

**COUNTERINTELLIGENCE REFORM ACT OF 2000**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT  
AND THE COURTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

**S. 2089**

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# CONTENTS

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## STATEMENTS OF COMMITTEE MEMBERS

Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont .....	5
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina .....	17
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania .....	1

## WITNESSES

Freeh, Hon. Louis J., Director, Federal Bureau of Investigation, Washington, DC .....	8
Townsend, Frances Fragos, Counsel for Intelligence Policy, Office of Intel- ligence Policy and Review, U.S. Department of Justice, Washington, DC .....	24

## SUBMISSIONS FOR THE RECORD

McArthur, Dobie, Staff Assistant to Senator Specter, memorandum .....	2
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# COUNTERINTELLIGENCE REFORM ACT OF 2000

TUESDAY, MARCH 7, 2000

U.S. SENATE,  
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT  
AND THE COURTS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senator Thurmond.

## **OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. The hour of 9:30 having arrived, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts will now proceed.

We have two witnesses this morning, the distinguished Director of the FBI, the Hon. Louis Freeh, and ranking Department of Justice official with the Attorney General, Ms. Frances Fragos Townsend. Director Freeh has another commitment this morning to appear before the appropriations subcommittee which funds the FBI which begins at 10 a.m., and we have made arrangements with the chairman there for him to be a little bit late, with Senator Judd Gregg, but we want to proceed now to have as much time as possible on Director Freeh's time here.

This hearing involves Senate bill 2089, which is designed to correct certain deficiencies in the Foreign Intelligence Surveillance Act. This bill was introduced on February 24 and has been cosponsored by every member of the subcommittee, by Senator Grassley, Senator Thurmond, Senator Sessions, Senator Torricelli, Senator Feingold, Senator Schumer, and also by Senator Biden, who was one of the original authors of the Foreign Intelligence Surveillance Act back in 1978, and also by Senator Helms.

The subcommittee has proceeded with an interim report because of the very important issues raised by the investigation of Dr. Wen Ho Lee, and we have submitted this legislation at an early date to try to correct some of the deficiencies, so-called loopholes in that bill.

Dr. Lee was indicted on December 10 of last year on 59 counts which alleged that he downloaded and removed from the Los Alamos National Laboratory classified nuclear weapons design and testing files. In the bail hearing for Dr. Lee, which was held on De-

ember 13, the seriousness of this matter was characterized by Dr. Stephen Younger, Assistant Laboratory Director for Nuclear Weapons at Los Alamos, as follows, "These codes and their associated databases and the input file, combined with someone who knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance." It is hard to find any assessment which is more onerous or more threatening than, "change the global strategic balance."

Dr. Younger further testified about the codes, "They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces. They represent the gravest possible security risk to the supreme national interest." And, again, it is hard to find a characterization more serious than, "military defeat of America's conventional forces," or "the gravest possible security risk to the supreme national interest."

There has been prepared a lengthy report, running approximately 65 pages, and it is my expectation that before the end of the day we will be able to release that report. I have had some comments from some of the committee members expressing some concern about that and I want to be sure as a matter of super-caution that we consider whatever anybody on the subcommittee has to say, or anybody else for that matter.

Yesterday, we received a letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, saying, in part, "The Department's legal standing to object to the release of the draft report rests solely on classification grounds, and we do not so object because the draft of the report that we reviewed does not divulge information that has been classified by the Department or the Federal Bureau of Investigation."

Mr. Raben goes on to raise a potential concern that the Central Intelligence Agency may have some concern about information that it has classified. But that has been reviewed in detail with the Central Intelligence Agency as well, and also with the Department of Energy.

Without objection, I will make a part of the record a memo from Staff Assistant Dobie McArthur, who has done such extraordinary and outstanding work on this report, which specifies the clearances which have been obtained from CIA and DoD, and summarizes the entire matter as to appropriateness for release of the report.

[The memo referred to follows:]

MEMORANDUM

To: Senator Specter  
 From: Dobie McArthur  
 Date: March 7, 2000  
 Re: Update on Classification Review of Interim Report

This memo summarizes the steps that have been taken to ensure that the interim report of the subcommittee Task Force does not contain any classified material.

The report was written based on unclassified information, with particular emphasis on the Attorney General's June 8, 1999 testimony before the Judiciary Committee; the information from the June 9, 1999 testimony before the Governmental Affairs Committee; the White House press package released in response to the Cox Committee Report; the Government's filings in the Wen Ho Lee case; and the Cox Committee Report itself.

On January 20, 2000 I shared a copy of an earlier draft with Senator Torricelli's staff, and then sent a copy to the FBI, the CIA and the DOE at your direction. After

your meeting with Senator Torricelli on January 27, a newer version of the report that contained some of the revisions suggested by Senator Torricelli's staff was sent to the DOJ. That is the draft about which Assistant Attorney General Robert Raben wrote his letter to Senator Hatch on March 6, 2000.

Although Mr. Raben did not directly address the issue of classification, when you asked him on the phone to state more clearly whether the Department of Justice had classification concerns or any objection to the public release of the report he later did so in three ways. First, I spoke with him after your call and he said that "the only legal grounds would be on classification, and we have no grounds to object on classification." He made it clear that the statement reflected the position of the Department of Justice, including the FBI, a fact which was reaffirmed when you met with Director Freeh this afternoon at FBI Headquarters. While we were at the FBI, Mr. Raben left a voice mail (which I have preserved), reiterating the same point, but adding that he had not spoken to the CIA and thought they might have some concerns. Later in the day, Mr. Raben sent another letter, this time to you, in which he explicitly stated that the Department of Justice had no classification concerns with the report, but he again noted that the CIA might have some.

I met with the CIA on February 7, 2000 and have addressed every issue they raised in the meeting. Specifically, I met with Mr. Robert Walpole, National Intelligence Officer for Strategic and Nuclear Programs. The meeting took place at CIA Headquarters, and was attended by Mr. Jack Dempsey, from CIA Congressional Affairs, and a representative from the CIA's Directorate of Intelligence, and one from the Directorate of Operations. The CIA raised several concerns about matters that had come from news accounts. As I had never seen the underlying CIA documents, I agreed to accept their assessment that, although the information was already in the public domain and had, in fact, been placed there by the White House, it should not be in the report. Every issue that was raised by the CIA in that meeting was addressed by revisions. Although asked to provide any additional comments they had about the report in writing, they have said nothing since February 7.

It should be noted that under Section 6 of Executive Order 12958 (April 17, 1995) which governs classified national security information, the Attorney General upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration. If the CIA had any concerns, they could have raised them at a number of points during which this report was being reviewed, including directly with the Attorney General before Mr. Raben sent his letter stating that DOJ had no classification concerns.

The DOE has also reviewed the report because DOE information is handled under separate procedures laid out in the Atomic Energy Act of 1954, as amended. On March 2, 2000 I met with Dr. Roger Heusser and Dr. Andy Weston-Dawkes. As a result of the meeting, DOE certified that the report does not contain any DOE classified data or any Restricted Data. Mr. Weston-Dawkes left a copy of the report on which he indicated that it contained no DOE classified material and no Restricted Data. He signed the front page and initialed each page. As it was printed out using the printer in room S407, the report was only 58 pages due to differences in formatting, but the content is substantively identical to the attached version of the report, which runs the full 65 pages you have seen previously. After Mr. Weston-Dawkes signed the report, I corrected a spelling error and removed the word DRAFT from the top of each page, but made no substantive changes.

In sum, every agency with classification responsibility for issues raised by the report has had possession of the report for more than a month. Every issue that has been identified by an agency has been addressed, so there are no outstanding concerns from any agency.

Senator SPECTER. The legislation which we are considering today to amend the Foreign Intelligence Surveillance Act deals with only a limited part of the investigation of Dr. Wen Ho Lee, and it will pick up the sequence at the application for the warrant under FISA, the abbreviation for Foreign Intelligence Surveillance Act.

The subcommittee had scheduled hearings on Dr. Wen Ho Lee's matter in December, and at the request of Director Freeh we have postponed those hearings. Director Freeh met with the ranking member, Senator Torricelli, and myself on December 14 and we agreed that we would not proceed with the hearing on the factual information.

I did discuss the matter with Director Freeh as to proceeding on the legislation several weeks ago, and again we met at length yesterday afternoon to be sure that this hearing on the legislation would not in any way interfere with Dr. Lee's trial. It is a very important matter for both of the parties, the United States of America, the prosecuting party, and Dr. Wen Ho Lee, the defending party, that there be no prejudice to that proceeding in any way, shape or form, and this subcommittee will honor that objective. I discussed with Director Freeh—and we will put it on the record formally when he testifies—that the disclosure of the report would not be in any way harmful to security matters or to that trial.

The essential facts which we are dealing with here, focusing again on the FISA application, involves the request by the FBI in June of 1997, which in regular procedure goes to the Department of Justice for submission to a court, to authorize a warrant which would permit surveillance of someone under the Foreign Intelligence Surveillance Act. That request was rejected by the Department of Justice on August 12, 1997, at which point Director Freeh instructed top-level Assistant Director John Lewis to confer personally with Attorney General Reno, which Mr. Lewis did.

Attorney General Reno then assigned the matter to a subordinate, Dan Seikaly, who was not experienced in these matters. He, in turn, rejected it. Attorney General Reno did not check on the matter after the delegation, and one of the cardinal points of the proposed legislation is to provide that when the Director of the FBI makes a personal request to the Attorney General that the Attorney General must rule on it personally, and that in order to be sure that the request has been made by the Director that it be made in writing, and that if the Attorney General rejects the request that the Attorney General state why, in writing, the request has been rejected, to give an opportunity, a road map, so to speak, to the FBI to find out what to do.

