

Congressman Adam B. Schiff

Testimony for Hearing on FISA Legislation
House Permanent Select Committee on Intelligence
July 27, 2006

Chairman Hoekstra, Ranking Member Harman, and Members of the Committee, I thank you for the opportunity to testify before you today about the “NSA Oversight Act” – bipartisan legislation that I introduced with Rep. Flake in March to address the domestic surveillance program conducted by the National Security Agency (NSA).

Summary of Schiff-Flake NSA Oversight Act

The Schiff-Flake NSA Oversight Act has three key components:

- 1) Reiteration that the Foreign Intelligence Surveillance Act (FISA) and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Chapters 119 and 121 of Title 18 United States Code) have and continue to be the exclusive authority for domestic electronic surveillance;
- 2) A clear congressional statement affirming that the AUMF does not provide any new or different authority to engage in domestic electronic surveillance; and
- 3) Limited classified disclosure to Congress of basic information about the program – not sources and methods and not actual names of targets – in order for policymakers to determine what, if any, modifications Congress should make.

Our bipartisan legislation has been cosponsored by a number of Republicans and Democrats, endorsed by both liberal and conservative groups including the ACLU, the Center for Democracy and Technology, and former Congressman Bob Barr’s “Patriots to Restore Checks and Balances,” and our bipartisan efforts have received editorial support.

Exclusivity of FISA and Title III

Mr. Chairman, I strongly believe that the Federal Government has a duty to pursue al Qaeda and other enemies of the United States with all available tools, including the use of electronic surveillance, to thwart future attacks and to destroy the enemy.

After the September 11th attacks, it became clear that there were some areas where improvements were needed in law enforcement’s ability to investigate and prosecute terrorist activity, particularly the need to keep pace with changes in technology and the use of that technology by terrorists.

Immediately after the attacks, the House Judiciary Committee – on which I sit with Rep. Flake – led the effort, working in a bipartisan fashion with this committee and others to develop such legislation. The bill that was ultimately signed into law by the President included a number of changes to FISA requested by the Administration.

Over a year ago, the Administration sent the Attorney General of the United States to urge Congress to reauthorize that legislation – the PATRIOT Act. We were told that the

authorities in the bill – including specific provisions related to wiretapping and other electronic surveillance – were crucial and must be reauthorized. Throughout the discussion, the Administration emphasized their required duty to “fully inform” congressional committees, they cited the involvement of an independent court with the required finding of probable cause to believe a target is a foreign agent, and they reminded us of the federal court review that has found a number of these authorities consistent with the Constitution.

We have now learned that the Administration was engaging in activities directly implicated by the PATRIOT Act and FISA, but wholly outside any statutes that occupy this field and without informing the committees of jurisdiction.

Indeed, we realized that the debate we had over FISA and the PATRIOT bill – complete with the Administration’s pledge that they were “open to any ideas that may be offered for improving these provisions” and that they would “be happy to consult with [us] and review [our] ideas” – was at best duplicitous. In fact, when one of our GOP colleagues in the Senate asked the Administration, during the debate over the PATRIOT reauthorization, whether additional changes to FISA were needed, the Administration responded that FISA was operating just fine. A more accurate representation would have been that FISA did not need further changes because the Administration did not feel bound by FISA even when it came to the surveillance of Americans on American soil.

Unless and until the Administration requests changes to current law, and the Congress acts to amend it, the Schiff-Flake “NSA Oversight Act” states that FISA and Title III continue to be the exclusive means by which domestic electronic surveillance may be conducted. While the President possesses the inherent authority to engage in electronic surveillance of the enemy outside the country, Congress possesses the authority to regulate such surveillance within the United States. When Congress passed FISA and Title III, it intended for those statutes to provide the sole authority for surveillance of Americans on American soil. In fact, Congress stated so explicitly in section 2511 of title 18 of the United States Code.

Clarification of Authorization for Use of Military Force

Our bill also makes clear that the Authorization for Use of Military Force does not provide an exception to this rule. Few Members of Congress would assert that when they voted to authorize the use of force to root out the terrorists who attacked us on September 11th, that they were also voting to nullify FISA and the criminal wiretap statutes as they apply to U.S. citizens. Indeed, Members from both sides of the aisle – including the former Senate Majority Leader, Senators Brownback, Specter, McCain, and Lindsey Graham – have indicated that they did not contemplate such authority when they voted for that resolution.

The Supreme Court recently spoke to the Administration’s overbroad reading of the AUMF. In the recent *Hamdan* decision, the Court analyzed the AUMF in determining whether Congress provided authorization, separate from the UCMJ, to establish the

President's military commissions to try Osama bin Laden's limo driver. The Court concluded that "there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in [the UCMJ]."

