconsistent with the values our system of justice holds dearly.

Another provision in the ***bill*** that deeply troubles me allows the ***detention*** and deportation of people engaging in innocent associational activity. It would allow for the ***detention*** and deportation of individuals who provide lawful assistance to groups that are not even designated by the Secretary of State as terrorist organizations, but instead have engaged in vaguely defined "terrorist activity" sometime in the past. To avoid deportation, the ***immigrant*** is required to prove a negative: that he or she did not know, and should not have known, that the assistance would further terrorist activity.

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. Groups that might fit this definition could include Operation Rescue, Greenpeace, and even the Northern Alliance fighting the Taliban in northern Afghanistan. This provision amounts to "guilt by association," which I believe violates the First Amendment.

And speaking of the First Amendment, 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.

Despite assurances from the Administration at various points in this process that these provisions that implicate associational activity would be improved, there have been no changes in the ***bill*** on these points since it passed the Senate.

Now here's where my cautions in the aftermath of the terrorist attacks and my concern over the reach of the ***anti-terrorism bill*** come together. To the extent that the expansive new immigration powers that the ***bill*** grants to the Attorney General are subject to abuse, who do we think is most likely to bear the brunt of that abuse? It won't be ***immigrants*** from Ireland, it won't be ***immigrants*** from El Salvador or Nicaragua, it won't even be ***immigrants*** from Haiti or Africa. It will be ***immigrants*** from Arab, Muslim, and South Asian countries. In the wake of these terrible events, our government has been given vast new powers and they may fall most heavily on a minority of our population who already feel particularly acutely the pain of this disaster.

When concerns of this kind have been raised with the Administration and supporters of this ***bill*** they have told us, "don't worry, the FBI would never do that." I call on the Attorney General and the Justice Department to ensure that my fears are not borne out.

The ***anti-terrorism bill*** that we consider in the Senate today highlights the march of technology, and how that march cuts both for and against personal liberty. Justice Brandeis foresaw some of the future in a 1928 dissent, when he wrote:

"The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, ***without*** removing ***papers*** from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

We must grant law enforcement the tools that it needs to stop this terrible threat. But we must give them only those extraordinary tools that they need and that relate specifically to the task at hand.

In the play, "A Man for All Seasons," Sir Thomas More questions the bounder Roper whether he would level the forest of English laws to punish the Devil. "What would you do?" More asks, "Cut a great road through the law to get after the Devil?" Roper affirms, "I'd cut down every law in England to do that." To which More replies:

"And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast . . . and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake. "

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. This is what I have tried to do with this ***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 11th. 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.

I yield the floor.

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