The Department of Energy entered the matter by giving a polygraph test to Dr. Lee on December 23, and the Department of Energy announced that he had passed the polygraph when, in fact, he had failed. The Secretary of Energy announced on national television that he had failed, which threw the investigation off.

This legislation provides that handling of the matter will be limited to the Federal Bureau of Investigation and that only the Federal Bureau of Investigation will be authorized to handle matters like the polygraph, or to give authority if the FBI chooses to do so.

The legislation further provides that the concept of "currently engaged" will not required an elevated standard as to imminence as, for example, on seizure of drugs, but will be taken by the totality of circumstances. The statute further provides that if an individual has been an asset of a Federal agency that that will be disclosed to the judge on the FISA application.

That, in essence, is a very brief overview of the statute. I might quote Senator Torricelli, who had expected to be in town today but is not in town, I am advised. On his statement cosponsoring the legislation, Senator Torricelli said this, on February 24, at page S-801 of the Congressional Record, "There was a startling, almost unbelievable failure of coordination and communication between the Department of Justice, the FBI and the Department of Energy in



dealing with this matter. And only through that lack of coordination was an allegation of possible espionage able to lead to 17 years of continued access and the possibility that this information was compromised.”

Senator Leahy has submitted a statement for the record and we will include that statement in the record at this point.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I have joined as a cosponsor of the Counterintelligence Reform Act of 2000, S. 2089, and look forward to working with my colleagues, Senators Grassley, Specter, and Torricelli, on making any improvements and refinements to the legislation which may become apparent as we hear from expert witnesses both today and at future hearings. This is an important issue with serious implications for the careful balance we have struck between the need to protect our national security and our obligation to defend the constitutional rights of American citizens.

This legislation was crafted in response to perceived problems in the investigation of nuclear physicist Wen Ho Lee. Our review of that matter is far from complete and, in view of the pending criminal case, must be put in abeyance to avoid any prejudice to the parties or suggest political influence on the proceedings. Based on the Subcommittee’s review to date, however, I do not share the views of some of my colleagues who have harshly criticized the Justice Department’s handling of this matter. Notwithstanding my disagreement, as explained below, with those criticisms of the Justice Department, I support this legislation as a constructive step towards improving the coordination and effectiveness of our counterintelligence efforts. Senators Grassley, Specter, and Torricelli, have provided constructive leadership in crafting this bill and bringing together Members who may disagree about the conclusions to be drawn from the underlying facts of the Wen Ho Lee investigation.

My view of the Justice Department’s handling of the Wen Ho Lee investigation differs in at least three significant respects from those of the Department’s critics in the Senate.

*First*, the Justice Department’s demand in the summer of 1997 for additional investigative work by the FBI has been misconstrued as a “rejection” of a FISA application for electronic surveillance. FBI officials first consulted attorneys at DOJ on June 30, 1997, about receiving authorization to conduct FISA surveillance against Lee.<sup>1</sup> The request was assigned to a line attorney in the Office of Intelligence and Policy Review (OIPR), who, appreciating the seriousness of the matter, drafted an application for the court over the holiday weekend.<sup>2</sup> A supervisor in the OIPR unit then reviewed the draft and decided that further work by the FBI would be needed “to complete the application and send it forward.”<sup>3</sup> Further discussions then ensued and two additional draft applications were prepared.

In August 1997, FBI agents met again with OIPR attorneys about the FISA request. The OIPR supervisor testified at a Governmental Affairs Committee hearing on June 9, 1999 that “[f]ollowing that meeting, the case was put back to the Bureau to further the investigation in order to flesh out and eliminate some of the inconsistencies, to flesh out some of the things that had not been done.”<sup>4</sup> He testified that the primary concern with the FBI investigation “had to do with the fact that the DOE and Bureau had [multiple] suspects, and only two were investigated . . . That is the principal flaw which ha[d] repercussions like dominoes throughout all of the other probable cause.”<sup>5</sup>

This was not a “rejection.” The OIPR attorneys expected the FBI to develop their case against Lee further and to return with additional information. This is normal, as most prosecutors know. Working with agents on investigations is a dynamic process, that regularly involves prosecutors pushing agents to get additional information and facts to bolster the strength of a case. Yet, nearly a year and a half passed before the attorneys at OIPR were again contacted by the FBI about Lee.<sup>6</sup>

The report issued by the Governmental Affairs Committee on this issue concludes that although the OIPR attorneys did not view their request for additional investigation as a “denial” of the FISA request, the FBI “took it as such.”<sup>7</sup> Notwithstanding or even mentioning these apparently differing views as to what had transpired, some have criticized the Justice Department for rejecting the FISA application in 1997. It is far from clear that a rejection took place, and I credit the perspective of the OIPR attorneys that their request to the FBI for additional investigative work was made in an effort to complete—not kill—the FISA application.

Second, the Justice Department correctly concluded that the FBI's initial FISA application failed to establish probable cause. Indeed, even the chief of the FBI's National Security Division, John Lewis, who worked on the FISA application, has admitted that he turned in the application earlier than anticipated and without as much supporting information as he would have liked.<sup>8</sup>

Determining whether probable cause exists is always a matter of judgment and experience, with important individual rights, public safety and law enforcement interests at stake if a mistake is made. From the outset, prosecutors making such a determination must keep a close eye on the applicable legal standard.

Pursuant to the terms of the FISA statute, intelligence surveillance against a United States person may only be authorized upon a showing that there is probable cause to believe: (1) that the targeted United States person is an agent of a foreign power; and (2) that each of the facilities or places to be surveilled is being used, or about to be used by that target. 50 U.S.C. §§ 1801(b)(2), 1804(a)(4). With regard to the first prong, the statute defines several ways in which a United States person can be shown to be an agent of a foreign power. Most relevant here, a United States person is considered an agent of a foreign power if the person "knowingly engages in clandestine intelligence gathering activities, for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." 50 U.S.C. 1801(b)(2)(A).

Without dissecting all of the allegations against Lee here, there are several issues that undermined the FBI's evidence that Lee was an "agent of a foreign power" and, in 1997, engaged in "clandestine intelligence gathering activities." In the letterhead memorandum by which the FBI first sought DOJ approval for the FISA warrant, the FBI reported that an administrative inquiry conducted by DOE and FBI investigators had identified Wen Ho Lee as a suspect in the loss of information relating to the W-88 nuclear warhead.<sup>9</sup> Most critically, however, the FBI indicated that Lee was one of a group of laboratory employees who: (1) had access to W-88 information; (2) had visited China in the relevant time period; and (3) had contact with visiting Chinese delegations.<sup>10</sup>

The problem with the FBI's reliance on this administrative inquiry and corresponding narrow focus on Lee and his wife as suspects was that the FBI "did nothing to follow up on the others."<sup>11</sup> The Attorney General testified at the June 8, 1999 Judiciary Committee hearing that "the elimination of other logical suspects, having the same access and opportunity, did not occur."<sup>12</sup> Similarly, the OIPR supervisor who testified at the GAC hearing confirmed that "the DOE and Bureau had [multiple] suspects, and only two [meaning Lee and his wife] were investigated."<sup>13</sup> According to him, as noted above, "[t]hat is the principal flaw which ha[d] repercussions like dominoes throughout all of the other probable cause."<sup>14</sup> Quite simply, the failure of the FBI to eliminate, or even investigate, the other potential suspects identified by the DOE administrative inquiry undermined their case for probable cause.

Indeed, this failure to investigate all potential leads identified in the DOE administrative inquiry has prompted the FBI to conduct a thorough re-examination, which is currently underway, of the factual assumptions and investigative conclusions of that initial inquiry.

The other evidence that the FBI had gathered about Lee was stale, inconclusive or speculative, at best and certainly did not tie him to the loss of the W-88 nuclear warhead information. For example, the FBI proffered evidence pertaining to a fifteen-year-old contract between Lee and Taiwanese officials. The FBI's earlier investigation boiled down to this: after the FBI learned in 1983 that Lee had been in contact with a scientist at another nuclear laboratory who was under investigation for espionage, Lee was questioned. He explained, eventually, that he had contacted this scientist because he had thought the scientist had been in trouble for doing similar unclassified consulting work that Lee volunteered that he had been doing for Taiwan.<sup>15</sup> To confirm his veracity, the FBI gave Lee a polygraph examination in January 1984, and he passed.<sup>16</sup> This polygraph included questions as to whether he had ever given classified information to any foreign government.<sup>17</sup> Shortly thereafter, the FBI closed its investigation into Lee and this incident.

Even if viewed as suspicious, Lee's contacts fifteen years earlier with Taiwanese officials did not give rise to probable cause to believe that in 1997 he was currently engaged in intelligence gathering for China.

As a further example, the FBI also relied on evidence that during a trip by Lee to Hong Kong in 1992, there was an unexplained charge incurred by Lee that the FBI speculated could be consistent with Lee having taken a side trip to Beijing.<sup>18</sup> As Attorney General Reno testified at the hearing, the fact that Lee incurred an unexplained travel charge in Hong Kong did not standing alone support an infer-

ence that he went to Beijing. It therefore did nothing to support the FBI's claim that Lee was an agent for China.

The OIPR attorneys who pushed the FBI for additional investigative work to bolster the FISA application for electronic surveillance of Wen Ho Lee were right—the evidence of probable cause proffered by the FBI was simply insufficient for the warrant.

