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THE USA PATRIOT ACT IN PRACTICE: SHEDDING LIGHT ON THE FISA PROCESS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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THE USA PATRIOT ACT IN PRACTICE: SHEDDING LIGHT ON THE FISA PROCESS

TUESDAY, SEPTEMBER 10, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:38 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Feingold, Schumer, Durbin, Hatch, Grassley, Specter, and DeWine.

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

Chairman LEAHY. We will begin. I understand Senator Hatch has been delayed in traffic but is coming in, but Senator DeWine, Senator Specter, and Senator Feingold are here.

Before we begin, I want to commend Senator Specter for not only this year but for as long as I can remember, he has highlighted this whole issue of FISA and the importance of it, as have Senators Grassley, DeWine, and Feingold. I appreciate this, and I mention this, Mr. Kris, because I know you have worked so very hard on this subject.

Today in Vermont, my own State, and also in Arizona, North Carolina, New York, Wisconsin, Maryland, and a number of other States, Americans are making our democracy work by casting votes in primary ballots. This Committee meets today as part of its role in that same democratic process, focusing oversight on one of the most important but least understood functions of our government. We are examining how the Foreign Intelligence Surveillance Act is working, and we are asking how it works not just in theory but in practice.

We had begun our oversight hearings last summer, as soon as the Senate majority shifted. After the terrorist attacks on September 11, we focused on expedited consideration of what became the USA PATRIOT Act, providing legal tools and resources to better protect our nation's security. We continue our efforts to ensure that the law is being implemented effectively and in ways that are consistent with preserving the liberties enshrined in the Constitution.

Much of our focus today will be on process issues in a secret system. In a nation of equal justice under law, process is important. In a nation whose Constitution is the bulwark of our liberty, process is essential. In administering a system that rightfully must op-

erate under a shroud of secrecy, Congressional oversight of that process is crucial.

The USA PATRIOT Act made important changes to the Foreign Intelligence Surveillance Act, which is called "FISA" for short. This law set up a secret court to review government applications to conduct secret wiretaps and searches inside the United States for the purpose of collecting foreign intelligence information to help protect this nation's national security. FISA was originally enacted in the 1970s to curb widespread abuses by both Presidents and former FBI officials of bugging and wiretapping Americans without any judicial warrant—based on the Executive Branch's unilateral determination that national security justified that surveillance.

The targets of those wiretaps included a Member and staff of the United States Congress, White House domestic affairs advisors, journalists, and many individuals and organizations engaged in no criminal activity but, like Dr. Martin Luther King, who expressed political views threatening to those in power.

Indeed, on our panel today is one of the victims of those abuses, Dr. Morton Halperin, whose telephone was illegally tapped by high-level officials in the Nixon Administration. I point this out because I don't want anybody to think all this is ancient history. It has happened more recently than we would like to think.

In the USA PATRIOT Act, we sought to make FISA a more effective tool to protect our national security, but the abuses of the past are far too fresh simply to surrender to the Executive Branch unfettered discretion to determine the scope of those changes. The checks and balances of oversight and scrutiny of how these new powers are being used are indispensable. Oversight of a secret system is especially difficult, but in a democracy it is especially important.

Over the last two decades, the FISA process has occurred largely in secret. Clearly, specific investigations must be kept secret, but even the basic facts about the FISA process have been resistant to sunlight. The law interpreting FISA has been developed largely behind closed doors. The Justice Department and FBI personnel who prepare the FISA applications work behind closed doors. When the FISA process hits snags, such as during the year immediately *before* the September 11 attacks, and adversely affects the processing of FISA surveillance applications and orders, the oversight Committees of the Congress should find out a lot sooner than the summer *after* the September 11 attacks. Even the most general information on FISA surveillance, including how often FISA surveillance targets American citizens, or how often FISA surveillance is used in a criminal case, is unknown to the public.

In matters of national security, we must give the Executive Branch the power it needs to do its job. But we must also have public oversight of its performance. When the Founding Fathers said "if men were all angels, we would need no laws," they did not mean secret laws.

Our oversight has already contributed to the public's understanding of this process. We have brought to light the FISA Court's unanimous opinion rejecting the Justice Department's interpretation of the USA PATRIOT Act's amendments. That was because of requests from this Committee. If it had not been for the prolonged

efforts of the Committee—and I want to note especially Senator Specter and Senator Grassley—one of the most important legal opinions in the last 20 years of national security law, even though it was unclassified, would have remained totally in secret. This is an unclassified government document remaining secret. We brought it out into the open.

As it is, this unclassified opinion was issued in May, but it was not released until three months later, on August 20, in response to a letter that I sent, along with Senator Specter and Senator Grassley, to the court. The May 17 opinion is the first window opened to the public and the Congress about today's FISA and about how the changes authorized by the USA PATRIOT Act are being used. Without this pressure to see the opinion, the Senators who wrote and voted on the very law in dispute would not have known how the Justice Department and the FISA Court were interpreting it. The glimpses offered by this unclassified opinion raise policy, process, and constitutional issues about the implementation of the new law.

The first-ever appeal to the FISA Court of Review, which the Solicitor General of the United States argued yesterday, was transcribed and, yesterday, with Senator Specter and Senator Grassley, I sent a letter asking the court to provide an unclassified version of the oral argument and their decision to this Committee. We need to know how the law is being interpreted and applied.

Many of the FISA provisions are subject to a sunset. Because of that, it is particularly important that this Committee monitor how the Justice Department is interpreting them, because if we don't know how they are interpreting them, I am one Senator who would not agree to continuing the Act once the sunset is there.

Now, let's be very clear about that. This Act has to be renewed. If we are not going to know how it is being used, I think there are going to be an awful lot of Senators, Republican and Democrat alike, who will not vote to continue the Act. The Department of Justice brief makes a sweeping claim regarding the USA PATRIOT Act amendments. The Department asserts that the longstanding "purpose" analysis adopted by numerous courts for more than 20 years is simply wrong. Specifically, the Department claims that using FISA for the sole and exclusive purpose of pursing a criminal prosecution, as opposed to collecting intelligence, is allowed.

The Department contends that changing the FISA test from requiring "the purpose" of collecting foreign intelligence to a "significant purpose" allows the use of FISA by prosecutors as a tool for a case even when they know from the outset that the case will be criminally prosecuted. They claim that criminal prosecutors can now initiate and direct secret FISA wiretaps, without normal probable cause requirements and discovery protections, as another tool in criminal investigations, even though they know that the strictures of Title III of the Fourth Amendment cannot be met. In short, the Department is arguing that the normal rules for Title III and criminal search warrants no longer apply in terrorism or espionage cases, even for U.S. persons.

I was surprised to learn that, as the "drafter of the coordination amendment" in the USA PATRIOT Act, the Department cites my statement to support its arguments that there is no longer a dis-

tinction between using FISA for a criminal prosecution and using it to collect foreign intelligence. Well, had the Department of Justice taken the time to pick up a phone and call me, I would have told them that was not and is not my belief. Let me state that again. Even though the Justice Department's brief cites what is my belief, let me tell you right now they are wrong. It is not my belief. When they cite me, they ought to talk to me first.

We sought to amend FISA to make it a better foreign intelligence tool. But it was not the intent of these amendments to fundamentally change FISA from a foreign intelligence tool into a criminal law enforcement tool. We all wanted to improve coordination between the criminal prosecutors and intelligence officers, but we did not intend to obliterate the distinction between the two, and we did not do so. Indeed, if we wanted to make a sweeping change in FISA, it would have required changes in far more parts of the statute than were affected by the USA PATRIOT Act.

In addition, as Professor Banks points out in his testimony, such changes would present serious constitutional concerns. The issues relating to FISA implementation are not just legal issues, however. Our Committee has also held closed sessions and briefings. We have heard from many of the FBI and Justice Department officials responsible for processing and approving FISA applications. We cannot go over all of this in an unclassified forum, but I can say this: before the 9/11 attacks, we discovered the FISA process was strapped by unnecessary layers of bureaucracy and riddled with inefficiencies. Some of these inefficiencies had to do with legal issues that we addressed in the USA PATRIOT Act, but many did not. They related to the same problems that this Committee has seen time and time again at the FBI: poor communication, inadequate training, a turf mentality, and cumbersome information management and computer systems that date back to the Dark Ages. Even a cursory read of the unanimous FISA Court opinion bears that out. The FISA Court was not frustrated with the state of the law. Instead, all seven Federal judges were concerned about a track record marred by a series of inaccurate affidavits that even caused them to take the extraordinary step of banning an agent from appearing before the court in the future. I continue to support Director Mueller's efforts to address these problems, but the going will not be easy.

As we conduct oversight of the FBI and the Justice Department, I have become more convinced there is no magic elixir to fix these problems. It is tempting to suggest further weakening of the FISA statute to respond to specific cases, but the truth is that the more difficult systemic problems must be properly addressed in order to combat terrorism effectively. Furthermore, given the secrecy of the FISA process and the law relating to the FISA, it is impossible to intelligently address the problems that do exist without risking doing more harm than good. As this week's mostly secret appeal before the FISA review court demonstrates, the consequences of amending that statute can be far-reaching and perhaps unintended. FISA was enacted for a reason. It is even more important to the nation today than it was a year ago, before September 11th, and we need it to work well. It ensures that our domestic surveillance is aimed at true national security targets and does not simply

serve as an excuse to violate the constitutional rights of our own citizens. We must first exercise the utmost care and diligence in understanding and overseeing its use.

I believe it was the Los Angeles Times, in an editorial shortly after September 11th, that said the buildings may have come down, our Constitution did not. And if we want to protect ourselves, we should make sure that both the buildings and Constitution have not come down.

Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I want to commend you for holding a hearing on this important issue—the Foreign Intelligence Surveillance Act, or FISA, process. The intelligence community and the law enforcement agencies rely on FISA to conduct critical intelligence gathering in order to protect our country and prevent further terrorist attacks. And let nobody miss the point. We have to be very vigilant and we will have to continue to be very vigilant in order to prevent any future terrorist attacks in this country. And we are very concerned when people are willing to give their own lives in suicide bombings. We know that that is a matter of even greater concern to many people.

Now, I look forward to examining this important issue relating to the FISA process today and am hopeful that we can do this in a spirit of bipartisanship. These are complex issues, and the Committee's constructive role is important.

The timing of this hearing—one day before the first-year anniversary of the attack on our country—could not be more telling. Our joint session last Friday in New York City helped to emphasize to everyone the horrible tragedy that our country suffered on September 11th. It reminded us of our continuing need to be vigilant in protecting our country from further terrorist attacks.

After last year's tragic attack on September 11th, the administration and Congress worked together to enact the PATRIOT Act. This is a broad package of measures that provided law enforcement and the intelligence communities with the necessary tools to fight terrorism worldwide and, of course, protect our country. These reforms were critical to enhance our government's ability to detect and prevent terrorist attacks from occurring again. We worked together on these reforms and passed them in the full Senate on a vote of 99 to 1.

One of the most significant issues addressed by the PATRIOT Act was the lack of effective coordination between intelligence and criminal investigations. This was not a new issue. The Bellows report relating to the Wen Ho Lee investigation, as well as the GAO Report on the subject, clearly identified the problem of intelligence sharing and the need to address the issue even before the September 11th attack. The issue was also identified by the Hart–Rudman Commission and dated back to the 1990s.

The PATRIOT Act addressed the issue in two significant ways:

First, Congress, with Section 218 of the Act, modified the "primary purpose" requirement for FISA surveillance and searches to

allow FISA to be used where a significant, but not necessarily primary, purpose is to gather foreign intelligence information.

Second, Section 504 of the PATRIOT Act specifically authorized intelligence officers who are using FISA to consult with Federal law enforcement officers to "coordinate efforts to investigate or protect against" foreign threats to national security including international terrorism.

Based on these two provisions, it is clear that Congress intended to allow greater use of FISA for criminal purposes, and to increase the sharing of intelligence information and coordination of investigations between intelligence and law enforcement officers.

At issue now is a very difficult but critical issue, and that is, where to draw the line between intelligence gathering and criminal investigations to ensure that our intelligence community and law enforcement agencies are fully capable of detecting and preventing future terrorist attacks while at the same time ensuring that Americans' civil liberties are preserved.

The Justice Department's interpretation of the PATRIOT Act modifications to the FISA process is currently at issue before the FISA Court. And I commend the Justice Department for bringing this issue to the FISA Court for its review. In March of this year, the Justice Department adopted revised guidelines governing intelligence sharing and criminal prosecutions, and then sought FISA Court approval for these revisions. The FISA Court approved most of these modifications but rejected a portion dealing with the role of criminal prosecutors in providing advice and direction to the intelligence investigations. The matter is now pending on appeal before the Foreign Intelligence Court of Review.

We all expected the courts to review this matter, but we cannot deny that Congress specifically intended such enhanced information sharing to take place. We must not revert back in this process and again risk a culture that would fail to pursue aggressively the investigation of terrorist threats.

In reviewing the FISA process, we need to consider the fact that there has been a dramatic change in the terrorist landscape since 1978 when FISA was enacted. There is no question that in response to our country's efforts to fight terrorism worldwide, terrorists are increasingly operating in a more decentralized manner, far different from the terrorist threat that existed in 1978. The threat posed by a small group—even a lone terrorist—may be very real and may involve devastating consequences, even beyond those suffered by our country on September 11th. Given this increasing threat, we have to ensure that intelligence and law enforcement agencies have sufficient tools to meet this new—and even more dangerous—challenge.

Being now aware of the evolving terrorist threat, we also may need to examine carefully proposals to modify the FISA statute. This Committee's inquiry should be forward-looking and done without exaggeration of past missteps and miscues which have since been corrected. The stakes are simply too high for anyone to inject politics into an area which requires careful and studied deliberation.

Today's witnesses will help us to consider these critical issues, and I look forward to hearing each of our witnesses today, and I

welcome you all to the Committee. We appreciate the effort and time that you have put in to present your views to us here today.

Chairman LEAHY. Thank you, Senator Hatch.

Normally we would go right to the witnesses now, but Senator Feinstein has asked to make a brief statement, as have Senators Specter, Feingold, and DeWine, each one of whom has had an interest in this subject. And so we will not follow the normal routine, but I would ask Senators if they might be brief.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Well, thank you, Mr. Chairman, very much for holding the hearing, and I appreciated the opening statements of both yourself and the ranking member.

I was present at the hearing when the Attorney General brought forward his concern and took an interest in it, and I think I actually suggested the word "significant." So I want to make a couple of comments.

I have read the Attorney General's opinion of March 6, and I have read the FISA opinion, I think it is April 17th. And I want to go back, to the best of my recollection, to the hearing when we made the decision.

We knew about the problems FBI agents in the Minneapolis field office had in getting a FISA order in the Moussaoui case. However, I do not believe any of us ever thought that the answer to the problem was to merge Title III and FISA purposes.

Now, we felt—or I felt that that was what the administration originally proposed when they sent legislation to us to change the words "primary purpose" in the FISA statute to "a purpose." And many of us believe that such a change would have eliminated the distinction between Title III and FISA. Any purpose, if it was done, even a stupid or a silly one, would have passed muster and allowed a FISA application to proceed.

When I questioned Attorney General Ashcroft at this Judiciary Committee hearing, he agreed that "significant purpose" would represent a compromise.

Now, Webster's defines the word "significant" as "having or likely to have influence or effect: important; a significant piece of legislation"; also, "of a noticeably or measurably large amount; a significant number of layoffs, for example, producing significant profits."

So that was the definition that we then selected, to lower the bar slightly but not entirely, and to provide that when one went for a FISA warrant, there had to be a significant relationship to foreign intelligence. And the bill that ultimately passed both House and Senate and became law included this compromise "significant purpose" standard.

Now, in the Attorney General's brief in the FISA Appellate Court, this brief argues against the balancing compromise language that Attorney General Ashcroft accepted, I thought, at the hearing. Under the administration's primary argument in its brief, the administration need not show any purpose of gathering foreign intelligence in any investigation involving national security. The administration seems to contend that a Federal prosecutor can direct the

FISA process in a case that is 100 percent law enforcement. I don't agree with that.

As a backup alternative argument, the administration seems to contend that any foreign intelligence purpose need not only be insignificant and, in any event, can still be fully directed by law enforcement. I disagree on that. Apparently, they believe they can get a FISA order even if a case is 80 or 90 percent law enforcement. I disagree with that.

In my view, there has been a skewing, Mr. Chairman, of what we set up in utilizing a "significant purpose" must be foreign intelligence——

Chairman LEAHY. I tend to agree, and that is why I got very concerned when I saw them quote me and what my position was on that, which is totally different than what my position is.

Senator FEINSTEIN. So that is my recollection of the matter and the discussion that took place, because I think in my Q and A with the Attorney General, we talked about various words, and I thought it was the intend of the Committee that we wanted to maintain the primary purpose being the gathering of foreign intelligence, not Title III, but we wanted to slightly lower the bar because of the particular nature of the circumstances we were in and, therefore, came up with the words "significant purpose," meaning important, significant, noticeably, measurably large amount.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Feinstein.

Senator Specter?

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

Senator SPECTER. The application of the Foreign Intelligence Surveillance Act, the proper application, is of enormous importance as we are trying to deal with homeland security and at the same time there are major challenges to what the Department of Justice is doing with civil rights. And the Department's actions leave a lot to be desired on both scores.

It would have seemed logical that, after the extensive examination of the Foreign Intelligence Surveillance Act in the Wen Ho Lee case, there would have been an understanding of its application. And there was a miscommunication at the highest levels between the Director of the FBI and the Attorney General, which we corrected by statute, and without going into the many ramifications of Wen Ho Lee, suffice it to say that the Department of Justice was on notice as to what FISA required.

The failure to obtain a warrant under the Foreign Intelligence Surveillance Act for Zacarias Moussaoui was a matter of enormous importance, and it is my view that if we had gotten into Zacarias Moussaoui's computer, a treasure trove of connections to Al–Qaeda, in combination with the FBI report from Phoenix where the young man with Osama bin Laden's picture seeking flight training, added to that Kuala Lumpur where the CIA knew about two men who turned out to be terrorist pilots on 9/11, plus the NSA advisory a day before 9/11, which wasn't interpreted until September 12th, that there was a veritable blueprint and 9/11 might well have been prevented.

And as we are working now to prevent another 9/11, there is a continuing question as to whether the FBI is properly applying a probable cause standard in seeking a FISA warrant.

We had a very important hearing where Special Agent Coleen Rowley from the Minneapolis field office came in on June the 6th, and it was revealing because Agent Rowley pointed out that the U.S. Attorney in Minneapolis looked for a 75- to 80-percent probability before getting a FISA warrant. And Agent Rowley herself thought that the standard was more probable than not.

And at that hearing on June 6th, there was considerable conversation about the standard for probable cause set forth by then–Associate Justice Rehnquist in the *Gates* case, which said, in critical part, as early as *Locke*, which is an 1813 decision, Chief Justice Marshall observed in a closely related context the "probable cause," according to its usual accepted definition means "less than evidence which would justify condemnation...it imports a seizure made under circumstances which warrant suspicion." And then the opinion goes on to say that "more probable than not" has no application.

We had a closed session with FBI agents on July 9th, and it would have been thought that when the public hearing occurred on June 6th, with a lot of publicity, the FBI agents would have picked up the *Gates* standard or that the Director of the FBI at the hearing would have told the FBI agents the *Gates* standard. But in a way which was really incredulous, the FBI agents didn't know the standard. They didn't know it when they were dealing with the Moussaoui case, and they didn't know it almost a year later when we had the closed-door hearing.

And I wrote to Director Mueller the very next day—and I ask, Mr. Chairman, that this letter be made a part of the record—setting forth the *Gates* standard again and asked him to implement it.

Again, in an incredulous way, 2 months have passed and no response. So as of this moment, without oversight function, we do not know whether, notwithstanding all of our pressure, they are using a proper standard for probable cause.

Now, there have been other matters which have been of enormous importance, such as the FISA Court disqualifying an FBI agent. And on this state of the record, I am not sure why. And we are trying to find out. But I believe that there has been an inevitable effect that the FBI is gun-shy. The testimony that we had on Moussaoui suggested that the agents felt their best course was to do nothing because they would get into no trouble if they did nothing. But if they did something, they might turn up like the FBI agent who was disqualified.

And then in our closed hearings, Senator Leahy, Senator Grassley, and I tried to find out what was going on, and we found out that there was an opinion of the FISA Court. But, inexplicably, the Department of Justice wouldn't give it to us, something that just can't be understood.

So we went to the FISA Court, and at first the FISA Court entered a plea of separation of powers. And we said that won't wash here, Judges. We are the Judiciary Committee. We have a right to oversight to see what is going on. And, finally, we got the opinion,

and then we understood why the Department of Justice wouldn't give it to us: because it was highly critical of the Department of Justice.

And then in that opinion, the court goes into some detail about rejecting the Attorney General's request for a regulation which would take the PATRIOT Act and turn the Foreign Intelligence Surveillance Act on its head. It has already been discussed, and I think very well, this morning. But just one brief comment.

When the purpose of the FISA Act was foreign intelligence and the court interpreted "purpose" as "primary purpose," the change was made to "significant purpose." But then the Department of Justice came in with its regulation and said that since the PATRIOT Act said a significant purpose was foreign intelligence, then the primary purpose must be law enforcement—which is just, simply stated, ridiculous.

The word "significant" was added to make it a little easier for law enforcement to have access to FISA material, but not to make law enforcement the primary purpose.

So here, Mr. Chairman, we are dealing with a situation where, by all indications, the FBI and the Department of Justice are not being as aggressive as they should be and can be with an appropriate standard for probable cause, and at the same time they are subverting the purpose of the Foreign Intelligence Act by trying to make it much, much broader than it was originally intended or that we made the modification under the PATRIOT Act.

And I think it is appropriate to put DOJ and FBI on notice that we are not going to let this matter drop. We are going to pursue it. And we are going to find out why the agent was disqualified, and we are going to find out what the FBI is doing on these matters, because this is a matter of enormous importance. Nothing is going on in Washington today, Mr. Chairman, and I thank you for convening this hearing and getting a proper application of the Foreign Intelligence Surveillance Act.

Thank you.

Chairman LEAHY. I appreciate it. As I said earlier, I also appreciate the fact that you have for years been pushing this issue in both Democratic and Republican Administrations. You have been very consistent in that.

I do want more answers. I do feel that we have asked legitimate questions and not gotten the answers. Again, I am urging the Department of Justice to come back with those answers. Otherwise, we are going to have to consider subpoenaing answers to our questions, and I know that the Republican chairman of the House Judiciary Committee has expressed similar concerns at the failure to get answers, I do not want to see a case where the House and Senate Judiciary Committees have to issue subpoenas to get answers to legitimate questions. And I would hope that it would not come to that, but if it does, it does.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. And be sure and turn your microphone on.

Senator FEINGOLD. It is on.

Thank you, Mr. Chairman, for holding this extremely important hearing on the implementation of the PATRIOT Act and FISA. I want to especially compliment Senator Feinstein and Senator Specter for their very well-informed and precise analysis of the question that is before us today.

Frankly, this abuse, in my view, by the Department of Justice of the language of the bill and unreasonable interpretation of the language of the bill is just the reason why I could not in the end vote for the USA PATRIOT Act as I feared that this kind of attempt would be made, and this is one of several examples where I think the language, as troubling as the language was to me in many cases, is strained even beyond a reasonable interpretation in a way that does not comport with the intent of even those who supported the legislation.

One year ago today, none of us anticipated, obviously, the terrible events of September 11th. And since then I have watched America come together in many wonderful ways, communities uniting, people taking the time to help others, and a Congress that is committed to protecting our country. But I believe that in our haste to develop legislation to help America, we went too far in some areas.

Now, the courts have played a significant role in exercising their role of oversight. There have been important recent court decisions prohibiting holding immigration proceedings in secret, requiring the disclosure of the identities of the hundreds of individuals rounded up since 9/11, and questioning the designation and indefinite detention of U.S. citizens as enemy combatants.

Even the most recent FISA decision we have been discussing today, it is the court and not the Department of Justice that has called out for appropriate restraint in our anti-terrorism efforts.

Last fall, as the Senate debated the PATRIOT Act, there were very few voices advocating a slower gait as we raced towards passing some of the most radical changes to law enforcement in a generation. And so I think that makes this hearing even more important.

Chairman Leahy did the right thing in holding this hearing. Congress has an important oversight responsibility and it has to exercise that responsibility. We must carefully examine what we have done in the battle against terrorism and also what this Department of Justice will ask us to do in the future.

Thank you, Mr. Chairman.

Chairman LEAHY. Senator DeWine?

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Thank you, Mr. Chairman. I want to thank you, Mr. Chairman, for holding this hearing today to discuss the Foreign Intelligence Surveillance Act. As my colleagues have pointed out, FISA is one of the most important investigative tools available to us in our fight against terrorism. Bluntly, unless we effectively use the powers of FISA, we will not be safe from terrorism. It is just that simple.

Now, today the congressional spotlight is on homeland security and defense, and that is a very good thing. That is all well and good. And when I go home to Ohio, Mr. Chairman, people ask me about the homeland security bill.

But I must say that at the end of the day, we can make all sorts of improvements in our homeland defense reorganization. We can move agencies around, departments around, box to box. We can improve our security at airports. And we can work to tighten our borders. But I truly believe that our success in defeating terrorism begins and ends with effective intelligence. And FISA is an absolutely critical part of this intelligence-gathering operation.

So I am hopeful that today's hearing will be the beginning—the beginning of a period of increased emphasis and focus on the FISA process as a whole. It deserves and I believe requires a great deal of attention from this Committee, and I congratulate you for this hearing. It requires attention from the Intelligence Committee and from the entire Congress.

Mr. Chairman, we simply cannot overstate the importance of FISA warrants and the contribution that FISA surveillance makes to the preservation of our national security. After the attacks a year ago tomorrow, it became clear to all of us that now, more than ever before, our intelligence-gathering agencies and law enforcement personnel must be able to communicate and share critical information about their investigations. We all know that. We know that our ability to protect the Nation from future terrorist attacks will be compromised unless we are able to fully and effectively combine the resources of our intelligence and law enforcement efforts. And the push, candidly, for the PATRIOT Act was based on that understanding.

FISA, of course, does pose some challenges, and it does create some risks, and we should not underestimate those. The FISA statute as amended by the PATRIOT Act creates a system of surveillance that is very powerful and, for the most part, completely secret. Accordingly, it is vital that we effectively balance the power of this statute and the need for intelligence information with clear, rational, and coherent boundaries around the government's ability to conduct these secret surveillances.

My belief is that the PATRIOT Act brings us closer to the proper balance. I am not as convinced as some of my colleagues that the government's position is wrong in regard to this.

What I do think is important, though, is that this matter be resolved so that this Congress can find out and so that everyone who is charged with the safety and security of this country can understand what guidelines they are operating under.

Mr. Chairman, I do believe that we need to consider whether current law provides for sufficient congressional oversight, and we need to consider how we on this Committee and the Intelligence Committee can conduct this oversight. Because unless we fully understand how the FISA law is being interpreted by the court, this Congress cannot fulfill its constitutional duty—its constitutional duty of oversight and its constitutional duty after we pass a law to see how it is working, to see how the courts are interpreting it, and then to make a rational public policy decision as to whether or not that law should be changed.

With only two written FISA decisions—that I am aware of, at least—in 24 years, that is impossible to know. It is impossible for this Congress to know how the law is being interpreted, and that has been true for previous Congresses.

Now, some of us believe, although we certainly cannot prove it because of the fact of the secrecy involved, that the interpretation of the original FISA law has become tighter and tighter and more burdensome and more burdensome over the years and that the relationship between the Justice Department and the courts, meaning that relationship whereby the Justice Department by definition has to, of course, follow what the court says, has resulted in an interpretation of a law that has been very strict. I believe that this interpretation may have been stricter than Congress may have intended it or that maybe Congress would have allowed to continue. The fact is Congress did not know that. Congress did not know. We will never know, frankly. I believe that that interpretation very well could have threatened our security.

This country, candidly, no matter what your belief about that issue, was not well served by the lack of effective oversight for the past 24 years. I happen to believe it has helped to create a risk-averse culture at the FBI. But, again, that is something because of lack of information that no one will ever know for sure.

So, Mr. Chairman, I thank you for holding this hearing. The legal issues that have been raised and that we will discuss are important. I am anxious to hear from our panel of experts, including what the Justice Department believes. But I believe, frankly, that our look at FISA must go beyond this. And what really is important is Congress' ability to, over time, monitor what is, in fact, happening with FISA because our national security and liberties are at stake.

We have to devise a method to do this while at the same time protecting the secrecy that we know is so very, very important in regard to the FISA Court. No one should misinterpret my comments in regard to FISA. I think FISA is and can be a very, very effective tool, and what is going on in FISA today is being very, very helpful in our war against terrorism.

