

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
July 26, 2006

Statement Of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Hearing On "FISA For The 21st Century"
Wednesday, July 26, 2006

I thank the Chairman for convening this hearing. We are especially glad to welcome General Hayden to his first appearance before this Committee since he assumed his new duties. The CIA has been in desperate need of the professionalism that he brings to this difficult job. Independence and competence were the two watchwords that led me to believe that he would serve well as Director of the CIA, and we need straight talk today in navigating the issues that we will be discussing at this hearing.

There are two sets of issues relating to the Foreign Intelligence Surveillance Act that are now before this Committee. First, what is the extent of the Administration's warrantless wiretapping in violation of FISA, and how should we in Congress react? After seven months and four hearings, we remain largely in the dark about what the Administration has been doing and continues to do, because the Administration has stonewalled this Committee's bipartisan efforts at oversight. But the answer is clear: we must demand and ensure that this Administration, and future Administrations, follow the law.

Second, does the FISA law itself need to be revised? Although it has been amended six times at this Administration's request in the five years since 9/11, the Administration is now telling us that it needs "modernization." The call for "modernization" is the focus of today's hearing. I appreciate Chairman Specter's agreement to the request that I and my fellow Democratic members of the Committee made to hold this hearing on the so-called modernization provisions contained in Section 9 of the Chairman's bill. Those proposals make substantial changes that require careful review.

It is important to emphasize at the outset that the issues of compliance and modernization are entirely separate. Whether or not FISA is in need of fine-tuning is a legitimate consideration, but FISA's possible imperfections provide no excuse for the Administration's flouting of existing law. By the same token, the Bush-Cheney Administration's outrageous disregard for existing law does not mean that we in Congress should shirk our responsibility to improve the law if there is room for improvement.

SECTION 9 "MODERNIZATION" PROVISIONS

So I am ready to consider Section 9 of the Chairman's bill on its merits. But I see serious grounds for skepticism, and I have some serious questions about those provisions, to which I think we need some candid answers.

First, if Section 9's provisions are, as claimed, needed to bring FISA up-to-date with 21st Century technology, why haven't we heard about them until now? Not only have we amended FISA six times in the past five years. In July 2002, former Attorney General Ashcroft testified that the 2001 PATRIOT Act had "modernized our surveillance tools to keep pace with technological changes." In March of this year, in the Reauthorization of the PATRIOT Act, Congress made all the amendments to FISA that the Administration requested, and the President took credit for updating the law further.

If FISA as amended is too "quaint" to meet the challenges of the 21st Century, the Bush-Cheney Administration owes the Congress and the American people an explanation for its failure to speak up before now. This Administration is not shy about seeking expansions of Executive power, so I am naturally skeptical of a supposed need for modernization that it has been so slow to discover.

Second, FISA is a very complex and finely calibrated statute. In order to evaluate the merits of technical-sounding proposed changes and definitional provisions, we need to understand their purpose and likely practical effect - not just take the Administration's word that they make sense. We need to know what obstacles to the government's ability to protect the nation's security the proposed amendments would remove, and what dangers to Americans' liberties and privacy they would present.

To the extent that I have been able to figure out the highly complex language of Section 9 of the Chairman's bill, it seems to me to permit vast new amounts of warrantless surveillance of telephone calls involving American citizens. It would appear to authorize unrestricted, unregulated government surveillance of American citizens talking to relatives, colleagues and trading partners overseas, without any showing that that surveillance is likely to protect our national security. It would also allow limitless delegation of the Attorney General's authority, down to the lowest-level government employee. But to the extent that the Administration's witnesses can explain to us today, in practical and concrete terms, why they make sense, I will listen.

OTHER PROVISIONS

I will have some hard questions about Section 9. But let me turn for a minute to the rest of the Chairman's bill. It has been called a compromise. This Vermonter does not believe that we should ever compromise on requiring the Executive to submit to the rule of law. I am sad to say that I see this bill as less of a compromise and more a concession. It would abandon our oversight role and confine oversight to a single judge on a secret court, whose decision on the one program the Bush-Cheney Administration has agreed to submit for review is appealable only by the Government. And even that oversight would not be required by the bill itself. I expect that Senator Specter got the best deal that he thought he could. The President, Vice President and their legions can be hard-headed rather than flexible bargainers to be sure. I make these observations respectfully, not to criticize Senator Specter, who has reached his own judgment

about how he is willing to proceed, but to express my reluctance to compromise FISA and the minimal protections it provides for Americans.

Section 8 would repeal FISA's "exclusivity" provision and affirmatively embrace the President's claim of sweeping inherent authority. The result is to make FISA optional. The President may use it or not, at his discretion.

It is astounding to me that we are considering this proposal. FISA was never intended to give Presidents choices; it was enacted to prevent abuses of Executive power and protect Americans' liberties by prohibiting the Government from spying on its citizens without court approval. The Bush-Cheney Administration has chosen to simply ignore it. Are we now going to reward its flouting of the rule of law by saying, in effect, "Oh, please excuse us for passing that law, we didn't mean it and we won't do it again."

Defenders of the bill have argued that Section 8 is meaningless because the President has whatever constitutional authority the Constitution says, and Congress cannot limit that authority through legislation. If the best thing we can say on behalf of proposed legislation is that it is a waste of ink, we should not be enacting it. But I do not for one minute believe that, when it goes before the secret FISA court, the Administration will adhere to the position that Section 8 is meaningless. The Administration is insisting on it for a reason.

As the Supreme Court recently explained in its Hamdan decision, the constitutional scope of presidential power depends on the legislation that Congress has enacted, even in times of war. The Constitution grants Congress the express power to set rules for the military, and the express power "To make all laws which shall be necessary and proper for carrying into execution" all the powers vested by the Constitution in the federal government, including those of the President.

In the absence of congressional action, the President may well have some measure of unilateral authority to gather intelligence, including through electronic surveillance. That is what the precedents the Administration always cites suggest. But once Congress has acted, as it did in FISA, the President is no longer free to do whatever he wants. As the Court explained in Hamdan, "Whether or not the President has independent power, absent congressional authorization," Congress may, "in proper exercise of its own . . . powers," place limitations on the President's powers.

That was the whole point of FISA: to limit the President's power to spy on ordinary Americans by making FISA the sole means by which foreign intelligence wiretaps may be conducted in the United States. Waiving FISA's exclusivity provision would not be meaningless; it would completely gut FISA and give the President a blank check to carry out warrantless wiretapping whenever he chooses. I could not in good conscience acquiesce in such a sweeping signing away of Americans' liberties in any circumstances. I certainly shall not do so at the behest of an Administration that has repeatedly broken the law.

#####