

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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Statement of Senator Patrick Leahy,

Ranking Member, Senate Judiciary Committee

Hearing on

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

Monday, February 6, 2006

The question for this hearing is the illegality of the Government's domestic spying on ordinary Americans without a warrant.

The question facing us is not whether the Government should have all the tools it needs to protect the American people. Of course it should. The terrorist threat to America's security remains very real, and it is vital that we be armed with the tools needed to protect Americans' security. That is why I co-authored the PATRIOT Act five years ago and why it passed with such broad, bipartisan support. That is why we have amended the Foreign Intelligence Surveillance Act five times since 9/11 to provide more flexibility.

We all agree that we should be wiretapping al Qaeda terrorists - of course we should. Congress has given the President authority to monitor these messages legally, with checks to guard against abuses when Americans' conversations and email are being monitored. But instead, the President has chosen to do it illegally, without those safeguards.

A judge from the special court Congress created to monitor domestic spying would grant any request to wiretap an al Qaeda terrorist. Of the approximately 20,000 foreign intelligence warrant applications over the past 28 years, only a handful have been turned down.

I thank the Chairman for convening today's hearing. The Chairman and I have a long history of conducting vigorous bipartisan oversight investigations. If the Senate is to serve its constitutional role as a real check on the Executive, thoroughgoing oversight is essential.

The domestic spying programs into emails and telephone calls apparently conducted by the National Security Agency were first reported by the New York Times on December 16, 2005. The next day, President Bush admitted that secret, domestic wiretapping has been conducted without warrants since late 2001, and that he has issued secret orders in this regard more than 30 times since then. We have asked for the presidential orders, but they have not been provided. We have asked for the official legal opinions of the Government that the Administration says justify and limit this program. They, too, have been withheld from us.

This hearing is expressly about the legality of these programs, not about their operational details. In order for us to conduct effective oversight, we clearly need the official documents that answer these basic questions. We are an oversight Committee of the United States Senate - the oversight committee with jurisdiction over the Department of

Justice and over its enforcement of the laws of the United States. We are the duly elected representatives of the people of the United States, and it is our duty to determine whether the laws of the United States have been violated. The President and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write them. They do not pass them. They do not have unchecked power to decide what laws to follow and what laws to ignore. They cannot violate the law or the rights of ordinary Americans. In America no one, not even the President, is above the law.

The President's Domestic Spying Programs

There is much that we do not know about the President's secret spying programs. I hope that we will begin to get some real answers from the Administration today -- not simply more self-serving characterizations. Let's start with what we do know.

Point One -- The President's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act ["FISA"].

That law expressly states that it provides the "exclusive" source of authority for wiretapping for intelligence purposes. Wiretapping that is not authorized under that statute is a federal crime. That is what the law says, and that is what the law means. This law was enacted to define how domestic surveillance for intelligence purposes may be conducted while protecting the fundamental liberties of Americans. Two or more generations of Americans are too young to know this from their experience, but there's a reason we have the FISA law. It was enacted after decades of abuses by the Executive, including the wiretapping of Dr. Martin Luther King Jr. and other political opponents of earlier government officials, and the White House "horrors" of the Nixon years, during which another President asserted that whatever he did was legal because he was the President.

The law has been updated five times since September 11, 2001, in order to keep pace with intelligence needs and technological developments. It provides broad and flexible authority. On July 31, 2002, the Justice Department testified that this law "is a highly flexible statute that has proven effective" and noted: "When you are trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind."

The Bush Administration now concedes that this President knowingly created a program involving thousands of wiretaps of Americans in the United States over the period of the last four to five years without complying with FISA. Legal scholars and former Government officials have been almost unanimous in stating the obvious: This is against the law.

Point Two -- The Authorization for the Use of Military Force that Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11 attacks did not give the President the authority to go around the FISA law to wiretap Americans illegally.

That resolution authorized the military action of sending military troops into Afghanistan to kill or capture Osama bin Laden and those acting with him -- in the words of the statute, "to use the United States Armed Forces against those responsible for the recent attacks launched against the United States."

It did not authorize domestic surveillance of United States citizens without a warrant from a judge. Nothing in the Authorization for the Use of Military Force was intended secretly to undermine the liberties and rights of Americans. Rather, it was to defend our liberties and rights that Congress authorized the President to use our Armed Forces against those responsible for the 9/11 attacks.

Let me be clear: It is only Republican Senators who are talking about "special rights for terrorists." I have no interest in that. I wish the Bush Administration had done a better job with the vast powers Congress has given it to destroy al Qaeda and kill or capture Osama bin Laden. But it has not.

My concern is for peaceful Quakers who are being spied upon and other law-abiding Americans and babies and nuns who are placed on terrorist watch lists.

Point Three -- The President never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which the NSA has been secretly engaged for the last several years.

After September 11, 2001, I helped lead a bipartisan effort to provide tools and legal authorities to improve our capabilities to prevent terrorist attacks. We enacted amendments to FISA in the USA PATRIOT ACT in October 2001 and four additional times subsequently. Ironically, when a Republican Senator proposed a legal change to the standard needed for a FISA warrant, the Bush Administration did not support that effort but raised questions about its constitutionality and testified that it was not needed. This Administration told the Senate that FISA was working just fine and that it did not seek additional adjustments. Attorney General Gonzales has said that the Administration did not ask for legislation authorizing warrantless wiretapping of Americans and did not think such legislation would pass.

Not only did the Bush Administration not seek broader legal authority, it kept the very existence of its domestic wiretapping program without warrants completely secret from 527 of the 535 Members of Congress, including Members on this Committee and on the Intelligence Committee, and placed limits and restrictions on what the eight Members who were told anything could know or say.

The Administration had not suggested to Congress and the American people that FISA was inadequate, outmoded or irrelevant until it was caught violating the statute with a secret program of wiretapping Americans without warrants. Indeed, in 2004, two years after he authorized the secret warrantless wiretapping program, the President told the American people: "Anytime you hear the United States government talking about wiretap, a wiretap requires a court order." He continued: "Nothing has changed ... When we're talking about chasing down terrorists, we're talking about getting a court order before we do so." In light of what we now know, that statement was, at best, misleading.

The Rule Of Law

I have many questions for the Attorney General. But first, I have a message to give him and the President. It is a message that should be unanimous, from every Member of Congress regardless of party and ideology. Under our Constitution, Congress is the co-equal branch of Government that makes the laws. If you believe we need new laws, you can come to us and tell us. If Congress agrees, we will amend the law. If you do not even attempt to persuade Congress to amend the law, you must abide by the law as written. That is as true for this President as it is for any other American. That is the rule of law, on which our Nation was founded, and on which it endures and prospers.

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