Third, the Justice Department was right not to forward a flawed and insufficient FISA application to the FISA court. Some have suggested that the Lee FISA application should have been forwarded to the court even though the Attorney General (through her attorneys) did not believe that was probable cause. To have done so would have violated the law.

The FISA statute specifically states that “[e]ach application shall require the approval of the Attorney General based upon [her] finding that it satisfies the criteria and requirements. . . .” 50 U.S.C. §1804(a). The Attorney General is statutorily required to find that the various requirements of the FISA statute have been met before approving an application and submitting it to the court.

As a former prosecutor, I know that this screening function is very important. Every day we rely on the sound judgment of experienced prosecutors. They help protect against encroachments on our civil liberties and constitutional rights. Any claim that the Attorney General should submit a FISA application to the court when in her view the statutory requirements have not been satisfied undermines completely the FISA safeguards deliberately included in the statute in the first place.

I appreciate that those who disagree with me that the evidence for the Lee FISA application was insufficient to meet the FISA standard for surveillance against a United States person may urge that this standard be weakened. This would be wrong.

The handling of the Wen Ho Lee FISA application does not suggest a flaw in the definition of probable cause in the FISA statute. Instead, it is an example of how the probable cause standard is applied and demonstrates that effective and complete investigative work is and should be required before extremely invasive surveillance techniques will be authorized against a United States person. The experienced Justice Department prosecutors who reviewed the Lee FISA application understood the law correctly and applied it effectively. They insisted that the FBI do its job of investigating and uncovering evidence sufficient to meet the governing legal standard.

The Counterintelligence Reform Act of 2000 correctly avoids changing this governing probable cause standard. Instead, the bill simply makes clear what is already the case—that a judge can consider evidence of past activities if they are relevant to a finding that the target currently “engages” in suspicious behavior. Indeed, the problem in the Lee case was not any failure to consider evidence of past acts. Rather, it was that the evidence of past acts presented regarding, for instance Lee’s connections to Taiwan, did not persuasively bear on whether Lee, in 1997, was engaging in clandestine intelligence gathering activities for another country, China.

Finally, some reforms are needed. The review of the Lee matter so far suggests that internal procedures within the FBI, and between the FBI and the Office of Intelligence Policy and Review, to ensure that follow-up investigation is done to develop probable cause do not always work. I share the concern expressed by some of my colleagues that it took the FBI an inordinately long time to relay the Justice Department’s request for further investigation and to then follow up.

The FBI and the OIPR section within DOJ have already taken important steps to ensure better communication, coordination and follow-up investigation in counterintelligence investigations. The FBI announced on November 11, 1999, that it has reorganized its intelligence-related divisions to facilitate the sharing of appropriate information and to coordinate international activities, the gathering of its own intelligence and its work with the counter-espionage agencies of other nations.

In addition, I understand that OIPR and the FBI are working to implement a policy under which OIPR attorneys will work directly with FBI field offices to develop probable cause and will maintain relationships with investigating agents. This should ensure better and more direct communication between the attorneys drafting the FISA warrants and the agents conducting the investigation and avoid information bottlenecks that apparently can occur when FBI Headquarters stands in the way of such direct information flow. I encourage the development of such a policy. In addition, the Attorney General advised us at the June 8, 1999 hearing that she has instituted new procedures within DOJ to ensure that she is personally advised if a FISA application is denied or if there is disagreement with the FBI.<sup>19</sup>

Notwithstanding all of these wise changes, the FISA legislation will require formal coordination between the Attorney General and the Director of the FBI, or other head of agency, in those rare cases where disagreements like those in the Lee case arise. I am confident that the Directors of the FBI and CIA and the Secretaries

of Defense and State, and the Attorney General, are capable of communicating directly on matters when they so choose, even without legislation. I am concerned that certain of these new requirements will be unduly burdensome on our high-ranking officials due to the clauses that prevent the delegation of certain duties.

For instance, the bill requires that upon the written request of the Director of the FBI or other head of agency, the Attorney General "shall personally review" a FISA application. If, upon this review, the Attorney General declines to approve the application, she must personally provide written notice to the head of agency and "set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application." The head of agency then has the option of adopting the proposed modifications, but should he choose to do so he must "supervise the making of any modification" personally.

I appreciate that these provisions of this bill are simply designed to ensure that our highest ranking officials are involved when disputes arise over the adequacy of a FISA application. However, we should consider, as we hold hearings on the bill, whether imposing statutory requirements personally on the Attorney General and others is the way to go.

I also support provisions in this bill that require information sharing and consultation between intelligence agencies, so that counterintelligence investigations will be coordinated more effectively in the future. In an area of such national importance, it is critical that our law enforcement and intelligence agencies work together as efficiently and cooperatively as possible. Certain provisions of this bill will facilitate this result.

In addition, Section 5 of the bill would require the adoption of regulations to govern when and under what circumstances information secured pursuant to FISA authority "shall be disclosed for law enforcement purposes." I welcome attention to this important matter, since OIPR attorneys had concerns in April 1999 about the FBI efforts to use the FISA secret search and surveillance procedures as a proxy for criminal search authority.<sup>20</sup>

Whatever our views about who is responsible for the miscommunications and missteps that marred the Wen Ho Lee investigation, the bill before us today stands on its own merits and I commend Senators Grassley, Specter, and Torricelli for their leadership and hard work in crafting this legislation.

#### ENDNOTES

<sup>1</sup> August 5, 1999 Statement of Senate Governmental Affairs Committee Chairman Fred Thompson and Ranking Member Joseph Lieberman (hereinafter "GAC report") at page 5.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> Redacted transcript of Attorney General Janet Reno's June 8, 1999 testimony before Senate Judiciary Committee (hereinafter "Tr.") at pages 11-12.

<sup>10</sup> *Id.* at 11-13.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.*

<sup>13</sup> GAC report at page 8.

<sup>14</sup> *Id.*

<sup>15</sup> Tr. at 15.

<sup>16</sup> *Id.* at 15-16.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 113-14.

<sup>19</sup> *Id.* at 41, 18.

<sup>20</sup> GAC report at page 12.

Senator SPECTER. Director Freeh, thank you very much for your availability today and for your cooperation. Your full statement will be made a part of the record, and we are pleased to turn the floor over to you.

#### STATEMENT OF HON. LOUIS J. FREEH, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, DC

Mr. FREEH. Thank you very much, Mr. Chairman, and as always it is a pleasure to be before you. In the almost seven years now that we have worked on these matters and other matters, it has

really been a privilege to work with you. I can't think of anybody more uniquely prepared to undertake not only the jurisdiction of your current subcommittee assignment but this particular matter with respect to proposed amendments to the FISA statute, a former chairman of the Intelligence Committee and a former prosecutor, being able to balance both the national security equities with the very important trial equities.

I very much appreciate, as does the Attorney General, your consideration and the committee's consideration of the sensitivity of the pending criminal matter which, as you so correctly point out, affects the interests not only of the United States but Dr. Lee. And we very, very much appreciate your addressing that matter as well as you have.

I thought I would just comment very, very briefly about the legislation, and I will be delighted then to answer any of your questions.

The FISA statute, which has been in use now for over 20 years, is an essential tool—in fact, a critical tool—in the ability of the United States to protect national security against not just agents of foreign powers who would commit espionage, but terrorists and other groups as characterized in the legislation.

The appropriate growth of the use of this tool, under full court supervision, has been fairly dramatic. In 1994, there were 597 FISA court orders signed; in 1999, approximately 830. This reflects not only a broadening of counterintelligence activities, but also counterterrorism activities. And the statute, in my view, has been used very prudently. It has been used consistent with the intent of Congress, and I believe that it has been properly applied and continues to be properly applied as a very potent, court-regulated tool with respect to fighting terrorism and espionage.

I believe that the statute has a flexible standard which permits the court to take into consideration the totality of circumstances involved in a particular application, and that that includes consideration of past activity relating to either espionage or terrorism. In some past cases, I have had concerns that the statute was being applied too restrictively. But on the whole, I believe that the current application of the FISA statute is consistent with the intent of Congress.

The Attorney General and I, as you know, both personally review and give our attention to the FISA process. In fact, each application to the court is reviewed and signed by the Attorney General and myself.

I am also convinced by recent events that the statute is being applied correctly. Over the millennial period, there were an unprecedented number of FISA court applications made by the Department of Justice. And having been directly involved along with the Attorney General and Ms. Fragos in that process, I can assure you, Mr. Chairman, that that was deliberative process, as well as a very effective process, addressed solely to the protection of our country, Americans both here as well as overseas, and that there was exceptionally close cooperation between the FBI and the Department of Justice, including the joint drafting of applications, the amendment of applications, and ensuring that the relevant information, facts and circumstances got exactly where they were supposed to be on

time. I believe that the process deployed during that period will continue to serve as an excellent model for the continued use of FISA applications and operations.

As I mentioned, FISA is really only one tool in the whole arsenal in counterintelligence and foreign counterintelligence activities. We have done a number of other things recently to ensure that this tool is used in the most effective manner, including restructuring our FBI headquarters to give counterintelligence a separate focus from counterterrorism. We have increased the number of FBI agents, as well as personnel, in the field dedicated to counterintelligence, particularly with respect to national laboratories.

I believe the coordination between the FBI and the Office of Intelligence which Ms. Fragos represents really is excellent, and I applaud in public her leadership. She is a former line prosecutor and brings to the very difficult and complex task of OIPR both a prosecutor's sense of relevancy, as well as a sound appreciation for the need with which these activities must be addressed. We have much more coordination with the Department of Energy. We are using, I think, more analytical tools and more technology to bring all of our efforts to bear.

