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United States Senate
Committee on the Judiciary
Attention: Barr Heufner
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

John R. Schmidt
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Dear Mr. Huefner:

I am in receipt of your letter dated August 2, 2006, in which you enclosed written questions from Committee members regarding the July 26, 2006 hearing on "FISA for the 21st Century".

My answers are attached herewith and a copy is being electronically sent to your office.

Sincerely,

A handwritten signature in dark ink, appearing to read "John R. Schmidt", written over a horizontal line.

John R. Schmidt

Enclosure

Senator Arlen Specter
FISA for the 21st Century
Wednesday, July 26, 2006
Questions for John Schmidt

Question:

1. **How do you think FISA should be modified? In your opinion, should FISA be altered so that the NSA may monitor phone calls in and out of the United States, when the target of the surveillance are suspected members of al queda?**

Answer:

1. I think it is important to establish a mechanism that allows the effective monitoring of calls into and out of the U.S. that involve suspected Al Qaeda members—and also calls among suspected Al Qaeda members within this country when that is necessary. The best mechanism to do this is to expand the jurisdiction of the FISA court (at the lower court or the Court of Review level) to allow court approval of the constitutionality of a surveillance program that the President, the Attorney General and the security agencies believe is reasonable and necessary to achieve that objective. No one can say today what the precise elements of such a program need to be over the life of our need to combat the threat of Al Qaeda terrorism, let alone over the future course of our need to deal with other foreign threats to the U.S. A court approval process is flexible and not tied to the specific elements of any current program, yet gives to all parties—including the President—the assurance that actions are being taken consistent with the Constitutional rights of American citizens.

Question:

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2. **In your opening statement March 31, 2006, when you testified before the Senate Judiciary Committee regarding “*An Examination of the Call to Censure the President*”, you stated that Article II of the Constitution provided the President with authority to authorize the NSA program, “notwithstanding the fact that it was inconsistent with the terms of the Foreign Intelligence Surveillance Act.”**
 - a. **Do you feel that my NSSA bill conflicts with the President’s Article II Commander-in-Chief powers in any way? If so, how?**

Answer:

2. No. I believe your bill is consistent with the President’s Article II power. Giving the FISA court (or the FISA Court of Review) jurisdiction to approve a surveillance program does not conflict with the President’s Article II power. Moreover, the provision of the bill that acknowledges that the President retains Article II power, notwithstanding any statutory provisions, eliminates the false implication of the current FISA law that its provisions are “exclusive”—a result which would be an unconstitutional encroachment

on the President's power in the context of surveillance that is ordered in response to a foreign attack on the U.S. As I said in my testimony, that purported "exclusivity" of the statute is also contrary to what I am certain all Senators and Congressmen would recognize to be the case, however narrowly they may choose to define the President's Article II authority.

Question:

3. **On March 31, 2006, you testified to the Judiciary committee that you "think there is reason to think seriously about legislation in this area to establish a court process to approve this kind of program." Can you comment on the court process you would legislate to authorize a program such as the Terrorist Surveillance Program?**
- a. **You have read my NSSA Bill. Can you please compare and contrast my proposed legislation with your proposed court process?**

Answer:

3. The process in the Specter bill is the kind of structure I had in mind. There are a few things I would do differently, as I noted in my statement. I would submit a surveillance program to the FISA Court of Review, instead of to the lower court; it seems to me that decisions on the constitutionality of a program, as opposed to individualized warrant approvals, should be made at the appellate level. I would also direct the court to submit copies of any opinion approving a surveillance program to the Supreme Court and give the Supreme Court power to review any such decision by writ of certiorari—thereby providing assurance that the ongoing process is consistent with the Supreme Court's view of constitutional requirements. I would also direct the court to make public its decision, to the extent I can do so without compromising the secrecy of the surveillance program. But the central elements of the court process set forth in your bill seem to me to be the appropriate institutional structure to determine issues of this kind—now and in the unpredictable range of circumstances that may confront this country in the future.

Question:

4. **In your Chicago Tribune Article, *A historical Solution to the Bush Spying Program*, dated February 12, 2006, you wrote the "rapid-time sequence and the need for security professionals to make quick decisions could not be reconciled with the FISA requirement to determine case-by-case probable cause in a manner that could satisfy the court."**
- b. **Do you feel that my legislation alleviates this problem?**

Answer:

4. Yes, your proposed legislation alleviates this problem by allowing for court approval of a surveillance program in which decisions are made by security professionals at the NSA or elsewhere. The program would have to be determined to meet constitutional

standards, which might include an assessment of the supervision of those professionals, the standards they are instructed to apply, and the methods of monitoring their conduct. The result is both to broaden the potential means of carrying out surveillance, beyond the specific procedures of the FISA statute, and at the same time to establish a more effective constraint on whatever means are adopted.

