

Statement of
The Honorable Patrick Leahy

United States Senator
United States Senate
January 31, 2012

I thank Senator Franken for the responsible leadership he is demonstrating as he chairs this panel on privacy. The right to privacy is one of our most fundamental freedoms. In his dissenting opinion in *Olmstead v. U.S.*, Justice Brandeis wrote that in our Constitution: "[The Founders] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

In the digital age ensuring the right to privacy is crucial. But, protecting privacy has become ever more difficult, as our Government and businesses collect, store, mine and use our most sensitive personal information for their own purposes. Whether sensitive medical records, private financial information or personal thoughts and feelings, I have worked to ensure that Americans' privacy rights are respected.

In 1988, Congress enacted the Video Privacy Protection Act. When I first introduced the bill, I said that it was intended to help make all of us a little freer to watch what we choose, without public scrutiny. At that time, video rentals took the form of VHS tape rentals from local stores. We had just seen the publication of Supreme Court nominee Robert Bork's video viewing records and joined together to enact this statutory protection for the privacy of all Americans. My original proposal was also to include library records, but we were unable to sustain that protection as the bill worked its way through Congress. More recently, I have worked to add protections for library and bookseller records to section 215 of the USA PATRIOT Act. While it is true that technology has changed over the years, we must stay faithful to our fundamental right to privacy and freedom. Today, social networking, video streaming, the "cloud," mobile apps and other new technologies have revolutionized the availability of Americans' information. These new technologies are outpacing our privacy laws. That is why I continue to push to enact the Personal Data Privacy and Security Act, to create a nationwide data breach notification standard and better combat cybercrime, and it is why last year I proposed a comprehensive review and update of the Electronic Communications Privacy Act. I introduced a bill last May to update ECPA by requiring that the Government obtain a search warrant to access email content, or certain geolocation information. I have worked closely with Senator Franken on this issue, who has himself introduced legislation on location information.

Last week, I was encouraged by the Supreme Court's decision in the *Jones* case. That case discussed Americans' reasonable expectations of privacy in an era of vast technological change. It also dealt with how we think about and enforce the Constitution's guarantee against unreasonable search and seizure, a key aspect of our privacy rights. I believe that Congress needs to do its part to shore up Americans' constitutional right to privacy in an age of pervasive surveillance, with so much information available from, and collected by, service providers. While updating our Federal laws, we must carefully balance the need to promote American innovation and the legitimate needs of law enforcement, while ensuring that we protect personal

privacy.

Recently, companies that dominate various aspects of cyberspace have announced that they want to simplify matters so that they can more easily track Americans' activities across the board. I am not reassured by the prospect of "Big Brother" watching everything we do. I worry that sometimes what is "simpler" for corporate purposes is not better for consumers. It might be "simpler" for some if we had no privacy protections, no antitrust protections and no consumer protections, but that is not better for Americans. I worry about a loss of privacy because of the claimed benefit of "simplicity." This claim strikes me like the claim we often hear in large corporate merger proposals about so-called "efficiencies." Netflix announced a simpler billing practice a few months ago regarding its various services, and its customers rebelled.

Privacy advocates and elected representatives from both sides of the aisle have serious concerns and serious questions. We are asking for information and answers. When dominant corporate interests entice a check off in order to receive what may seem like a fun new app or service, they may not be presenting a realistic and informed choice to consumers. A one-time check off that has the effect of an all-time surrender of privacy does not seem to me the best course for consumers. I worry that the availability of vast stores of information via corporate databanks also makes this information readily available to the Government, which has almost unfettered power to obtain information with an administrative subpoena and so-called national security letters. These are issued unilaterally, without any judicial check or warrant requirement beforehand. That is why I think we need comprehensive reform to update our privacy laws.

I thank Representative Mel Watt, a thoughtful leader on these issues, for joining us, and the panel of witnesses assembled for sharing their views on this important subject. I am hearing from many privacy advocates who have expressed concerns about the privacy implications of the House-passed proposal. A key concern is that a one-time check off of consent to disclose, mine, sell and share information does not adequately protect the privacy of consumers. Nor does the House's proposal update the law with respect to streaming or cloud computing. We need to move forward with a comprehensive review and update of the Electronic Communications Privacy Act, and with it careful consideration of how best to update to the Video Privacy Protection Act.

#####