So I very much pleased to be here, and the fact that this legislation is cosponsored not only by you, Mr. Chairman, but by Senator Biden, one of the authors of the 1978 statute, makes this a very important and nationally sensitive discussion. I am pleased to be here.

Senator SPECTER. Director Freeh, turning to the core provisions, which in the statute are broader than a request from the Director of the FBI encompassing a request from the Secretary of State, the Secretary of Defense or the Director of Central Intelligence, because those are the relevant departments which may request a warrant under the Foreign Intelligence Surveillance Act, what is your evaluation of the statutory provision which would, in order to trigger the personal review of the Attorney General, require that a request be made in writing either by you as Director of the FBI or the Secretary of State personally or the Secretary of Defense personally or the Director of Central Intelligence?

Mr. FREEH. Senator, to the extent that the provision would hold the FBI Director and the Attorney General personally accountable for addressing and resolving such an issue, I certainly have no objection to that. I do believe that, under any circumstances, the FBI Director and the Attorney General are personally accountable for not just the applications that are made, but applications which are requested and for one reason or the other are not made.

The only issue I would raise is whether that statutory provision is too inflexible. For instance, should there be the ability to delegate in emergency circumstances to a Deputy Attorney General or a Deputy Director? The statute as written would not really provide for that.

The other suggestion would be whether or not your bringing the personal accountability of the Attorney General and the Director to the fore, which I think is totally proper—whether that would be better done in strong report language or whether you actually want to put that into a statutory provision. I don't have any objection to the latter, but I think if you do that, you want to have some flexi-

bility there and not lock us into a situation where we couldn't delegate under any circumstances.

Senator SPECTER. Well, when you talk about report language, I have seen report language as often ignored as followed. When you talk about a statute, it is binding. We frequently in the appropriations process will put in very strong report language as to congressional intent on expenditures. But the interpretation by the executive branch has consistently been that they can take it or leave it, really. But if it is a statutory matter, it is different.

But I do think that the caveat about having it delegable under some circumstances would be something we ought to refine. Certainly, in case of disability, there ought to be the opportunity for the next in line to handle it. We do not envisage a situation where the Director has to handle every one of them. We are really thinking only about the extraordinary case where there is some reluctance on the part of the Department of Justice, as there was in this case to issue the FISA warrant.

And then when it becomes a matter of non-routine, if your subordinates handle these matters in regular course and they are approved, then it does not require the personal intervention of either the Director of the FBI or the Attorney General. But we are looking to the unusual case, and the real issue is whether this is administratively burdensome. Does this occur so often as to place an undue burden on you as Director?

Mr. FREEH. No, I don't think it would at all. I think this would be a rare circumstance and would not administratively burden either the Director or the Attorney General.

Senator SPECTER. Do you know, Director Freeh, how many times there has been a declination, a refusal, by the Department of Justice to forward the FBI's request to a court for a FISA warrant?

Mr. FREEH. It has been a very rare occasion in my experience.

Senator SPECTER. Has there been any occasion other than this one with Dr. Wen Ho Lee, to your knowledge?

Mr. FREEH. There have been occasions where, you know, the application has gone back and forth between the Department and the FBI, which is exactly the way the process is designed as a collaborative process. So the application is not rejected, but it is sent back for additional work and review. In this particular case, there was a rejection at the end of all the deliberations and this was a very rare case, in my experience.

Senator SPECTER. Do you know of any other case where there was a rejection at the end of the deliberations, the back-and-forth process, as you describe it?

Mr. FREEH. Only one other case.

Senator SPECTER. The second provision of the statute we have already talked about, and that is where the Attorney General declines to forward a FISA application. The declination must be communicated in writing to the requesting officials with specific recommendations regarding additional investigative steps that should be taken to establish the requisite probable cause.

I think you have already answered the question about not being administratively burdensome on the Attorney General, but how about the desirability of that as a prospective road map to tell the

FBI where to go to fill out the picture to get the request submitted and a warrant issued?

Mr. FREEH. Well, again, the accountability and the specificity that this provision would require would clearly contribute and enhance the process of collaborative work, modification, supplementation to the original application. This would certainly ensure that in a very, very rare case, you wouldn't see something fall between the cracks or get lost in the shuffle.

But, again, ideally the process does work this way, in my experience, in the overwhelming number of cases that I have been able to see and understand. So, again, I think it is a provision that is not unduly burdensome. I think our process does work that way and should work that way, and this certainly would highlight the need for that specificity and a turn-around responsibility.

Senator SPECTER. And the third statutory provision requires that the requesting official—Director of the FBI, CIA, Secretary of State or Defense—who makes the request and gets the personal response of the Attorney General would then have the obligation for personally reviewing the matter, again, to avoid any kind of delay such as was present in the Dr. Wen Ho Lee investigation.

Again, the question is is this unduly burdensome on the requesting official?

Mr. FREEH. No, not at all.

Senator SPECTER. In the Dr. Wen Ho Lee case, there was an objection raised on the concept that the suspect be, "presently engaged," in the suspect activity. And the statute has eliminated that consideration, but places the issuance of the warrant on the totality of circumstances, which is the general rule for probable cause.

What is your view of that provision?

Mr. FREEH. Mr. Chairman, as I said in my opening remarks, I do believe that the current standard, if properly applied—and I think it is properly applied now—allows within the totality of the circumstances the past activity to be considered. In fact, in the 1978 legislative history the report talks about the situation where you have a foreign agent who is a sleeper, who is sent into our country to do harm to our national security but is not yet required or asked to become active. And that fact, which would be past activity, not current activity, is clearly a factor to be considered.

The legislation as you propose, I think, takes away that interpretive aspect and makes very, very clear that the past activity is considered. But, again, my view is that is currently contemplated and that is, in fact, considered in these applications.

Senator SPECTER. So this is really just a codification of what you view the law to have been?

Mr. FREEH. I believe so.

Senator SPECTER. And any emphasis on being presently engaged as a reason for declining a search warrant would, without reference to any specific case, just be an erroneous application of the existing law?

Mr. FREEH. Well, I think you could argue that current participation and activity would be more probative of past activity in the total accumulation of probable cause. But it is clearly not to be considered to the exclusion of past activity that is relevant to be considered.



Senator SPECTER. You make reference to the term "sleeper," and by that you mean somebody who comes into an espionage situation and is deliberately put on ice, so to speak, or put in a background position to await events for an opportune moment, which goes to the issue of you could have somebody on a calculated wait on espionage who was holding back and not presently engaged, but is waiting for the opportune moment.

Could you amplify the concept of the sleeper?

Mr. FREEH. Surely. The technique of using a sleeper, which would be someone obviously recruited and controlled by a foreign power, sent into the United States with no specific current assignment, the only assignment being to get into the mainstream and become available and wait until a reactivation or a command would come—it is a classic clandestine activity used by services, particularly those who have worked historically against the United States. In fact, we have made cases, including one in Philadelphia, with respect to a sleeper.

The design there is not to have that person engage in activity until a given moment or a given command. So to say that that person is a foreign agent but could not be surveiled pursuant to a court order because they are not currently involved in espionage would seem to defeat the intent of the Congress. Indeed, the 1978 legislative history addresses this particular phenomenon.

Senator SPECTER. So that there is a plan in some cases for the spy to come into a community, establish themselves in a business, make friends, social contacts, be a regular person, et cetera, and wait for the opportune moment?

Mr. FREEH. Exactly.

Senator SPECTER. So that there could be justification for a FISA warrant even though there was not any immediate current activity on the part of that individual?

Mr. FREEH. Yes. Again, looking at all the circumstances together, you could certainly make that case.

Senator SPECTER. Another provision in the bill requires the disclosure of any relevant relationship between a suspect and a Federal law enforcement or intelligence agency. What is your view of that provision, Director Freeh?

Mr. FREEH. I think that the provision certainly addresses what would be an absolute requirement to an application, particularly one that is submitted for review and evaluation. We would have to disclose in there that the subject, the intended subject of the court order had some prior affiliation with either the FBI, if that was the agency, or some other agency. So I think that is a critical and necessary requirement that that relationship be disclosed.

With respect to statutorily requiring that, this one, unlike the prior provisions, could become administratively burdensome in the sense that if the applying agency, in this case the FBI, did not have such a relationship with that individual, but another agency in the intelligence community did, there may be difficulties in getting access to that information in a timely manner and getting it disclosed.

So you may be creating some requirements which would be administratively burdensome in the overall intelligence community. In fact, we could get into situations where we would be inquiring

specifically to other agencies if they had a current or past relationship with a particular individual. So I would probably want to spend more time to deliberate on this one. I think there are some aspects to it that could be problematic. But, certainly, if the agency has that knowledge or information, it has to be put in the application.

Senator SPECTER. Well, Director Freeh, that raises a very basic and important question as to how much the various Federal agencies know about what each other is doing, illustrated by what does the FBI know about what the CIA is doing. And it would seem to me that it would be very important to have in place procedures where the FBI would know what the CIA knows about a given individual to be most effective in dealing with that individual.

What procedures are in place now so that you do a name check if you have someone and want to know what is known by some other Federal Agency—State, Defense, CIA, et cetera?

Mr. FREEH. There are a number of very well-established procedures, as well as intelligence community structures that address that. For instance, the counterintelligence center at the CIA which is staffed jointly, in part, by FBI officers as well as CIA officers, is a place where such a clearinghouse and an exchange of information takes place. On a regular basis, with all the agencies in the intelligence community, the FBI, through its representatives and liaison to those agencies, checks not only names but phone numbers and other information.

