



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 109th CONGRESS, FIRST SESSION

Vol. 151

WASHINGTON, Friday, December 16, 2005

No. 162

Senate

Statement of Senator Dianne Feinstein

“On Reports of Unauthorized Wiretaps”

Mrs. FEINSTEIN. Mr. President, I rise today as a 12-year member of the Senate Judiciary Committee and a 5-year member of the Senate Intelligence Committee. I do so indeed with a very heavy heart. I have had, until now, great confidence in America's intelligence activities. I have assured people time and time again that what happens at home has always been conducted in accordance with the law.

I played a role in the PATRIOT Act. I moved one of the critical amendments having to do with the wall and the FISA court. Today's allegations as written in the New York Times really question whether this is in fact true. I read it with a heavy heart, yet without knowing the full story.

Let me be clear. Domestic intelligence collection is governed by the Foreign Intelligence Surveillance Act, known as FISA. This law sets out a careful set of checks and balances that are designed to ensure that domestic intelligence collection is conducted in accordance with the Constitution, under the supervision of judges and with accountability to the Congress of the United States.

Specifically, FISA allows the Government to wiretap phones or to open packages, but only with a showing to a special court -- the FISA court -- and after meeting a legal standard that requires that the effort is based on probable cause to believe the target is an agent of a foreign power.

Let me cite two sources. The first is a 1978 report by the Senate Select Committee on Intelligence. In the report is a comment by the then-chairman of that committee, Senator Birch Bayh. He is talking about the FISA bill that had just come to the floor in 1978:

The bill requires a court order for electronic surveillance, defined therein, conducted for foreign intelligence purposes within the United States or targeted against the international communications of particular United States persons who are in the United States. The bill establishes the exclusive means by which such surveillance may be conducted.

That is the bill, FISA, which was passed in 1978.

Second, in late 2001 this subject came up again on the Senate Intelligence Committee. The Senate Intelligence Committee discussed this subject and amended at that time in its authorization bill National Security Act section 502, which is the reporting of intelligence activities other than covert action.

Section 502 states:

To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters,

the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall:

1) keep the congressional intelligence committees --

It doesn't say only the chairman and the vice chairman --

fully and currently informed of all intelligence activities other than a covert action (as defined in section 503(e)), which are not the responsibility of, are engaged in by, or are carried out for or on behalf of any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure.

And 2) furnish the congressional intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

At that time, we had this discussion about just the chairman and the vice chairman receiving certain information, and this act was amended, and section (b) was added to

the National Security Act, called "form and contents of certain reports." It was to clarify what the form and content of the reporting to the committee would be. And the wording is as follows:

Any report relating to a significant anticipated intelligence activity or a significant intelligence failure that is submitted to the congressional intelligence committees for the purposes of subsection (a)(1) shall be in writing and shall contain the following:

- 1) a concise statement of any fact pertinent to such report;
- 2) an explanation of the significance of the intelligence activity or intelligence failure covered by such report.

And then section (c) was added, "standards and procedures for certain reports," that those standards and procedures would hereby be established.

What has happened is that it has become increasingly used just to notify a very few people. There are 535 Members of the Senate and the House of Representatives of the United States.

If the President of the United States is not going to follow the law and he simply alerts eight Members, that doesn't mean he doesn't violate a law. I repeat, that doesn't mean he doesn't violate a law. FISA is the exclusive law in this area, unless there is something I missed, and please, someone, if there is, bring it to my attention.

Section 105 (f) of FISA allows for emergency applications where time is of the essence. But even in these cases, a judge makes the final decision as to whether someone inside the United States of America, a citizen or a non-citizen, is going to have their communications wiretapped or intercepted. The New York Times reports that in 2004, over 1,700 warrants for this kind of wiretapping activity were approved by the FISA

Court. The fact of the matter is, FISA can grant emergency approval for wiretaps within hours and even minutes, if necessary.

In times of war, FISA section 111 states this:

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress.

I would argue the resolution authorizing use of force was not a declaration of war. I read it this morning carefully. It does not authorize the President of the United States to do anything other than use force. It doesn't say he can wiretap people in the United States of America. And apparently, perhaps with some change, but apparently this activity has been going on unbeknownst to most of us in this body and in the other body now since 2002.

The newspaper, the New York Times, states that the President unilaterally decided to ignore this law and ordered subordinates to monitor communications outside of this legal authority.

In the absence of authority under FISA, Americans up till this point have been confident -- and we have assured them -- that such surveillance was prohibited.