I just believe that we can do a better job, and the only way that we can fulfill our obligation here in Congress to make sure that the FISA law is finely tuned and is, in fact, serving the needs of this country in the year 2002 and beyond is for us to somehow develop the ability to get more information about what is going on.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. As the Senator perhaps knows, we have some draft legislation circulating on changes, and I would encourage him to take a look at it.

Senator Durbin will be the last person to speak—Senator Durbin will be the penultimate Senator to speak.

[Laughter.]

Chairman LEAHY. We will then go to Senator Schumer. There will be no other Senators who will speak. This is such an extremely important issue, and every member here has worked very closely on the whole issue of the USA PATRIOT Act.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLNOIS

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Chairman, let me thank you and Senator Specter, Senator Grassley, Senator Feinstein, and others for your leadership on this issue and for calling this hearing today.

I think this hearing is of historic importance. Behind closed doors, with the highest level of secrecy, there is a battle that is being waged in our country. It is a battle over an issue as basic as the origin of our Nation: the power of a government, the rights of an individual.

The release of the May 17th opinion by the court that oversees the Foreign Intelligence Surveillance Act was sobering. It was our first insight into that battle. It was our first view behind those closed doors. And what we found as a result of that May 17th opinion troubles me, because what we found is that the court said that the Government has misused the FISA law. The Government has misled the court dozens of times. The FBI had supplied erroneous information in more than 75 applications of the FISA law. The FBI had improperly shared intelligence information with Government prosecutors handling criminal cases. The FBI Director himself had submitted a false statement to the court. And one FBI agent proved so unreliable that the court barred him from ever submitting affidavits again.

What is particularly troubling about this May 17th opinion is that a reflection on a decision, another historic decision made by this Congress, after last September 11th. We were told by our Government that the FISA law as written was inadequate to protect America. We were asked to show faith in this Government and to invest it with new authority to protect America from its enemies. And so many of us decided to make that leap of faith.

But, as we reflect now, we know that it was a faith born of fear—fear for the security of our Nation, a legitimate fear after September 11th.

It was also an expression of faith that our Government would not abuse its new authority under the changes in the FISA law. We felt confident that, given these new tools and these new resources, our Government would defend America but not at the cost of our basic liberties. Sadly, this May 17th opinion from the court has told us that this administration, this Department of Justice has abused the faith entrusted them with this change in the FISA law.

In light of these disclosures, I am troubled by those who would use the intelligence failures of September 11th as a justification for even expanding the powers that Government has to monitor individuals within the United States, but not expand meaningful oversight of those powers. What have we learned? We need many more opinions from this court. This Congress and the American people need to review the progress that is being made to make certain that the rights of individuals and the liberties that are so central to America are not abused in the name of national security.

We have known for some time that FBI officials were reluctant to seek a FISA search warrant for Zacarias Moussaoui, the so-called 20th hijacker, who was detained a month before the terrorist attack. That fact has prompted calls from the Justice Department

and from Members of Congress for additional government authority to obtain warrants beyond the significant expansion of authority already granted by Congress in the USA PATRIOT Act, which I voted for.

We now know why the FBI had its doubts about the FISA process. Its credibility and the credibility of the attorneys at the Department of Justice who appear before the FISA Court have been repeatedly called into question, as the May 17th opinion tells us so graphically.

Before we make additional changes to the law, before we give additional authority to the Government over the rights and liberties of individuals, before we vastly expand the power of investigations further, we should require a full and complete accounting of these past mistakes.

Mr. Chairman, thanks for your leadership on this issue.

Chairman LEAHY. I do appreciate the fact that some of the inadequacies were brought to the attention of the court by some within the Department of Justice. I agree so much with the Senator from Illinois, the problems that have come to light are problems that can only be affected if we do have adequate oversight.

I remember the great flap over Wen Ho Lee and whether there was adequate probable cause to get a computer search just went on and on until after he had downloaded everything from the computer and left. Somebody forgot the obvious thing they should have done, and that was simply have gone to the administrator of computers at the Lab and said, Did he sign a waiver, a blanket waiver to go into his computer? Of course, he had. They didn't need the search warrant in the first place. If somebody had just done what any 15-year-old would have known who was computer savvy to do, what any one of our systems administrators here in the Congress would have known to do, they would have just gone and said, By the way, is there a blanket release to go into computers that are used for company business? And it was there, and they could have gotten it all.

Senator Schumer, you get the very last——

Senator HATCH. If I could just make a little short statement?

Chairman LEAHY. Well, except, of course, for Senator Hatch.

Senator HATCH. Sorry to interrupt you, Senator Schumer.

Senator SCHUMER. That is okay. Any time.

Senator HATCH. I look forward to your remarks. But I think that these points have been well raised by my colleagues, but errors in FISA applications occurred in 2000. That was under the Clinton administration—that was one of them—and then in 2001 under this administration. Both occurred before Director Mueller assumed his position. And the FBI has since adopted new procedures for processing, and I think the record just needs to show that in April 2002, Judge Royce Lamberth, who was then the presiding judge of the FISA Court, publicly stated, "We consistently find the FISA applications well scrubbed by the Attorney General and his staff before they are presented to us."

He also stated that the process is working. It is working in part because the Attorney General was conscientiously doing his job, as is his staff.

So I just wanted to make sure that record is clarified.

Chairman LEAHY. Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I, too, join the rest of the Committee in thanking you for this much needed hearing.

Now, we all know that in times of war and certainly in this post–9/11 world, one of the most difficult questions we face is how to balance security and liberty. It is an age-old struggle. It is one that goes back to the Founding Fathers in their debates about freedom and democracy. And traditionally, when we face threats such as those we face today, security waxes and liberty wanes.

Now, I believe there has to be some give and take to deal with the particular threats of the times. The key word is "balance." It is easy to say we face security needs and let's get rid of the Constitution. It is also easy to say we shouldn't change a thing. You know, the Constitution is being thrown away. Those on the hard left and hard right are good at doing each of those, and those are clear and simple, easy ways to go. But the real trick is the balance, and that is what is so difficult to find. It has never been more difficult than today.

Now, it is made difficult, more difficult by another phenomenon. We are on all the front lines. We don't know where or when a terrorist is going to strike. We know that some could be American citizens who are here or non-citizens who are here, legally or illegally, but we know that American soil is a new battleground. And that certainly invokes, should invoke new discussion and probably some kinds of changes.

So when it comes to FISA, we need to give the Government, I believe, some expanded powers to strike the right balance. For example, it doesn't make sense to handcuff ourselves by requiring that DOJ show that a suspected terrorist is a member of a terrorist group. There may be lone wolves out there. There may be groups that we don't know, and if this person or group of people is acting to promote terrorism, linking them to a known group is not necessary.

There may be non–U.S. citizens who we can't prove are part of a known terrorist group, and that shouldn't stop us from getting a warrant. Senator Kyl and I have a bill that would fix that problem.

But at the same time, of course, DOJ's powers shouldn't be unfettered. If we blur the line too much between criminal investigations and foreign intelligence gathering, the Fourth Amendment may get tossed out with the bath water. It is about finding the right balance. And one of the reasons that we struggle here particularly to find middle ground is we know so little about the FISA Court.

I am a big believer in the Brandeisian admonition that sunlight is the best disinfectant. There is less sunlight on the FISA Court than you would find in most photographers' darkrooms, and that is why this hearing is so critical. We are not going to come to balance until we actually know what is going on.

In conclusion, Mr. Chairman, I have been struggling to come up with some way to make the FISA process more open without endangering security. I have spoken with a lot of people about the

problem and, frankly, no one yet I have spoken to has any really good ideas. That is why I eagerly await the panel's testimony.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

And we will begin with that. Mr. Kris, you have been very patient. You are the Associate Deputy Attorney General. This Committee appreciates both your professionalism and your help in the past, and please feel free to go ahead.

STATEMENT OF DAVID KRIS, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. KRIS. Thank you. Mr. Chairman, Senator Hatch, and members of the Committee, thank you for the opportunity to testify this morning about the Government's first appeal to the Foreign Intelligence Surveillance Court of Review.

At the request of your staff, I have focused my preparation on three main issues that relate to the appeal: first, and most importantly, a description concretely of exactly what is at stake in the appeal; second, a description of the legal issues that are raised in the appeal; and, third, and finally, a discussion of some of the accuracy concerns that are raised in the opinion of the Foreign Intelligence Surveillance Court, the FISC, from May 17th that have already been adverted to.

I know that there are many, many other FISA-related issues in the air today, but I must say that I have not specially prepared to address those issues this morning. At least from where I am sitting, the appeal seems like more than enough to tackle in one hearing.

My written statement lays out in more detail——

Chairman LEAHY. A lot of the other questions have been sent to the Attorney General. He just has been otherwise preoccupied in being able to answer them, either to me or to the chairman in the House. Let's hope. But we will let you keep within your area of expertise.

Mr. KRIS. Well, my statement, my written statement which has been submitted, sort of lays out in more detail the points that I would hope to make. Let me try to give a more sort of user-friendly summary here.

In fact, before I turn to a discussion of what the PATRIOT Act did change in FISA, because I think there were very important changes, let me start just by quickly reviewing three areas of FISA that were not changed by the USA PATRIOT Act.

First, as always, FISA requires advanced judicial approval for almost all electronic surveillances and physical searches. That was not changed by the USA PATRIOT Act.

Second, every FISA application must be certified in writing by a high-ranking and politically accountable Executive Branch official, such as the Director of the FBI or the Director of Central Intelligence, and every FISA application must be personally approved in writing either by the Attorney General or the Deputy Attorney General. Again, the USA PATRIOT Act did not change that.

And, third, the USA PATRIOT Act did not change the kinds of persons whom we are permitted under FISA to search or surveil. Today, as always, a FISA target must be an agent of a foreign

power, as defined by FISA, a term that, when it comes to United States persons—that is, U.S. citizens or permanent resident aliens—requires not only a connection to a foreign government or a foreign terrorist group or other foreign power, but also probable cause that the target is engaged in espionage, terrorism, sabotage, or related activities.

Now, to be sure, the USA PATRIOT Act did change the allowable purpose of a FISA search or surveillance, the sort of reasons why FISA may be used. But while the USA PATRIOT Act changed the "why" of FISA, I think it is also accurate to say, although perhaps in need of some elaboration, that it did not change the who, what, where, when, or how of FISA.

Now, let me turn to the three specific issues that you identified for me, beginning with what is at stake in the appeal.

What is at stake here really is the Government's ability effectively to protect this Nation against foreign terrorists and espionage threats. And I don't sort of mean to be melodramatic about it, but the truth is that when we confront one of these threats, whether it be a terrorist or an espionage threat, we have to pursue an integrated, coherent, cohesive response to the threat. We need all of our best people, whether they be law enforcement personnel or intelligence personnel, sitting down together in the same room and discussing, well, what is the best way to neutralize this threat?

In some cases, the best way to neutralize or deal with a threat is a criminal prosecution or some other law enforcement approach, and the recent prosecution of Robert Hanssen for espionage is a good example of that.

In other cases—and I think even probably in most cases—law enforcement is not the best way to deal with the threat, and some other approach, such as recruitment as a double agent or something like that, is called for. And, of course, in some cases, you are going to need use both law enforcement and non-law enforcement techniques.

What is important, what is critical to us, and what is at stake in this appeal is our ability to sit down and have a rational discussion in any given case about what the best way to deal with the problem is. And let me sort of offer quickly a medical analogy, because I think this is pretty technical stuff not only just legally but operationally.

Imagine that a patient walks into a hospital somewhere in the United States—let's just say California—and he is discovered to have cancer, and that cancer represents a threat to his survival. In some cases, the best solution to curing the cancer and saving the patient is surgery to cut the tumor out. And in other cases, it will be some other technique like chemotherapy. And in some cases, it is going to be both surgery and chemotherapy together.

But who would go to a hospital in which the surgeons are not permitted to sit down and coordinate and talk to the oncologists and figure out in this case, for this patient, what rationally is the best way to stop the cancer, to cure the cancer and keep him alive? That would be bad medicine, and that, in effect, is exactly what we are litigating against in the context of this appeal.

Now, I guess I see that the red light is on, and so I think I may have breached protocol by going over my time. I can continue or I can stop, at your preference.

Chairman LEAHY. Do you want to get back to the very specific cause? I appreciate your medical analogy, but this is a different case.

Mr. KRIS. Well, I can talk about the legal issues, which is a little bit more technical, if you would like.

Chairman LEAHY. Well, we do have your statement. We have it in the record. I think it might be easier if we go to questions with you, but I want to let Professor Banks get a chance to testify first. But let's go with Professor Banks, and then I do have a number of questions. I do want to come back to you, Mr. Kris.

[The prepared statement of Mr. Kris appears as a submission for the record.]

Chairman LEAHY. Professor Banks?

STATEMENT OF WILLIAM C. BANKS, PROFESSOR OF LAW, SYRACUSE UNIVERSITY, SYRACUSE, NEW YORK

Mr. BANKS. Thank you. Good morning, Senator Leahy, Senator Hatch, members of the Judiciary Committee. Thanks very much for inviting me to participate in this morning's hearing.

In 1978, the drafters of FISA understood that intelligence gathering and law enforcement would overlap in practice. In the years since 1978, the reality of terrorism and the resulting confluence of intelligence gathering and law enforcement as elements of counterterrorism strategy has strained the FISA-inspired wall between intelligence and law enforcement.

In addition, the enactment of dozens of criminal prohibitions on terrorist activities and espionage has added to the context in which surveillance may be simultaneously contemplated for intelligence-gathering and law enforcement purposes.

In the weeks after September 11th, the Justice Department pressed for greater authorities to conduct surveillance of would-be terrorists. Officials reasonably maintained that counterterrorism investigations are now expected to be simultaneously concerned with the prevention of terrorist activities and the apprehension of criminal terrorists. Surveillance of such targets for overlapping purposes is of critical national security importance.

In the USA PATRIOT Act, Congress agreed to lower the barrier between law enforcement and intelligence gathering in seeking FISA surveillance. Instead of intelligence collection being the primary purpose of surveillance, it must now be a significant purpose of the search or wiretap.

The statutory change may not have been necessary. Whatever its wisdom, however, this language does not mean that prosecutors can now run the FISA show. The essential fabric of FISA was left untouched by the USA PATRIOT Act. Its essence remains foreign intelligence collection. Greater information sharing and consultation was permitted between intelligence and law enforcement officials, but law enforcement officials are not permitted under "significant purpose" or any other part of FISA to direct or manage intelligence gathering for law enforcement purposes.

The concern expressed in the May 17 opinion by the FISC is easy to envision stripping away the technical questions of statutory interpretation. Prosecutors may seek to use FISA to end-run the traditional law enforcement warrant procedures. They gain flexibility that way, but they also become less accountable.

The May 17 opinion, signed by all seven judges, is nuanced but firm in its partial repudiation of the proposed 2002 minimization procedures. The Department would effectively permit placement of supervision and control over FISA surveillance in the hands of law enforcement teams. The Department based its proposed revision on the USA PATRIOT Act amendments to FISA, which they say would permit FISA to be used primarily for a law enforcement purpose.

As the court noted, portions of the Department's procedures would permit the coordination among intelligence and law enforcement agencies to become subordinated, the former to the latter officials.

It is impossible for any academic or, indeed, any outsider to opine intelligently about what goes on in working with FISA. Its proceedings are secret, little reporting is done, and only rarely does any FISA surveillance reach the public eye. We outsiders simply don't know enough to offer a detailed critique of the procedures for implementing FISA pre- or post–USA PATRIOT Act.

Our ignorance can be remedied in part by providing more information about the implementation of FISA. Now that some of the guidelines have been disclosed during this dispute, why not assure that all such guidelines are publicly reported, redacted as necessary to protect classified information or sources and methods.

The reporting that now occurs is bare bones, limited to simple aggregate numbers of applications each year, with no further detail. Why not report with appropriate breakdowns for electronic surveillance and searches, numbers of targets, numbers of roving wiretaps, how many targets of FISA were prosecuted, how many were U.S. persons? The report should also be available to all of us more often than annually.

In addition, among the reforms that the Committee could consider would be a formal role for the FISC in reviewing and approving FISA guidelines. FISC is, of course, an Article III court. The Judiciary Committee is, thus, centrally responsible for its oversight, even if its work concerns intelligence.

I will close now and await your questions. Thank you.

[The prepared statement of Mr. Banks appears as a submission for the record.]

Chairman LEAHY. I appreciate that, and obviously, from my earlier comments, there are a number of things I find myself in total agreement with.

We have begun the roll call vote. If any Senators wish to go and vote, feel free. But we will hear Mr. Bass and Dr. Halperin, and then I will leave for the vote and come right back and begin the questions.

Go ahead, Mr. Bass.

STATEMENT OF KENNETH C. BASS, III, SENIOR COUNSEL, STERNE, KESSLER, GOLDSTEIN AND FOX, WASHINGTON, D.C.

Mr. BASS. Thank you. Mr. Chairman, members of the Committee, I appreciate the opportunity to testify before you today. I have submitted a lengthy written statement, but I want to address some comments to remarks that the various Senators have made that are not fully addressed in the written testimony.

I have the perspective of having been there with Senator Leahy, Senator Hatch, and Senator Specter at the foundation of FISA. I was in the Department of Justice when the legislation was moved through Congress and worked also with Mr. Halperin, of course, in that process.

What I want to share with the Committee today is the perspective of the views of someone who was at one time within the tent, was responsible for implementing FISA in the 1978 to 1981 period. And I have tried to stay in touch with the process since returning to private practice as much as possible. As we all know, despite security classifications, there are some leakages around the edge of the tent, and I have been the beneficiary of some of those leakages over the years, so I think I have a relatively informed perspective on what has happened.

On the critical issue of the role of FISA with respect to intelligence versus law enforcement, let me confess in the beginning that I am a moderate. I firmly believe that the "primary purpose" test, as it developed and evolved in the 1995 procedures and in the wall, was absolutely wrong, fundamentally inconsistent with the basic purpose of FISA, and reflects a careless misreading of cases that had tangentially commented in dicta about the so-called "primary purpose" test. My testimony examines that thesis at some length. I won't repeat it here.

But the second proposition I think is equally true. The chairman stated that the department's view of FISA post–PATRIOT is that FISA can be used for a surveillance if the "sole and exclusive purpose is a criminal investigation." If that is indeed the Department's position—I am not sure it is, but if that is the Department's position—they are in my view flatly wrong. But they are wrong not because of anything in FISA that deals with purpose. They are wrong because of a misunderstanding of the penumbra of FISA, the context in which it was developed, the *Keith* decision that laid the constitutional groundwork before FISA was enacted, and, most specifically, the little noticed provision in Section 1823(a)(7).

Why do I focus on that? Very simply, because Section 1823(a)(7) requires that the certification which lies at the heart of every FISA application must be made by an Executive Branch official with responsibilities in the area of national security. No one except national security officials can certify FISA applications. To me, intentionally or not, that provision reflects Congress' plain and unambivalent intention that FISA was never to be used for a purely criminal investigation. It was only to be used where there was a national security/foreign affairs aspect to the investigation.

At the same time I am equally clear that the balance of criminal versus traditional counterintelligence and intelligence aspects was not a part of the original understanding and should never have crept into the act to create a wall of separation. The inherent na-

ture of counterintelligence, and obviously the inherent nature of terrorism is that they always will share mixed purposes. The plan will sometimes be a roll-up operation. It will sometimes be a dangle. It will sometimes be a false flag operation in the intelligence community. It will sometimes be a prosecution. And you cannot, as I think the Committee unanimously feels, effectively function in today's world with a wall of separation between law enforcement and intelligence.

But there is no doubt in my mind that neither the original FISA nor this Committee's action in the PATRIOT Act was intended to provide an alternative to Title III for a purely criminal investigation. That would pervert the entire purpose of FISA and in my view be a very unfaithful service to the Supreme Court's decision in the *Keith* case when it laid down what the very distinction was between what they call domestic matters and national security matters in a different time, but with many similarities.

I would like to just briefly point out that in the prepared remarks I have suggested a number of improvements and changes that I think could be made and comments on some proposed changes that I do not think should be made to the FISA situation, but I could not agree more with Senator Schumer's remark about the Brandeisian element of sunlight. This process has got to be opened up. In my judgment there is absolutely no reason why the FISA Court of Review proceeding yesterday could not have been a public proceeding or at least mostly a public proceeding, and I certainly believe that the proceeding needs to be adversarial. The ex parte nature of both the application process and the appeal yesterday leads to poor judicial decisions, uninformed decisions, and an aura of secrecy that undermines public confidence in the entire process. And I have advocated for years that counsel can be appointed in certain cases to represent the target without any compromise whatsoever for national security.

At that point I will cease. Thank you very much.

[The prepared statement of Mr. Bass appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Bass, and I know you have taken that position for years. I happen to agree with you. I feel that it is something that will be helpful. I do not care who the administration has—I am thinking of it not only for consistency, but also to make sure the statute is followed the way it should be.

Dr. Halperin, please go ahead, sir.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, WASHINGTON OFFICE, OPEN SOCIETY INSTITUTE, WASHINGTON, D.C.

Mr. HALPERIN. Thank you, Mr. Chairman. It is a great pleasure for me to testify again on FISA. As you know, I was deeply involved in the process that led to the enactment of it. I urged the Congress to support it. I still think it is in the national interest and plays a vital role. I do think we need to open up the adversarial process, and I want to associate myself with the comments of the previous witnesses, and particularly the last comments of Ken Bass.

As you know, the fundamental starting point to FISA was that there was a requirement to gather national security information, and that this could not be accommodated within the Title III procedures, and therefore we needed different procedures. But these could be made consistent with the Constitution, because the Government's purpose was not to gather evidence of a crime. Congress, of course, recognized that inevitably you would be gathering evidence of a crime and provided procedures to use that evidence, both in national security cases and for common crimes. But as the FISA Court's opinion reminds us forcefully, the due process requirements in FISA are very different, and therefore can be used only where the Government's purpose is a different one. And I think none of the Government's arguments, as members of this Committee have said, can get around that fundamental logic. It cannot be the purpose to gather evidence for the crime and still be constitutional.

Now, I agree that 9–11 changed things, and that threats required different balances, but I think the way to deal with that is to focus on the new threat and to limit whatever changes are made in FISA procedures to dealing with international terrorist threats. Because where you have terrorists operating at home and abroad, seeking to kill innocent Americans, the barrier between intelligence and law enforcement makes no sense, and the barrier between gathering information at home or abroad makes no sense.

Now, I see nothing in the FISA legislation, either the previous one or the PATRIOT Act, that requires those barriers, but if there is any, I think Congress ought to make it clear that there is nothing that prevents that intimate cooperation up to the limit proposed by the FISA Court. That is, the direction and control of the tap cannot be in the hands of law enforcement officials. I think that is clear from a number of provisions in the statute, including the one that Ken Bass points to. But there can be intimate conversations that can be close cooperation that can be the securing of advice, everything the Justice Department says that it wants, while adhering to the view that the purpose has to be to deal with foreign intelligence purposes. Indeed, my view is that when you are dealing with international terrorism, the primary purpose is, as the Attorney General has said, to prevent further terrorist attacks. You do that by gathering foreign intelligence information about international terrorism and then you use that information in a variety of ways, one of which might be criminal prosecutions. But if you take that approach, you want to break down all the barriers, but make sure that the people in charge are the people who are dealing with this primary purpose of preventing future terrorist attacks. And as I say, it surely should be possible to devise procedures to do that which are consistent with the Court's decision and with the purposes of the statute.

I think the same is true of Senator Schumer's proposal. While I have great sympathy with what he wants to do, I think his proposal does not work, first because since he has not changed the definition of either international terrorism or of foreign intelligence information, in fact you do not accomplish your purpose, because the Government would still have to certify that it was gathering international terrorism information, and that includes certifying that it is gathering information of an international terrorist group. I think

there are other ways to deal with that problem, either by permitting a warrant until you know which purpose it is, and then moving it in one of two directions in the courts, or by creating a presumption, as the Congress did, about agents of foreign powers engaging in clandestine intelligence, when we had a similar problem with Russian citizens within the United States.

And, Senator, I would be pleased to work with you on that. I think this is a problem. I think it can be solved. And I think the solution you have is neither the right one, nor one that works.

Now, I would say more generally, Mr. Chairman, I think if you look back at the FISA process, we then arrived at a bill which properly balanced national security and civil liberties, not only because there were extensive hearings, but there were extensive conversations among staffs and Senators with the administration and private citizens who cared about these issues. And at the end of the day, we arrived at solutions that properly balanced national security and civil liberties. That has been lacking since last September 11th. And I think it is time we reverted back to that process, and I think if we do, we can find solutions to Senator Schumer's concerns, to the Justice Department concerns about being able to have all the people in the room and get all their advice, but do so in way that remains faithful to the fundamental principles of FISA and of the Constitution. Thank you.

[The prepared statement of Mr. Halperin appears as a submission for the record.]

Chairman LEAHY. What I want to do, I want to go and vote. Senator Grassley has voted. As an accommodation to him, I suggest he begin questions. Do not forget to turn your microphone on. Also, in accommodation to the panel, which has been very patient, when his questions are finished, if I am not back, we will then stand in recess until I get back. I should be here shortly. Thank you.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you very much, and I do not think I will take all the time allotted.

I am going to ask Mr. Kris to listen to some preliminary comments I have leading up to four questions I would like to ask him. This Committee, during the course of its oversight hearings and investigative briefings and interviews, has learned that there exists a wide variety of interpretations of key provisions of the FISA statute among critical personnel at the Department of Justice. We have found, for instance, that FBI agents and attorneys on the one hand, Department of Justice attorneys and their managers on the other, all have different and sometimes conflicting definitions of what are key elements of the law. These very people are occupying positions in their organizations that are crucial to the success of the Foreign Surveillance Intelligence Act as a meaningful tool in America's war against terrorism.

Those people charged with moving FISA applications forward from FBI investigative units through the Department of Justice, it seems to me must have a uniform and correct idea of what it takes to meet the statutory minimums required.

So I would like to ask four questions before you answer any, so you kind of see them in a context. First, what oversight, review, training or inspection procedures has the Department of Justice put in place to guarantee that employees administering the FISA application process are doing so correctly, and effectively?

Secondly, when did the Department of Justice put these procedures in place?

Thirdly, has the Department of Justice arrived at a consensus definition of probable cause as it now applies to FISA applications and shared that definition with all the agents and attorneys involved in the FISA process?

And lastly, what other reforms to the FISA process has the Department of Justice proposed or implemented under the direction of Attorney General Ashcroft that will prevent the abuses of the prior administration from occurring again? And in regard to the prior administration, I am thinking about the opinion that referred to 75 violations, 74 under the previous administration, 1 that presumably was admitted to under this administration.

Mr. KRIS. Right. Okay. I think I can answer sort of those questions together. There have been a number of unclassified Department of Justice or FBI guidelines issued addressing any number of FISA issues and procedures. Many of those were provided to the Committee in connection with our appeal. I am thinking of the July 1995 procedures, the April 6, 2001 Woods Procedures governing accuracy—and I will actually return to focus on that in a moment in response to your fourth question—the Attorney General's memorandum of May 18th, 2001 on the FISA process, the memorandum from the Deputy Attorney General on August 6th, 2001 on the FISA process, and in particular on coordination between intelligence and law enforcement officials, the March 6, 2002 procedures, which are at issue in the appeal which the Attorney General approved, but we obviously were not able to implement in full because of the litigation. There is also a memorandum concerning file review in terrorism cases. There are also many classified guidelines that I should not talk about here, but that have been at least averted to with the intelligence Committees. So there is actually quite a lot of internal guidance that has been issued over the years.

With respect particularly to the probably cause question that you raised, I know that there is in the process right now some FBI guidance on that. I looked at a draft of that recently—I cannot say exactly when—and actually gave some comments on it. I expect that it will be coming out fairly soon. I think one of the things that was clear to me in looking at that document is that abstract and general statements about probable cause are not always very helpful and indeed is in my view the central holding of *Illinois* v. *Gates*, that it is a practical common sense conception and so one of my comments was we need to have some examples of particular cases in this guidance where there were facts asserted, and the Court then found yes or no probable cause, so there is that document with respect to that issue that is in the works.

And finally, on the question of accuracy, which I did not cover in my opening—it is in my written statement, but let me say some words about that because I think it is very important—there were two groups of unrelated FISA cases. The first group arose in the

summer of 2000 and the second group in March of 2001, in which there were inaccurate statements made in FISA applications, and that is discussed in the FISC's May 17th opinion. We basically adopted both a short term and a long term response to those accuracy problems, and let me try quickly to lay out what those responses were, and I will get at the end to the most important point, which is what procedures we now have in place, in direct answer to your question.

In the short term, of course, the first thing we did was correct the mistakes with the FISC, with the FISA Court. Indeed that is how the Court learned of the mistakes, because we informed the Court. We also contemporaneously informed Congress of the problems that had arisen, and that is in keeping with our statutory obligation to keep both the Senate Intelligence Committee and the House Intelligence Committee fully informed about our use of FISA.