It is also reciprocal. Through our presence at these intelligence agency stations, the intelligence agencies, including the Department of Defense, have the ability to check, again, names, places and things like that. So we have a good index system. It is probably not universally perfect because of the divergence of agencies and the different manners in which they operate. So I think we have some very, very good structures there. This is routine operating procedure before applications are made, before cases are opened, and before preliminary inquiries are made, and that organization works very well.

Senator SPECTER. Well, to the extent that the system works as you describe it, then the applying agency would know if some other agency has used the suspect as an asset, and it would call for the best efforts of checking and saying what you know. If there is an oversight, you can't be held accountable for that if you have used appropriate diligence in putting a system into effect which is designed to disclose that fact.

Mr. FREEH. You are absolutely right and I agree with that. Even in the criminal area, in the Title III applications, before an application is made to a district court the investigative agency has to do a thorough, comprehensive, best-efforts, good-faith check of all the names, as well as the phone numbers and addresses in the application, with all the other agencies available to be indexed to make sure that the person is not the prior subject of an electronic surveillance order. So the same would apply here.

Senator SPECTER. Well, as a matter of basic fairness, I think, for the suspect, this is a provision which we think ought to be included.

The next provision in the law would require that when the FBI desires for investigative reasons to leave in place a suspect who has access to classified information, that decision must be communicated in writing to the head of the affected agency, along with a plan to minimize the potential harm to national security.

What is your thought about that statutory provision?

Mr. FREEH. Senator, I don't have any objection to it at all. It is the manner by which we generally operate. As the investigative agency, we don't make, nor do we purport to ever make a decision with respect to keeping someone in place at the expense of national security or the compromise of the agency where that person may work or have access to. That has to always be, and should always be a decision by the host agency. To put that in writing and to require a plan, I don't have any objection to that. It certainly makes clear what our best practice should be and what we strive to make it.

Senator SPECTER. And the affected agency must likewise respond in writing with a plan within 30 days as to how to handle the access of that suspect to classified information. Is that provision satisfactory to you?

Mr. FREEH. Yes, sir.

Senator SPECTER. It is my hope that at tomorrow's hearing that Mr. Edward Curran, Chief of Security for the Department of Energy, will appear here to testify about these provisions as well. Mr. Curran had been confirmed to appear tomorrow and we received late word that he would not be here. We are still trying to open up that channel, as we are trying to open up the channel to bring in Secretary of Energy Richardson. I have personally talked to him. He has a scheduling conflict on an appropriations matter tomorrow, but we do expect Mr. Curran tomorrow and we will be hearing from Secretary Richardson in due course.

Director Freeh, as I mentioned to you in our meeting yesterday afternoon, there are a couple of additional provisions which are not in the bill which are under consideration for inclusion at a later time, and that is to codify the difference between a FISA warrant and a search warrant in a criminal case where there is a necessity of showing that the instrumentality is currently used in the commission of a crime, contrasted with a FISA warrant where you seek to have surveillance of a residence, for example, where there may not be a current crime being committed, but it is an effort over a long period of time to see what does happen, very much on the sleeper concept. It may not be currently used in the commission of a crime, but may be very relevant to have that situation under surveillance.

Do you agree with that analysis on the distinction between what must be put into a FISA warrant contrasted with a criminal search warrant?

Mr. FREEH. Senator, I know we discussed this yesterday. We have actually discussed it before, and it is a very good and I think a very profound question and inquiry. I am not a constitutional expert, so I think there are a lot of people—

Senator SPECTER. If you are not a constitutional expert, Director, Judge, Special Agent Freeh, who is?

Mr. FREEH. I could actually name quite a few, including some of the professors I had. In fact, one of them was the advocate in the *Camera* case, which was one of the cases that we discussed yesterday.

I have looked at these two cases; I have looked at them before, but I read them again last night. The *Camera* case, which is the 1967 Supreme Court case by Justice White, clearly indicates that there may be a constitutional exception to distinguishing a criminal probable cause standard and something which would go to regulatory or in this particular case public safety searches.

There is a dissent by Justice Douglas in the *Frank v. Maryland* case which clearly says that the test of probable cause required by the fourth amendment can take into account the nature of the search that is being sought. A couple of years later, in the U.S. District Court for the Eastern District of Michigan case, which was a 1972 opinion by Chief Justice Burger, the Court clearly contemplates some distinction between probable cause as applied to a criminal case and another case, in this case one involving domestic security.

And the Court wrote, if I just might read this portion, "Given those potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specific crimes." It goes on to talk about that it may be that Congress, for example, would judge that the adjudication and affidavit showing probable cause need not follow circumstances more appropriate to domestic security cases.

So there is clearly language over several Supreme Court cases that at least contemplate a distinction between probable cause applying to a criminal case and other probable cause applying to a warrant application for non-criminal matters. So the basis is there. I think I would have to leave it to much better and more competent experts to fashion that balance. But we discussed this yesterday and I think there is a clear basis to at least have this inquiry, and a very important one indeed.

Senator SPECTER. Before turning to our distinguished President Pro Tempore who has just arrived, let me pursue that. We are right in the middle of a fairly complex legal issue.

As you have articulated and referred to the cases—and thanks for improving your status as a constitutional expert with additional research last night—what you have just commented on goes to another point that I was coming to next about a potential difference in standard on national security matters, which is really just an additional factor on the customary totality of circumstances, but where there is a balancing test of incursion into privacy contrasted with the law enforcement interest.

Where you have national security, you have obviously have a weightier matter than you have on a minor seller of narcotics. So what you have just said, I think, goes to the point that there is a national security factor on the weighing and the balancing. Is that the essence of what those cases articulate?

Mr. FREEH. Yes, sir, I believe they do. Justice White in *Camera* says that the reasonableness is really the ultimate standard. So I

think that being the guidepost, the balancing that you have just alluded to is clearly an appropriate exercise.

Senator SPECTER. Now, coming back to the specific point about whether there has to be a crime currently in process, which you have to do for a criminal warrant, my sense is that we ought to codify, because there was a misunderstanding in the Wen Ho Lee case. And this is in the report and I am not asking you to comment about that, but just the generalized desirability of writing it down in the statute and then you don't have an argument as to what the rule is. Everybody who works on these cases is not a constitutional expert; you don't have them making out the warrants or passing on them.

So the question is, number one, do you agree with that difference on probable cause so that when we have a criminal warrant the instrumentality must be used in the commission of a crime, contrasted with a FISA warrant where you do not have that immediacy?

Mr. FREEH. Yes, I agree with that.

Senator SPECTER. And, secondly, the desirability of codification so it is plain to someone who picks up the statute and reads it and is in dialogue with an FBI agent who wants a FISA warrant that this is the appropriate standard?

Mr. FREEH. Yes, I understand the reason for that, and if you recall one of the past Congresses where you sponsored a provision for the Intelligence Authorization Act, Section 811, which put into statutory form the requirement which was the practice then, hopefully a requirement that any and all agencies who come up with information with respect to counterintelligence or espionage activity must refer that immediately. So there is no downside in codifying that.

Again, I think the current statute contemplates that, and a fair reading of it would permit it and has permitted it and does permit it. But I don't have any objection to your suggestion.

Senator SPECTER. Let me interrupt my questioning of you, Director Freeh, to turn to our distinguished President Pro Tempore who had opened the Senate this morning, which is one of his many duties. I know he has other commitments, so let's turn to Senator Thurmond at this time.

**STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR  
FROM THE STATE OF SOUTH CAROLINA**

Senator THURMOND. Thank you very much, Mr. Chairman. Mr. Chairman, I want to commend you for holding these hearings to discuss the need for reform to the Foreign Intelligence Surveillance Act, or FISA. We must make certain that this critical law enforcement tool is fully utilized to protect America's national security.

Recently, Senator Specter and Senator Torricelli introduced the Counterintelligence Reform Act of 2000. This bill would make important but modest changes in the law to help provide for more accountability by the Justice Department regarding its review of applications for FISA warrants from law enforcement. I am pleased to be an original cosponsor of this timely legislation.

Since early last year, I have been extremely concerned that highly sensitive information regarding the design, construction and

testing of nuclear weapons may have been compromised from our national laboratories. Some of the information that may have been released goes to the heart of our national security.

Based on this subcommittee's investigation, it is clear that apparent breaches of national security at Los Alamos National Laboratory were not aggressively investigated by law enforcement before the matter received widespread attention last year. Even though national security was at stake, there was no sense of urgency or priority, and the investigation was poorly managed.

However, many of the problems that have been identified regarding this investigation could have been avoided had the Attorney General approved the FBI's request for the FISA warrant in 1997. At the time, the Attorney General delegated her review to an inexperienced subordinate, who concluded that probable cause to proceed did not exist. This was a serious mistake that resulted in significant delays to the investigation.

We must make sure that the mistakes made in the past do not happen again. The bill we are considering today would help prevent future problems in many ways. First and foremost, it imposes personal responsibility on the Attorney General. It requires that, if requested by the FBI Director, the Secretary of State, Secretary of Defense, or the CIA Director, the Attorney General must personally decide whether the FISA warrant request should be presented to the court.

If the Attorney General rejects the application, she must do so in writing with an explanation, so that the agency will have some guidance to help it perfect the warrant. I do not believe this is an unreasonable burden because this personal involvement is only triggered if requested by one of these agency heads. Also, we hardly can be too careful when grave matters of national security are at stake.

Further, the bill clarifies that when determining whether probable cause exists for the warrant, the court may consider past activities of the person under investigation. Obviously, past conduct is critical to whether a warrant should be issued, and this should be clear in the law.

