Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 28, 2006

Statement of Senator Patrick Leahy,

Ranking Member, Judiciary Committee

Hearing on

"Wartime Executive Power and the NSA's Surveillance Authority II"

Tuesday, February 28, 2006

Today's hearing is our second to explore the legality of President Bush's warrantless domestic spying program. On December 17, 2005 - one day after the existence of the program was reported by The New York Times - the President admitted that the Bush-Cheney Administration has engaged in secret wiretapping of ordinary Americans without warrants for more than four years. Seven weeks later, Attorney General Gonzales was called before this Committee and provided unsworn testimony about the program.

That testimony was far from complete and left many important questions unanswered. At that hearing, we had before us the chief legal officer of the United States. He is not the President's legal advisor; he is the American people's lawyer. His sworn duty is to uphold and enforce the Constitution and the laws enacted by Congress -- including the Foreign Intelligence Surveillance Act, which we have amended five times since the September 11 attacks. It seemed reasonable to start by asking him about how his Department of Justice has and will interpret those laws. Also, by starting with legal questions, we avoided raising any operational issues that could conceivably implicate national security concerns. So I asked the Attorney General a simple question: When did the Administration come up with its current theory that the congressional resolution authorizing the use of military force against al Qaeda - a resolution that says nothing at all about wiretapping -- also authorized secret, warrantless wiretapping of Americans inside the United States? At every opportunity, the Attorney General failed and refused to answer this basic factual question.

The Attorney General was asked several times to clarify the scope of the Bush-Cheney Administration's legal theory of Executive power. If, as they claim, they can ignore FISA's express prohibition of warrantless wiretapping, can they also eavesdrop on purely domestic phone calls? Can they search or electronically bug an American's home or office? Can they comb through Americans' medical records and open first-class mail? Can they suspend the Posse Comitatus Act? These are questions to which Congress and the American people deserve answers. Based on his testimony and persistent refusals to answer responsively, it appears the Attorney General, whose job it is to enforce the laws, has a radically different understanding of the laws than do many of us -- the people's representatives in Congress who wrote the laws. The Attorney General refused to answer questions - even legal and hypothetical questions - but limited his appearance to confirming "those facts the President has publicly confirmed, nothing more." In a last-minute change to his prepared testimony he also followed the path of his predecessor by playing politics on important security matters, hoping to intimidate Senators who asked questions and sought to get to the facts.

Senators from both parties took great care to ask straightforward questions about the program that could be answered without danger to national security. When did the program begin? How many Americans have had their calls and emails intercepted? Has the program led to any arrests? What involvement, if any, has the FISA Court had with the program? Why was the program shut down in 2004, and was its scope changed in 2004? Once again, we

got no answers. Attorney General Gonzales refused to answer a simple "yes or no" question regarding the role of telephone companies and ISPs in implementing the program. He asserted that the program was "very narrowly tailored," but he pointedly refused to say whether earlier versions of the program were likewise "narrowly tailored," or whether the President has authorized other, broader secret surveillance programs inside the United States - for example, programs that may involve warrantless physical searches or large-scale data-mining.

In short, we learned almost nothing from our prior hearing. So far as the Attorney General was concerned, any question that was not limited to confirming the current version of the specific program the President described in December was irrelevant or hypothetical, even if it went to the core of the Administration's legal justifications. And any question that was about that program amounted to a request for "operational details" that the American people have no business knowing, even if those questions were confined to the purely historical question of when the program began. Whatever we asked, it was either too relevant or not relevant enough, and either way, we were getting no answers from the Attorney General.

There was, briefly, one crack in the stone wall he erected. It has been reported that senior Department of Justice officials concluded in 2004 that the President's program was illegal and, backed by former Attorney General Ashcroft, insisted that its scope be narrowed. So Chairman Specter asked the Attorney General whether he had any objection to his predecessor testifying before the Committee on this issue. Attorney General Gonzales replied: "I would not." One week later, in a carefully worded about-face, he had an assistant write to Chairman Specter that the Bush-Cheney Administration would not permit any former officials to provide any new information to the Committee. The stone wall was back up.

Attorney General Gonzales' conduct has made the Bush-Cheney Administration's position crystal clear: It claims there is no place for congressional or judicial oversight of any of its activities in any way related to national security in the post-9/11 world. Through stonewalling, steamrolling and intimidation, this Administration is running roughshod over the Constitution and hiding behind inflammatory rhetoric demanding Americans blindly trust every one of its decisions. Just last week we were reminded, again, that they hold to that position even when bipartisan members of Congress raise national security concerns about the approval of a government-owned Dubai company taking over port operations in the United States. There are some striking parallels between the warrantless wiretapping program and approval of the takeover of most of our key ports on the East Coast by a firm controlled by a foreign government that has previous ties to Osama bin Laden, to terrorist financing and to the proliferation of nuclear weapons technology by Ali Khan. In both cases, this obsessively secretive Administration proceeded with action that it must have known would face strong bipartisan opposition and did so without informing Congress or the American people. In both cases, the Administration made no attempt whatsoever to follow even the confidential review processes mandated by specific and express federal statutes: the FISA Court warrant requirement in the wiretapping case, and the 45-day review requirement of the Exon-Florio law in the case of the ports deal. And in both cases, the Bush-Cheney Administration has responded to bipartisan efforts at congressional oversight with bellicose political threats.

Will the Republican Congress fulfill its constitutional duty of providing the checks and balances envisioned by the Framers by engaging in real and effective oversight, or will it continue to abdicate its oversight role in deference to the other end of Pennsylvania Avenue?

Chairman Specter has a history of engaging in meaningful, bipartisan oversight and I very much appreciate his efforts thus far to lead a bipartisan quest for straight answers on this illegal domestic surveillance program. I am glad that we are having today's hearing. But we should be clear about what today's hearing is, and is not. It is not an oversight hearing. Through Attorney General Gonzales, the Bush-Cheney Administration has refused to answer oversight questions and refused to allow former officials to answer them. At this point, meaningful oversight of the Government's actions can only be achieved by subpoenas backed by threat of real congressional sanctions if the Bush-Cheney Administration continues to stonewall.

Our hearing today will be an academic panel discussion featuring commentators who have not witnessed or played any role in the program that they are discussing, and who know no more than the very minimal facts about the program that the President has chosen to divulge. This is an important discussion to have to help this Committee, Congress and the American people understand our legal landscape, and what consequences this illegal program has on our system. These are scholars and former government officials with a great deal of expertise in the law or in the intelligence field. I greatly appreciate their analysis, just as I appreciate the analysis of former President Jimmy

Carter, former FBI Director William Sessions, conservative columnist George Will, and the many other scholars and former government officials who have concluded that this program violates the Foreign Intelligence Surveillance Act and threatens the constitutional separation of powers. But today's hearing is no substitute for the vigorous and forceful oversight this Congress owes the American people.

# # # # #