Third, we opened an internal OPR investigation. That is OPR, Office of Professional Responsibility, not to be confused with OIPR, the Office of Intelligence Policy and Review, which is the office that represents the Department in front of the FISA Court. And that OPR investigation is still pending. It is mentioned in the FISA Court opinion. In keeping with normal DOJ policy, I will not comment on that investigation except to acknowledge its existence.

For the long run—those are the three short run—correct the record in the Court, inform Congress, and open an internal investigation.

Senator GRASSLEY. This is in answer to my fourth question?

Mr. KRIS. Yes. Yes, sir. And then the most important thing that I think we did for the long run was in April of 2001, the FBI adopted these so-called Woods Procedures, named after the attorney who is their principal architect, and they were provided to the Court, also provided to the Committee by Director Mueller, I believe in connection with his June 6th testimony of this year. Those procedures are complex and they are quite detailed. The Committee has them. I will not go through sort of a technical rundown of the entire thing, but the critical aspect of the Woods Procedures is that they require FBI field agents, who are actually engaged in these counterintelligence investigations, to review and approve for accuracy the FISA application, which purports to describe those investigations to the Court.

And that is a critical improvement, and I think it actually has been helpful in improving accuracy. And Senator Hatch earlier quoted from the speech that Judge Lamberth gave in April of this year, a year after those procedures were adopted, in which he made some very complimentary statements about the way things were going.

The reason that this coordination and that the procedures are so vital is that a counterintelligence investigation is fundamentally unlike most criminal investigations. A criminal investigation is typically local or at most regional in scope. Somebody robs a bank in Boston, Massachusetts, the FBI in Boston will investigate. The U.S. Attorney's Office in Boston will be involved. The Court, if there is going to be a wiretap, would be in Boston, and everybody is right there.

In a FISA case, in a counterintelligence investigation, we are talking by definition about cases that are both national and international in scope because the adversary is an agent of a foreign power or a foreign power, and they target this country as a whole. So you may have related investigative activity occurring simultaneously in Portland, Oregon, Los Angeles, California, Denver, Colorado, Miami, Florida and so forth, and they are all part of a larger investigation of a particular foreign power and its efforts to target us in some way.

The FISA application, in any FISA that relates to that investigation, is of course filed here in Washington, D.C., because that is where the FISC is located, that is where the Attorney General is located, that is where the Director is located and that is where OIPR is located. And the affiant in a FISA application is a Headquarters agent, because that is the agent who is overseeing and coordinating the overall investigation because these investigations need that coordination, but the problem is, he is not, this Headquarters agent, actually at ground level out in the field and actually doing the investigation. He is one step removed. And no individual field agent knows absolutely everything about up to the minute of what the others are doing, and that is where inaccuracies can creep in, when the Headquarters agent talks about what happens in the investigation that is being conducted by others, and the Woods Procedures then are designed to deal with that problem by requiring coordination and sign-off by the actual field agents with respect to the affidavit being filed in the FISC in Washington. So that is the key innovation, I think, of the Woods Procedures. The May 18th memo of the Attorney General from 2001 goes further in the same direction by requiring additional coordination by OIPR and the field.

That is a long answer, but I hope a——

Senator GRASSLEY. Well, as a way of summary and not for further discussion of this issue, but just so I think you are saying in answers to my first, second and fourth questions, that you have procedures in place covering oversight, review, training and inspection, and that this administration has put in place further procedures to prevent abuses from occurring again. But am I right in saying then that we are still in the process of—if that is accurate, then additionally then we still have hanging in the balance here, an understanding throughout all of the Department of Justice as well as FBI, of what probable cause is. That is not settled yet from the standpoint of its application to the FISA process.

Mr. KRIS. Well, I think there is—I mean the consciousness has certainly been raised. I think there is a common understanding. The procedures, as far as I know, have not yet gone out on that though, so that is right.

Senator GRASSLEY. Okay. Not the definition of probable cause, but the procedures to follow in regard to what is probable cause.

Mr. KRIS. That is right, yes, sir.

Senator GRASSLEY. Then my last point would be putting the legal issues to the side, but I would like to ask about how the Department of Justice plans will affect FISA investigations. Prosecutors and criminal investigators certainly have a place in FISA investigations, and I believe prosecution is one way and sometimes a good

way to disrupt and stop terrorist attacks. But we have to recognize that these are intelligence operations first and foremost, and decisions should be made based on national security and intelligence concerns. The Justice Department wields an enormous amount of influence over the FBI and individual investigations.

So I want to say what I worry about down the road is that some prosecutors who do not have experience dealing with terrorists and spies may be tempted to order an arrest for reasons other than national security. That prosecutor may, for instance, want a convicted terrorist on his record, even though it is smarter to watch the suspect and learn about his plans and conspirators. The intelligence agencies on the case may still be looking for other terrorists in the cells, but they get overruled by the prosecutor. I know that if there is disagreement, the dispute can go through a chain of command, but FBI agents know that prosecutors decide what FBI cases to prosecute or decline day in and day out, and they may be hesitant to protest a bad decision. What you have described as advice for prosecutors to intelligence agency agents could end up being direct orders. I have no problem with FISA information being used in a prosecution as long as all rules are followed. I am worried that prosecution is not always the best decision in terms of national security.

So, first, is the intention of the March regulations to have prosecutors be in charge of FISA investigations, and who do you think should run those investigations?

And second and lastly, what assurance can you give the Committee that prosecutors will not end up running these cases and how will we be able to verify that through our oversight?

Mr. KRIS. I think that is actually a very fair question. I mean one of the main limits on—well, let me say first, I completely agree with the premise of your question, which is that in some cases prosecution is a good way to protect, and in other cases it is a very bad way and then you can mess it up. And there are costs associated with the prosecution of somebody using FISA information. Chief among them, you have to reveal publicly the fact that there has been FISA surveillance, and that if there are others out there who are not being prosecuted, they are then alerted to the fact that the Government is on to the conspiracy or whatever, and that can obviously be very, very damaging, and there are also other concerns that arise when you prosecute an intelligence case involving protection of source and method information, and a variety of other concerns.

And just as a tactical matter, sometimes prosecution is not the right way to go. Other times you just want to monitor these people or do something else. You try to recruit one of them as a double agent. You feed them false information. You disrupt them using some other technique. In some cases you do want to prosecute.

Under FISA already there is a protection against a line attorney, line prosecutor somewhere going off and deciding that he is in charge and he is going to bring this case to trial, and that is because the statute already provides that before information can be used in a law enforcement proceeding, the Attorney General has to approve that use. That has been in the statute since 1978, and that is only one part of a sort of a general centralized control that exists

in these cases. So before some renegade AUSA, if that is what you are talking about, could sort of return an indictment, he would have the get approval from the Attorney General. So there is a centralized mechanism in the statute I think that deals with that.

Senator GRASSLEY. Thank you very much.

I should probably let Senator Feingold decide what he wants to do, but I was told when I was done that we could stand at ease if nobody else was here.

So I thank you very much, and I thank the Chairman for allowing me to question during the time that the vote was going on. Thank you all very much.

Senator FEINGOLD. [Presiding] Thank you very much, Senator Grassley, and I will begin my round of questions at this point, and I appreciate of course the panel being here today.

Let me first ask Dr. Halperin and Professor Banks and Mr. Bass. It seems to me that Congress was not as clear as perhaps it could have been or needed to be when the new FISA rules were rapidly drafted and then passed after September 11th as part of the PATRIOT Act.

So my question is, should Congress essentially try again, and codify the FISA Court's May 17th decision? Mr. Halperin?

Mr. HALPERIN. Well, I think if that can be done effectively and efficiently without opening up a great many other issues, I think that might be the way to go. I think a little bit depends on whether the Appeals Court and ultimately the Supreme Court, if the Government goes there, upholds the FISA Court's decision. If it does, then it seems to me that the solution to the problem is simply to make it clear to the Government that nothing in the FISA statute and nothing in the Constitution prevents the kind of consultation that the Justice Department witness talked about of getting everybody in the room who is knowledgeable and getting their advice as long as the control of the FISA investigation is in the hands of intelligence officials who are using it for the foreign intelligence purpose of preventing further terrorist attacks.

I do not think there is any reason, if that is done, to change the statute. If the Government prevails on its appeal and therefore is in a position to use FISA to run a criminal investigation, then I think the Congress does need to act and act consistent with what every member of the Committee who has spoken has said you intended to do. And I think, frankly, the way to do that is to legislate the "primary purpose" standard, which of course was not in the statute—it was brought in by the courts—accompanied by clear legislative findings that that does not in any way prevent the full cooperation of law enforcement and intelligence in dealing with the problem. I think it is clear that that is what Congress thought it had done. If the Court accepts the Government's view that you did something much more radical, and in my view, unconstitutional, then I think you should fix it, and I think the legislative fix is pretty clear.

Senator FEINGOLD. I appreciate that answer, Dr. Halperin.

Mr. Bass?

Mr. BASS. Senator Feingold, first let me say that I do not think the pending case is the right vehicle for answering the questions that are really the focus of the Committee's concern. I have indi-

cated in my remarks that are more extensive, that one thing that is wrong with the case is it is unilateral, it is ex parte, there is no adversary on the other side, and it is secret, but more importantly, as the FISA Court pointed out, they did not rule on when it was proper to come to the Court for a FISA surveillance. They only ruled on an aspect of approving minimization procedures, which only apply in cases of U.S. persons to begin with. And jurisprudentially, the issue in the case and the issue on appeal is far too narrow to address the issues of concern to this Committee.

In response to the first part of your question, yes, if Congress could act, it should, but if Congress were to act as it did in the PATRIOT Act, I am frank to say, no, please do not do that again.

Senator FEINGOLD. Well, you know I agree with that.

Mr. BASS. That Act was so hastily prepared, and at least as far as I know, nobody ever knew what it did in many of its provisions because of its haste. The legislative history is too sparse. And to cram congressional intent into a change from "the purpose" to "a significant purpose" to deal with all these questions we are dealing with today is intellectually impossible. So if you are going to do it, do it right, and come up with something that is not the product of the usual sort of political compromise, but in fact gives clear guidance as to when you transition from a FISA surveillance to a Title III surveillance.

I am cynically suspicious that that cannot be done very easily, and certainly cannot be done in today's climate. But I am also equally convinced that the courts will make a mess of it if they continue to proceed the way this process has proceeded to date, and that is with these secret unilateral proceedings in which the FISA judges talk to the Executive Branch both in court proceedings and in nonproceeding meetings, but they refuse to talk to Congress, and that cannot be the way to run the ship.

Senator FEINGOLD. I thank you for that answer.

Professor Banks.

Mr. BANKS. Senator Feingold, I agree with Mr. Halperin and Mr. Bass, and Mr. Bass in particular about the inappropriateness of using this case as a vehicle for restating what FISA is about.

I do have mixed feelings about the "significant purpose" standard, but I doubt that it would be wise at this time to revisit that question. I think the "significant purpose" rule is not as good a rule as was in place before, but I think it only lowered the barrier somewhat for reviewing courts in trying to sort out the relative role of law enforcement and intelligence in a joint or some kind of parallel investigation.

I think if Congress wished to be more clear about the limits that were imposed in the PATRIOT Act on the information sharing and consultation, that it is in that provision that some attention should be paid. I think that we have all sort of danced around the difference this morning between consultation and information sharing on the one hand and direction and control on the other. That is where the cleavage appears to exist, and if there is some legislative attention, I would devote it there.

Senator FEINGOLD. Thank you for that answer, Professor.

Mr. Kris, the Justice Department claims that a broad interpretation of FISA is necessary to protect our country from terrorism. Yet

this Committee has not heard an example of how more appropriate and narrow a construction of FISA, like the one proposed by the FISA Court would actually impair our national security.

Could you please tell us what hurdles a reasonable construction of FISA would place in front of our desire for safety, and if the Justice Department prevails in their appeal, what role the established intelligence community will have in FISA matters when the primary purpose of using FISA is law enforcement?

Mr. KRIS. Yes, I think I can do that even in this open forum, although perhaps not with any real case examples for you.

Let me focus on just one aspect of the FISA Court's opinion that I think is troubling in a—in a relatively clear way. In addition to accepting our information sharing provisions and rejecting in part our advice giving provisions, the Court imposed a third element in the coordination process, requiring what I have called, and what are brief refers to as a "chaperone requirement." The essence of that requirement is that before intelligence officials can talk to or engage in a consultation with a prosecutor, they must first notify OIPR, the Office of Intelligence Policy and Review, which is located in Washington, schedule the consultation and invite OIPR to attend or participate if it is by telephone or in person. And for its part, OIPR is required by the Court's order to participate in the consultation unless it is unable to do so. And, obviously, I mean that really means unable because OIPR has to stand up in front of that court on a daily basis, and it cannot sort of start playing "cutesie" when it is unavailable.

Well, I think the impact of that should be clear for anybody who has experienced running sort of a complex criminal investigation. The agents and the lawyers are talking to each other, and should be talking to each other, all the time, by phone or in person, many, many, many times a day, because something occurs to you, you call up the agent, you say, "Oh, you have got to look into this." The agent calls you back, "Oh, here is what I found." And there is a very dynamic process that ought to be going forward, especially in these very, very sensitive investigations. If every time a prosecutor wants to talk to an intelligence agent about a case, he has to call OIPR, and if he wants to meet in person he has to wait for OIPR to send a lawyer to fly out there. And as I said, OIPR is in Washington. The FISC is in Washington. These investigations are going on all over the place.

I mean I guess I would say it is very unworkable to have to wait for an in-person meeting for somebody to fly out. And what that means is that really in effect it is very difficult to have the coordination that is necessary.

Senator FEINGOLD. Mr. Bass?

Mr. BASS. Senator, if I could be so bold as to say I am shocked at the Department's position with respect to the role of OIPR. This is 2002. If the Department does not yet have in place secure, contemporaneous communication facilities for voice or e-mail, then it is light years behind my law firm, and that is abysmal. They have presented no justification for objecting to the, quote, "chaperon provision" except administrative inconvenience. I cannot believe that that actually is a problem. And if it is, it is one to be solved by allocation of resources. OIPR provides an important role, in my view,

in performing a contemporaneous oversight function in a very difficult area that no other institution of Government can provide.

And to me the biggest problem with the AG's proposal is taking OIPR out of the loop and allowing criminal prosecutors and intelligence agents to communicate directly without a third party being there. Call it pejoratively a chaperone, if you will. I call it a protector of liberty.

Senator FEINGOLD. Dr. Halperin, and then I will give my time——

Mr. HALPERIN. Senator, what troubles me most about this is the judges on those courts, we all know many of them have experience inside the Executive Branch. None of them are people who are insensitive to the requirements of law enforcement and national security, and that they felt obliged to impose that kind of specific requirement on the Justice Department, suggests to me a level of concern not to say mistrust of what the process would be like that I find deeply troubling.

So I think it is very important for this Committee, in its oversight role, to try to get to understand what it is that led the Court to decide that that was the only way it could be confident that the rules it was laying out were being enforced.

On the face of it, it seems extraordinary that the judges would have the right to do that, and as the Government points out, it is hard to see in FISA where they get that authority, but it comes from their right as overseers of this process to say what they have said in effect, "We do not have any confidence in this unless that happens," and I think that has got to be fixed, whether by implementing this requirement or in some other way.

Senator FEINGOLD. I thank you all. This is an excellent panel.

I thank you, Mr. Chairman.

Chairman LEAHY. I thank you.

Senator Hatch, and then I will take my questions.

Senator HATCH. Mr. Kris, after having listened to your colleagues here, do you have any additional comments you would care to make?

Mr. KRIS. Well, I mean I guess I agree with Dr. Halperin that I do find it difficult to find anywhere in the FISA statute or in Article III, authority for a Court to impose that kind of close management of Executive Branch functions, and to dictate who must be in the room when a consultation is going on. I think I am inclined to agree with him that it is really not supportable, and indeed that is our position on appeal.

I must say I disagree with Mr. Bass about the practical limitations that such a requirement poses. Even if one can do secure conference calls, which the technology—well, I should not get into that. But even if one can do that, there is really no substitute for an in-person meeting, and a free and dynamic exchange of ideas, which is not to say that OIPR should not be there or that the intelligence lawyer's perspective is not valuable. But it is one thing to say as a matter of Executive Branch management for the Attorney General to say, "well, it is a good idea, though not a ironclad requirement for OIPR to be there." It is another thing for a Court to say that they must be there before you can have a meeting, and

I think that is the central legal argument anyway that we are raising.

Senator HATCH. Let me focus your attention on one particular argument the Government has made on appeal. Specifically you argue that the primary purpose of FISA surveillance may be law enforcement as long as "significant," foreign intelligence purpose is also present. Now, what evidence do you have that Congress understood that possibility when it enacted the "significant purpose" amendment in Section 218 of the PATRIOT Act? Was there any discussion of the FISA surveillance being used primarily for law enforcement purpose and only secondarily for foreign intelligence purposes? Maybe I will go a little bit further. As you can tell, I am asking a question that I know the answer to, but I want you to answer it anyway. In fact, several Senators made specific comments during the PATRIOT Act debate, indicating their understanding that this specific change would increase criminal use of FISA. And let me just cite with particularity. A statement by senator Feingold. Quote: "The Government now will only have to show that intelligence is a 'significant purpose' of the investigation. So even if the primary purpose is a criminal investigation, the heightened protections of the Fourth Amendment will not apply."

Mr. KRIS. That is correct.

Senator HATCH. Senator Wellstone said, quote: "The bill broadens the Foreign Intelligence Surveillance Act, FISA, by extending FISA surveillance authority to criminal investigations, even when the primary purpose is not intelligence gathering." That was on the floor on October 25th, both of them on October 25th.

On October 11th Senator Cantwell said, "Although the language has been improved from the administration's original proposal, now it would require that a significant rather than simply a purpose of the wiretap must be the gathering of foreign intelligence. The possibility remains that the primary purpose of the wiretap would be a criminal investigation without the safeguards of Title III wiretap law and the protections under the Fourth Amendment that those will fill. I would like to ask the Chairman of the Judiciary Committee whether he interprets this language in the same way."

Senator Leahy said, "Yes, the Senator from Washington is correct. While improved, the USA PATRIOT Act would make it easier for the FBI to use a FISA wiretap to obtain information, where the Government's most important motivation for the wiretap is for use in a criminal prosecution."

Well, you know, I do not think there is any question that that is what we intended to do, but give us your take on it.

Mr. KRIS. Well, I mean, I agree with you, Senator Hatch, and those citations to those statements are collected in our brief. I guess I would also say for the Department's part, that on October 1st of 2001 we sent a rather long letter to Congress, and to both the Chairmen and ranking members of the House and Senate Intelligence and Judiciary Committees, describing and defending the "significant purpose" amendment that we had proposed. And that letter said, and I will quote from that, quote, "The Courts should not deny the President the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution." So I do think that—I mean we have in our

brief, and I do rely on this evidence to say that not only is that the inevitable consequence of the plain language of the provision, which I think it is as a simple matter of grammar, but also that at least some members of Congress and the Department, in presenting the amendment, understood that that was what was at stake whether they supported it or not.

Senator HATCH. The Chairman has been kind enough to allow me to ask one more question.

Mr. Kris, in your written testimony you outline the Government's argument that with the modifications of the PATRIOT Act, and specifically Sections 218 and 504, FISA may now be used primarily to obtain evidence for a prosecution of foreign terrorists or spies.

Now, in support of that position, you suggest that criminal prosecution is a "lawful" means to protect our country from spies and foreign terrorists. And would you elaborate on this argument, citing the specific provisions in the PATRIOT Act relating to the definition of "foreign intelligence information" in the FISA statute, and explain how criminal prosecution is one of the several legitimate means to protect our country from foreign spies and terrorist attack.

Mr. KRIS. Sure.

Senator HATCH. You made that point earlier, but I would like you to elaborate on it.

Mr. KRIS. Yes, sir. FISA, as enacted in 1978 said that the Executive Branch must certify, and in the case of a U.S. person, the Court must find that the certification is not clearly erroneous, that the purpose of the search of surveillance is to obtain this category of information known as foreign intelligence information, and "the purpose" was read as the primary purpose and then later changed to a "significant purpose."

But what your question goes to is exactly what is this thing that we are having some purpose to obtain? What is foreign intelligence information? Well, it is defined in 50 U.S.C. 1801 (e)(1), to include information that is necessary to the ability of the United States to protect against a list of specified foreign threats to national security, including both espionage and international terrorism. The basic thrust of our argument on appeal is that information can be used to protect against these threats in a variety of different ways. There are diplomatic methods that can be used. There are military, paramilitary, economic sanctions, intelligence methods, and there is also law enforcement methods. It is back to that analogy, you can do chemotherapy to stop cancer, or you can do surgery to stop cancer, and there are a lot of different ways to go about it.

Sometimes prosecution is the good way. Sometimes it is not. But there is nothing in that definition in 1801(e)(1) that discriminates between law enforcement methods of protecting against these threats and other methods of doing so. The only thing that FISA says about the use of information is that it be lawful. And that would mean, for example, you could not use the information say for some unlawful blackmail or for some other thing that would be unlawful. Prosecution is actually a lawful thing to do. And that really is the center of our argument on appeal,and it is based not only, as I say, on the plain language of the 1978 version of FISA, but also on Section 504 of the USA PATRIOT Act which is now codified

at 50 U.S.C. 1806(k) and 1825(k) for physical searches, which in our view reaffirms this original idea that foreign intelligence information includes information that will be needed to protect regardless of the method, law enforcement or otherwise, that is used to achieve that protection.

Senator HATCH. Thank you so much.

Chairman LEAHY. Mr. Kris, you keep using the analogy of treating a cancer patient. I have a feeling you are probably a far better lawyer than you are a doctor.

Mr. KRIS. That is probably correct.

Chairman LEAHY. And another way you could use the analogy in making the kind of choices the Department of Justice would want it to be, would be that the cancer patient were told, "Well, you have a choice of going to this team of oncologists at Johns Hopkins or to the law firm of Smith, Smith and Smith." I mean, frankly, that is about what is happening, because what you have done, you have had to stretch the language of the FISA statute to reach a position that criminal prosecution is a type of foreign intelligence purpose. Congress never intended criminal prosecutors to be able to choose to use FISA as their first choice.

In your written testimony, you cite a single sentence from a lengthy letter that the Department wrote during consideration of the USA PATRIOT Act in the Senate. The one sentence you quote is in the section discussing Court-imposed constitutional limits in FISA. What you did not cite in your testimony today was a section of the same letter in which DOJ addressed a meeting of the new proposed statutory language which says, "In light of this case law and FISA statutory structure, we do not believe that an amendment of FISA for 'the purpose' to 'a significant purpose' would be unconstitutional as long as the Government has a legitimate objective in obtaining foreign intelligence information. It should not matter whether it also has collateral interest in obtaining information for a criminal prosecution. As courts have observed, the criminal law interest of the government did not taint a FISA search when its foreign intelligence objective is primary."

Now, how do you square that with the view you have advocated that the amendment was intended to allow the use of FISA for cases where the criminal interest was not collateral but primary?

Mr. KRIS. Well, as I understand what you just read, it is a description of the primary purpose case law, which such as it was, certainly did hold or at least indicated—the case law is somewhat more ambiguous than maybe I am saying—but in any event, assume that it did indicate, if it did not hold, that the primary purpose must be something other than law enforcement. I think that is, for example, the holding of the Troung decision from 1980 in the Fourth Circuit.

But the idea was actually to change that, and—so I think the one part of the letter is describing the law and the other is describing what the amendment would do to the law, and I think really it is quite inevitable as just a matter of common English.

Chairman LEAHY. Is this a new argument for the Department of Justice?

Mr. KRIS. No, it is an old argument, Senator. I mean it is in our brief.

Chairman LEAHY. But has it been advanced before in the courts?

Mr. KRIS. Oh. No. In that respect, yes, it is a new argument. This is not an argument——

Chairman LEAHY. Is this saying that for 20 years the courts have been deciding these things wrongly?

Mr. KRIS. Well, in effect, yes, it is saying that. I mean, I think as I said, you can quibble and reasonable minds can differ about exactly to what extent the courts actually held this rather than just assuming it, and there is not that much published case law here.

Chairman LEAHY. Well, we have a hard time finding much published because probably Justice does not want to answer our questions. I read in CQ, I think it was today, that the Republicans for the House Judiciary Committee wants to start subpoenaing these answers. If the Department is correct, if criminal investigators and prosecutors may actually direct or control a FISA wiretap, does that mean that the information sharing consultation provisions that we wrote into the USA PATRIOT Act that are directed at intelligence officials are sort of moot or superfluous?

Mr. KRIS. I am not sure I follow your question. I mean——

Chairman LEAHY. Well, you cannot share with yourself. See, this is what I do not understand. I mean basically what you are trying to do is change 20 years of a way of doing things.

Mr. KRIS. Yes.

Chairman LEAHY. And we find from the courts that some of the mistakes made by the Department of Justice coming before them, I guess even to the extent that one person was probably Justice has been banned from the courts. Are you trying a new interpretation to cover your mistakes, or a new interpretation because you think that is what the law is?

Senator HATCH. The law has changed.

Mr. KRIS. Well, yes. I mean——

Chairman LEAHY. Well, that is why I am asking the question.

Mr. KRIS. Senator Leahy, I do think we are trying to change, and I think we are pretty overt about it, 20 plus years of practice, and I do think that is what the PATRIOT Act represented, was a paradigm shift in this area. And you have cited——

Chairman LEAHY. Then you would say the court is wrong in a unanimous opinion when they say the Attorney General's proposed procedures for the FISA, quote, "appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches. This may be because the Government is unable to meet the substantive requirements of these law enforcement tools or because the administrative burdens are too onerous. In either case these procedures cannot be used by Government to amend the Act in ways Congress has not."

You disagree with the court?

Mr. KRIS. Yes, I disagree.

Chairman LEAHY. You disagree with the unanimous opinion of the court?

Mr. KRIS. Yes. I mean we disagree respectfully, and we have a lot of respect for that Court, but I mean that is what it means when you—I mean we are appealing because we think they got it wrong.

Chairman LEAHY. I have argued a few appeals myself. I understand what appeals are. Thank you. Although I have never been in a case where I could argue the appeal in secret and be the only person appealing even when I represented the Government, I was never able to argue in a secret hearing before a court that meets in secret and where the other side cannot be heard. From a government attorney's point of view, it must be a lot of fun.

[Laughter.]

Mr. KRIS. That is not the word I would use to describe the process, and I have—I want to apologize. I did not mean to be—I know that you have law enforcement experience as a prosecutor, and I do not mean to be disrespectful.

Chairman LEAHY. No, and you were not, Mr. Kris.

Mr. KRIS. I mean we do disagree with the Court and we are—we will see what happens in the appeal. If we are right on the law, then I guess the Court will tell us, and if we are wrong on the law, then I am sure the Court will tell us that too, and we will have to see.

Chairman LEAHY. Well, if the Justice Department is now wanting to use FISA as a tool in matters brought primarily for law enforcement purposes, should we consider importing some of the procedural protections applied at criminal wiretaps to FISA wiretaps?

Mr. KRIS. Actually, that issue did come up in one of the briefings I did for the staff. I think that we would be prepared to discuss some other reforms in FISA. I think some of the requirements at least that existed on the Title III side are not a good fit for FISA. There may be some things that we can do. I guess what I would say is an intelligent discussion of additional changes in this area I think ought to await the implementation of—well, first the decision of the Court of Review. We will have to see. We may be all mooted out by a decision that affirms, in which case none of this will be in play.

If we prevail in the appeal, then I think there will be a period of the mandate going to the FISC and the FISC and us interpreting the Court of Review's decision, and then a period of education of our people because if our arguments are accepted, it is a big change. And we are certainly not hiding from that. It would be a big change, but that is going to take some time to get the word out and educate our line attorneys and agents. And then I think what you will see is as that happens, cases developing in a different way, and one might see public prosecutions that occur using FISA under a different pattern. And I think it would be useful to see what happens in that respect.

Chairman LEAHY. Let me ask this last question, and I ask it of the whole panel.

We were talking about development of the secret body of laws without public scrutiny, and that is very unusual, not only in our democracy but any democracy. The Department is urging broader use of the FISA in criminal cases. And you are going to lose, ultimately lose public confidence both in the Department and in the courts, unless you can, by public reporting or otherwise show this is being used appropriately. Right at the moment, as we worry about terrorist attacks, there is a certain amount of freedom given you, but people are beginning to worry more and more from across

the political spectrum. So, do you see any problem with public reporting of the number of times FISA is used on U.S. persons, the legal reasoning used by the FISA Court, or the number of times FISA information is used in criminal cases?

I ask that question because the answer and what happens is certainly going to reflect the debate which is coming up actually, in congressional terms, fairly soon, about whether we sunset all these provisions.

So what would you say, Mr. Kris? Then we will go to the other members.

Mr. KRIS. Yes. I mean they do sunset at the end of 2005. We are very acutely aware of that. I think that part of what you said might be possible, part I think is not a good idea.