Although the Wen Ho Lee case is the primary reason we are considering this legislation, we must keep in mind that the investigation of Lee is an ongoing matter. It is important that we avoid the factual details of this or other active cases when discussing this legislation because these hearings must not interfere in any ongoing investigation. We must not do anything that could be harmful to the legal process.

I believe this bill is an important step in helping to protect our national security. We cannot prevent the mistakes of the past, but we can take steps to help prevent history from repeating itself. I welcome our distinguished witnesses to this hearing. I look forward to discussing this important legislation with them today.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Thurmond. The concluding part of your statement emphasizes a point which I had commented about earlier, and that is to honor Director Freeh's request that we avoid the specifics of Dr. Wen Ho Lee's case, both out of fairness for the prosecution and out of fairness to the defend-

ant. And I had discussed that again with Director Freeh just yesterday.

I had said in my opening statement, Director Freeh, that I was going to come to you for corroboration of our discussion, but with Senator Thurmond here and his having just made the point, this is as good a time as any. Let me begin by the basic point as to whether to your satisfaction we have honored your request that we not get into the facts of the Wen Ho Lee case which could in any way prejudice the prosecution or prejudice the defendant.

Mr. FREEH. Absolutely, Mr. Chairman. And, Senator Thurmond, thank you. This is obviously, as we have all agreed, a critical issue, and I think that the oversight you are exercising here is directly on point. It is critical to preserving and improving the use of this tool and you are doing it in a fashion that certainly doesn't interfere with that pending matter. So you have our appreciation and the appreciation of the Attorney General.

Senator SPECTER. Director Freeh, let me just supplement one other point about our conversation as to the report. Dobie McArthur, who has done such an outstanding job for me, is working with John Collingwood of your office, and it has been cleared at the staff level. Of course, you and I have talked about it personally, and I have already referred to the letter from the Assistant Attorney General for Legislative Affairs, Mr. Robert Raben, who said that there are no classification problems.

Just to confirm for the record your review of that report, is it correct that there is no problem for the FBI in the release of that report?

Mr. FREEH. Yes, sir. We have no objection.

Senator SPECTER. Let me proceed now, Director Freeh, to the subject of counterintelligence and its importance, a matter which you and I talked about yesterday and thought this would be a useful occasion for an amplification as to the scope of the Bureau's work and the importance of counterintelligence.

Notwithstanding the demise of the Soviet Union, there are still a great many threats in the world, and I appreciate your having made available to me a copy of testimony which you presented to the House Permanent Select Committee on Intelligence, with a fair number of those items being in an unclassified state which would apprise the public, I think, in a very meaningful way as to the importance of counterintelligence over and above the Wen Ho Lee case as to what the FBI is currently engaged in.

Mr. FREEH. Mr. Chairman, as you well know, having had such an extensive background in this area, the counterintelligence programs in the United States have not only continued at their pre-1989-1999 levels, but have actually increased in some respects.

As you know by recently reported cases, we have been continuing our efforts against the Russian Intelligence Service and the Cuban Intelligence Service. Those cases recently made which I won't comment on—one is a particular pending criminal case also in the category that we have previously discussed, but the cases and the allegations there indicate that these two countries obviously are actively involved in espionage activities against the United States.

If you take not only—

Senator SPECTER. Can you mention the countries, Director Freeh?

Mr. FREEH. Yes; Cuba and Russia.

If you take the particular traditional adversaries of the United States in areas of counterintelligence and you then add to that the current threats and different threats, we know from the hearings that the Senate had and the House had on the Economic Espionage Act that there are several countries, over 20 in number, who use their clandestine services to plan to acquire trade secrets which go directly to the economic security of the United States, which today is tantamount to our national security.

We have technology tools available to use in counterintelligence. But, of course, the spies as well as the terrorists also use counterintelligence tools. We saw over the millennial period, for instance, that several well-documented plans which were in motion to attack Americans inside the United States as well as outside the United States were being carried out in a manner that used technology with great sophistication, using computers, using encrypted files on computers, using telecommunications which are difficult to intercept as well as to analyze on a real-time basis.

So we have not only the traditional threats and adversaries against the United States, but we have a whole new genre of threats which are augmented in terms of their dangerousness by the technology which is available to be used against the United States.

So our counterintelligence programs have been growing. We have asked not only in the current 2001 budget, which I will testify about later this morning, but in past budgets for enhancements in not only personnel but tools and technology, infrastructure, computer analysts. We are finding that more and more of our work, particularly in complex counterintelligence matters, relates to our competency to understand and extract forensically from computers information, whether it is encrypted or not.

All of the work that this committee and you personally have done to make sure we preserve our tools to use court-authorized electronic surveillance in the digital age—all of these competencies are very, very much relevant when you have spies and terrorists applying technology to the extent they are doing so against the United States. So we are not in anything except a growth mode with respect to both our capabilities and the scope of the apparent abilities of these agencies to harm us.

Senator SPECTER. Director Freeh, I note from your written testimony submitted to the House Intelligence Committee that when you enumerate the intelligence services, you lead with the PRC, the People's Republic of China. We are about to consider permanent trade status with China, and one of the factors on the minds of many in the Congress who will have to vote, and the American people generally, involves what the People's Republic of China may be doing on espionage.

I am not talking about any special case, although I think it might be fair to comment about the case of Dr. Peter Lee which this oversight committee is looking at, where there was a plea bargain in the District Court for the Central District of California. And Dr. Lee, no relation to Dr. Wen Ho Lee, but Dr. Peter Lee re-



ceived community service and a fine and no jail sentence in what I consider to be a very egregious case involving the disclosure of nuclear secrets in 1985 and the disclosure of certain materials about detecting submarines in 1997.

We are taking a close look at whether the Department of the Navy responded properly to the Department of Justice request for a prosecution and whether the Department of Justice pressed hard enough on some of the key spots. But that is a very prominent illustration of People's Republic of China espionage.

And there are a great many factors on the trade issue. There is the factor of threat to Taiwan, there is the factor of sale of missiles to Pakistan, there is the factor of human rights. We just went through a very tortuous process where a librarian from Dickinson College in Carlisle, PA, was detained. Finally, he was released, but an egregious violation, a man held in detention for absolutely no reason from August until late January, early February.

My question to you, to the extent that you can comment about the threat posed by espionage from the People's Republic of China, is how serious is it, Director Freeh?

Mr. FREEH. Mr. Chairman, as you can see from my opening statement in the session that was before the House Intelligence Committee, I extensively detailed by number as well as particular cases the aspects of that threat, which we not only in the FBI but our other security agencies treat with the utmost seriousness. It is difficult to go into the scope of it or the particulars of it in this session.

The reason for that testimony in front of the House Intelligence Committee and testimony tomorrow by Mr. Tenant and I in the Senate Intelligence Committee is to exactly lay out the parameters of that threat so that can be considered appropriately by the decisions which are made by the Congress.

Senator SPECTER. But you characterize it as very serious?

Mr. FREEH. Yes, sir, absolutely.

Senator SPECTER. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Director Freeh, during significant investigations such as alleged espionage, which management levels above the field supervisor does FBI policy require to be involved on either a daily, weekly, or monthly basis either to review the status of the investigation or to be briefed as to the case status?

Mr. FREEH. Yes, sir. Our practice and the requirements of the managers of the counterintelligence program, particularly at the supervisory level in the field, the headquarters supervisory level and the section chief, and then assistant director level, is to be continuously advised of those developments.

One of the reasons why we split our national security division into a separate counterterrorism and counterintelligence division is to give both of those programs on a case-by-case basis more focus, more knowledge on a timely basis to the chain of command, including the Director. So, that is the regular practice and is a necessity in these types of cases.

Senator THURMOND. Director Freeh, recently the FBI completed a reorganization, creating two new divisions which split the national security division into counterintelligence and

counterterrorism. How will this reorganization assist in your efforts to address allegations of espionage?

Mr. FREEH. Again, it gives us a much more enhanced ability in terms of command and control of both counterintelligence cases and counterterrorism cases. We found in the national security division that the phenomenal growth of the counterterrorism programs was such between 1993 and 1999 that they began to overshadow some of the counterintelligence matters of equal importance. And the leadership in that division was continuously pressed by the immediacy of the terrorist threats and issues to sometimes not pay the attention required to the counterintelligence cases, again, of equal and maybe more importance. So this splitting gives us more command and control, more hands-on attention, and more information flowing up to the Director and the Attorney General.

Senator THURMOND. Director Freeh, will this reorganization bring about greater supervisory involvement and more effective FBI case management practices, in order that cases which involve breaches of our national security are more likely to proceed with some sense of urgency and priority?

Mr. FREEH. Yes, sir, I believe it will, and the addition of counterintelligence personnel, both agents, analysts, surveillance personnel, will all add to that focus and distribute it evenly between the two divisions.

Senator THURMOND. Director Freeh, do you believe the Counterintelligence Reform Act will enhance the FBI's ability to pursue and to complete in an expeditious manner the investigation of cases involving allegations of espionage?

Mr. FREEH. Yes; as I set forth before, all of those elements in the statute certainly promote and enhance those objectives. There is nothing in there that does otherwise, except for the few qualifications that I made to the chairman.

Senator THURMOND. Director Freeh, what additional changes, if any, to the Foreign Intelligence Surveillance Act would help our counterintelligence efforts?

Mr. FREEH. Senator, I can't think of any now. I don't propose any. I think the ones that are contemplated in the jointly sponsored legislation address certainly the areas that have occupied our concern recently.