It is equally clear that Congress did not authorize the President to wiretap Americans on U.S. soil without court order in any provision of the AUMF. This conclusion is at the heart of the Schiff-Flake NSA Oversight Act.

And while we have been told that surveillance in this program is limited to phone calls where one of the parties is outside of the United States, there appears to be no limiting principle to the Executive's claim of authority provided by the military force resolution. When I questioned the Attorney General on this point a few months ago at a Judiciary Committee hearing, he would not rule out the proposition that the Executive has the authority to wiretap purely domestic calls between two Americans without seeking a warrant. No one in Congress would deny the need to tap certain calls under court order; but if the government can tap purely domestic phone calls between Americans without court approval, there is no limit to executive power.

In enacting FISA, Congress specifically sought to balance our national security interests with legitimate civil liberties concerns. In so doing, Congress expressly permitted warrantless surveillance without court order for 15 days after a declaration of war. Additionally, Congress provided the authority to engage in electronic surveillance for up to 72 hours without any court order. Furthermore, after the September 11th attacks, the Administration came to Congress and asked us to modify FISA to respond to new challenges in the war on terror, and Congress responded by making those changes.

But the Administration has not come to Congress and made the case for statutory change to authorize this NSA program; instead it has taken the position that FISA does not apply, or that if it does, it is unconstitutional. The Administration pushed forward this new surveillance effort, informing a few members of this committee but leaving the rest of Congress in the dark. And, until this hearing and its counterpart in the Senate, Congress was content to remain in the dark, unwilling to perform adequate oversight and play its institutional role.

Limited Classified Disclosure to Congress

When we learned late last year in the New York Times that the President had authorized the NSA to engage in a secret domestic wiretapping program, this revelation was news to some 430 Members of the House, including virtually every member of this Committee. Members of Congress should not have to rely on the morning paper to learn about such programs, particularly when they sit on committees that have jurisdiction over precisely these matters. To date, however, most Members of Congress – including those Members of the Judiciary Committee with jurisdiction over FISA, criminal wiretap statutes, the PATRIOT Act, terrorism, and civil liberties – know nothing about the NSA program outside of what we have read in the newspaper or seen on the nightly news.

Therefore, the Schiff-Flake bill would require classified disclosure to the members of the two committees with oversight over FISA – Judiciary and Intelligence – about U.S. persons who have been the subject of such wiretaps, and what criteria was used to target them.

Mr. Chairman, it is important to note that each of the 3 bills that are the subject of today's hearing have received a primary referral to the House Judiciary Committee, with a sequential referral to Intelligence.

I must emphasize what our bill does not do, as some have unfortunately mischaracterized this section of our legislation. Our bill absolutely does not require disclosure of any sources or methods and it does not require the disclosure of actual names of targets.

Unfortunately, the bill introduced by Rep. Wilson proposes significant and wide-reaching changes to FISA before the very policymakers tasked with jurisdiction over FISA have had the opportunity to understand if either of these moves is even warranted, short of the Administration's public suggestion to "trust" them. Under Rep. Wilson's legislation, we would be asked to act on proposed changes to FISA which would expand the scope and duration of surveillance in the U.S. without court order or supervision without any information from the Administration as to why current law is inadequate for the job.

If Congress is unable to be educated on the very basic operation of the disclosed program and any other programs in existence, I cannot see how we can make the determination whether current law should be amended to either grant the President the powers he seeks, or make any other modifications to current law that we deem appropriate.

Importantly, the Wilson bill also appears to leave the existing NSA program alone and merely creates a parallel framework. Any other undisclosed current or future programs could still operate outside of FISA and Title III in contravention of the exclusivity provision in existing law.

Conclusion

Until recently, no committee action was scheduled on this issue or our legislation, and Mr. Flake and I felt compelled to initiate debate of this important issue on the House Floor via an amendment that we offered to the DOD Appropriations bill. After 1½ hours of spirited debate – the only substantive public congressional deliberation on this topic – the Schiff-Flake amendment failed by a slim margin, but not before garnering the support of 23 Republicans and prompting a commitment to hold this legislative hearing today.

The Schiff-Flake NSA Oversight Act has been a completely bipartisan effort since day one, and I urge this Committee to continue this spirit of bipartisanship by moving on our legislation and using it as a vehicle for any proposed changes or modifications to FISA related to the current NSA program.

Mr. Chairman, Ranking Member, and Members of the Committee, in working to meet the real national security needs of the country, we must also ensure that Congress does not abdicate its oversight responsibility in order to ensure that the fundamental principles of the separation of powers underlying our democracy are not compromised. Electronic surveillance of al Qaeda operatives and others seeking to harm our country must continue; it simply can and should comply with the law.