Chairman LEAHY. Tell me what part is possible and what part is not.

Mr. KRIS. I think, for example, disclosure of the number of "U.S. person" cases involving FISA to the public could pose some operational risks for us. I do not want to—not in this hearing anyway—get into them. We do report that kind of data and more to the intelligence Committees on a twice-annual basis, and it is quite an extensive written document that is produced to them, and I know that—well, there are members of this Committee that are also on the other Committee, so they know what I am talking about. I worry about disclosure of certain operational information that might be useful to the adversaries in avoiding coverage. We do not want to give them too much of a road map of how we go about doing this.

Chairman LEAHY. How about reporting the number of times that FISA information is used in criminal cases? I would assume these criminal cases are open and public.

Mr. KRIS. Yes. Indeed we already report, under a relatively recent amendment to FISA, we already report exactly that information to the intelligence Committees.

Chairman LEAHY. You do a classified report about what was done in an open public court. I am asking what do you think about reporting the number of times this information is used in criminal cases, assuming those criminal cases have been in an open court with the press and everybody else available?

Mr. KRIS. Well, I will say that I agree with you that the information that reveals the use of FISA in a criminal trial is public. The trial is public and notice is given to the target or any aggrieved person against whom the information is used. So at that point you are not hiding the fact any longer of the existence of a FISA. And I will—I am not authorized to commit the Department, obviously, but I will take it back and we will, I think, look forward to working with you as the—I mean we will be——

Chairman LEAHY. But I might not be following what happened in the Western District of Pennsylvania or the Southern District of New York on all these hundreds of cases, but you certainly have to know. And it has been publicly disclosed, and it would be interesting to know, because obviously, if you have a huge increase in the number of criminal cases that turn out to be things like mail fraud and so on, then we might want to know. And we all want to think that our priorities are counterintelligence and protecting

us, but we also now that investigations go on in such things as, as was brought out in one of these hearings: the amazing discovery by the Department of Justice that there were some prostitutes in New Orleans, something that nobody ever would have known about if they had not done that.

[Laughter.]

Chairman LEAHY. Professor Banks.

Mr. BANKS. As you said, Senator, the secrecy in the process is ultimately corrosive, and anything that the Department and the Congress can do to reduce the amount of secrecy that attends a necessarily secret process is a good idea.

I think your two specific suggestions are good ones. I do understand the operational sensitivity of a "U.S. persons" disclosure, and perhaps there is a middle ground there. I made several other specific suggestions in my written remarks about oversight mechanisms that could open up the process to some degree.

Chairman LEAHY. Thank you.

Mr. Bass?

Mr. BASS. Senator, the specific proposals would only enhance national security if they were enacted. The only legitimate security concern about disclosing publicly the number of U.S. persons was theoretically in the early years when that number may have been two that we would disclose, having prosecuted two, people that we weren't targeting.

I can't believe the number is that small in the present circumstances, but at the same time I am absolutely confident that the number of U.S.-person-targeted surveillances in the FISA environment is so small compared to the total volume that the United States public and this Committee could only feel more comfortable about our national security, which for me includes liberty as well as counter-intelligence and counter-terrorism, if that number were publicly known.

If I could briefly comment, though, on one point about the statement that was made about the Department understanding the PATRIOT Act as trying to reverse 20 years of judicial history, that is not the way I viewed what the Congress did.

I won't elaborate on it because it is in my prepared testimony, but in the early days the original understanding of the Act did not include a primary purpose test and did not include a wall. The primary purpose test and the wall developed largely in 1995 as a result of things this Committee knows better than I do, but can certainly find out about.

I read the PATRIOT Act as saying tear down the wall. I read the PATRIOT Act as saying go back to the original understanding, not to go beyond the original understanding and to transform FISA into an alternative Title III, which is what I hear the Department saying today.

Chairman LEAHY. Thank you.

Mr. Halperin?

Mr. HALPERIN. Well, first, if I can comment on that very briefly, the fact is that the paragraph that you read, Mr. Chairman, is not in the section of the letter that Mr. Kris said it is in. It is in the section of the letter precisely interpreting what would be the meaning of the new "significant purpose" section. So I think the Justice

Department has created a legislative history for itself which supports the Committee's interpretation, and the letter speaks for itself and where it is in the letter speaks for itself.

On the issue of how to make it more open, I do want to say that I find it somewhat strange that this is always referred to as a secret court issuing secret warrants, because, of course, all search warrants are done ex parte in secret just with the government. So in that sense, this isn't any different.

But I do think that nobody contemplated that decisions of law which were unclassified would not be made public, and I think nobody contemplated that appeals which dealt with legal issues would be non-adversarial and in secret. And I do think that Congress needs to make it clear that if the court issues unclassified opinions, they need to be published. You don't have to wait until you somehow find out about them and ask for them.

I also think that what happened yesterday was disgraceful: a hearing on legal issues in which there was no adversarial process, in which the public was not allowed to be present. If the Government thought it needed an additional session in camera to present some information, as it did in its brief, that could have been decided by the court and would have been appropriate.

But the notion that you have a public opinion, you have a public Government brief, and you have a secret non-adversarial hearing goes against, I think, every fundamental element of what we understand to be the way to protect individual rights in a constitutional process. And I think if the court doesn't correct that, Congress needs to do so.

Chairman LEAHY. Thank you.

Senator DEWINE.

Have you asked questions?

Senator SPECTER. No.

Chairman LEAHY. I am sorry. I thought you had asked questions. I apologize.

Senator SPECTER. No, I have not.

Chairman LEAHY. Senator Specter. I do apologize.

Senator SPECTER. Mr. Kris, taking up the issue of standards for probable cause on warrants under the Foreign Intelligence Surveillance Act, I know you have the case of *Illinois* v. *Gates* because you showed it to me when I walked by to greet you before the hearing started. I had thought that the *Gates* case was prohibited reading for the Department of Justice and the FBI.

Is there any doubt in your mind that the appropriate standard for the issuance of a warrant under the Foreign Intelligence Surveillance Act? It does not require preponderance of the evidence?

Mr. KRIS. There is no doubt in my mind on that score.

Senator SPECTER. Or any higher standard?

Mr. KRIS. Certainly not higher.

Senator SPECTER. And the definition which then–Associate Justice Rehnquist articulated, going back to the opinion by Chief Justice Marshall all the way back to the Cranch case in 1813, turns essentially on suspicion and a totality of the circumstances?

Mr. KRIS. I completely agree.

Senator SPECTER. Do you know if there has been any effort since the June 6 hearing with Special Agent Rowley and FBI Director

Mueller where this Committee took up in great detail that question—whether there has been any effort to educate the agents of the FBI about that standard?

Mr. KRIS. Yes, sir, there has been, and indeed I think this came up in my earlier answers to Senator Grassley's questions. I know the Bureau is preparing some guidance on the probable cause.

Senator SPECTER. Who is preparing it?

Mr. KRIS. The FBI, and I myself actually reviewed a draft of that guidance, I don't know, a week or two ago.

Senator SPECTER. Well, had that been done before we had the closed session with the FBI agents on July 10?

Mr. KRIS. I don't know the answer to that. I certainly don't think I reviewed a draft until after July 10. I couldn't tell you whether it was——

Senator SPECTER. Why does it take so long, when these warrants are so important to find out what is going on with possible subversion or possible terrorism?

Mr. KRIS. I really can't answer that fully. I can say that when I saw the draft, the suggestion I had was because probable cause is such a fact-intensive inquiry, because it is a pragmatic, fluid concept, you can't actually say much that is meaningful and actually helpful in the abstract.

What you need to focus on are some examples of real cases with real facts in which the facts are such and such, and the court rules yes or no, there is or is not probable cause. So I think maybe the crafting of the guidance has taken some time. They want to get it right, they want it to be helpful, they want it to be useful and good. So sometimes that takes some time, but I am not really intimately part of that process. I just reviewed this draft recently.

Senator SPECTER. Well, I do not agree with you that definitions in the abstract are not helpful. They may not be conclusive, but when the court articulates a standard for probable cause, they cannot start to run out a whole string of examples; they have to generalize.

When you have Associate Justice Rehnquist, now Chief Justice, articulating that standard, isn't it minimal that the FBI agents would know the case? It may not provide all the answers, but it is a start, isn't it?

Mr. KRIS. I mean, I maybe overstated in my prior answer. I don't mean to say that there is nothing useful to be said in the abstract, but saying something like it is not a preponderance or a "more likely than not" standard is a good start—I will take your point on that, but I think that good guidance here would actually trot out a series of examples because, at ground level, I think the central teaching of *Gates* is that it is such a fact-intensive question and it is such a pragmatic standard that at least you can't just describe these things in abstract terms. You need to get down in the weeds and dig in.

So maybe I will retract my statement to the extent I said abstract is no good. It is just not the whole picture.

Senator SPECTER. Well, would you find out for this Committee when the standards were propounded and would you furnish this Committee with a copy of the standards, and would you seek to provide an answer as to why it has taken so long?

The generalizations that you have given I consider inadequate if it wasn't done by July 10. We will find out when it was done, and I would prefer to ask Director Mueller these questions, but he is not here and he hasn't responded to correspondence.

We had a lengthy session with Attorney General Ashcroft on this matter during the oversight hearing and it got me a luncheon invitation to meet with him and his top deputies at the Department of Justice. Frankly, I wasn't interested in lunch, but I was interested in an answer. So I went to lunch and then I finally got an answer.

But to say that it is disquieting is an understatement. To say that it is disrespectful to the Judiciary Committee is an understatement. But the real point is that it puts Americans at peril if the Department of Justice and the FBI don't know what the standard is, if they are applying a standard which is too high.

So we have the converse here of the FBI and the Department of Justice being uninformed about the standard and applying the wrong standard. And you have a public hearing on June 6, widely publicized. Agent Rowley was all over the newspapers, all over television, and by July 10 the FBI agents still don't know what the standard is, and then my letter to the Director the very next day to try to get some motion.

So let us know the specifics as to when they acted and the specific instructions which were given and an explanation, if you can provide one.

And just for a moment, having not been as vigorous as the Department ought to be, is there some effect on being gunshy by the FBI as a result of one agent being disqualified from applying for warrants to the FISA Court?

Mr. KRIS. I don't—and I have said this before in briefings—I don't see a connection between concerns about the accuracy of FISA applications and the facts reported in them and the adequacy of those facts to establish probable cause.

The accuracy principle requires us to tell the truth to the court and give the facts, good, bad and ugly, such as they are, and not to omit material facts and not to misstate material facts. That is an obligation the Government always has in dealing with any court, but it is particularly potent with respect to this court, in part because of the nature of the proceedings.

Senator SPECTER. So your answer is no?

Mr. KRIS. I don't see a connection between that and what you call being gunshy about facing up to the facts such as they are and then pushing them to probable cause.

Senator SPECTER. My red light is on, so I want to conclude this. The Committee intends to go into detail as to why the agent was disqualified. I think that is a very severe consequence for the court to disqualify an agent and we intend to look at it.

If the court disqualifies him from being an agent, he still is an agent. He appeared in our closed session.

Mr. KRIS. Yes.

Senator SPECTER. Then there is a question about whether he ought to be an agent. Speaking for myself, I don't think the FBI ought to sit back and let an agent be disqualified unless there is really a basis for it. They ought to protect the agent, but that is

an oversight function for this Committee. We will take a look at what the court has done and what the FBI has done.

Mr. Halperin, just one question for you. You are a veteran of this line and have special insights, having been the subject of illegal eavesdropping over wiretaps yourself. Do you have any reason to challenge what the FBI or the Department of Justice is doing under the Foreign Intelligence Surveillance Act or Title III wiretaps at the present time?

Mr. HALPERIN. Well, of course, the problem is that we don't really know because we don't learn until much later. I was frankly very disturbed by the court's decision. That is, as I have said, a group of very distinguished judges. Many of us have worked with Royce Lamberth when he was in the Justice Department, know of his decisions on the court.

Senator SPECTER. Why were you disturbed with the decision? I would have thought you would have liked it.

Mr. HALPERIN. I liked the outcome. What I was disturbed by was the clear indication that the judges, not only on the issue of the incorrect facts, but in their view that the Justice Department had misinterpreted the intent of Congress in the statute—that the Government was, in fact, doing things that it should not be doing. I was pleased that the judges ruled the way they did. I think their decision was correct.

But I think it underscores the fact that oversight by this Committee, by the Congress as a whole, making the court procedure more open to the degree that we can and more adversarial is necessary because otherwise there is no way to find out what is to be done.

It is also, I think, a problem, in my view, that the courts have misinterpreted the provisions of the statute that deal with what happens when the Government uses FISA information in a criminal prosecution. As I understand it, there has not been a single case in which the defendant has been given the justification for the wiretap so that there could be an adversarial confrontation as to whether there was, in fact, probable cause.

The statute says that needs to be done when due process requires it, and I think the courts have misinterpreted it to say that a non-adversarial, in camera hearing is always sufficient. That increases the sense that we can't really know what is going on because even people, where it is used against them in a criminal trial, don't have what I think is the necessary opportunity to challenge that.

Senator SPECTER. Well, I would like to go further, but Senator DeWine has been waiting a long time. In conclusion, I would just say we intend to pursue it. This oversight is going to be pursued, but I have to tell you it is like pulling teeth, with all due respect, Mr. Kris, dealing with the Department of Justice, like pulling bicuspids dealing with the FBI. And it is pretty hard to deal with the court, telling us separation of powers, when we are looking for an opinion. That is not separation of powers, to read an opinion.

Thank you, gentlemen, for being here. Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you, Senator.

Senator DEWINE.

Senator DEWINE. Well, Mr. Chairman, let me just reiterate what I said earlier in my opening statement, to follow up on what Senator Specter just said, that it is impossible for this Judiciary Committee and for the Intelligence Committee and for Congress to have proper oversight because we don't know what the court has been doing. It is one of the only times that we have passed a law that we don't have any really good indication of its effectiveness.

You know, it is obvious from this panel and this Committee that we are probably divided on how we look at this and which way we should be going. But without the ability to get the information, it is just very, very difficult.

Mr. Kris, let me get back to you one more time. I know you are having a great day today. Thank you for being with us, and all the panelists. It has been a good panel. Mr. Bass said a few minutes ago that he believes that you at the Justice Department look at FISA as an alternative to Title III, and I want to kind of explore that with you because I am still not clear and I don't think it is clear how far you all think the law does, in fact, go.

The PATRIOT Act, in Section K, talks about coordination with law enforcement and I will read part of it. "Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with federal law enforcement officers to coordinate efforts, to investigate or protect against," and three things are listed. Then it concludes: "Coordination authorized under paragraph (1) shall not preclude the certification which is required by section," et cetera.

How far does this go and what is your position? I mean, do you believe that the correct interpretation of the law is that Justice can, in fact, direct FISA investigations, or that law enforcement can? It is not clear how far that goes. I know what the statute says. I have looked at your guidelines. "Consultations may include the exchange of advice and recommendations on all issues necessary to the ability of the United States to investigate or protect against foreign attack." And then it goes on later on: "initiation, operation, continuation, or expansion of FISA searches or surveillance."

Mr. KRIS. There is a very long answer to your question which I will avoid for now, and then there is a shorter answer. So let me start with the shorter one, and that is I think that direction or control by law enforcement——

Senator DEWINE. Well, let's start with my first question, though, whether or not you really think that this is an alternative to Title III and you can just kind of pick and choose, which is the inference from Mr. Bass.

Mr. KRIS. Yes, I mean I guess I would say that is right at least to a certain extent, or at least to the following extent. If we are faced with a case in which we satisfy the standards of Title III and we also satisfy the standards of FISA, then it would be a matter of choice which avenue——

Senator DEWINE. Okay. I would interpret that as a "no, but," but you can say it however you want to.

Mr. KRIS. I mean, I do think it is an alternative.

Senator DEWINE. You are saying you have to meet the requirements of FISA?

Mr. KRIS. Yes. So in that sense, of course, it is an alternative. I mean, I think maybe what Mr. Bass is getting at is that our interpretation of FISA makes it available even when prosecution is the purpose of the surveillance, and with that I certainly do agree. Our fundamental——

Senator DEWINE. Agree in what way?

Mr. KRIS. I agree that prosecution—when you are dealing with spies and terrorists and those listed threats that you mentioned that are cited not only in the definition of foreign intelligence, but also in the——

Senator DEWINE. Which the law says you can cooperate with.

Mr. KRIS. Right. When you are talking about those threats, I say that FISA does not discriminate among law enforcement methods and other methods of protecting against them. So it doesn't matter for purposes of FISA whether the goal is to protect against espionage by prosecuting Robert Hanssen or whether the goal is to protect against espionage by flipping him and turning him into a triple agent and running him back against his handlers. That difference is not a difference that has traction in FISA. That is the Government's position.

Senator DEWINE. But you would qualify that, I guess, by what you said a moment ago that if you are proceeding under that, you still have to qualify under both. Is that right?

Mr. KRIS. Under—I am sorry—both what?

Senator DEWINE. Title III and FISA.

Mr. KRIS. No. If you file a FISA application, you need only satisfy FISA. You don't need to worry about Title III, and vice versa.

One other point I should make is it is easy to take these "purpose" provisions in isolation from the rest of the statute. I think it is important to point out one very key difference between Title III and FISA which does make a difference about their availability apart from the law enforcement purpose, and that is who can be a target.

Title III can basically apply to any felon in the case of electronic communications and to anybody who commits a long list of predicate felonies set forth in Section 2516 for wire and oral communications. It doesn't say anything about who the target is, other than that it be somebody who is committing these list of crimes.

FISA, by contrast, is confined to persons who qualify as agents of foreign powers. So if there is an investigation of Bonnie and Clyde for bank robbery, or even John Gotti, that is not a FISA—you can't do that under FISA.

Senator DEWINE. My time is up, but let me just close, with the chairman's permission. In the Attorney General's guidelines, the term "direct" is not used, and so I would like to understand whether Justice intended to have prosecutors direct FISA investigations.

Mr. KRIS. Well, I would say that the term "direction and control" is not in our procedures, nor is it anywhere to be found in FISA. Direction and control—I mean, I don't even know exactly what that is. If it means advice-giving, I think there is a lot of advice-giving.

If, however, direction and control were exercised by prosecutors, if they started bossing around the intelligence agents to the point that there was no significant foreign intelligence purpose for the

surveillance, then, of course, we would be over the line. There must be a significant foreign intelligence purpose for the surveillance.

I think direction and control is just a proxy that has no textual anchor in FISA, and it is a bad proxy. The test that matters always is, is there a significant foreign intelligence purpose for this surveillance. In some cases, there will be direction and control and there still will be a significant foreign intelligence purpose. In others, there wouldn't be. It would depend on the facts, but I think we need to focus on what the statute actually says and not some formula that was created as a proxy. And it appears in the 1995 guidelines—I don't mean to cast aspersions on others, but I don't think it is rooted in the text of the statute. So I don't think it ought to be used instead of the actual text of the statute.

Senator DEWINE. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Well, I thank you gentlemen for this.

Mr. Bass, you know, I couldn't help but think when Mr. Kris was answering that that your eyebrow went up a bit.

Mr. BASS. It did.

Chairman LEAHY. Was I reading that correctly?

Mr. BASS. You did. Let me put a specific hypothetical to the Committee and to Mr. Kris that I think highlights the concern at least that I have.

If we had in the beginning been presented with an FBI agent from the Southern District of New York who came in and said we have uncovered evidence of securities fraud being engaged in by this U.S. citizen who is an employee of Deutschebank and we want to do a FISA surveillance, it would not have taken us two minutes to say go down to the Criminal Division, don't come to us, despite the fact that I think legally we could have worked that surveillance into the text of FISA.

But the critical difference would have been that in that sort of case, there was absolutely no intention in anybody's mind of using it as part of a national security policy concern. It would not have gone to the NSC, it would not have gone to State, it would not have gone to the White House. It would have remained a purely domestic law enforcement matter.

I haven't heard the Department of Justice publicly confront that sort of hypothetical and tell us what they think the PATRIOT Act did to that calculus. I hear some overtones that say, well, we think if we could squeeze it under the language of the Act and make that a matter of statutorily defined foreign intelligence, we could do that surveillance even if we had no intention from day one of ever doing anything except to conduct a criminal investigation.

If that is their view, I think they are dead wrong with respect to congressional intent, to the extent I can divine some intent from the PATRIOT Act, and I think they are dead wrong as a matter of public policy. But that is the issue for me that we are still waltzing around.

Senator DEWINE. Mr. Chairman, just one last comment. The chairman has been very indulgent.

Chairman LEAHY. Always.

Senator DEWINE. I know. I appreciate it, Mr. Chairman.

We are going to have this debate, and I am glad we are having this debate. I think it is very proper and I think a lot of good points have been made, but it seems to me that the bottom line is going to come down to a common-sense approach, however we craft it, and that is the question why are we after this guy, why do we want him?

It seems to me that is what Mr. Bass was saying, and I think it was frankly what Mr. Kris was saying. The public would pretty much understand that. Why do we really want this guy? Is it a national security issue or is it because he is a no-good bum and he is violating the law and we have to go get him? It seems to me that is what it is going to boil down to.

Chairman LEAHY. Yes, but we should never forget the history of how this all got put into place.

Senator DEWINE. Well, we are not going to forget that.

Chairman LEAHY. No. I mean, in a society like ours we do have these checks and balances. The Senator from Ohio is a former prosecutor. We both used to hear people say, boy, we have got to get rid of all these technicalities so we can get at the criminals. We tended to be able to work pretty well with the technicalities, from *Miranda* to search and seizure, because we knew it did give a check and balance.

I don't want to go back to the days in the past when we started going into these investigations because we didn't like somebody's political views or religious views, because that is a sword that can cut too many ways.

Somebody had answered about the Woods Procedures. We got those declassified and released at our June 6 hearing. I believe it was you, Mr. Kris, who mentioned it. I am glad they are working to increase the accuracy of affidavits given to the FISA Court.

I think we are going to have to have a lot more hearings on this. I would urge the Department of Justice to listen—this is not a partisan call to the concerns being expressed by both Republicans and Democrats of both the House and Senate Judiciary Committees.

Obviously, on this Committee, and I have been on it for nearly a quarter of a century, we try to work with whatever administration there is and to try to get things cooperatively. We also have subpoena power. Cooperation is always more satisfactory to everybody. Subpoena power is always there.

Senator Thurmond has submitted a statement and it will be included in the record.

[The prepared statement of Senator Thurmond appears as a submission for the record.]

Chairman LEAHY. We also have a FISC opinion, of May 17, 2002; a letter from myself, Senator Grassley, and Senator Specter to the FISC; and a chart that we will include in the record at this point.

Thank you, gentlemen, for taking the time.

[Whereupon, at 12:22 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Answers to Written Questions of Senator Patrick Leahy
Chairman of the Senate Judiciary Committee
Based on the Hearing Before the Senate Judiciary Committee
"The USA PATRIOT Act in Practice: Shedding Light on the FISA Process"
September 10, 2002

Introduction: Please provide answers to the following questions to the maximum extent possible in unclassified form. Should the answer to a question contain classified information, please provide the classified portion of the answer to the Committee via the Senate Security Office. If the Department is refusing to answer any question either in either classified or unclassified form, please fully explain the reason for such refusal.

1. The Justice Department argues that information collected **exclusively** for the purpose of criminal prosecution can be a type of "foreign intelligence" information because the definition of "foreign intelligence information" encompasses all information relevant or necessary to help the U.S. protect against specified threats, including attack, sabotage, terrorism and espionage committed by foreign powers or their agents, even if the form of that protection occurs in a criminal prosecution. The Department acknowledged in its brief that the Department of Justice has "never advanced" this argument before.

(A) Is it correct that the USA PATRIOT Act did not change the statutory definition of "foreign intelligence" as it applies to such matters?

As explained in the principal brief and supplemental brief for the United States in the appeal to the Foreign Intelligence Surveillance Court of Review (both of which have previously been provided to the Committee), the USA Patriot Act did not change the statutory definition of "foreign intelligence information." See 50 U.S.C. § 1801(e). On the contrary, the Patriot Act reaffirmed the original definition of that term, and incorporated its operative language, verbatim, into new provisions of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1806(k) and 1825(k). Those new provisions expressly permit intelligence officials using FISA to "consult" with "Federal law enforcement officers" to "coordinate" efforts to "investigate or protect against" foreign threats to national security, including espionage and international terrorism. The Patriot Act provides that such coordination "shall not" preclude the government's certification of a significant purpose to obtain "foreign intelligence information," or the issuance of an order authorizing a search or surveillance by the Foreign Intelligence Surveillance Court (FISC). The Patriot Act's legislative history states clearly that the Act was intended to reaffirm the original meaning of "foreign intelligence information" to include information sought for use as evidence in the prosecution of a foreign spy or terrorist.

The introduction to the Committee's question states that the Department acknowledges that it has "never advanced" its current interpretation of the definition of "foreign intelligence information." That is not fully accurate. The government's principal brief on appeal states (page

46) that "from all that appears" it never advanced that interpretation in any of the following published judicial decisions: *United States* v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States* v. *Duggan*, 743 F.2d 59, 78 (2d Cir. 1984); *United States* v. *Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *United States* v. *Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States* v. *Johnson*, 952 F.2d 565, 572 (1st Cir. 1992). It did not refer to other contexts. The government's supplemental brief on appeal recounts in detail the history of the Department's position on this and related issues.

In its opinion released on November 18, 2002, the Court of Review held that while FISA as enacted in 1978 allowed surveillance exclusively for the purpose of gathering evidence for a criminal prosecution, the USA Patriot Act requires a significant non-law enforcement purpose.

(B) The Department of Justice is arguing that as it was originally drafted in 1978, FISA's definition of a "foreign intelligence" purpose could include information that was collected exclusively for the purpose of criminal prosecution of a terrorism or espionage case. Why did the Department of Justice never advance this argument prior to now – that is, 24 years after FISA's enactment, a time period that encompassed several different Administrations from both political parties and countless espionage and terrorist threats to this country?

The history of the Department's interpretation of FISA is set forth in detail on pages 2-20 of the government's supplemental brief on appeal, a copy of which has previously been provided to the Committee.

(C) Other than the portion of a single Ninth Circuit opinion, which the Department of Justice conceded in its brief was "dicta," is there any other reported or unreported opinion taking this view of "foreign intelligence?"

This matter is addressed in the opinion of the Foreign Intelligence Surveillance Court of Review. As the government's principal brief explains (pages 45-49), the "courts did not endorse" the government's current position, but neither did they "expressly reject[]" that position (emphasis removed). The Fourth Circuit's decision in *United States* v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), did not purport to interpret or apply FISA. Relevant language cited in support of the government's position is in dicta in the Ninth Circuit's decision in *United States* v. *Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

2. As a practical matter, is it the Department's position that it is simply not necessary to use the authority under title 18, United States Code, for electronic surveillance, or the authority under the Federal Rules of Criminal Procedures for criminal search warrants, in criminal investigations when (i) an agent of a foreign power is the target; or (ii) when the investigation is focused on foreign terrorism or espionage activity?

The Department's position is that where all of the provisions of FISA are satisfied, and a surveillance order is lawfully available under FISA, the government may use FISA. Where all of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 are satisfied, the government may use Title III. Similarly, where one party to an electronic or other communication is a government agent, or otherwise consents, the government may secretly monitor the communication without any probable cause or prior judicial order of any sort. See 18 U.S.C. § 2511(2)(d), 50 U.S.C. §§ 1801(f); *United States* v. *White*, 401 U.S. 745, 751-753 (1971). Where the government satisfies Rule 41 of the Federal Rules of Criminal Procedure, it may obtain a search warrant under that provision. And the government may also search private property, again without probable cause or any prior judicial approval, upon consent. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); 50 U.S.C. § 1821(5). Tactical and legal considerations inform the government's decision to use one or more of these investigative tools, as well as various other investigative tools – *e.g.*, national security letters or grand jury subpoenas – in individual cases. As to whether the government may use FISA, rather than Title III or Rule 41, merely because "(i) an agent of a foreign power is the target; or (ii) when the investigation is focused on foreign terrorism or espionage activity," see the responses to Questions 4 and 17, *infra*.

3. In a case where the FISA is being used for primarily criminal purposes under the Department's interpretation of FISA, would it be permissible for the criminal prosecutors or agents to "direct" or "control" a FISA surveillance or search? Which if any of the actions described in question 4 (a)-(d) would the criminal prosecutor or agent be allowed to take?

As explained in the government's principal brief on appeal, the "direction or control" test is inappropriate for at least two reasons. First, it has no textual support in FISA or any published decision interpreting the statute. Second, the test is highly ambiguous – and therefore dangerously constricting – in practice. As the Department's witness at the September 10, 2002 hearing explained to the Committee:

> I would say that the term direction and control is not in [the Department's] procedures, nor is it anywhere to be found in FISA. Direction and control, I mean I don't even know exactly what that is. If it means advice giving, I think there's a lot of advice giving. If, however, direction and control were exercised by prosecutors, if they started bossing around the intelligence agents to the point that there was no significant foreign intelligence purpose for the surveillance, then of course we would be over the line. There must be a significant foreign intelligence purpose for the surveillance. I think direction and control is just a proxy that has no textural anchor in FISA and it's a bad proxy. The test that matters always is, is there a significant foreign intelligence purpose for this surveillance?
>
> Some cases there will be direction and control and there still will be a significant foreign intelligence purpose.