Senator THURMOND. Director Freeh, this Act would require the Attorney General to personally review FISA applications when requested to do so. How often do you think that you would need to contact the Attorney General to seek a personal review and support for a warrant, or do you think it would generally not be necessary to involve the Attorney General personally?

Mr. FREEH. I think it would be a rare occasion when we would need to do that, but I think on those occasions you would want to have involved both the Director and the Attorney General personally, as is the case on these types of matters.

Senator THURMOND. Thank you.

Ms. Townsend, it appears to me, based on various testimony and documentation, that the OIPR legal review function regarding law enforcement requests for FISA warrants has operated in an adversarial role with law enforcement. It appears to be simply a review function when, in important matters such as espionage, it should

be assistance-oriented and actively aid law enforcement in perfecting warrant applications so they will be approved.

What needs to be done to improve your office's cooperation with law enforcement regarding FISA applications?

Ms. TOWNSEND. Senator, it is unfortunate if the impression has been left that the process is an adversarial one. I view it very much as a collaborative process where we work very closely with the FBI and other requesting agencies. That has been the case, that has been my experience.

The Director has heard me say often enough that I view the FBI as my biggest client, and I think that speaks volumes about the relationship. We do work cooperatively together. We work in the best interests of the United States to promote the Nation's security and to perfect the cases and the facts so that we can obtain the warrants and the FBI can utilize those techniques that they believe necessary.

Senator THURMOND. Ms. Townsend, in my view, it is critical for the Department of Justice to assist the FBI and other requesting agencies to correct any flaws in FISA applications and not simply engage in a review function regarding applications.

Do you believe the Counterintelligence Reform Act can be implemented in a manner that will help promote a proactive, assistance-oriented approach to FISA applications on the part of the Department of Justice?

Ms. TOWNSEND. Yes, sir, I do.

Senator THURMOND. Ms. Townsend, do you think this legislation, combined with perhaps a change of attitude, will make it possible for Department of Justice attorneys to work more closely and more effectively with the FBI on important matters such as FISA applications in a manner that will aid in the expeditious completion of an investigation, especially one that relates to our national security?

Ms. TOWNSEND. Senator, I would hope that would be the case in all cases, whether they were espionage- or terrorism-related, that we would work together cooperatively to perfect those applications and allow the Nation's security to be best protected.

Senator THURMOND. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Thurmond.

Director Freeh, thank you very much for joining us. We know you have a commitment before the appropriations subcommittee. This is an interim report on the issues raised on Dr. Wen Ho Lee. This report goes to the legislation, as has your testimony. It may well be—I don't want to make any firm declarations—

Senator THURMOND. Mr. Chairman, I have another appointment, if you will excuse me.

Senator SPECTER. Thank you very much, Senator Thurmond. It is a great pleasure, as always.

As I say, I don't want to make a firm commitment, but we probably will have further hearings on Dr. Wen Ho Lee's matter on the substance as to what happened specifically. But we appreciate your coming in today and your candid testimony on the statute because it is our intention to move this very promptly because these matters are of such great importance to have these procedures in place.

So thank you.

Mr. FREEH. Thank you, Mr. Chairman. Thank you again for your leadership, and again on behalf of the Attorney General and I, thank you for your consideration of these matters.

Senator SPECTER. Thank you.

[The prepared statement of Mr. Freeh follows:]

PREPARED STATEMENT OF LOUIS J. FREEH

Good morning Chairman Specter and Members of the Judiciary Subcommittee. I am pleased to be with you this morning as you discuss the Counterintelligence Reform Act of 2000.

Before we begin, I would like to take this opportunity to thank you again for agreeing to forego hearings on the Wen Ho Lee matter at this time. I appreciate your understanding of the sensitive circumstances surrounding this matter and the concern that testimony on these issues could interfere with the ongoing case.

I know that many of you have concerns as to whether the FBI's counterintelligence legal authorities, particularly those contained in the Foreign Intelligence Surveillance Act, remain effective tools in the current environment. Likewise, many have asked whether the FISA statute is being interpreted as Congress intended. Although I have shared those concerns on some occasions in the past, I am pleased to say that, today, I am confident that the FISA is being properly applied and continues to be a potent weapon in our fight against terrorism and espionage.

In my view, FISA is a flexible statute which permits the court to take into account the totality of circumstances existing in each case. I believe this includes consideration of past activity relating to espionage or terrorism. In some past cases, I have had concerns that the statute was being applied too restrictively, but, on the whole, I think that the current application of FISA is consistent with Congress's intent. The Attorney General and I have both given our personal attention to the FISA process over the past several months. As a result, we now are improving the procedures for generating FISA orders, and we have clarified our joint understanding of the FISA standards.

The events of the recent millennial crisis dramatically illustrate the success of these efforts. During the crisis, DOJ and FBI worked together to bring the full range of FISA techniques to bear on the emerging terrorist threat. A large number of FISA requests were prepared and presented to the court in record time. More importantly, the decision-making process for these applications incorporated exceptionally close cooperation between DOJ attorneys and both FBI headquarters personnel and FBI agents in the field. Such discussions allowed the decision-makers a more detailed picture of the circumstances surrounding each FISA request. I believe the process deployed in the millennial crisis will serve as an excellent model for future FISA operations.

I appreciate the opportunity to speak with you today on this very important subject. I would be happy to answer any questions the Subcommittee might have relating to the proposed legislation.

Senator SPECTER. Ms. Townsend, let's proceed with your testimony. Senator Thurmond has very appropriately started to raise some of the key issues, but your statement is, of course, a part of the record and we look forward to your testimony.

**STATEMENT OF FRANCES FRAGOS TOWNSEND, COUNSEL FOR INTELLIGENCE POLICY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Ms. TOWNSEND. Thank you, Mr. Chairman, for the opportunity to appear today and to provide the views of the Department of Justice on the Counterintelligence Reform Act of 2000. This proposed legislation seeks to amend the Act of 1978 to modify procedures relating to orders for surveillance and searches for foreign intelligence purposes.

As the chairman is well aware from your own experience, FISA was in large part a response to concerns in the 1970's regarding the use of warrantless electronic surveillance in the name of na-

tional security. In the crafting of the current FISA statute, the drafters attempted to strike a balance between the protection of national security and the protection of personal liberties, providing the executive branch with statutory authority in appropriate cases to acquire important foreign intelligence information by surveillances and searches.

The balance that was struck in the original statute largely has withstood the test of time, to include challenges both to the constitutionality of the authority contained in FISA and the demands placed upon the statutory mechanism to authorize the collection of foreign intelligence and counterintelligence information which is essential to our national security.

As the Attorney General has stated, the maintenance of U.S. national security is one of the most crucial missions of the U.S. Government. As Counsel for Intelligence Policy, assisting in investigations to safeguard and protect our national security is my primary and most important mission.

Everyday, my office works closely with FBI agents and others to ensure that we make every effort to protect our country from national security threats such as espionage and international terrorism. At the same time, all of us involved in the FISA process are keenly aware of the delicate balance between the need to protect the constitutional rights of our citizens on the one hand, and the need to protect the very Nation that ensures those rights which has been struck by the existing statute.

We appreciate very much the sensitivity reflected in the subcommittee's approach to the amendment of FISA, as we believe it retains the balance struck by the drafters of the current statute, while providing those charged with implementing FISA—that is, the Department, the Bureau and the court—with additional guidance on the very real importance of certain factors to be considered in the request.

While we might suggest minor changes regarding the delegability of some of the provisions you and the Director have already referred to, we support the current proposed legislation. We are happy to work with the subcommittee on any minor changes. We believe that the current FISA statute allows us to consider all the factors and procedures contemplated by the proposed amendment. However, we welcome the additional guidance and clarity that the Counterintelligence Reform Act of 2000 provides. The Department supports the proposed legislation as a helpful enunciation of these important factors in national security cases.

Thank you.

Senator SPECTER. Thank you very much, Ms. Townsend. In your statement, you refer to some amendments that you categorize as minor on delegation of responsibility. What would your suggestion be?

Ms. TOWNSEND. I very much concur with the Director's assessment that none of the provisions—for example, the Attorney General's personal review or the Director's written request for her to conduct a personal review—I do not believe that they cause an administrative burden.

I think as a practical matter we all in Government wish to have the maximum amount of accountability, and I think that the stat-

ute goes a long way to ensuring that. I think that the rare instance where this would come up will be in the most important and sensitive cases. For that reason, I think that we want to ensure that there is some flexibility allowed, while providing for the type of accountability that Congress seeks, whether that means that there can be delegation to an acting, if either are unavailable or incapacitated.

But I think there needs to be some flexibility, if this is going to be legislated, to provide—I mean, in the last two weeks, the first week the Attorney General was out of the country, the second week the Director was out of the country. And I wouldn't want to see a situation where there was some delay in the processing of an important case where there was a disagreement. That would be my only concern.

Senator SPECTER. If there is disability, that would be an occasion for delegation. Would you say being out of the country would be another basis for delegation? Any time frame on that or just out of the country for any time?

Ms. TOWNSEND. I think it is difficult to say, Senator, because I think, depending on the exigency of the case or the circumstance, a day or two could be an unacceptable delay under a particular set of facts. And because I think a statute if it doesn't provide for some delegability can't anticipate those circumstances, I think it is wise to provide for some flexibility.

Senator SPECTER. Well, we could provide for disability, unavailability, with an exigency provision, something very important to get done. Is there any other situation which comes to your mind where there ought to be delegation?

Ms. TOWNSEND. No, sir.

Senator SPECTER. Director Freeh testified, as you heard, that he knew of only one case other than Dr. Wen Ho Lee where the Department of Justice turned down a request by the FBI for submission of a FISA application to a judge. Do you know of any cases?