This is made explicit in chapter 119 of title 18 of the criminal code which makes it a crime for any person without authorization to intentionally intercept any wire, oral, or electronic communication.

As a member of the Senate Judiciary and Intelligence Committees, I have been repeatedly assured by this administration that their efforts to combat terrorism were being conducted within the law, specifically within the parameters of the Foreign Intelligence Surveillance Act which,

as I have just read, makes no exception other than 15 days following a declaration of war.

We have changed aspects of that law at the request of the administration in the USA PATRIOT Act to allow for a more aggressive but still lawful defense against terror. So there have been amendments. But if this article is accurate, it calls into question the integrity and credibility of our Nation's commitment to the rule of law.

I refreshed myself this morning on the fourth amendment to the Bill of Rights of the Constitution of the United States. Here is what it says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Clearly an intercept, a wiretap, is a search. It is a common interpretation. A wiretap is a search. You are looking for something. It is a search. It falls under the fourth amendment.

Again, the New York Times states that a small number of Senators, as I said, were informed of this decision by the President. That doesn't diminish the import of this issue, and that certainly doesn't mean that the action was within the law or legal.

What is concerning me, as a member of the Intelligence Committee, is if eight people, rather than 535 people, can know there is going to be an illegal act and they were told this under an intelligence umbrella -- and therefore, their lips are sealed -- does that make the act any less culpable? I don't think so.

The resolution passed after September 11 gave the President specific authority to use force, including powers to prevent further terrorist acts in the form of force. I would like to

read it. I read Public Law 107-40, 107th Congress:

Sec.1. Short title.

This joint resolution may be cited as the "Authorization for Use of Military Force".

Sec. 2. Authorization for Use of United States Armed Forces.

(A) In General. -- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Then it goes on to say:

Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

This is use of force. It is not use of wiretapping or electronic surveillance of American citizens or those without citizenship within the confines of the United States. That is the jurisdiction of the FISA Court. There is a procedure, and it is timely.

As a matter of fact, we got into this rather seriously in the Judiciary Committee. At the time we wrote the PATRIOT Act, I offered an amendment to change what is called "the wall" between domestic intelligence-gathering agencies and foreign intelligence-gathering agencies from a "primary purpose" for the collection of foreign intelligence to a "significant purpose." We had a major discussion in the committee, as is the American way. We were making public policy. We discussed what primary purpose meant. We discussed in legal terms what significant purpose meant.

So this was a conscious loosening of a standard in the FISA law to permit the communication of one element of Government with the other and transfer foreign intelligence information from one element of the Government to the other.

That is the way this is done, by law. We are a government of law. The Congress was never asked to give the President the kind of unilateral authority that appears to have been exercised.

Mr. BYRD. Right.

Mrs. FEINSTEIN. I was heartened when Senator Specter also said that he believed that if the New York Times report is true -- and the fact that they have withheld the story for a year leads me to believe it is true, and I have heard no denunciation of it by the administration -- then it is inappropriate, it is a violation of the law.

How can I go out, how can any Member of this body go out, and say that under the PATRIOT Act we protect the rights of American citizens if, in fact, the President is not going to be bound by the law, which is the FISA court?

And there are no exceptions to the FISA court.

So Senator Specter, this morning, as the chairman of the Judiciary Committee, announced that he would hold hearings on this matter the first thing next year. I truly believe this is the most significant thing I have heard in my 12 years. I am so proud of this Government because we are governed by the rule of law, and so few countries can really claim that. I am so proud that nobody can be picked up in the middle of the night and thrown into jail without due process, and that they have due process. That is what makes us different. That is why our Government is so special, and that is why this Constitution is so special. That is why the fourth amendment was added to the Bill of Rights -- to state clearly that searches and seizures must be carried out under the parameter of law, not on the direction of a President unilaterally.

So I believe the door has been opened to a very major investigation and set of circumstances. I think people who know me in this body know I am not led toward hyperbole, but I cannot stress what happened when I read this story. And everything I hold dear about this country, everything I pledge my allegiance to in that flag, is this kind of protection as provided by the Constitution of the United States and the laws we labor to discuss, argue, debate, enact, then pressure the other body to pass, and then urge the President to sign. That is our process.

If the President wanted this authority, he should have come to the Intelligence Committee for an amendment to FISA, and he did not.

The fact that this has been going on since 2002 -- it is now the end of 2005. Maybe 8 people in these 2 bodies in some way, shape, or form may have known something about it, but the rest of us on the Intelligence Committees did not.

That is simply unacceptable.

I yield the floor.