> Others there wouldn't be. It would depend on the facts but I think we need to focus on what the statute actually says and not some formula that was created as a proxy.

The Department's March 6, 2002 Intelligence Sharing Procedures, which have previously been provided to the Committee, state that prosecutors and intelligence agents may exchange

> advice and recommendations on all issues necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities, including protection against the foregoing through criminal investigation and prosecution, subject to the limits set forth above. Relevant issues include, but are not limited to, the strategy and goals for the investigation; the law enforcement and intelligence methods to be used in conducting the investigation; the interaction between intelligence and law enforcement components as part of the investigation; and the initiation, operation, continuation, or expansion of FISA searches or surveillance.

March 6, 2002 Intelligence Sharing Procedures, Part II.B. The Foreign Intelligence Surveillance Court of Review upheld in full the March 6, 2002 Procedures, and rejected the "direction or control" test.

4. In an investigation of an alien who works for a foreign government-owned bank, for possible violation of securities fraud, would it be permissible for the criminal prosecutors to take any or all of the following actions:

(A) Recommending specific targets, phones, or search locations for FISA applications?

(B) Recommending that specific FISA surveillances be initiated or terminated?

(C) Recommending that foreign intelligence agents take specific actions besides FISA surveillance to gather evidence specifically intended to be used for a criminal case, such as following a person, "sitting" on a house, or doing "trash rips?"

(D) If any or all of these are permissible, what safeguards have been instituted to ensure that valuable and scarce foreign intelligence resources are not diverted to primarily criminal matters?

While addressing hypothetical questions may provide some assistance in considering how FISA applies, it must be emphasized that application of FISA in any case is highly dependent upon detailed consideration – first by the appropriate Executive Branch officials and then, if FISA applications are made, by the FISC – of the specific facts and circumstances of the

particular case. To provide a definitive answer to the hypothetical question posed, it would be necessary to consider specific facts and circumstances that are not all specified in the question, including but not limited to facts concerning whether the "foreign government-owned bank" is a "foreign power" and whether the "alien" is an "agent of a foreign power" as defined by FISA.

If the target of a proposed surveillance does not fall within the statutory definition of a foreign power or an agent of a foreign power, FISA surveillance would not be available. Under 50 U.S.C. § 1801(a), a "foreign power" is defined to be any of the following:

> (1) a foreign government or any component thereof, whether or not recognized by the United States;
>
> (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
>
> (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
>
> (4) a group engaged in international terrorism or activities in preparation therefor;
>
> (5) a foreign-based political organization, not substantially composed of United States persons; or
>
> (6) an entity that is directed and controlled by a foreign government or governments.

The legislative history of FISA explains that Section 1801(a)(3) "would include, for example, a legitimate commercial establishment which is directed and controlled by a foreign government. Such a legitimate commercial establishment might be a foreign government's airline, even though it was incorporated in the United States." H.R. Rep. No. 95-1283, 95th Cong. 2d Sess. 29 (1978) [hereinafter House Report]. If the bank referred to in the Committee's question is "openly acknowledged" to be owned (directed and controlled) by the foreign government, then it could be a foreign power under Section 1801(a)(3).

FISA defines the term "agent of a foreign power" in a way that distinguishes between "United States persons" and other persons, commonly referred to as "non-United States persons." See 50 U.S.C. § 1801(b). The term "United States person" is defined to include some, but not all, persons who may be characterized as "aliens." 50 U.S.C. § 1801(i). In particular, a "United States person" includes "a citizen of the United States" and "an alien lawfully admitted for permanent residence." *Ibid.* (emphasis added). Thus, a lawful permanent resident alien – a green card holder – is a U.S. person, but a visiting foreigner or an illegal alien is not a U.S. person. See House Report 32.

The term "agent of a foreign power" is defined by FISA as follows (50 U.S.C. § 1801(b)):

(1) any person other than a United States person, who –

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who –

(A) 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;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

As the text of this definition makes clear, FISA defines the term "agent of a foreign power" more narrowly when it comes to U.S. persons, including permanent resident aliens. Such a U.S. person can be an "agent of a foreign power" only if he engages in some level of specified criminal activity. As explained in the government's supplemental brief on appeal, there are two main categories of U.S.-person agents of foreign powers: (1) persons engaged in espionage and clandestine intelligence activities; and (2) persons engaged in sabotage and international terrorism. A third category includes persons who enter the United States under a false identity or assume a false identity on behalf of a foreign power.

As a general proposition, the "possible violation of securities fraud" statutes referred to in the Committee's question would not satisfy FISA's probable cause standards for U.S. persons because such a violation generally would have no connection to clandestine intelligence activities, sabotage, international terrorism, or assuming a false identity on behalf of a foreign power. It is, of course, also possible, that if additional facts are added to the hypothetical question – such as that the person committing the fraud is known to be an agent of a hostile foreign intelligence service and he is engaged in fraudulent financial transactions to assist that service in clandestine funding of its intelligence activities – the situation might be suitable for the use of FISA. Also, a U.S. person cannot be an agent of a foreign power unless he engages in the specified conduct – clandestine intelligence activities, sabotage, international terrorism, assuming a false identity – "for or on behalf of" a foreign power.

In addition, a "significant purpose" of the proposed surveillance must be to obtain "foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B). (The FISC does not review that certification in cases involving non-U.S. persons, see 50 U.S.C. § 1805(a)(5); House Report 80-81, but that does not relieve the government of its obligation to file truthful certifications.) "Foreign intelligence information" includes information that is "relevant" (or in the case of a U.S. person is "necessary") to the ability of the United States to "protect against" attack, sabotage, international terrorism, or clandestine intelligence activities committed by foreign powers or their agents. See 50 U.S.C. § 1801(e)(1). Securities fraud is a federal crime, but (subject to the caveat concerning additional facts set forth above) it has no apparent connection to attack, sabotage, international terrorism, or clandestine intelligence gathering. As the government's principal brief on appeal explains (pages 31, 35) "information concerning foreign activities that do not threaten national security – *e.g.*, an international fraud scheme – is also not foreign intelligence information." Thus, the investigation into securities fraud described by the Committee's question, even if committed by an agent of a foreign power, does not appear to satisfy the requirements of FISA. The Court of Review held that the prosecution of an "ordinary crime" (as opposed to a "foreign intelligence crime" or related crime) may not be the primary purpose of a FISA search or surveillance. As noted above, however, the application of FISA is highly fact-dependent, and to provide a definitive answer to the hypothetical question posed, it would be necessary to consider specific facts and circumstances that are not all specified in the question.

As noted in response to Question 3, *supra*, the Department's March 6, 2002 Intelligence Sharing Procedures allow law enforcement officials to offer advice on "all issues necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities, including * * * the initiation, operation, continuation, or expansion of FISA searches or surveillance."

There are a number of safeguards to ensure that the FBI's foreign intelligence resources are not used inappropriately, either in criminal matters or otherwise. First, every FISA application is certified by the FBI Director (or other appropriate official, such as the Director of Central Intelligence), and approved by the Attorney General (or the Acting or Deputy Attorney

General). As FISA's legislative history explains, the certification requirement "is designed to ensure that a high-level official with responsibility in the area of national security will review" each FISA application and "insure that those making certifications consider carefully the cases before them." House Report at 76.

Second, FISA expressly provides that "[n]o information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General." 50 U.S.C. § 1806(b); see 50 U.S.C. § 1825(c) (governing physical searches). As implemented by the Department, this provision ensures that appropriate consideration is given before a prosecution is initiated.

Third, when the government intends to use FISA information against an aggrieved person in a criminal trial (or in "any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States"), it must "notify the aggrieved person" of its intent to use the information. 50 U.S.C. § 1806(c); see 50 U.S.C. § 1825(d) (governing physical searches). Thus, such use has a significant cost: It reveals the fact that the aggrieved person was intercepted pursuant to FISA. That sort of revelation can, of course, alert the targets of the surveillance, and thereby dramatically reduce or eliminate its continuing effectiveness. As the Department's witness testified at the September 10, 2002 hearings before this Committee:

> What is at stake here really is the government's ability effectively to protect this nation against foreign terrorists and espionage threats. And I don't sort of mean to be melodramatic about it but the truth is that when we confront one of these threats, whether it be a terrorist or an espionage threat, we have to pursue an integrated, coherent, cohesive response to the threat. We need all of our best people, whether they be law enforcement personnel or intelligence personnel, sitting down together in the same room and discussing what is the best way to neutralize this threat.
>
> In some cases the best way to neutralize or deal with a threat is a criminal prosecution or some other law enforcement approach and the recent prosecution of Robert Hanssen for espionage is a good example of that. In other cases and I think even probably in most cases, law enforcement is not the best way to deal with the threat, and some other approach such as recruitment as a double agent or something like that is called for. And of course in some cases you're going to need to use both law enforcement and non-law enforcement techniques.
>
> What's important, what's critical to us and what's at stake in this appeal is our ability to sit down and have a rational discussion in any given case about what the best way to deal with the problem is. And let me sort of offer quickly a

medical analogy because I think this is pretty technical stuff not only just legally but operationally. Imagine that a patient walks into a hospital somewhere in the United States, let's just say California, and he's discovered to have cancer and that cancer represents a threat to his survival. In some cases, the best solution to curing the cancer and saving the patient is surgery to cut the tumor out. And in other cases it will be some other technique like chemotherapy. And in some cases it's going to be both surgery and chemotherapy together.

But who would go to a hospital in which the surgeons are not permitted to sit down and coordinate and talk to the oncologists and figure out in this case for this patient what rationally is the best way to stop the cancer, to cure the cancer and keep him alive? That would be bad medicine and that in effect is exactly what we are litigating against in the context of this appeal.

5. Has the Department of Justice or the FBI prepared any budget analysis at all regarding the effects that the Department's new legal arguments and FISA use will have on its traditional (i.e. non criminal) foreign intelligence program? If so, please provide any such analysis to the Committee.

Pursuant to Section 606(b) of the Intelligence Authorization Act for Fiscal Year 2001, Pub. L. No. 106-567, 114 Stat. 2831, the Department of Justice recently submitted to the Committee a report on the manner in which funds authorized to be appropriated by the Act for OIPR for fiscal years 2002 and 2003 will be used (i) to improve and strengthen its oversight of the Federal Bureau of Investigation field offices in the implementation of FISA orders, and (ii) to streamline and increase the efficiency of the application process under FISA. That Report addresses several issues, including the possible impact of the current appeal.

6. According to press reports, the Foreign Intelligence Surveillance Court of Review during oral argument on May 9, 2002, directed the Justice Department to file a supplemental brief responding to questions of the court.

(E) Is that press report correct?

(F) What will the supplemental brief be filed?

(G) Please provide a copy of any supplemental brief to the Committee.

(H) Why did the Department not inform the Committee that a supplemental brief would be submitted to the Court of Review during the hearing on May 10?

(I) What questions will be/are addressed in the supplemental brief?

The government's supplemental brief, which was filed on September 25, 2002, was provided to the Committee on September 26, 2002.

7. The FISA Court's unanimous concern was that the Attorney General's proposed procedures for the FISA "appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches. This may be because the government is unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous. In either case, these procedures cannot be used by the government to amend the Act in ways Congress has not." The FISA Court judges were clearly concerned about the government using FISA powers as an end run around normal criminal search warrants and Title III wiretaps.

(A) If the government is intending to use FISA for cases that are primarily criminal matters, does the Department believe that an examination of certain provisions in FISA (which were developed when FISA was only used in primarily intelligence matters) is appropriate? Please respond to the following areas of concern:

(B) Discovery:

(i) In the 24 years of FISA's existence, has a person who has faced a criminal prosecution based on FISA evidence ever been allowed to see the FISA surveillance application or order in the pretrial discovery process? If so, in what case?

(ii) Is the current standard for discovery of the FISA application different from the standard for other classified information under the Classified Information Procedures Act ("CIPA")? If so, what is the justification for this distinction?

(iii) Has a motion to suppress ever been granted in a criminal case regarding evidence obtained under the FISA? If so, please describe the circumstances and the court's ruling.

(iv) Should the CIPA standard and procedures that are used for other classified material in criminal cases be adopted to apply to the discovery of FISA applications and affidavits when FISA-derived information is used in a criminal case? Please explain why or why not.

(C) Court Supervision of FISA electronic surveillance:

(i) Since the Justice Department is now stating that FISA is going to be used as a tool in matters brought primarily for law enforcement purposes, should there be reconsideration of the difference between the 90 day wiretap period allowed in FISA without reauthorization by a judge as compared with the 30 day period allowed under a normal Title III wiretap?

(ii) Besides logistical considerations, is there any inherent reason that a FISA wiretap being used to obtain evidence in a criminal investigation should last for three times as long as a Title III wiretap without court approval?

(iii) In Title III wiretaps agents and prosecutors are routinely required to make progress reports to the Court every ten days. Is it correct that there is currently no interim court reporting requirement under FISA wiretaps? If not, what is the Department of Justice's position on imposing such interim court reporting requirements in FISA cases, since the Department now intends to use FISA wiretaps for primarily criminal cases?

(iv) Please specify the differences between the procedures employed under FISA and those applicable under Title III.

(v) To what extent does the Department of Justice believe that the FISA Court has inherent supervisory power over the FISA process and the Department of Justice's use of FISA? Would the Department support legislation clarifying that such power exists (or creating such court power if you do not believe that it currently exists)?

With respect to Questions 7 and 7(A), the May 17, 2002 opinion and order of the FISC speaks for itself and the Department of Justice does not characterize the opinion or what may have been in the minds of the judges of the FISC, except to refer the Committee to the principal brief and supplemental brief filed by the Department with the Foreign Intelligence Surveillance Court of Review in the government's appeal. As explained in those briefs, and in the Court of Review's decision, FISA has always contemplated law enforcement as a valid method of protecting against foreign spies and terrorists. The procedural protections in FISA, including its discovery and related provisions, were crafted with such use in mind. Thus, the initial presumption is not, as Question 7(A) and 7(C)(i) assume, that the USA Patriot Act's changes to FISA require countervailing changes elsewhere in the statute. Rather, any examination of these issues should begin with the presumption that the balance struck in 1978 is still appropriate today.

Question 7(B) poses several specific questions concerning discovery. The answer to Question 7(B)(i) is "no." No person has ever received discovery of a FISA surveillance application or order. Under FISA, "notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," the district court must "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f); see 50 U.S.C. § 1825(g) (governing physical searches). The court is authorized to disclose the FISA application to the defendant "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance" or when otherwise required by due process. 50 U.S.C. § 1806(f); see 50 U.S.C. § 1806(g). In each case in which discovery was sought, the Attorney General has filed the affidavit, and in each case the district court concluded that the legality of the surveillance may be determined without disclosure of the underlying materials to the defendant. See generally *Giordano* v. *United States*, 394 U.S. 310, 313 (1969) (per curiam).

The answer to Question 7(B)(ii) is "yes." The current standard for discovery of the FISA application is different from the standard for discovery of other classified information under the Classified Information Procedures Act (CIPA), reflecting a legislative determination of a need for the difference in treatment. Under Section 4 of CIPA, the district judge may authorize deletion of classified material from otherwise discoverable documents. FISA controls whether and to what extent certain documents are discoverable.

The answer to Question 7(B)(iii) is "no." No court has ever suppressed information obtained from FISA in a criminal case.

The answer to Question 7(B)(iv) is "no." The CIPA standard and procedures should not be applied in place of FISA's current regime. Among other things, the operational nature of classified material in FISA applications, the need for complete disclosure to the FISC, and the review by the FISC of the legality of FISA surveillance before it occurs justifies the differences between FISA and CIPA.

Question 7(C) poses several specific questions concerning FISC supervision of the government's use of FISA. The answer to Question 7(C)(i) is "no" – the 90-day surveillance period for U.S. persons under FISA should not be reduced to 30 days. As the Department's witness testified at the hearing on September 10, "[b]y definition, every FISA investigation – an investigation in which FISA is used – is both national and international in scope, involving hostile foreign powers that target this country as a whole. As a result, any given FISA target may be part of an investigation that takes place simultaneously in, for example, New York, Los Angeles, Boston, and Houston." Thus, as compared to Title III, FISA searches and surveillance require additional coordination among geographically diverse government personnel. In addition, the information obtained from FISA searches and surveillances frequently must to undergo lengthy translation processes that can involve multiple federal agencies and take

considerable time. Moreover, the information involved in FISA searches and surveillance is almost always highly classified, and therefore more cumbersome to transmit and handle. These limitations are significant and contribute to the need for longer surveillance periods for FISA as opposed to Title III.

While the Department did not seek to enlarge the time periods for U.S. persons in the USA Patriot Act, there are problems that would attend a contraction of those periods for U.S. person FISA orders. Indeed, Congress in 1978 noted similar problems that would have followed from applying the 90-day standard to certain surveillances of foreign powers, and ultimately decided to authorize such surveillances for one-year periods. Congress' observations in that context apply equally to efforts to reduce from 90 to 30 days the authorized period of surveillance for U.S. persons:

> Although such surveillance could be accomplished by successive 90-day [30-day] court renewals, the generation of four [three] times the required paperwork with the attendant increased possibility of a compromise as well as the administrative burden which would result, are reasons for exempting these [targets] from the 90-day [30-day] limitation.

Senate Intelligence Report at 56. In short, as the House Report explained, the 90-day period for U.S. persons "is not as long as some have wished but longer than others desired." House Report 82.

Under 50 U.S.C. § 1805(e), an order may be issued "for the period necessary to achieve its purpose, or for ninety days, whichever is less." Thus, if the FISC concludes based on the record in a particular case that the government can achieve its purpose in less than 90 days, the surveillance will be allowed for less than 90 days. Of course, even in 1978 Congress "recognize[d] that it will be a rare case where the surveillance should terminate upon obtaining a specific set of information. Ordinarily, the information sought will not be of a type that at a given time all of it can be said to have been obtained." House Report at 76. Imposing a 30-day limit would eliminate the FISC's discretion to allow longer periods of surveillance, and would amount to a judgment that FISA should never be used for longer than 30 days at a time.

Finally, the statute allows the FISC to "assess compliance with the minimization procedures" either "[a]t or before the end of the period of time for which electronic surveillance is approved by an order or an extension." 50 U.S.C. § 1805(e)(3).

The answer to Questions 7(C)(ii) and (iii) are largely set forth in the answer to Question 7(C)(i). The concerns set forth above concerning a proposed 30-day time period for FISA surveillance apply with even greater force to the proposed 10-day reporting requirement discussed in Question 7(C)(iii). Such a reporting requirement would be unworkable and could have the most serious consequences for the FISA program and the national security.

Question 7(C)(iv) asks about the differences between the procedures employed under FISA and Title III. The appendix to the supplemental brief for the United States (which was previously provided to the Committee) contains a detailed comparison between the two statutes in the following areas: (1) review by a neutral and detached magistrate, (2) probable cause, (3) particularity, (4) necessity, (5) duration of surveillance, (6) minimization, (7) sealing, (8) notice to the target, (9) suppression, and (10) other matters. The Court of Review's decision also discusses the differences between FISA and Title III, noting that each contains certain protections lacking in the other.

Question 7(C)(v) concerns the FISC's supervisory authority. Several courts of appeals have concluded or strongly suggested that the FISC is an Article III court, see, *e.g.*, *United States* v. *Cavanagh*, 807 F.2d 787, 791-792 (9th Cir. 1987) (rejecting argument that FISC is not an Article III court), and the Department of Justice sees no reason to question that conclusion. As such, the FISC possesses certain inherent supervisory powers, which are essential to its ability to function as a court.[1] For example, the FISC may have inherent power to discipline those who appear before it and to hold in contempt those who disobey its orders. See, *e.g.*, *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 43-44 (1991). Of course, such powers cannot be exercised in a way that conflicts with a statute (such as FISA or the USA Patriot Act). See, *e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 426-427 (1996). Moreover, as explained in the government's supplemental brief on appeal to the Foreign Intelligence Surveillance Court of Review, any such inherent or supervisory power may not be a guise under which the FISC exercises executive power or micromanages the Executive Branch. Because the FISC already possesses supervisory power (in addition to some express statutory discretion, see 50 U.S.C.§§ 1804(d), 1805(e)(3)), we believe legislation confirming the existence of such power is unnecessary.

10. In September 2000, the Department of Justice admitted to the FISA court that 75 applications for FISA surveillance contained inaccuracies. In March 2001, another series of inaccuracies was discovered. How many inaccuracies were involved in the March, 2001, submission to the FISA court?

The March 2001 group of cases involved 15 FISA applications. See the response to Question 11, *infra*.

11. Is the Department of Justice conducting any further formal inquiry or investigation to ascertain how these inaccuracies occurred? If so, when will such a review be completed? Will you share the findings with the Judiciary Committee?

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[1] These conclusions hold (though possibly to a lesser extent) even if the FISC is not an Article III court. See, *e.g.*, *Touche Ross & Co.* v. *SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (upholding an agency regulation designed "to preserve the integrity of [the agency's] own procedures" absent express statutory authorization).

Related Question from Senator Grassley: The FISA Court states that there were misleading representations made by the FBI that included: an erroneous statement by the FBI Director that a FISA target was not a criminal suspect; erroneous (false) statements in FISA affidavits by some FBI agents concerning a purported "wall" between intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant United State attorneys; and, omissions of material facts from FBI FISA affidavits concealing that a FISA target gad been the subject of a prior criminal investigation. The government similarly reported several instances of noncompliance with a promised "wall of separation" between foreign intelligence gathering and criminal prosecution.

Last year, Attorney General Ashcroft announced that he had ordered an investigation by the DOJ Office of Professional Responsibility, into the 75 alleged instances of abuse in the FISA application process committed by FBI personnel as claimed by the Foreign Intelligence Surveillance Court. I ask that my office be provided with a report on the investigation detailing its current status and any conclusions and/or recommendations contained therein. Specifically, I with to be advised of the number and rank (both currently, and the rank held at the time of the misrepresentation) of any FBI personnel found to have knowingly, or otherwise, provided false or incorrect information to the FISA court. I also wish to be advised of the disciplinary action recommended and subsequently actually administered by the FBI to those personnel found to be involved in these 75 cases. If the investigation is not complete, please provide the number of individuals interviewed to date, and the anticipated date the investigation will be concluded.

As stated in the written testimony of the Department's witness for the September 10, 2002 hearings (page 8), the Department's Office of Professional Responsibility (OPR) has opened an investigation into how the inaccuracies occurred. The first set of approximately 75 related FISA applications were filed with the FISC during the period January 1997 to July 2000. The second set of 15 related FISA applications were filed with the FISC during the period September 2000 to March 2001. During OPR's investigation, approximately 40 witnesses have been interviewed, including agents in the Federal Bureau of Investigation field offices; agents, analysts, supervisors, and National Security Law Unit attorneys in FBI headquarters; OIPR attorneys; Assistant United States Attorneys; and the former presiding judge of the FISC.

As indicated in the witness' written testimony, the Department in May 2001 adopted new accuracy procedures (the Woods Procedures) that have substantially improved the FISA process, and in May 2002 the then-Presiding Judge of the FISC praised the Department in a public speech for the "well-scrubbed" quality of the government's FISA applications. Accuracy is important in all submissions made to any court by any litigant, and it is particularly important in submissions made to the FISC by the government as part of the FISA process. Accuracy is not a problem to be solved and forgotten, but rather is a standard that requires constant effort to maintain, especially because of the extreme time pressure and complexity that often accompany national

security emergencies underlying the FISA process. As part of its obligation to keep the Congressional Intelligence Committees "fully inform[ed]" about the use of FISA, 50 U.S.C. §§ 1808, 1826, the Department in its semi-annual report to those Committees has in the past described and will continue in the future to describe significant inaccuracies as they are discovered and reported to the FISC (and, as appropriate, to other courts), as the Department did with respect to the 75 applications referred to in the May 17 FISC opinion. See also answer to Question 14, infra. The most recent semi-annual report (covering the period January 1, 2002 through June 30, 2002) was filed with the Intelligence Committees on January 2, 2003, by cover letters signed by the Acting Attorney General on December 31, 2002. The report discusses accuracy issues as well as other matters occurring during the reporting period.

12. The Department initially resisted providing the Judiciary Committee with a copy of the FISA Court's May 17, 2002 unclassified opinion rejecting the Department's interpretation of the USA PATRIOT Act's FISA amendments. Please explain why.

Generally, the Department respects the prerogative of courts to control the release of the opinions issued by the courts. The FISC's opinion and order, which is unclassified, has been made available to Congress and the public. The FISC has also advised the Committee of its intent to make public unclassified opinions in the future. The Westlaw legal research service has established a database (FORINTSUR-DOC) of Foreign Intelligence Surveillance Court documents.

13. Is it the Department of Justice's position that non-classified documents generated by other government agencies that are in the possession of the Department of Justice cannot be provided to Congress without the permission of such agencies?

The Justice Department is, of course, part of the unitary Executive Branch supervised by the President. In its dealings with the documents generated by other Executive Departments, the Justice Department generally proceeds in comity and consultation with those Departments regarding dissemination of those documents – consistent, of course, with applicable laws and regulations. The Justice Department also attempts to maintain cooperative relationships with regard to documents with the Legislative and Judicial Branches – again, consistent with applicable laws and regulations.

14. An April 4, 2001 memorandum from the FISC to Director Freeh is referenced in the Director's memorandum of May 4, 2001 provided to the Committee. Please describe the import of the April 4, 2001 memorandum and provide a copy of it to the Committee.

There is an April 4, 2001 memorandum from the Presiding Judge of the FISC to the Attorney General (with a copy sent to the FBI Director) that is discussed in the May 18, 2001 Memorandum of the Attorney General; the May 18, 2001 memorandum was previously provided to the Committee. The FISC's April 4, 2001 memorandum refers to concerns about the "FBI's confirmation of telephone numbers being used by a target." At the time the April 4

memorandum was issued, FISA applications normally stated that the FBI had confirmed a target's use of a particular facility through reviewing the telephone company's records (or other, similar records) "and" through independent investigation. Subsequently, the Department concluded and reported to the FISC that the standard language employed in FISA declarations was accurate. However, to avoid any confusion, the Department changed the standard language from "and" to "and/or." The FISC took no further action in this matter. The Intelligence Committees were informed of this matter in the December 2001 Attorney General's Report on Electronic Surveillance and Physical Search Under the Foreign Intelligence Surveillance Act. The Department has asked the FISC for permission to release the April 4, 2001 memorandum and will advise the Committee when an answer has been received from the Court.

16. The Department has argued that criminal prosecution is a form of counterintelligence covered by the FISA because putting a suspected terrorist in jail protects against future acts of terrorism. Do you agree that this legal position would allow the Department to use FISA for the exclusive purpose of prosecuting a person not for a terrorist act, but an immigration violation, or a bank robbery, or a drug offense, provided that the government is able to establish that the person was the agent of a foreign power?

FISA surveillance is not available merely because the target is an agent of a foreign power. It requires that a significant purpose of the surveillance be to obtain "foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B). As explained on pages 28-29 of the government's supplemental brief on appeal, information sought for use as evidence may be "foreign intelligence information" as defined by FISA in some cases. In others, the information will not be "foreign intelligence information."

17. Assume that an organized criminal in the United States has ties to Russia and the Department gets a tip that the person is planning a robbery of a rival organization's storefront. Under the Department's interpretation of FISA, could the criminal prosecutor legally use FISA wiretaps to gather evidence about this person's activities, even if the purpose is to lock up the criminal and prosecute him?

While addressing hypothetical questions may provide some assistance in considering how FISA applies, it must be emphasized that application of FISA in any case is highly dependent upon detailed consideration – first by the appropriate Executive Branch officials and then, if FISA applications are made, by the FISC – of the specific facts and circumstances of the particular case. To provide a definitive answer to the hypothetical question posed, it would be necessary to consider specific facts and circumstances that are not all specified in the question, not limited to facts concerning whether the "organized criminal [with] ties to Russia" is a "foreign power" or an "agent of a foreign power" as defined by FISA. If the target of a proposed surveillance does not fall within the statutory definition of a foreign power or an agent of a foreign power, FISA surveillance would not be available. Although generally a situation based on the hypothetical described above would not provide a basis for a FISA order, it is possible to

imagine facts and circumstances in such a hypothetical situation (not specified in the Committee's question) that would provide a basis for a FISA order. See Response to Question 4, *supra*.

18. Were the FISC rules shared with the Court of Review judges at or near the time such rules were issued? If not, when were they shared with the Court of Review?