Question:

- 5. Technology has changed tremendously since 1978. What are some of the technological hurdles that make FISA obsolete today? Do you agree with how S. 2453 deals with emerging technological issues? Is it feasible for the FISA Court to make the type of determinations and issue the type of program-wide warrants that the bill envisions?**

Answer:

5. Yes, the FISA court can make these determinations. Testing the specifics of a particular program or course of action against the requirements of the constitution is what federal courts do all the time. The job of the court will not be to second guess the President or the security professionals on technical or other aspects of a program or the particular foreign threat that makes it necessary. But through the submissions required under the statute—and the court's power to request any additional information it deems necessary—the court will be able to understand what is proposed to be done, the justification for it, the protections that are included to protect constitutional rights and the means of assuring that those protections are observed. It would be a mistake for Congress to try to make these kinds of particularized judgments and put them into statutory provisions that will inevitably turn over time into a legal straitjacket that cannot keep pace with new technologies and new threats. The Specter bill is an institutional structure that can go a long way to create confidence and cooperation, as opposed to the current confrontation, over the appropriate means to serve the most vital national security interests of this country.

Senator Edward M. Kennedy
Questions for the Record
From Senate Judiciary Committee hearing on “FISA for the 21st Century”
Held on July 26, 2006

To John Schmidt

In the hearing before the Senate Judiciary Committee on July 26, 2006, you made the following claim:

If it were true that the President was, in fact, limited to a statutory surveillance process, it would mean that if on the morning of 9/11 General Hayden had called President Bush and said, "We want to go forward immediately with the interception of calls at airports around this country where we think al Qaeda has people on the ground prepared to carry out further attacks," the President's only lawful response to that would be to say, "Well, we need to get the Attorney General, we need to begin examining whether each of those intercepts complies with the FISA statute, and maybe we will be able to get you authority by this afternoon or tomorrow morning."

However, FISA allows the NSA to begin tapping a source immediately and continuously for up to 72 hours while it pursues a warrant. This can be done entirely at the discretion of the Attorney General, so long as he makes a good-faith effort to “reasonably determine[]” that “an emergency situation exists” and that “the factual basis for the issuance of an order ... exists”. 50 U.S.C. §1805.

Question:

- **If the problem with the current law is the inability of the NSA to process the required number of FISA petitions within the 72-hour window, why not simply amend the statute to extend the grace period? If the grace period were extended to a month, or three months, the NSA could discard useless information and use the ample extra time to apply for warrants to obtain any useful information. Why do we need the Chairman’s sweeping overhaul if the actual problem can be solved in a targeted manner?**
- **If the concern is about the time that it takes for the Attorney General to approve wiretapping under the emergency 72-hour provision, why does it take longer to meet the requirements of FISA (“reasonably determin[ing] that “an emergency situation exists” and that “the factual basis for the issuance of an order...exists””) than the Administration’s standard for the warrantless wiretapping program (“a communication we believe to be affiliated with al Qaeda, associated with al Qaeda, one end of which is in the United States, and we believe at least one end we have a probable cause standard is al Qaeda”)? Could this problem be solved by delegating this responsibility to specified senior officials with legal proficiency in these matters? Or the allocation of additional resources to the FISA Court or the relevant federal agencies gathering intelligence?**

Answer:

- The statute requires that before the Attorney General authorizes emergency surveillance he must reasonably determine that “the factual basis for the issuance of an order exists”—that is that there is probable cause to believe that each U.S. person who is a target of the surveillance is an “agent of a foreign power” and that “each facility” being intercepted is being used by that target. In the circumstance I described—where the need is for immediate interception of calls at other U.S. airports after the 9/11 attack—there would be no basis for making either of these determinations as to all of the proposed interceptions—nor would there be time to get the Attorney General or any other specified official involved in making such determinations. Any U.S. President in these circumstances—in the immediate aftermath of an attack by a foreign power in the U.S. —would direct the NSA to go forward with any surveillance that might reasonably be thought necessary to obtain information on a possible further attack. I cited this example not in the context of urging specific FISA changes but to make the point that all rational people must recognize that there are circumstances where the President possesses Article II surveillance power to respond to foreign attack that cannot be circumscribed by any statute. That is why it is “dangerous” (to use Ed Levi’s phrase) for Congress to pass a statute purporting to have that effect. In the immediate context of the Specter bill, given that everyone must recognize that the President does have Article II power that goes beyond any statute, there is no reason for objection to the provision of the bill that contains that acknowledgment—without purporting to define the limits of that Article II authority.
- The immediate problem that led to the authorization of the NSA program—that is, the need to make quick decisions in following the trail of Al Qaeda from calls intercepted outside the U.S. to calls into or out of this country—could conceivably be solved by “delegating” the authority to make surveillance decisions to a large number of NSA security professionals. But that is a less desirable result than the Specter bill approach that would allow a surveillance program of that nature to be submitted for court review of its constitutionality—requiring the court to be advised of all elements of the program (the manner in which surveillance targets will be identified, the supervision of personnel making such decisions, the process for monitoring to make sure decisions are being made appropriately, etc)—as well as ongoing court review at specified intervals of the continued need for the program and the manner of its implementation. Moreover, “fixing” the statute with that kind of specific modification only solves the particular need we have identified today without creating an institutional mechanism that can deal with the inevitable other problems that will arise in the future—as a result of the unpredictability of foreign attacks on this country and the constantly changing communications technology that affects both the types of communications to be intercepted and our capacities to carry out that interception. A flexible court process is far preferable to trying to “write the NSA program into the law.”