Ms. TOWNSEND. Senator, in fairness, I have been sitting here since the Director said that racking my brain for what that one case would have been. I am not aware of—and it may be prior to my tenure, sir—

Senator SPECTER. How long have you been with the Department of Justice?

Ms. TOWNSEND. I have been with the Department of Justice since January 1988, but I have only been in my current position as counsel since March 1998.

Senator SPECTER. Since March 1998, and it is only in your current position that you have dealt with FISA warrant applications?

Ms. TOWNSEND. Yes, sir.

Senator SPECTER. And in that period of time, do you know of any declination besides the Dr. Wen Ho Lee matter?

Ms. TOWNSEND. Honestly, Senator, none that come to mind. I will certainly go back and check and immediately advise you if there is one that I am unaware of.

Senator SPECTER. Was there any case other than Dr. Wen Ho Lee where the matter was taken personally on a FISA application to the Attorney General?

Ms. TOWNSEND. Oh, yes. In my tenure, we have frequently—I won't say frequently; it overstates it. We have on occasion, where there has been some legal issue where there has been a disagreement with the FBI on how to proceed, presented it to the Attorney General. If there was a disagreement of some nature between the FBI and myself, I would not presume to make the final decision. I would take that to the Attorney General and discuss it with her personally and, in fact, suggest to her, as has been the case in every one of these, that we sit down together with the Bureau to resolve it.

We have been able to work through every issue. None of those involved the denial. When I say bring a matter to her attention personally, there is not a single one of those that involved a rejection or denial by the Department where I was suggesting we should do that. It was on some implementation issue, it was on some narrow issue about how to plead something. It was not on is there probable cause or not.

Senator SPECTER. How frequently have those matters been taken to the Attorney General during your tenure for the last two years, since March 1998?

Ms. TOWNSEND. Less than a handful. I mean, I would say less than six.

Senator SPECTER. Less than five?

Ms. TOWNSEND. Less than five or six.

Senator SPECTER. When they have been taken to the Attorney General, has her practice been to delegate them to somebody, as she did to Dan Seikaly?

Ms. TOWNSEND. No, sir. She has decided each of them—that I am aware of, she has decided each of them personally.

Senator SPECTER. I don't want to get into any of the investigative matters, but I don't think it does, to inquire as to why it was presented to Mr. Seikaly in this case.

Ms. TOWNSEND. Senator, as I have said, I came into the position in March 1998. I was not present in my current position at that time. So why it was presented to Mr. Seikaly, I don't know.

Senator SPECTER. Who held your position in August–September 1997?

Ms. TOWNSEND. At the time, it was an acting counsel because the position had not been selected. It was Gerald Schrader, who is still a member of the Department of Justice.

Senator SPECTER. Would it have been customary to have the matter go to him as opposed to somebody else like Mr. Seikaly?

Ms. TOWNSEND. My understanding—and, again, I have tried to learn these facts looking back—my understanding was that it did come to him initially in terms of the decision before it was ever raised with the Attorney General and before it went to Mr. Seikaly.

Senator SPECTER. So it went to Mr. Seikaly after the person in your position had ruled on it, then to the Attorney General and she delegated to Mr. Seikaly?

Ms. TOWNSEND. I don't know that Mr. Schrader ever raised this matter with the Attorney General, Senator. I think he did not.

Senator SPECTER. Do you know if Mr. Schrader passed on the matter?

Ms. TOWNSEND. Yes, I think he did.

Senator SPECTER. Do you know what he did?

Ms. TOWNSEND. In detail, no, sir. Again, I was not present and so I am reluctant only because I don't want to misstate it.

Senator SPECTER. All right. Well, having not been there when this matter was handled by the Department of Justice, you are obviously not in a position to say exactly what happened. Well, we have asked for the Attorney General, as you know, on March 21, so we will go into that with her at that time.

With respect to the provision to eliminate the requirement of being, quote, "presently engaged," close quote, does your Department agree with that statutory change?

Ms. TOWNSEND. You are talking about Section 2 where it may consider past conduct?

Senator SPECTER. Yes.

Ms. TOWNSEND. Yes, sir.

Senator SPECTER. And does not have the same standard which might be described as a restrictive standard on being presently engaged in the suspect activity?

Ms. TOWNSEND. Senator, I believe that Section 2 as proposed really codifies what is current practice; that is, in evaluating the probable cause, we do consider and include, to the extent it is relevant, any past conduct, and would include it. So the Department supports this frankly as a codification of what our current practices are.

Senator SPECTER. Well, there was an emphasis here on being presently engaged. Do you think that that is now the appropriate standard under existing law, so that this is just a codification?

Ms. TOWNSEND. The language of the statute is "engages in," and we have interpreted that in the past to be "presently engaged in," which is where I think that language comes from. That is not to the exclusion of past activity, and frankly oftentimes where we see past activity, it has been my experience that in looking back and working with the agents what you will find is there is some indication either of present activity or the intention of present activity.

Senator SPECTER. So you don't have to be presently engaged. You could be a sleeper, as Director Freeh defined it, to qualify?

Ms. TOWNSEND. Yes, that is correct.

Senator SPECTER. So you think that is existing law, but the Department has no objection to the codification to eliminate any potential misunderstanding that someone must be presently engaged?

Ms. TOWNSEND. That is correct.

Senator SPECTER. With respect to the difference on standard on a criminal warrant where the instrumentality has to be in the use of a crime as opposed to a FISA warrant, you heard the discussion which I had with Director Freeh. Do you agree with Director Freeh's assessment that there is a difference on probable cause for a criminal search warrant as opposed to a FISA search warrant with respect to whether the instrumentality is being used for a crime under a criminal warrant contrasted with a FISA warrant, say, for a house where there does not have to be a showing of present crime or violation?

Ms. TOWNSEND. Yes. As it relates to the instrumentality and the use of the instrumentality, I do agree with your analysis. I do not



believe it is the same as the criminal standard; that is, use in commission of a crime. That is not the standard under FISA, and the proposed codification of that the Department has no objection to.

Senator SPECTER. And with respect to the balancing test on national security, what is your view on that?

Ms. TOWNSEND. It is interesting to me, Senator, because I think that the cases, both *Whren* and *Dunaway v. New York*, suggest that a balancing where a warrant is required and the basis of the warrant is probable cause, we don't engage in a balancing. This multifactor balancing test is not appropriate in those cases.

I think that the *Illinois v. Gates* totality of circumstances is, to the extent the Supreme Court has given us guidance on the definition for probable cause, the best definition. It is what is a reasonable inference based on all of the facts presented before us. And I think to the extent that the statute gives us guidance that that includes past conduct, current conduct, what we know about an individual, what we know about their actions on behalf of a foreign power. All of that needs to be brought together in considering whether or not it has met the standard.

I believe that the proposed legislation as it currently exists and is before the Senate for consideration is the best formulation which strikes a balance that is consistent with the 1978 statute.

Senator SPECTER. Well, would balancing include a factor of some weight where there is a national security interest which would be of some significance, distinguished from a regular criminal case?

Ms. TOWNSEND. Senator, I think that there is no question. When these cases come in to us, the significance of the national security interest absolutely affects how—

Senator SPECTER. No question that the national security is a weighty factor?

Ms. TOWNSEND. It is absolutely a factor that comes into consideration. I think the national security interest is one that we must be aware of and we must consider. But, again, I think that the cases that suggest a balancing as opposed to probable cause—I think those are different tests, and I think that under a probable cause standard as defined by the statute, we must look to the factors that are set forth in the statute and take the entire circumstance of the presentation and the facts that are before us.

Senator SPECTER. Including national security?

Ms. TOWNSEND. Yes, sir.

Senator SPECTER. Well, in light of the fact, Ms. Townsend, that you were not there until March 1998 and cannot shed any additional light on some of the matters that I have asked you about, we will limit the questioning to the statute which we have covered.

We thank you for appearing here, and that concludes our hearing.

Ms. TOWNSEND. Senator, could I add one point?

Senator SPECTER. Sure.

Ms. TOWNSEND. On section 3, you had asked the Director about the importance of revealing in the context of an application the asset relationship. I would like just to take a moment of your time—

Senator SPECTER. That is fine, on that point or anything else that you would care to add, sure.

Ms. TOWNSEND. Thank you. I think it is critically important—and I have no reason to disagree with the Director's characterization that good-faith best efforts are made to bring that information to the attention of the Department and the court.

The current formulation suggests that that information should be included where it is relevant to the determination of probable cause. I would suggest to you that it is always relevant. Where we have to make a pleading to the court that an individual is an agent of a foreign power, whether or not we have at some point in the past or currently have some relationship with that target is essential to know in making a determination as to whether or not someone is indeed acting on behalf of a foreign power.

That is not to suggest if we find that we have had a relationship or do have a relationship that that prohibits the application from going forward. In fact, the legislative history to the 1978 Act is quite the contrary. It allows us, in spite of some relationship, to proceed with the application.

I just can't underscore enough I think it is very important, and I think the court believes it important, that that sort of information be included. I certainly would not want to see an undue administrative burden put on the FBI, but I think that that piece of the proposed legislation is very important to retain.

Senator SPECTER. That is a provision you would attach a little extra weight to, right?

Ms. TOWNSEND. Yes, sir.

Senator SPECTER. OK; anything else, Ms. Townsend?

Ms. TOWNSEND. No, sir. Thank you very much.

Senator SPECTER. Thank you very much for coming.

That concludes our hearing.

[Whereupon, at 11:00 a.m., the subcommittee was adjourned.]