The Department of Justice respectfully refers the Committee to the FISC concerning whether and when it shared its rules with the Foreign Intelligence Surveillance Court of Review.

19. What is the position of the Department of Justice regarding whether there should be a requirement that any FISC rules be shared with congressional oversight committees and the FISC Court of Review?

The Department of Justice would respectfully defer to the FISC with regard to whether, to what extent, and under what circumstances the Court should share its current and future rules with the committees of Congress or the Foreign Intelligence Surveillance Court of Review, except that the Executive Branch would expect any such sharing between the Judicial and Legislative Branches, or within the Judicial Branch, to be consistent with the protection of classified information and intelligence sources, methods and activities from unauthorized disclosure.

20. Are proceedings before the FISC transcribed? What record is kept of FISC proceedings? Please describe the nature of any contact between the Executive branch and the FISC that is not fully recorded or memorialized.

Proceedings before the FISC are not normally transcribed. When a FISA application is presented to a judge of the FISC, the Department of Justice attorney who is handling the application and the FBI agent who has signed the declaration of facts contained in the application will usually appear in person. The judge will then place the agent under oath and ask any questions that the judge may have concerning the application. The judge then makes his or her decision to grant or deny an order authorizing the surveillance. FISA applications and orders are preserved in accordance with applicable law, and information obtained by surveillance under FISA is minimized, retained, analyzed, disseminated and disposed of in accordance with applicable law and regulations.

Response to Written Questions of Senator Patrick Leahy
Chairman of the Senate Judiciary Committee
Based on the Hearing Before the Senate Judiciary Committee
"The USA PATRIOT Act in Practice: Shedding Light on the FISA Process"
September 10, 2002

Responses of William C. Banks
September 30, 2002

Question No. 1
Can you set forth some of the legal reforms of FISA that should be enacted, consistent with the need to protect national security, in the following areas:

A. Discovery of FISA applications in criminal cases.
See my comments to Question 1 B below. While the discovery of FISA applications in criminal cases could properly be subject to case-by-case objections by DOJ, based on the risk of release of sensitive information, cleared counsel who appear before the FISC on behalf of the target of surveillance could represent the target's interest in a proceeding to determine the propriety of discovery of FISA applications in criminal cases.

B. Supervision of the FISA process by the FISC.
As I indicated in my written statement of September 10, I believe that it would be prudent to amend FISA to require that all FISA-related guidelines be approved by the FISC. The FISC would assume a role equivalent to that played by the Supreme Court in reviewing the Federal Rules of Civil Procedure.

C. Providing the ability to create a more adversarial process before the FISC or the FISA Review Court by the appointment of court selected experts to address particularly complex legal questions.
My view is that the process can benefit from advocates more than experts. Unlike the technical and scientific matters where masters are employed to assist federal judges, FISA is simply an intricate statute that parses close lines between intelligence gathering and law enforcement, and between US persons and others. There is nothing about FISA, however, that is uniquely complex or technical. Instead of experts, FISA should authorize the creation of a list of cleared counsel who could represent the target before the FISC and the Review Court. The target would not by tipped off by counsel performing this role, and information security practices would be unaffected by such a change in the way of proceeding before the special courts.

D. Providing for more Congressional oversight and public reporting regarding FISA. What particular areas of reporting would you recommend? What is the usefulness of the current reporting requirements under FISA?
As I indicated in my September 10 statement, the bare reporting of an aggregate number of applications to the FISC on an annual basis by DOJ tells Congress and the public almost nothing, only the outlines of a trend about overall traffic before the court. FISA should be amended to require more detailed reports on a more frequent basis. For

example, reports should indicate how many applications are turned away at DOJ, before submission to the court. This information would tell all of us more about the workings of FISA, and may add confidence for those who fear that the Department simply rubber-stamps applications throughout the process. I know that the review is careful, rigorous, and multi-layered in DOJ/FBI, and there is no reason that Congress and the public should not be informed of the care that is taken with the process. Similarly, reporting should break down electronic surveillance and physical search applications, those targeting US persons vs. others.

E. Whether there should be a requirement that any FISC rules be shared with congressional oversight committees and the FISC Court of Review.

The rules should be shared with Congress and the Court of Review, as well as with DOJ/FBI, and they should be published in the Federal Register, subject to notice and comment, and reviewable under the traditional administrative law "arbitrary and capricious" standard. Except for special cases, counsel could be appointed by the FISC to assess comments. DOJ could be given a chance to respond to comments.

Question No. 2. Are there any parts of FISA that do not square with the Department's interpretation of the "significant purpose" requirement before the FISA Court of Review?
Yes. As I indicated in my September 10 statement, the essence of FISA is intelligence, not law enforcement. The DOJ interpretation of "significant purpose" could, in some cases, permit the Department to use FISA to undertake what is purely a law enforcement investigation. As my statement indicates, the definitions of "foreign intelligence information" and the structure of the information-sharing provisions cement the conclusion that FISA is designed to permit and exceptional opportunity to seek intelligence information to protect the national security. The USA PATRIOT Act amendment was adopted to lower the barrier between intelligence gathering and law enforcement, but there is no indication in the 2001 Act, or in the original FISA, that Congress intended to substitute FISA procedures for Title III in law enforcement investigations.

Questions No. 3. Do you believe that the argument made by the Department of Justice in its brief to the FISA court regarding the meaning of "significant purpose" raises any constitutional questions? Please explain.
Yes. As I indicated in my September 10 statement, the Keith Court supported an exception to the traditional warrant requirements because it is reasonable to use other procedures in pursuit of foreign intelligence information. FISA occupied the exception recognized by the Supreme Court, leaving the law enforcement model in place. Allowing the government to employ FISA procedures to enforce the criminal laws would violate the Fourth Amendment. See my statement for further details.

Question No. 4. Senator DeWine has introduced a bill that proposes to lower the standard of proof under FISA from probable cause to "reasonable suspicion." In your opinion, what constitutional issues are raised by such a proposal?
I believe that a "reasonable suspicion" standard as the predicate for FISA surveillance would be unconstitutional, in violation of the Fourth Amendment. There is no doubt that

surveillance authorized pursuant to FISA constitutes a "search" within the Fourth Amendment. The "probable cause" standard employed in FISA is already considerably watered down from what is normally required in law enforcement. Instead of probable cause to believe that a serious crime is being committed, FISA insists only on probable cause to believe that the target is an agent of a foreign power. The "reasonable suspicion" standard requires the equivalent of a hunch, considerably less than probable cause. Senator DeWine's proposal would water down an already watered down standard and would seriously undermine constitutional values at the intersection of privacy and free expression. Reasonable suspicion has been permitted only for the brief "stop and frisk" checks employed in law enforcement, a much less serious intrusion than FISA surveillance, and for certain immigration investigations, where the target has a lesser set of constitutional rights.

Written Questions of Senator Patrick Leahy
Chairman of the Senate Judiciary Committee
Based on the Hearing Before the Senate Judiciary Committee
"The USA PATRIOT Act in Practice: Shedding Light on the FISA Process"
September 10, 2002

Questions for Kenneth Bass

1. Can you set forth some of the legal reforms of FISA that should be enacted, consistent with the need to protect national security, in the following areas:

A. Discovery of FISA applications in criminal cases;

B. Supervision of the FISA process by the FISC;

C. Providing the ability to create a more adversarial process before the FISC or the FISA Review Court by the appointment of court selected experts to address particularly complex legal questions;

D. Providing for more Congressional oversight and public reporting regarding FISA. What particular areas of reporting would you recommend? What is the usefulness of the current reporting requirements under FISA?

E. Whether there should be a requirement that any FISC rules be shared with congressional oversight committees and the FISC Court of Review

2. You stated at the hearing that certain more expansive public reporting requirements regarding FISA would actually enhance national security. Can you please explain your answer?

Ken Bass' Answers to Sen. Leahy's Written Questions

1) Legal reforms that should be enacted:
   a) Discovery of FISA applications in criminal cases.

      The default situation should be that defense counsel gets a sanitized version of the full FISA application, deleting only information that would identify and still-secret sources, such as co-operating foreign services, undercover CIA/FBI officers/agents, or continuing establishment surveillances. Admittedly there will be cases in which it will be difficult to follow this line, but the burden should be on DOJ to conceal, not on defense counsel to obtain. This change will require legislation since neither DOJ nor the courts are likely to use existing authority to disclose more.

   b) Supervision of the FISA process by the FISC

      I do not think more supervision is needed. In fact I think there is too much today, as indicated in my comments on existing FISC Rule 11 which I regard as an unfortunate excessive injection of the Judiciary into Executive matters. I do not think any legislation on this point is needed.

   c) More adversarial process

      The FISA should be amended to authorize the appointment of "counsel for the target" when the target is a U.S. natural person, but not otherwise. That counsel should be someone with prior DOJ, FISC, FBI or CIA experience and familiarity with the FISA process. The cleared counsel should be given full access to the application, deleting only the specific identity of the target and any human sources of information. The full "probable cause" material, absent that same identifying information, must be provided to appointed counsel. Counsel would not be able to talk to the target, but could have access to all material submitted to the Court and the opportunity to appear and cross-examine the testifying agent, as well as make oral and written arguments to the FISC. While the procedure should not be mandatory in all U.S. natural person cases, it should be the presumptive procedure for all initial applications and alternate renewal applications, beginning with the second renewal.

   d) More congressional oversight and more public reporting.

      I do not think more oversight is needed. The Intelligence Committees, coupled with the overlapping membership on Judiciary, provides adequate means for congressional oversight. The reporting Sen. Leahy suggested at the hearing is appropriate, except I would recommend reports on the number of U.S. person searches/surveillances be in the form of "not more than X" (where X is greater

than the actual number but not more than twice the actual number) rather than disclosing the actual number. This disclosure format would, I believe, satisfy legitimate concern about possibly telling people they were NOT under FISA surveillance. The current reporting requirements are a useful barometer of the extent of surveillance, but of limited utility since the "packaging" of applications has changed over the years, making year-to-year comparisons of limited validity.

e) Sharing FISC rules with Congress

FISC rules, like other rules of judicial procedure, should be laid before Congress in a procedure similar to that employed under 28 U.S.C. § 2074, except it might be necessary to have some rules submitted in a non-public manner.

2) How does more public reporting enhance national security?

National security is composed of at least there distinct aspects:

1. Military strength

2. Economic strength

3. Public confidence

Weakness in any one of these three can lead to a fall of the government, as history has shown both here and abroad. There is an understandable distrust of secret government in many quarters. Secret surveillance provokes excessive concern, but that concern is understandable in light of prior abuses. Expansive public reporting would, I believe help by revealing how few of the thousands of FISA surveillances are targeted at individuals, as distinguished from establishments, and how many of those are targeted at U.S. persons.

SUBMISSIONS FOR THE RECORD

STATEMENT OF PROFESSOR WILLIAM C. BANKS[1]

Thirty years ago the Supreme Court first confronted the tensions between unmonitored executive surveillance and individual freedoms in the national security setting. *United States v. United States District Court*[2] *(Keith)* arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property – the dynamite bombing of a CIA office in Ann Arbor, Michigan. During pretrial proceedings, the defendants moved to compel disclosure of electronic surveillance. The Government admitted that a warrantless wiretap had intercepted conversations involving the defendants. In the Supreme Court, the government defended its actions on the basis of the Constitution and a national security disclaimer in the 1968 Crime Control Act. Justice Powell's opinion for the Court first rejected the statutory argument and found that the Crime Control Act disclaimer of any intention to legislate regarding national security surveillance simply left presidential powers in the area untouched.

Turning to the constitutional claim, the Court found authority for national security surveillance implicit in the President's Article II Oath Clause, which includes the power "to protect our Government against those who would subvert or overthrow it by unlawful means." However, the "broader spirit" of the Fourth Amendment, and "the convergence of First and Fourth Amendment values" in national security wiretapping cases made the Court especially wary of possible abuses of the national security power. Justice Powell then proceeded to balance "the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free

[1] Laura J. and L. Douglas Meredith Professor, Syracuse University College of Law, Professor of Public Administration, Maxwell School of Citizenship and Public Affairs, Syracuse University.
[2] 407 U.S. 297 (1972).

expression." Waiving the Fourth Amendment probable cause requirement could lead the executive to "yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."

Although the government argued for an exception to the warrant requirement, citing the unique characteristics of ongoing national security surveillance, and the fear that leaks could endanger sources and methods of intelligence gathering, Justice Powell answered that the potential for abuse of the surveillance power in this setting, along with the capacity of the judiciary to manage sensitive information in *ex parte* proceedings, rendered any inconvenience to the government "justified in a free society to protect constitutional values."

Justice Powell was careful to emphasize that the case involved only the domestic aspects of national security, and that the Court was not expressing an opinion on the discretion to conduct surveillance when foreign powers or their agents are targeted. Finally, the Court left open the possibility that different warrant standards and procedures than those required in normal criminal investigations might be applicable in a national security investigation:

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the

> enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.[3]

The Court implicitly invited Congress to promulgate a set of standards for such surveillance:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to *the legitimate need of Government* for *intelligence information* and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of the citizen rights deserving protection.[4]

Although Congress did not react immediately to *Keith*, Justice Powell's opinion provided an important impetus for the development of what became the Foreign Intelligence Surveillance Act of 1978 (FISA). Like the Supreme Court, Congress recognized that warrantless surveillance by the executive branch untethered by law could undermine important constitutional values at the confluence of the First and Fourth Amendments. At the same time, Congress came to appreciate that the nature and purpose of intelligence investigations differs considerably from criminal law enforcement investigations. As such, the traditional warrant requirement as practiced by law enforcement might not be the best model for assuring that the balance of security and liberty is fairly struck in national security investigatitons.

The system that emerged through twenty-four years of practice under FISA has been repeatedly construed by the federal courts as an adequate substitute for the law

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[3] 407 U.S. at 323.
[4] Id. at 322-323 (emphasis supplied).

enforcement warrant to satisfy the "reasonableness" requirement of the Fourth Amendment. Central to the development of this body of case law upholding the FISA procedures has been the principal that FISA is designed for the gathering of foreign intelligence information and that any criminal prosecution that follows from surveillance undertaken pursuant to FISA has been incidental to the purpose of gathering foreign intelligence information.

Although the "primary purpose" standard was developed by judges in pre-FISA judicial review of warrantless surveillance and does not appear as such in FISA, the "primary purpose" standard guided the implementation and review of FISA surveillance for twenty –three years. FISA seeks to ensure that its searches and surveillances are conducted for foreign intelligence purposes by requiring a senior-level certification of foreign intelligence purpose, and providing for limited judicial review of those certifications. Each certification must also designate the type of foreign intelligence information being sought, and explain the basis for this designation.

Admittedly, "primary purpose" is a qualitative standard that invites after-the-fact subjective judgments in evidentiary hearings, where judges are inclined to defer to the decisions of intelligence professionals. In addition, in the midst of an investigation, the need for speedy action, along with problems of coordination among the law enforcement and intelligence agencies, means that the intelligence professionals make the "primary purpose" calls, not a magistrate. The logic, however, is that once an investigation becomes primarily criminal in nature, the courts are entirely competent to make the usual probable cause determination when surveillance or search authority is sought, and

individual privacy interests come to the fore when the government is attempting to form the basis for a criminal prosecution.

Criminal defendants have asserted many times since 1978 that FISC-approved surveillance was not for the primary purpose of foreign intelligence collection. In each such challenge, the federal courts have sustained the FISA surveillance under the "primary purpose" test. The government's defense in each case was aided by the prophylactic protection afforded by a FISC judge's prior approval of the surveillance as being in pursuit of foreign intelligence or foreign counterintelligence information.

The Intelligence/Law Enforcement Overlap

Even in 1978, the drafters of FISA understood that intelligence gathering and law enforcement would overlap in practice. In the years since 1978, the reality of terrorism and the resulting confluence of intelligence gathering and law enforcement as elements of counter terrorism strategy has strained the FISA-inspired "wall" between intelligence and law enforcement. In addition, the enactment of dozens of criminal prohibitions on terrorist activities and espionage has added to the contexts in which surveillance may be simultaneously contemplated for intelligence gathering and law enforcement purposes.

In the weeks after September 11, the Justice Department pressed for greater authorities to conduct surveillance of would-be terrorists. Officials reasonably maintained that counter terrorism investigations are now expected to be simultaneously concerned with prevention of terrorist activities and apprehension of criminal terrorists. Surveillance of such targets is for overlapping purposes, both of critical importance. In the USA Patriot Act, Congress agreed to lower the barrier between law enforcement and intelligence gathering in seeking FISA surveillance. Instead of intelligence collection

being the primary purpose of the surveillance, it now must be a "significant purpose" of the search or wiretap.

The statutory change may or may not have been necessary or even prudent. Whatever its wisdom, however, the "significant purpose" language does not mean that prosecutors can now run the FISA show. The FISA was largely untouched by the USA Patriot Act; its essence remains foreign intelligence collection. Greater information sharing and consultation was permitted between intelligence and law enforcement officials, but law enforcement officials are not permitted under "significant purpose" or any other part of FISA to direct or manage intelligence gathering for law enforcement purposes.

The May 2002 FISC Opinion

The concern exposed by the May 17 FISC opinion is easy to envision, stripping away the technical questions of statutory interpretation: Prosecutors may seek to use FISA to end-run the traditional law enforcement warrant procedures. They gain flexibility that way, but they also become less accountable, and any of us could be subject to surveillance and then arrested and detained without the protections afforded by the criminal justice system.

The May 17 FISC opinion, signed by all seven judges, is nuanced but firm in its partial repudiation of the proposed revised 2002 minimization procedures of the Department of Justice to effectively permit placement of supervision and control over FISA surveillance in the hands of law enforcement teams. Although it may have been preferable as a tactical matter for the FISC to respond directly to the effect of the "significant purpose" amendment in the USA Patriot Act, the court was nonetheless on

solid ground in concluding that the entire FISA, including its requirements for minimization procedures, continues to constitute a system for monitoring the gathering of foreign intelligence information. The Department of Justice based its proposed 2002 revisions to the minimization procedures on its understanding that the USA Patriot Act amendments to FISA permit FISA to be used *primarily* for a law enforcement purpose. As the FISC noted, portions of the Department's procedures would permit useful coordination among intelligence and law enforcement agencies to become subordination of the former to the latter.

The USA Patriot Act authorizes consultation between intelligence and law enforcement officers to "coordinate efforts to investigate or protect against foreign threats to national security."[5] The limits drawn by the FISC opinion on Department of Justice procedures seek to assure that efforts to "coordinate" do not become a ruse for subordination. Without delving into the details of the minimization guidelines, it is fair to say that the modest restrictions imposed by the FISC follow reasonably from the court's conclusion that some of the Department of Justice proposals would have permitted the law enforcement officials to do more than engage in "consultations" with intelligence officials.

The Department of Justice Appeal to the Foreign Intelligence Surveillance Court of Review

The brief of the Department of Justice on appeal to the Foreign Intelligence Surveillance Court of Review is forcefully written. Its legal arguments are powerful. However, it is hardly the case as the brief maintains that the FISC was "plainly wrong."[6]

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[5] 50 U.S.C. §§ 1806(k), 1825(k).
[6] Redacted Brief filed in the Foreign Intelligence Surveillance Court of Review, at 10 (hereinafter Brief).

Although the USA Patriot Act did lower the wall between intelligence and law enforcement, it was not removed, and the essence of FISA as an exceptional procedure for the gathering of foreign intelligence information remains. In the end, the brief begs the question: If the FISC did not directly interpret the "significant purpose" change to FISA, precisely how does the USA Patriot Act affect the meaning of FISA? That fundamental question was answered, albeit implicitly, by the FISC. FISA continues to restrict the use of FISA procedures for law enforcement purposes. FISA is still fundamentally a mechanism for gaining access to foreign intelligence information. Each of the statutory definitions of "foreign intelligence information" pertain to categories of intelligence that may further the counter terrorism goals of law enforcement, but each definition requires that the surveillance be for "information" that furthers these purposes. "Obtaining evidence for conviction" is something different from "obtaining foreign intelligence information," even if the conviction will deter terrorism. The change in FISA from "purpose" to "significant purpose" acknowledges the evolving interconnectedness of intelligence gathering and law enforcement as counter terrorism tools, but there is no indication in the USA Patriot Act that the fundamental purpose of FISA was altered.

Although the Department of Justice brief notes that FISA must be read as a whole, not in bits and pieces, the brief does just what it cautions against. For example, the brief notes that the definition of "foreign intelligence information" does not limit how the government may use the information to protect against threats to the national security. However, as the FISC explained, other parts of FISA, including the minimization requirements, do so limit the government. Similarly, the Department of Justice is correct

to assert that "foreign intelligence information" may be used for a law enforcement purpose, but the information may only be used according to the other requirements of FISA, including minimization. Finally, while the USA Patriot Act expressly authorizes consultation and coordination between intelligence and law enforcement officials, the Act also expressly continues to place intelligence officials as those in charge who will do the consulting and information sharing with law enforcement officials.

The Constitution as construed by the Supreme Court in *Keith* also supports the continuing legal obligation to balance carefully intelligence gathering and law enforcement investigations. The Department of Justice brief inaccurately characterizes the *Keith* decision as drawing the constitutional boundaries for surveillance on the basis of the "nature of the threat, not the nature of the government's response to that threat."[7] Both elements figured in the balancing formula in *Keith*. As noted above, the Court recognized that different standards may be constitutional "if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." The government's duty to protect the national security was pitted against the danger that untethered executive surveillance would abuse individual rights.

The *Keith* Court supported an exception to the warrant requirements because it is reasonable to use other procedures in pursuit of intelligence information. FISA occupied the exception recognized by the Supreme Court, leaving the law enforcement model in place. Although it is common to refer to what the FISC issues as "warrants," they have that label not because they are Fourth Amendment warrants, but because the FISC permits the type of surveillance associated with a Title III warrant. Allowing the

[7] Brief at 11.

government to employ FISA to enforce the criminal laws would therefore also be unconstitutional, in violation of the Fourth Amendment.

Why should we care what the primary or even a significant purpose of surveillance is? Why should intelligence gathering and law enforcement investigations be subject to different rules? First, collection of foreign intelligence information is designed to head-off a threat to national security, while law enforcement collection has traditionally been after-the-fact, to identify perpetrators of completed crimes. (Terrorism is admittedly a different kind of crime that has forced all of us to confront a complex range of authority and rights problems.) Foreign intelligence is also sometimes sought simply to keep tabs on foreign groups, absent any anticipated criminal activity. Foreign intelligence gathering is therefore sometimes less specific and more programmatic than law enforcement collection. In addition, foreign intelligence information may also be harder for someone outside the intelligence community to evaluate. Pieces may be understood only as part of a mosaic of information, by contrast to the often more specific, historical information obtained for particular law enforcement purposes. Traditional standards of probable cause are thus inappropriate for foreign intelligence gathering.

It is not accurate to claim, as the brief does, that before the USA Patriot Act the federal courts treated law enforcement and intelligence gathering purposes "as if the two terms are mutually exclusive."[8] Instead, the "primary purpose" standard was developed with care by judges reviewing criminal defendants' claims that FISA surveillance tainted the prosecution in violation of the Fourth Amendment. The standard recognized the frequent overlap of law enforcement and intelligence operations, and sought to draw a reasonable line to guide law enforcement and intelligence officials as they manage

[8] Brief p.20.

parallel investigations.[9] Although the USA Patriot Act amendment required only that the surveillance have a "significant" intelligence purpose, nothing else in the USA Patriot Act or in FISA forgives the required review of consultations between intelligence and law enforcement officials, much less the finding made by the FISC in each case that the surveillance approved is in pursuit of foreign intelligence information.

Continuing Congressional Oversight

It is impossible for any academic to opine intelligently about what goes on in working with FISA. Its proceedings are secret, little reporting is done, and only rarely does any FISA surveillance reach the public eye. We outsiders simply do not know enough to offer a detailed critique of the procedures for implementing FISA, pre or post-USA Patriot Act. Of course our relative ignorance can be remedied, at least in part, by providing more information about the implementation of FISA. Now that some of the guidelines have been disclosed during this dispute, why not assure that all such guidelines are publicly reported, redacted as necessary to protect classified information or intelligence sources and methods. The reporting that now occurs is bare-bones, limited to a simple aggregate number of applications each year with no further detail. Why not report with appropriate break-downs for electronic surveillance and searches, numbers of targets, numbers of roving wiretaps, how many targets of FISA were prosecuted, how many were U.S. persons. The reports should also be available more often than annually.

In addition, among the reforms to FISA that the Judiciary Committee could consider would be a formal role for the FISC in reviewing and approving FISA guidelines, akin to the role the Supreme Court assumes in reviewing the Rules of Civil

[9] *See*, e.g., United States v. Truong Dinh Hung, 629 F. 2d 908 (4th Cir. 1980); United States v. Duggan, 743 F. 2d 59 (2d Cir. 1984).

Procedure and Rules of Evidence. The FISC is, of course, an Article III court, and the Judiciary Committee is thus centrally responsible for its oversight, even if its work concerns intelligence.

Moreover, the appeal of the FISC decision lays bear the one-sided nature of FISA proceedings. Now that the government has lost a case and has exercised its statutory right of appeal, who will represent the FISC on appeal? As the statute now stands, no one speaks for the FISC. The Judiciary Committee may consider an amendment to FISA that permits the creation of a list of security-cleared counsel who could brief and argue any subsequent appeals from the FISC.

Conclusions

Government works best when the branches work together. The rare glimpse at the secret surveillance mechanism afforded by the release of the May 17 FISC opinion and attendant correspondence has shown that the changing U.S. environment for counter terrorism demands that all the principal government actors must cooperate in reforming a system for such surveillance that keeps us safe and free. Recent developments have exposed some dissonance among those responsible for making FISA attain its aim of granting extraordinary access to intelligence information in the hands of those who would plot against the United States, while protecting the First and Fourth Amendment rights of all persons. Congress should do what it can to enable the government to speak with one voice in national security surveillance, to keep us safe and free.

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BEFORE THE SENATE JUDICIARY COMMITTEE On The USA PATRIOT Act in Practice: Shedding Light on the FISA Process.

September 10, 2002

The Delicate – and Difficult – Balance of Intelligence and Criminal Prosecution Interests in the Foreign Intelligence Surveillance Act

Mr. Chairman and Member of the Committee, I appreciate the invitation to appear before the Committee to discuss an issue of considerable significance to our Nation: how should we balance the differing, and often overlapping, goals of protecting national security from hostile acts of foreign powers and enforcing criminal laws. My goal is to share with the Committee the Department of Justice's perspective at the time of the enactment and implementation of the Foreign Intelligence Surveillance Act of 1978, to review the evolution of that perspective over the past two decades and to discuss what this Committee, the Department of Justice and the Foreign Intelligence Surveillance Court should do in post-9/11 environment.

I want to caveat my remarks with an essential fact. Any evaluation of what "should" be done must be based on a thorough understanding of what "has" been done in the past. The legal and policy principles at the heart of the current debate reflect years of secret activity in the implementation of FISA. I was personally aware of that activity for only a few years preceding and immediately

following passage of FISA. I have endeavored to stay informed about these issues since I left the Department in 1981, but I have not had access to the most critical facts that remain within the classified written and unwritten history of FISA as reflected in FISA applications, hearings, FISC orders and executive deliberations. I am aware that this Committee is, to some extent, burdened with the same limitations. It is entirely possible that my views on what ought to be done now would change if I had access to the full historical record. Despite that limitation, I believe any consideration by the Committee should include the "original understanding." I hope today to convey that understanding and provide suggestions based on that history in light of recent events.

I. The Original Understanding

The perspective that surrounded the passage and initial implementation of FISA was significantly influenced by the events that lead to the creation of the Office of Intelligence Policy and Review and the passage of FISA itself. For many years the Executive Branch had engaged in electronic surveillance of certain targets without a judicial warrant and in reliance on an assertion of the inherent authority of the President as Commander-in-Chief to take acts necessary to protect national security. During the Vietnam War that established practice was invoked to undertake warrantless surveillance of a number of anti-war individuals and groups on a belief that their activities threatened national security. In some cases those surveillance targets were domestic groups with no provable ties to any foreign interest. One such surveillance came before the Supreme Court in *United States v. United States District Court*, 407 U.S. 297

(1972). In that case, commonly referred to as the *Keith* decision, the Court held that the Nixon Administration's warrantless surveillance "to protect the nation from attempts of ***domestic organizations*** to attack and subvert the existing structure of Government" violated the Fourth Amendment. *Id.* at 300, emphasis added. The Court eschewed a "precise definition" but stated that term "domestic organization" meant "a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has ***no significant connection with a foreign power, its agents or agencies***." *Id.* at 309, n.8, emphasis added. The *Keith* decision and subsequent revelations during the Watergate investigations lead to an effort that began in the Ford Administration to create a Foreign Intelligence Surveillance Court to issue judicial warrants for national security investigations.

When I joined the Department of Justice in the Carter Administration as a senior lawyer in the Office of Legal Counsel, I assumed responsibilities for certain "national security" functions that soon resulted in the creation of the Office of Intelligence Policy and Review that I headed. The Administration was committed to enactment of what became FISA. We took the *Keith* case as our fundamental guidance on the limits of any warrantless national security surveillance.

During our tenure the Department learned that a Vietnamese citizen in the United States was sending packages to Paris through a courier who happened to be a CIA agent. In Paris the documents were delivered to an official of the Vietnamese government. We were asked to approve a warrantless search of

one of the packages. On the basis of the information then available to us, we declined to advise the Attorney General that we should invoke the foreign intelligence exception and engage in warrantless physical searches of the packages if there was a reasonable expectation of privacy. We did, however, conclude that the specific package in the courier's possession was not protected by any reasonable privacy expectation and a search even in the context of a criminal investigation would not require a warrant. We thus authorized the courier to open the package and inspect its contents. That inspection revealed that classified government documents were indeed being transferred to a Vietnamese official in Paris. On the basis of that information and other investigations, we subsequently advised the Attorney General to obtain the President's personal approval of subsequent searches of packages that were, in our opinion, protected by a reasonable expectation of privacy. In addition to those physical search authorizations, the Attorney General approved installation of a wiretap of the individual's phone. Eventually we learned that the source of the classified documents was a U.S. citizen employed by the United States Information Agency. The Attorney General also approved installation of covert television surveillance of the citizen's USIA office.

Throughout investigation, the Criminal Division was informed of its status. Eventually the President accepted Attorney General Bell's advice that we should prosecute the Vietnamese individual and the U.S. citizen. They were arrested and indicted in January 1978. Their trial lawyers challenged the legality of the initial package inspection as well as the subsequent Presidential authorizations

for physical searches and electronic surveillance. The District Court held an evidentiary hearing and ruled that the initial package inspection was constitutional because there was no reasonable expectation of privacy and that subsequent searches and surveillance authorized by the President did not violate the Fourth Amendment under the *Keith* test. However, the District Court also found, on the basis of certain Criminal Division memoranda, that the investigation became "primarily a criminal investigation" on July 20, 1977 and suppressed evidence obtained from warrantless searches and surveillance after that date.

Both defendants were convicted and appealed. They contended that the original package inspection was unconstitutional and that the President did not have inherent authority to approve the subsequent searches and surveillance. I argued on appeal that the District Court correctly upheld the validity of the early searches, but had erroneously adopted the "primary purpose" test to suppress evidence obtained after July 20. The Fourth Circuit characterized our position as contending "that, if surveillance is to any degree directed at gathering foreign intelligence, the executive may ignore the warrant requirement of the Fourth Amendment." *United States v. Troung Dinh Hung*, 629 F.2d 908, 915 (1980). The defendants argued that the foreign intelligence exception to the warrant requirement could not be invoked unless the search was conducted "solely" for foreign policy purposes. The Court of Appeals rejected both arguments and affirmed the District Court's reliance on the "primary purpose" test.

FISA was enacted during the pendency of the *Troung* appeal. As passed, the Act included a requirement that "an executive branch official . . . designated

by the President from among those executive branch officers employed in the area of national security [certify] that the purpose of the [FISA] search is to obtain foreign intelligence information." 50 U.S.C. § 1823(a)(7), as originally enacted.

Over the years the language of the Act and the *Troung* decision evolved into the adoption of a "primary purpose" test in the administration of FISA that resulted in the creation in 1995 of a "wall" of separation between intelligence and law enforcement. That wall in turn lead to the amendments in the PATRIOT Act changing the relevant language from "the purpose" to "a significant purpose."

I am not privy to all the actions that led the Department, the FBI and the FISC to implement that "wall." I am confident, however, that the post-1995 strict separation was not consistent with the view we held in the beginning. I also believe the "wall" reflects an erroneous view of the 1978 Act and the court decisions.

The *Troung* decision involved searches and surveillances undertaken without any prior judicial approval. Since passage of FISA, similar searches have been authorized by an Article III judge under the FISA procedures. That critical different was, in my view, overlooked in the creation of the "wall." The *Troung* court was concerned with the limits of warrantless surveillance in a prosecution context. That concern is absent whenever a FISA order has been issued. Thus the basis for concern about the "primary purpose" of an FBI surveillance is not present when a FISA order has been obtained. For me the FISA order is a warrant within the meaning of the Fourth Amendment, as long as

the purpose of the surveillance is to obtain foreign intelligence, as that term is defined in FISA itself.

The evolution of the "primary purpose" test reflects confusion between the ***purpose*** of the surveillance and the ***motivating cause*** of the surveillance. Admittedly we were never faced with a terrorist environment like today's post 9/11 concerns. We did have international terrorist cases, but those cases rarely involved any threat of criminal activities in the United States. Our focus was on international terrorist organizations whose violent activities were directed to foreign targets and also engaged in fund-raising and other activities in the United States. As the Committee knows, the term "foreign intelligence" in FISA was intentionally drafted to include information about criminal and non-criminal activities of agents of foreign powers. That information would normally be of interest to the national security/foreign affairs community. To the extent that information implicated criminal concerns, it was overwhelmingly in the arena of espionage, not terrorism.

Against that backdrop we never engaged in any analysis of the "primary purpose" of a FISA surveillance. We were totally comfortable with an understanding that if the purpose for undertaking the surveillance was to gather information about the activities of agents of foreign powers that was not otherwise obtainable, then "**the** purpose" of the surveillance was to gather foreign intelligence. The subsequent use of that information, at least insofar as it concerned U.S. persons, was governed by the minimization procedures. Dissemination and use of the information for criminal law enforcement purposes

was expressly authorized by FISA and that use did not, to us, affect "the purpose" of the surveillance. This view did not, however, mean that we would have authorized a FISA application that had its origin entirely within the law enforcement community with no prior involvement of an official in the intelligence community, had such a case ever arisen.

For me the key provision in FISA is not the "purpose" language, but the certification language that restricts authority to Executive Branch officials "employed in the area of national security." Given the background of FISA, particularly the Supreme Court's *Keith* decision, that provision was a clear indication that the FISA authority was to be exercised when an official with national security responsibilities certified that there was a national security reason to undertake the surveillance. The delegations of authority by successive Presidents have always included the top officials in what we all recognize as the intelligence/national security community. The problem arises because of the counterintelligence and law enforcement responsibilities of the FBI. Because the Bureau has both responsibilities, the Director is both an intelligence official and a law enforcement official.

Although FISA does not explicitly limit certifications by the FBI Director to exercises of his "intelligence" responsibilities, we had always understood the fundamental purpose of FISA surveillances to be limited by the *Keith* principle. Thus a "pure law enforcement" investigation was to be handled using traditional law enforcement authorities, such as Title III. We never viewed FISA as an alternative to Title III for such cases. At the same time we never believed that

FISA precluded applications where the ultimate use of the information gathered would be criminal prosecution. As long as the investigation related to a matter of concern to the national security community and the information sought met the FISA definition of foreign intelligence, the statutory requirements were met.

Thus for us the phrase "purpose" referred to the goal of the surveillance itself, not the goal of the broader investigation. By definition, at least during the Carter Administration, counterintelligence investigations of U.S. persons always contemplated a possible criminal prosecution. But that reality did not mean that the purpose of the FISA surveillance was law enforcement. The purpose was to gather foreign intelligence information about the activities of the U.S. person. That purpose remained the same throughout the course of surveillance, even if there was a decision to undertake a criminal prosecution instead of a non-prosecutorial solution such as a false-flag or "turning" operation.

II. Evolution of "the Primary Purpose" Concern

It is now apparent that our original understanding has not been followed in recent times. Until the past few years when the Lee/Bellows investigation and other disclosures have brought the issue forward, the evolving attitudes remained hidden from public view. There were several judicial decisions upholding FISA surveillances, and a few of them made reference to the "purpose" or "primary purpose" of FISA surveillances. It is now clear that the Department and the FISC read those decisions as requiring creation of a "wall" between the intelligence and the law enforcement responsibilities of the FBI and the Department. As I

read those decisions, none of them required the adoption of the 1995 procedures. Certainly the Supreme Court never addressed the issue and there was a clear divergence of views among the circuits. For reasons that remain hidden in the classified FISA files and the institutional memory of the participants, what emerged was the July, 1995 directive from the Attorney General that sharing of FISA information with law enforcement officials of the FBI and the Criminal Division must not "inadvertently result in ether the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives." Those procedures also mandated the inclusion in FISA renewal applications of a disclosure to the FISC of "any contacts among the FBI, the Criminal Division, and a U.S. Attorney's Office, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation."

The reasons for that directive remain a mystery. But for me the 1995 directive was not required either by FISA as it was originally enacted or by the reported decisions of any court. It is unclear whether the 1995 procedures originated with the Department, the FISC or some other institution. It is, however, clear that the directive was not subsequently followed, that numerous instances of that failure were disclosed to the FISC, that the FISC became quite concerned about these violations, that a senior FBI official was disciplined and that the FISC has now refused to approve the Department's effort to change those procedures as the Department believes it need to do.

Based on the public materials, I see no basis in FISA or judicial decisions for imposing the 1995 limitations. There may well be valid policy reasons or specific classified DOJ or FISC actions that led the Department to adopt the 1995 procedures. The Committee should, I believe, try to determine precisely why the procedures were adopted. But regardless of those reasons, it is clear to me that the 1995 procedures reflect an understanding of FISA's requirements that is far more restrictive than our original understanding.

III.The PATRIOT Act Response

Congress changed the FISA language from "the purpose" to "a significant purpose" in two subsections of FISA. It did not, however, change all occurrences of the phrase and that action has contributed to the current FISC/DOJ impasse. Moreover, the atmosphere surrounding passage of the PATRIOT Act and its sparse legislative history makes it difficult to be confident about any correct legal interpretation of the effect of that Act on the 1995 procedures. The Department believes that the change justifies tearing down the 1995 wall and authorizes FISA surveillances where "the primary purpose" is criminal law enforcement. The FISC, on the other hand, unanimously concluded that the amendments did not justify eliminating the 1995 restrictions.

From my observation of the PATRIOT Act's passage, it appears there is support in the legislative debates for the Department's view. However, the specific issues involved in the Department's appeal to the Court of Review do not appear to have been fully understood or addressed by the Congress. It is plain beyond debate that Congress intended to facilitate increased information-sharing

between the intelligence and law enforcement communities. It is equally plain that Congress intended to eliminate the "primary purpose" gloss that had encrusted FISA over the years. It is not at all clear that Congress intended to change the process to the extent the Department now seeks.

IV. Recommendations

With full awareness of the limitations on my knowledge of the classified facts, I advance a few specific recommendations:

A. Obtain More Information and Make it Public

The Committee should ensure that t has a full and complete understanding of the reasons that led to the promulgation of the 1995 procedures and the pre- and post-1995 incidents with the FISC that led to the FISC decision to bar future appearances before it of a particular FBI agent.

The Committee needs to learn whether the present DOJ appeal to the Court of Review was based on an actual impairment of the FBI's ability to protect the national security or a more abstract concern about the proper interpretation of the PATRIOT Act. For that reason the Committee, either directly or through the Intelligence Committee, needs access to an unredacted version of the Department's brief on appeal.

The Committee should also meet with one or more judges of the FISC to obtain their perspective on how the 1995 procedures and the "wall" developed. I understand that the FISC may be concerned about such a meeting because of separation of powers concerns. It is entirely appropriate for traditional courts to address the other branches solely through published opinions and thus decline a congressional request to meet to discuss legal issues that tribunal has decided. But the FISC is not a traditional court that publishes opinions. It works, and properly so, in a classified environment. There are no published opinions that explain what the FISC believes the "primary purpose" principle requires a wall between the intelligence and law enforcement functions. There is no public opinion explaining the numerous departures from the 1995 procedures that lead to the FISC's order barring the FBI agent from appearing before it. Finally, it appears that the FISC has not been precluded by separation of powers concerns from full and open communications and meetings with the executive branch. Given the unique business of that court and the congressional need to obtain a complete perspective on this issue, the Committee and the FISC should

find some means for a full and frank dialogue.

To the fullest possible extent, the Committee should make this information public, recognizing legitimate concerns about disclosing case-specific information, but erring on the side of disclosure rather than continued secrecy.

B. Introduce Elements of an Adversarial Process for FISA

I have previously advocated appointment of counsel to serve as a "devil's advocate" for U.S. persons who are targets of FISA applications. I believe any process that departs from our normal adversary proceedings is subject to increased risk of error. When there is no counsel on "the other side," the court finds itself in an uncomfortable position of being critic as well as judge. I believe the May 17, 2002 amended decision and order of the FISC reflects the built-up tension in that Court's role, a tension exacerbated by the total absence of an adversarial process.

I do not suggest that counsel for the target be used in non-U.S. person cases, nor even in all U.S.-person cases. Nor would I have counsel communicate with the target. Indeed it might be possible to eliminate certain target-identifying information from the pleadings disclosed to cleared counsel. But I believe the FISA process would be enhanced if the FISC in certain cases appointed a lawyer with the requisite background to review the FISA filing and interpose objections as appropriate. I think the FISC, as an Article III court has the inherent authority to make such appointments now. But Congress could facilitate that outcome by specific authorizing amendments to FISA.

I had hoped that the Court of Review would appoint counsel to serve as *amicus curiae* to defend the FISC order and decision in the present appeal. I am aware that petitions to intervene were filed by public interest organizations. Unfortunately the Court of Review proceeded to hear arguments yesterday in a closed proceeding. The secrecy of that hearing and the absence of any meaningful adversary process diminished the quality – as well as the public acceptability – of the Court's ultimate decision.

C. Insure that the Office of Intelligence Policy and Review Remains Fully Involved

One of the less-well-publicized aspects of the FISC May 17 order is the preservation of the role of OIPR as a full participant in the

exchange of information between the intelligence and law enforcement components. The Department's public disclosures on this aspect of their proposed new procedures provide absolutely no explanation for the change. The Department has deleted every part of its argument on this point in its redacted brief.

OIPR has played an important role throughout FISA as part of the internal "checks and balances" to offset features of FISA that depart from the criminal search warrant standards. The Department has not stated publicly why OIPR's role needs to be changed. I understand that they have stated "off the record" that it is "administratively difficult or inconvenient" to require OIPR's presence under the 1995 procedures and the FISC's amendment to the new procedures. That justification, if it is indeed the reason, is unpersuasive. Here again there may be legitimately classified reasons to support the Department's position. If so, this Committee should obtain access to those reasons and make an independent evaluation of the validity of the proposed change. If there is in fact some limitation of human or physical resources that led to the proposed curtailing of OIPR's role, Congress should provide the needed resources to insure the Office continues to function both as advocate for FISA applications and as watchdog.

D. Do Not Change the FISA "Agent of a Foreign Power" Definition

As noted earlier, the *Keith* "agent of a foreign power" principle was the overriding jurisprudential concept on which FISA was based. In essence, if activities were being undertaken on behalf of a foreign power, they were appropriate for consideration by the national security/intelligence components of the government, but if there was no such agency, the matter was one for domestic law enforcement and not an assertion of inherent Commander-in-Chief authority. Domestic law enforcement surveillances were to be left to Title III warrants, while national security/intelligence surveillances were to proceed using FISA warrants.

In the aftermath of 9/11 there have been some proposals to amend FISA to delete the "agent of a foreign power" limitation, at least with regard to non-U.S. persons. That proposal would fundamentally change the basic concept of FISA and transform it from a foreign affairs/national security intelligence tool to a criminal intelligence tool. That change would, in my opinion, unnecessarily blur the already difficult line between the intelligence and law enforcement

communities. It would also institutionalize an alienage-based distinction of considerable significance.

In a given case where there is no basis to allege that a particular individual is acting as an agent of a foreign power, the matter is rarely going to be of concern to the National Security Council, the Department of State and the Department of Defense. Absent an interest from one of those components, there is no legitimate foreign intelligence interest and no reason to authorize FISA surveillance.

E. Change FISC Rule 11

In April 2002 the FISC adopted Rule 11 requiring all FISA applications to include "informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutors at the department of Justice or a United States Attorney's Office. I believe that requirement is unsound and goes well beyond any appropriate role of the FISC.

I recognize the FISC has a duty to oversee the implementation of minimization procedures. That duty properly includes reports of dissemination of information obtained through FISA surveillances and searches. But Rule 11 is not limited to dissemination of FISA-derived information. Rule 11 requires comprehensive reporting on all aspects of any criminal investigation involving a FISA target. That requirement injects the FISC far too deeply into criminal investigations. It amounts to a comprehensive contemporaneous oversight of certain criminal investigations and prosecutorial decisions. That is not an appropriate role for an Article III court. Investigation and prosecution of crimes is an executive, not judicial, function. Rule 11 should accordingly be substantially revised to limit any reports to those needed to monitor implementation of minimization procedures.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

Testimony
to in the book -

July 31, 2002

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable Richard C. Shelby
Vice-Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Vice Chairman:

The letter presents the views of the Justice Department on S. 2586, a bill "[t]o exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." The bill would extend the coverage of the Foreign Intelligence Surveillance Act ("FISA") to individuals who engage in international terrorism or activities in preparation therefor without a showing of membership in or affiliation with an international terrorist group. The bill would limit this type of coverage to non-United States persons. The Department of Justice supports S. 2586.

We note that the proposed title of the bill is potentially misleading. The current title is "To exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." A better title, in keeping with the function of the bill, would be something along the following lines: "To expand the Foreign Intelligence Surveillance Act of 1978 ('FISA') to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group."

Additionally, we understand that a question has arisen as to whether S. 2586 would satisfy constitutional requirements. We believe that it would.

FISA allows a specially designated court to issue an order approving an electronic surveillance or physical search, where a significant purpose of the surveillance or search is "to obtain foreign intelligence information." *Id.* §§ 1804(a)(7)(B), 1805(a). Given this purpose, the court makes a determination about probable cause that differs in some respects from the determination ordinarily underlying a search warrant. The court need not find that there is probable cause to believe that the surveillance or search, in fact, will lead to foreign intelligence information, let alone evidence of a crime, and in many instances need not find probable cause to believe that the target has committed a criminal act. The court instead determines, in the case of electronic surveillance, whether there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(A), and that each of the places at which the surveillance is directed "is being used, or about to be used, by a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(B). The court makes parallel determinations in the case of a physical search. *Id.* § 1824(a)(3)(A), (B).

The terms "foreign power" and "agent of a foreign power" are defined at some length, *id.* § 1801(a), (b), and specific parts of the definitions are especially applicable to surveillances or searches aimed at collecting intelligence about terrorism. As currently defined, "foreign power" includes "a *group* engaged in international terrorism or activities in preparation therefor," *id.* § 1801(a)(4) (emphasis added), and an "agent of a foreign power" includes any person who "knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power," *id.* § 1801(b)(2)(C). "International terrorism" is defined to mean activities that

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
>
> (2) appear to be intended--
>
> (A) to intimidate or coerce a civilian population;
>
> (B) to influence the policy of a government by intimidation or coercion; or
>
> (C) to affect the conduct of a government by assassination or kidnapping; and
>
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Id. § 1801(c).

S. 2586 would expand the definition of "foreign power" to reach persons who are involved in activities defined as "international terrorism," even if these persons cannot be shown to be agents of a "group" engaged in international terrorism. To achieve this expansion, the bill would add the following italicized words to the current definition of "foreign power": "*any person other than a United States person who is, or* a group *that is,* engaged in international terrorism or activities in preparation therefor."

The courts repeatedly have upheld the constitutionality, under the Fourth Amendment, of the FISA provisions that permit issuance of an order based on probable cause to believe that the target of a surveillance or search is a foreign power or agent of a foreign power. The question posed by S. 2586 would be whether the reasoning of those cases precludes expansion of the term "foreign power" to include individual international terrorists who are unconnected to a terrorist group.

The Second Circuit's decision in *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), sets out the fullest explanation of the "governmental concerns" that had led to the enactment of the procedures in FISA. To identify these concerns, the court first quoted from the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*"), which addressed "domestic national security surveillance" rather than surveillance of foreign powers and their agents, but which specified the particular difficulties in gathering "security intelligence" that might justify departures from the usual standards for warrants: "[Such intelligence gathering] is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [dealing with electronic surveillance in ordinary criminal cases]. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency. Thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Duggan*, 743 F.2d at 72 (*quoting Keith*, 407 U.S. at 322). The Second Circuit then quoted a portion of the Senate Committee Report on FISA: "[The] reasonableness [of FISA procedures] depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. . . . Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting* S. Rep. No. 95-701, at 14-15, *reprinted in* 1978 U.S.C.C.A.N. 3973, 3983) ("Senate Report"). The court concluded:

> Against this background, [FISA] requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of [FISA]. These requirements make it reasonable to dispense with a requirement that the FISA Judge find

> probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information.

Id. at 73. The court added that, *a fortiori*, it "reject[ed] defendants' argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target *has committed a crime*." *Id.* at n.5. *See also, e.g.*, *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (per then-Circuit Judge Kennedy); *United States v. Nicholson*, 955 F. Supp. 588, 590-91 (E.D. Va. 1997).

We can conceive of a possible argument for distinguishing, under the Fourth Amendment, the proposed definition of "foreign power" from the definition approved by the courts as the basis for a determination of probable cause under FISA as now written. According to this argument, because the proposed definition would require no tie to a terrorist group, it would improperly allow the use of FISA where an ordinary probable cause determination would be feasible and appropriate – where a court could look at the activities of a single individual without having to assess "the interrelation of various sources and types of information," *see Keith*, 407 U.S. at 322, or relationships with foreign-based groups, *see Duggan*, 743 F.2d at 73; where there need be no inexactitude in the target or focus of the surveillance, *see Keith*, 407 U.S. at 322; and where the international activities of the United States are less likely to be implicated, *see Duggan*, 743 F.2d at 73. However, we believe that this argument would not be well-founded.

The expanded definition still would be limited to collecting foreign intelligence for the "international responsibilities of the United States, [and] the duties of the Federal Government to the States in matters involving foreign terrorism." *Id.* at 73 (*quoting* Senate Report at 14). The individuals covered by S. 2586 would not be United States persons, and the "international terrorism" in which they would be involved would continue to "occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c)(3). These circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *Duggan*, 743 F.2d at 73 (*quoting* Senate Report at 14). To overcome those difficulties, a foreign intelligence investigation "often [will be] long range and involve[] the interrelation of various sources and types of information." *Id.* at 72 (*quoting Keith*, 407 U.S. at 322). This information frequently will require special handling, as under the procedures of the FISA court, because of "the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Furthermore, because in foreign intelligence investigations under the expanded definition "[o]ften . . . the emphasis . . . [will be] on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency," the "focus of . . . surveillance may be less precise than that directed against more conventional types of crime." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Therefore, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for the S. 2586.

Indeed, S. 2586 would add only a modest increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

The events of the past few months point to one other consideration on which courts have not relied previously in upholding FISA procedures – the extraordinary level of harm that an international terrorist can do to our Nation. The touchstone for the constitutionality of searches under the Fourth Amendment is whether they are "reasonable." As the Supreme Court has discussed in the context of "special needs cases," whether a search is reasonable depends on whether the government's interests outweigh any intrusion into individual privacy interests. In light of the efforts of international terrorists to obtain weapons of mass destruction, it does not seem debatable that we could suffer terrible injury at the hands of a terrorist whose ties to an identified "group" remained obscure. Even in the criminal context, the Court has recognized the need for flexibility in cases of terrorism. *See Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). Congress could legitimately judge that even a single international terrorist, who intends "to intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion" or "to affect the conduct of a government by assassination or kidnapping," 50 U.S.C. § 1801(c)(2), acts with the power of a full terrorist group or foreign nation and should be treated as a "foreign power" subject to the procedures of FISA rather than those applicable to warrants in criminal cases.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

for Patrick H. O'Brien, DJB

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Charles E. Schumer
The Honorable Jon L. Kyl

Statement of Senator Charles E. Grassley The USA Patriot Act in Practice: Shedding Light on the FISA Process September 10, 2002

Thank you Mr. Chairman for holding this important hearing today regarding the work being done by the Foreign Intelligence Surveillance Court and those entities responsible for bringing their investigations before it. The Foreign Intelligence Surveillance Act provides a statutory framework for electronic surveillance in the context of foreign intelligence gathering. Investigations for this purpose give rise to a tension between the Government's legitimate national security interests and the protection of an individual's privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and personal privacy interests in this sensitive arena.

However, in the past, there have been problems in the FISA process; a misunderstanding of the rules governing the application procedure, varying interpretations of the law, and a lack of communication amongst all those involved in the FISA application process. The Zacarias Moussaoui investigation is a recent example of this.

Compounding the problem is the attitude of "careerist" senior FBI agents who rapidly move through sensitive positions. This "ticket punching" is routinely allowed to take place at the expense of maintaining critical institutional knowledge in key positions. This has exacerbated the process and I believe severely hampered the ability of the Government to apply FISA properly.

All these problems demonstrate that there is a dire need here for a thorough review of procedural and substantive practices. I believe that this Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself.

Government transparency is a constitutional presumption in a self-governing nation worried about government abuses. I'm not saying the FISA process is fatally flawed, but rather its administration and coordination needs review and improvement.

What made the headlines recently was the refusal of the FISA court to grant the Justice Department new surveillance and investigative authority.

In its opinion, the court emphasized that the FBI had previously submitted 75 inaccurate applications that sometimes contained downright false information to the Court for search warrants and wiretaps.

Let me clarify that these abuses of the FISA Court's trust by the FBI did not take place under Mr. Ashcroft's watch. Rather, the misuse of its powers occurred while Janet Reno was attorney general and Louis Freeh headed the FBI.

The misleading representations made by the FBI included: an erroneous statement by the FBI director that a FISA target was not a criminal suspect; erroneous statements in FISA affidavits by some FBI agents concerning a purported "wall" between intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant United States

attorneys; and, omissions of material facts from FBI FISA affidavits concealing that a FISA target had been the subject of a prior criminal investigation.

The government similarly reported several instances of noncompliance with a promised "wall of separation" between foreign intelligence gathering and criminal prosecution. Mr. Ashcroft subsequently began an investigation as to who was responsible for this noncompliance. That was the right thing to do and I commend him for looking into this matter.

But now, the Justice Department is appealing the FISA court's denial of the new authority it asked for in March because it needs these new powers in the war against terrorism.

The Department argues that under changes authorized by the USA Patriot Act, it could undertake searches and wiretaps "primarily for a law enforcement purpose, so long as a significant foreign-intelligence purpose remains."

What's at stake in the conflict between the Justice Department and the FISA court is whether this country can secure its liberties against terrorism without compromising them. I think we can. Established by Congress in 1978, the court allows the FBI to conduct electronic surveillance and physical searches in gathering foreign intelligence on terrorism and espionage.

But, unlike regular court warrants for criminal investigations, FISA doesn't require the FBI to show that a crime is “being” committed to obtain a FISA warrant.

Due process means the justice system has to be fair and accountable when the system breaks down, as it did in the failure of the FBI to adhere to the rule of law, and the failure of the FISA court to hold the FBI accountable for so long. What I find troubling is the failure of Congress to exercise its oversight power over the FBI and the Justice Department while all this noncompliance was going on under the watch of Janet Reno and Louis Freeh.

As an illustration of the result of the breakdown in the FISA process, FBI Special Agent Coleen Rowley wrote in a letter to FBI Director Mueller, "There was a great deal of frustration expressed on the part of the Minneapolis office toward what they viewed as a less than aggressive attitude from headquarters." "The bottom line is that headquarters was the problem."

I was glad to hear Director Mueller say earlier this year; "There is no room after the attacks for the types of problems and attitudes that could inhibit our efforts."

Many things are different now since the tragic events of last September, but one thing that hasn't changed is the United States Constitution. We here in Congress must work to guarantee the civil liberties of our people, while at the same time, meet our obligations to America's national security. There needs to be a proper balance.

Statement of Morton H. Halperin
Director, Washington Office
Open Society Institute
before the Senate Committee on the Judiciary
Tuesday, September 10, 2002

Mr. Chairman,

I am very pleased to have been asked by this Committee to testify about FISA. This is not the first time I have done so. As you know, I was part of a panel that discussed aspects of the anti-terrorism legislation enacted after 9/11. I also testified numerous times before this Committee and others in the House and Senate when FISA was first proposed. At the end of a very long and careful process, we arrived at a bill which correctly balanced the needs of national security with individual liberty and which passed with overwhelming support. I urged Congress to pass that legislation and still believe that it was in the national interest.

What we have learned recently about the activities of the FISA court vindicates the view of those of us who argued that Article III judges would take their role seriously and would, in ex-parte situations, ensure that constitutional rights were protected. The judicial oversight process of FISA is working well and any proposals for change should be considered with measured care.

I testified last year against the proposal to change the "the purpose" language. I continue to believe that the "significant purpose" standard, as interpreted by the Justice Department, is unconstitutional. The FISA court, reading the statute as a whole with the imperative of interpreting it in a way that avoids reaching constitutional issues, has articulated a sound position. I urge this Committee not to seek to alter that interpretation of the statute. I will return to this issue after reviewing the basic principles which underlie FISA.

The process that led to the enactment of FISA began when the Executive branch, under two Presidents from different parties, asked Congress to enact legislation authorizing electronic surveillance for national security purposes. Presidents Ford and Carter sought this legislation because of a confluence of two events. First, the Supreme Court held that wiretaps were covered by the Fourth Amendment. Second, public and Congressional concern about abuses by intelligence agencies and the FBI made Executive branch officials reluctant to continue to conduct "national security" electronic surveillances without Congressional authorization and court supervision.[1]

As part of the process of negotiating FISA, the Executive branch agreed to accept a provision mandating that the FISA procedures would be the sole means by which the

[1] I should mention here that I was the victim of a 21 month warrantless wiretap of my home telephone which was found to be in violation of the Constitution.

government would conduct national security surveillances. It is dispiriting then, to say the least, to have the Justice Department now raise the issue of inherent Presidential power and to argue that since the President can act on his own and do whatever he wants, Congress can change the FISA procedures without fear of violating the Constitution. As the Supreme Court outlined in the steel seizure case, even if the President could conduct surveillances in the absence of legislation, once Congress acts, the Executive branch is bound by those rules. In any case, the government's actions must be consistent with the Constitution. The President has no inherent authority to violate the Bill of Rights.

The fundamental starting points of FISA were that the requirements of gathering information for national security purposes could not be accommodated within the procedures laid out in Title III for criminal wiretaps, and that different procedures could be authorized which would be consistent with the Constitution.[2]

Different procedures were both necessary and appropriate because the government's purpose in seeking the information was not to gather evidence for use in criminal prosecutions. Rather, it was to gather foreign intelligence information to protect national security. But Congress recognized that some of the information gathered would comprise both national security information and evidence of criminal actions. Thus it properly provided procedures for allowing the government to use the information in criminal prosecutions of both "national security" crimes and "common" crimes.

As the FISA court reminds us in its forceful and articulate opinion, the FISA procedures differ in a number of dramatic ways from those required by Title III and provide much less protection of individual rights. The Title III requirements are, in my view, required by the Constitution when the government is conducting a criminal investigation. The government cannot circumvent these requirements simply by using another statute whose sole constitutional justification is that the government is entitled to use different procedures when it seeks information for a different purpose. Nothing in the various government documents which defend the use of FISA for gathering evidence for prosecutorial purposes can get around this simple logic.

The government argues that 9/11 created a new situation that requires granting new powers to deal with the new threat. I agree. In balancing national security claims with those of civil liberties, the nature of the threat is certainly of great relevance. However, these newly granted authorities must be narrowly tailored to meet the new threats.

Therefore, it seems self-evident that any new authority should be limited to dealing with threats arising from international terrorist groups.[3] FISA lends itself to this approach since procedures for dealing with international terrorism are separately included

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[2] Congress later amended FISA to cover physical searches. There is no need to deal with that issue here but I do feel obliged to state my strong conviction that, at the very least as they relate to the secret searches of the homes of Americans, those provisions are unconstitutional.

[3] If there is a case to change the procedures for other FISA targets, these changes should be considered separately and with due deliberation.

within the statute.[4] Indeed the two new proposed amendments to FISA have the one virtue of limiting the proposed changes to international terrorism investigations.

Congress will have an opportunity to revisit the change in the purpose language when the Patriot Act's amendments to FISA expire, or sooner if the appellate courts uphold the FISA court ruling and the government seeks a legislative solution.

It is certainly true that firewalls erected between intelligence activities in the United States and in locations beyond our borders, and between our own intelligence and law enforcement bodies, are ill-suited for dealing with a clandestine group that operates both in the United States and abroad and which seeks to kill Americans everywhere in the world. This is not the place to discuss organizational changes which may be necessary to deal most effectively with this threat, but whatever the organizational structure, there should not be and are no longer legislated barriers to full cooperation and information-sharing among agencies dealing with such international terrorist groups.

The primary purpose of electronic surveillance of international terrorist groups must be, as the Attorney General has repeatedly said, to prevent new terrorist attacks. FISA surveillance of such groups would be designed for the purpose of gathering foreign intelligence information to prevent future terrorist attacks. Since all international terrorist acts are illegal, and since indictment and conviction is a standard method of preventing future attack, gathering evidence of criminal conduct will always be a legitimate byproduct of such surveillance. Surely, officials of the Executive branch can find ways to implement cooperation between these two functions so that they are fully effective while avoiding putting officials whose goal is to gather evidence to be used in criminal prosecutions in charge of the FISA surveillance. Proceeding in this way would satisfy the requirements of the FISA court decision.

Any perceived impediments to effective cooperation and information exchange should be dealt with legislatively, by enacting "primary purpose" language and by making legislative findings related to the imperative of cooperation and information exchange between domestic and foreign activities and law enforcement and intelligence. Congress should find that there is no constitutional barrier to such cooperation in any given investigation of an international terrorist group targeting Americans around the world.

I believe that the issue that concerns Senators Schumer and Kyl can and should be addressed in the same way. The method they suggest is at odds with the whole structure of FISA. To get approval for a FISA surveillance, the government must show not only that the targeted person meets the definition but also that the information to be collected is "foreign intelligence information"—which means it must be information about "international terrorism <u>by a foreign power or an agent of a foreign power</u>" (underlining

[4] I would go further and limit the changes to threats emanating from international terrorist groups like Al Qaeda that target innocent Americans at home and abroad. I see no justification for changing the procedures for terrorist groups that target non-Americans and carry out terrorist acts only outside the United States.

added), and for the acts to constitute "international terrorism" they must "transcend" international boundaries. Thus, to accomplish the intended purpose of the amendment's sponsors, all three definitions would need to be changed in ways that would fundamentally alter the statute and would risk being found to be unconstitutional.

If there is information indicating that an individual is planning terrorist acts, without any indication that he is doing so on behalf of some foreign group, constitutional ways can be found to authorize surveillance of that individual, including ascertaining whether he is in fact connected to a terrorist group. But it should not be done by simply applying the procedures of FISA wholesale to individuals, when there is no evidence that they have any connection to a foreign government or group.

Mr. Chairman, at the end of day, Congress was able to pass FISA with overwhelming support from intelligence and law enforcement agencies as well as from private civil libertarians and civil liberties organizations. This eventuality occurred not only because there were extensive hearings, but also because many knowledgeable people from within and without the government committed themselves, through informal and private discussions, to finding solutions that respected both the demands of national security and the imperatives of civil liberties. I am convinced that similarly appropriate solutions can be found to the new problems created by the grave threat of international terrorism if the same methods are followed. I stand ready, as I am sure others do, to assist in that process in any way that I can.

I would now be pleased to respond to your questions.

JOINT STATEMENT OF SENATORS HATCH, THURMOND, KYL, DeWINE, SESSIONS, AND McCONNELL
COMMITTEE ON THE JUDICIARY
"The USA PATRIOT Act In Practice: Shedding Light on the FISA Process"
September 10, 2002

Prior to the USA Patriot Act of 2001, the Foreign Intelligence Surveillance Act of 1978 authorized the government to gather intelligence on agents of foreign powers with less stringent requirements than those required for surveillance of domestic criminals. The courts interpreted FISA as requiring that gathering foreign intelligence be the "primary purpose" of the surveillance of the foreign agent. See United States v. Duggan, 743 F.2d 59, 77 (2nd Cir. 1984); United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1154 (1982).

This statutory regime worked well during the cold war for conducting surveillance on spies who were either foreign nationals employed by foreign government working under diplomatic cover at foreign embassies in the United States, or United States persons in this country who had been recruited to spy by foreign intelligence agencies. Both were clearly "agents of a foreign power," and gathering foreign intelligence on the activities of these targets was generally the "primary purpose," if not the only purpose, of the surveillance.

The statutory regime did not work as well with respect to terrorists, who did not work for a foreign government, who often financed their operations with criminal activities, such as drug dealing, and who began to target American interests. It was more difficult to determine if such terrorists were "agents of a foreign power" and it was difficult for the government to keep the appropriate types of investigators, intelligence or criminal, involved in the operation.

To determine what the "primary purpose" of a surveillance was, courts looked to what type of federal investigators were managing and directing the

surveillance operation. If intelligence investigators managed and directed the surveillance, courts interpreted the primary purpose of the surveillance to be gathering foreign intelligence, thus requiring the government to comply with the less stringent FISA surveillance procedures. On the other hand, if criminal investigators managed and directed the surveillance, courts interpreted the primary purpose of the surveillance to be gathering criminal evidence, thus requiring the government to comply with the more stringent Title III wiretap procedures or to exclude the evidence from court. In short, the courts held that there could be only one primary purpose, and it was either gathering foreign intelligence or gathering criminal evidence. See, e.g., Truong, 629 F.2d at 912-13.

The attacks on September 11, 2001, appeared to be orchestrated by the Al Qaeda, an international terrorist organization, with no embassies or diplomats, and whose operatives were loosely associated small groups who often engaged in criminal activities. The intelligence agencies and criminal investigators were unable to analyze and disseminate information needed to detect and prevent the September 11th attacks partly because of restrictions on their ability to share information and coordinate tactical strategies in order to disrupt foreign terrorist activities. It was apparent that the existing court interpretation of the FISA requirement of "primary purpose" impeded the sharing and coordination of information between criminal and intelligence investigators on foreign terrorists.

Accordingly, Congress enacted the USA Patriot Act, in part, to replace the "primary purpose" requirement with a less stringent requirement, and to increase consultation and coordination efforts between intelligence and federal law enforcement officers to investigate and protect against foreign terrorist threats. *See* Sections 218 and 504. Three replacement standards were discussed for determining how large a purpose gathering foreign intelligence must be in order for a FISA warrant to issue: (1) a substantial purpose; (2) a significant purpose; and (3) a purpose. With multiple purposes in an investigation of an international terrorist, there could be only one "primary" purpose, but more than one "substantial", "significant," or "a" purposes. A "substantial" purpose of gathering foreign intelligence was

viewed to be less than primary, but more than a de minimis purpose. A "significant" purpose of gathering foreign intelligence was deemed to be less than "substantial," but more than a de minimis purpose. And "a purpose" of gathering foreign intelligence was deemed to include a de minimis purpose.

Congress chose the word "significant" purpose to replace the existing FISA requirement of a "primary" purpose. By this we intended that the purpose to gather intelligence could be less than the main or dominant purpose, but nonetheless important and not de minimis. Because a significant purpose of gathering foreign intelligence was not the primary or dominant purpose, it was clear to us that in a FISA search or surveillance involving multiple purposes, gathering criminal evidence could be the primary purpose as long as gathering foreign intelligence was a significant purpose in the investigation. See generally, e.g., United States v. Soto-Silva, 129 F.3d 340, 347 (5th Cir. 1997) (holding that a defendant who maintained a house for the "primary purpose" of taking care of a family member also maintained the house for a "significant purpose" of distributing marijuana).

The Department of Justice confirmed the meaning of the change from primary purpose to significant purpose in a letter supporting the amendment sent on October 1, 2001, to the Chairmen and Ranking Members of the House and Senate Judiciary and Intelligence Committees. The Department stated that the amendment would recognize that "the courts should not deny [the President] the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution."

This understanding of increased cooperation between intelligence and law enforcement was confirmed by voices in the House and the Senate in the days and weeks immediately following the new FISA standard. "This legislation authorizes the sharing of information between criminal investigators and those engaged in foreign intelligence-gathering. It provides for enhanced wiretap and surveillance authority. It brings the basic building blocks of a criminal investigation, pen registers and trap and trace provisions, into the 21st century to deal with e-mails and Internet communications." 147 Cong. Rec. H7196 (daily ed. Oct. 23, 2001) (statement of Rep. Sensenbrenner). "The core provisions of the legislation we passed in the Senate 2 weeks ago remain firmly in place. For

instance, in the future, our law enforcement and intelligence communities will be able to share information and cooperate fully in protecting our Nation against terrorist attacks." 147 Cong. Rec. S11016 (daily ed. Oct. 25, 2001) (statement of Sen. Hatch).

In addition, a news publication confirmed the general understanding on Capitol Hill during the consideration of the USA Patriot Act. The Congressional Quarterly reported separately on October 8, 9, and 23, 2001: "Under the measure, for example, law enforcement could carry out a FISA operation even if the primary purpose was a criminal investigation." Congr. Q., House Action Reports, Fact Sheet No. 107-33, at p. 3 (Oct. 9, 2001); see Cong. Q., House Action Reports, Legislative Week, at p. 3(Oct. 23, 2001); Cong. Q., House Action Reports, Legislative Week, at p. 13 (Oct. 8, 2001). FISA may now be used "even if the primary purpose is a criminal investigation." Cong.Q. Billwatch Brief, H.R. 3162 (Oct. 23, 2001).

It was our intent when we included the plain language of Section 218 of the USA Patriot Act and when we voted for the Act as a whole to change FISA to allow a foreign intelligence surveillance warrant to be obtained when "a significant" purpose of the surveillance was to gather foreign intelligence, even when the primary purpose of the surveillance was the gathering of criminal evidence.

STATEMENT OF ASSOCIATE DEPUTY ATTORNEY GENERAL DAVID S. KRIS
Senate Judiciary Committee
September 10, 2002

Mr. Chairman, Senator Hatch, and Members of the Committee: Thank you for the opportunity to testify about the government's first appeal to the Foreign Intelligence Surveillance Court of Review. Obviously, the record in the appeal is classified, because the underlying FISA applications are classified. But I am pleased to provide as much information as possible about the appeal in this open hearing. The May 17 opinion of the Foreign Intelligence Surveillance Court (the FISC), as well as a redacted version of the government's brief on appeal, are not classified, and have already been provided to the Committee. Those two documents set forth the main legal arguments pro and con, albeit without reference to the facts of any particular case.

At the request of your staff, I have focused on three specific questions: First, the question of what is at stake in this appeal, and the differences between the Intelligence Sharing Procedures proposed by the government and those approved by the FISC in its May 17 order. Second, the FISC's legal reasoning as well as our interpretation of FISA and the USA Patriot Act; here I will also discuss the practical implications of our legal reasoning. Third and finally, concerns about the accuracy of FISA applications which are raised in the FISC's May 17 opinion. At the Committee's request, I have prepared specifically to address those three issues. I know that there are many other FISA-related issues in the air today, but I must say that I have not specially prepared to address them. The appeal is more than enough to tackle in one sitting.

Background

To frame the issues properly, I have to review some background about FISA, and describe what has – and has not – changed as a result of the USA Patriot Act. Here is what has not changed. As always, FISA continues to require advance judicial approval for almost all electronic surveillance and physical searches. As always, every FISA application must be personally signed and certified by a high-ranking and politically accountable Executive Branch official, such as the Director of the FBI. As always, every FISA application must also be personally signed and approved by the Attorney General or the Deputy Attorney General. As always, a FISA target must be an "agent of a foreign power" as defined by the statute – a standard that for United States persons requires not only a connection to a foreign power, but also probable cause that the person is engaged in clandestine intelligence activities, international terrorism, sabotage, or related activity.

Let me use terrorism as an example of this last point. A United States person – a citizen or green card holder – cannot be an "agent of a foreign power" under the rubric of terrorism, and therefore cannot be a FISA target, unless the government shows, and the court finds, probable cause that he is "knowingly engaged in" or "prepar[ing]" to engage in "international terrorism" for or on behalf of a foreign power. 50 U.S.C. § 1801(b)(2)(C).

FISA defines "international terrorism" to require, among other things, the commission of "violent" or "dangerous" acts that either "are a violation" of U.S. criminal law, or that "would be a criminal violation" if they were committed here. 50 U.S.C. § 1801(c). Flying an airplane into the World Trade Center is a crime under U.S. law, and therefore could qualify as an international terrorist act. Flying an airplane into the Eiffel Tower may not be a crime under U.S. law, but it could still qualify as international terrorism because it would be criminal if the Eiffel Tower were within our jurisdiction. To search or surveil a U.S. person under the terrorism provision of FISA, we have to show that he is "knowingly engaged" in committing, or "prepar[ing]" to commit, such a criminal act. And, of course, FISA imposes other requirements that are not required in an ordinary criminal case.

None of this was changed by the USA Patriot Act. The USA Patriot Act did certainly change the allowable "purpose" of a search or surveillance – the reasons "why" FISA may be used. But it is also accurate to say – though perhaps in need of elaboration – that the Act did not fundamentally change the "who," the "what," the "where," the "when" or the "how" of FISA surveillance.

What is at Stake in the Appeal

The first issue you identified for me concerns what is at stake in the appeal. What is at stake is nothing less than our ability to protect this country from foreign spies and terrorists. When we identify a spy or a terrorist, we have to pursue a coordinated, integrated, coherent response. We need all of our best people, intelligence and law enforcement alike, working together to neutralize the threat. In some cases, the best protection is prosecution – like the recent prosecution of Robert Hanssen for espionage. In other cases, prosecution is a bad idea, and another method – such as recruitment – is called for. Sometimes you need to use both methods. But we can't make a rational decision until everyone is allowed to sit down together and brainstorm about what to do. That is what we are seeking.

Let me draw a medical analogy. When someone has cancer, sometimes the best solution is surgery to cut the tumor out. Other times, it's chemotherapy. And in some cases you need both. But who would go to a hospital where the doctors can't sit down and talk to each other about what's best for the patient? That's bad medicine. And that is what we're trying to change.

Now let me describe the more technical aspects of what is at stake. The Intelligence Sharing Procedures proposed by the Department in March 2002 would have permitted a full range of coordination between intelligence and law enforcement officials, including both (1) information-sharing and (2) advice-giving. The FISC accepted in full the Department's standards governing information-sharing. Under those standards, the FBI must keep prosecutors informed of "all information" that is "necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities." Thus, absent special limits imposed in particular cases, intelligence officials may share a full range of information with their law enforcement counterparts, including federal prosecutors.

Sharing information from intelligence to law enforcement, however, is only half of the equation. The other half is advice about the conduct of the investigation going back the other way, from law enforcement to intelligence officials. For example, if intelligence agents inform a prosecutor that a FISA target is engaging in espionage, the prosecutor may want to advise the intelligence agents to obtain the target's financial records – for example, to determine whether he has been receiving cash deposits from a hostile foreign government. In its May 17 opinion, the FISC limited the amount of advice that can be given. While the precise extent of those limits remain somewhat opaque, even after the filing of a motion for clarification, the FISC clearly did not give us the authority that we think is appropriate under the law.

Finally, and perhaps most importantly, the FISC imposed a "chaperone" requirement, which would prohibit intelligence agents from consulting with prosecutors unless they first invite the Department's Office of Intelligence Policy and Review (OIPR) to participate. For its part, OIPR must attend the consultation unless it is "unable" to do so. That is an enormous impediment, especially because OIPR is located in Washington and the cases arise all over the country. Investigations of foreign spies and terrorists are – or at least should be – dynamic and fast-paced. Agents and lawyers need to meet and talk on the phone 5, 10, or 20 times a day, day after day, to move the investigation forward. To illustrate with an example, let me return to the medical analogy. The problem with the FISC's order is that it does not recognize that surgery, as much as chemotherapy, can be used to treat cancer – that the surgeon, as much as the oncologist, is trying to save the patient. The order says that before the oncologist can even talk to the surgeon, he has to call the hospital administrator and invite him to attend the consultation – even if the doctors and the patient are located in Los Angeles, and the hospital administrator is located in Washington. That is obviously an unworkable system.

Legal Analysis

The next question is why, as a matter of law, we disagree strongly, but respectfully with the Foreign Intelligence Surveillance Court (FISC)'s decision and legal analysis in this matter. Our legal arguments are laid out fully in our brief, but will be summarized here. First, let me provide a legal framework. Since its enactment, FISA has required that some part of the government's purpose for conducting surveillance – whether it be the purpose, the primary purpose, or a significant purpose – must be to obtain what is called "foreign intelligence information." That raises two questions: First, what is "foreign intelligence information?"; and second, how much of a foreign intelligence purpose is required?

With respect to the first question, courts have generally (not always) indicated that a "foreign intelligence" purpose is a purpose to protect against foreign threats to national security, such as espionage and terrorism, using methods other than law enforcement. In other words, they have drawn a distinction between a foreign intelligence purpose and a law enforcement purpose. (This is a distinction that we think is false, as I will explain shortly.) In keeping with that approach, the courts – including the FISC – have generally evaluated the government's purpose for using FISA by evaluating the nature and extent of coordination between intelligence and law

enforcement officials. The more coordination that occurs, the more likely courts are to find a law enforcement purpose rather than a foreign intelligence purpose. Under pre-Patriot Act law, if the law enforcement purpose became primary, the surveillance had to stop.

We have two arguments on appeal that correspond to these two questions. The first concerns the definition of "foreign intelligence information," which under FISA includes information needed to "protect" against espionage and international terrorism. We maintain that one way to achieve that protection is to prosecute the spies and terrorists and put them in jail – in other words, that surgery, as much as chemotherapy, can help treat cancer. Prosecution is not the only way, but it's one way to protect the country. As a result, information needed as evidence in such a prosecution is itself "foreign intelligence information" as defined by the statute. In support of that argument, we rely on the original language of FISA and also on Section 504 of the USA Patriot Act, which created 50 U.S.C. §§ 1806(k) and 1825(k). As the Chairman of this Committee stated in describing Section 504:

> In addition, I proposed and the Administration agreed to an additional provision in Section 505 [later changed to Section 504] that clarifies the boundaries for consultation and coordination between officials who conduct FISA search and surveillance and Federal law enforcement officials including prosecutors. Such consultation and coordination is authorized for the enforcement of laws that protect against international terrorism, clandestine intelligence activities of foreign agents, and other grave foreign threats to the nation. Protection against these foreign-based threats by any lawful means is within the scope of the definition of 'foreign intelligence information,' and the use of FISA to gather evidence for the enforcement of these laws was contemplated in the enactment of FISA. The Justice Department's opinion cites relevant legislative history from the Senate Intelligence Committee's report in 1978, and there is comparable language in the House report.

147 Cong. Rec. S11004 (Oct. 25, 2001) (emphasis added) (statement of Senator Leahy). This same argument – that "foreign intelligence information" includes information sought for use in prosecutions designed to protect against foreign spies and terrorists – was repeated by the Chairman and Members of the Committee in the publicly available letter they sent to the FISC in July of this year:

> We appreciate that "foreign intelligence information" sought under FISA may be evidence of a crime that will be used for law enforcement purposes to protect against international terrorism, sabotage, and clandestine intelligence activities by foreign powers. * * * * [Quoting the 1978 House Report, the letter states that FISA] "explicitly recognizes that information which is evidence of crimes involving clandestine intelligence activities, sabotage, and international terrorism can be sought, retained, and used pursuant to this bill." * * * * Coordination between FBI Agents and prosecutors is essential to ensure that the

> information sought and obtained under FISA contributed most effectively to protecting the national security against such threats.

Letter of July 31, 2002 (available at 2002 WL 1949260). This corresponds exactly to the government's principal argument on appeal.

Our second argument concerns the "significant purpose" amendment. As I mentioned, under prior law, foreign intelligence had to be the primary purpose for a FISA, and "foreign intelligence" was understood to exclude information needed for law enforcement. Thus, law enforcement could be a "significant" purpose for using FISA, but it could not be the "primary purpose." Coordination between intelligence and law enforcement personnel had to be restrained in keeping with that limit. The Patriot Act changed the old law, allowing the intelligence purpose to drop from primary to significant, and correspondingly allowing the law enforcement purpose to rise from significant to primary. What that means, at ground level, is that more coordination between intelligence and law enforcement officials should be tolerated, because even if a court would find that extensive coordination made law enforcement the primary purpose, the surveillance is still lawful under FISA. I am not sure we will have many cases in which our primary purpose is law enforcement, but the important thing is that even if we do, or the courts find that we do, the surveillance will not be at risk.

The Congressional record is replete with statements acknowledging that Members understood the implications of this change to "significant" purpose. *See*, 147 Cong. Rec. S10593 (Oct. 11, 2001) (statement of Senators Leahy and Cantwell); 147 Cong. Rec. S11021 (Oct. 25, 2001)(statement of Senator Feingold); 147 Cong. Rec. S11025 (Oct. 25, 2001)(statement of Senator Wellstone); Hearing of September 24, 2001, available at 2001 WL 1147486 (statement of Senator Edwards).

Indeed, it is not surprising that these Members of Congress understood the point, because the Department itself clearly described the implications of the "significant purpose" amendment in written submissions. In a letter supporting the "significant purpose" amendment sent on October 1, 2001 to the Chairs and Ranking Members of the House and Senate Judiciary and Intelligence Committees, the Department stated that the amendment would recognize that "the courts should not deny [the President] the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution." Letter from Assistant Attorney General Dan Bryant to the Chairs and Ranking Members of the House and Senate Judiciary and Intelligence Committees, October 1, 2001 (page 13).

Finally, outside media observers were aware of, and reported, the implications of the "significant purpose" amendment while the Patriot Act was under consideration. As Congressional Quarterly reported separately on October 8, 9, and 23, 2001: "Under the measure, for example, law enforcement could carry out a FISA operation even if the primary purpose was a criminal investigation." Congressional Quarterly, House Action Reports, Fact Sheet No. 107-33 (Oct. 9, 2001), at page 3; see Congressional Quarterly, House Action Reports, Legislative

Week (Oct. 23, 2001), at page 3; Congressional Quarterly, House Action Reports, Legislative Week (October 8, 2001), at page13.

Ultimately, the courts will decide whether or not the government's legal arguments are persuasive. Those who claim that Congress never envisioned those legal arguments, however, face a steep uphill battle in light of the historical record.

Implications of the Government's Legal Arguments

Having outlined our basic legal arguments, and their support in the Patriot Act, let me make a few observation about the effect those arguments will have at ground level. Of course, predictions are limited because we have not yet been able to implement the Patriot Act's "purpose" and "coordination" amendments.

As I mentioned, under pre-Patriot Act law, the courts treated "foreign intelligence information" as if it excluded information sought for use in a criminal prosecution, apparently even if the prosecution was itself designed to protect national security against foreign threats -- *e.g.*, the prosecution of Robert Hanssen for espionage. That does not mean, however, that the government did not monitor persons such as Robert Hanssen. On the contrary, we did monitor them, albeit not for the primary purpose of prosecuting them. Even if our purpose is allowed to change, however, the scope of the surveillance will not change. As the FISC recognized in its May 17 opinion, the information sought by law enforcement officials for the prosecution of a spy or terrorist is essentially the same as the information sought by intelligence agents for a traditional counterintelligence investigation under FISA. See FISC May 17, 2002 opinion at 10 (second-to-last bullet point), 25 (first bullet point). Congress also understood that congruence when it enacted FISA in 1978. See House Report 49, 62 ("evidence of certain crimes like espionage would itself constitute 'foreign intelligence information' as defined"). A good criminal-espionage investigation requires essentially the same information as a good counterintelligence-espionage investigation. Thus, under the Patriot Act, our purpose may change, but we will still be seeking and collecting the same information as before.*

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* In any given case, of course, a particular prosecutor may be more insightful than his intelligence counterparts in identifying valuable surveillance targets, but those targets would still be valuable for intelligence officials as well as law enforcement officials. In other words, prosecutorial advice may affect surveillance because a particular prosecutor is smart, not because of any law enforcement purpose. Moreover, allowing prosecutors to participate in intelligence investigations increases the number of persons who may suggest FISA surveillance, and thus creates the possibility of more FISA applications being filed, albeit cabined by the Department's limited resources in the FBI and OIPR. Finally, as discussed *infra*, there may be cases in which, under pre-Patriot Act law, the government would have had to choose between increased prosecutorial involvement and the continuation of FISA surveillance, which might in some cases have resulted in earlier termination of surveillance; under the new interpretation, there would be no need for such a choice and the surveillance could thus continue longer.

We also claim, as a result of the "significant purpose" amendment, that FISA may be used primarily for a law enforcement purpose of any sort, as long as a significant foreign intelligence purpose remains. Considered in context, with the rest of FISA's provisions, judicial approval of this argument will also not radically change the scope of surveillance. There are several reasons why this is true:

First, of course, the "significant purpose" amendment will not and cannot change who the government may monitor. Domestic criminals – *e.g.*, corrupt Enron executives, Bonnie and Clyde, Sammy "the Bull" Gravano, and Timothy McVeigh – cannot be FISA targets because they are not agents of foreign powers as defined by 50 U.S.C. § 1801(b). Regardless of the government's purpose, these targets simply do not satisfy FISA's probable cause requirements because they are not agents of a foreign power.

Indeed, such persons are immune from FISA for another reason: There would be no foreign intelligence purpose for monitoring them, and FISA still requires a "significant" foreign intelligence purpose. Thus, both before and after the Patriot Act, FISA can be used only against foreign powers and their agents, and only where there is at least a significant foreign intelligence purpose for the surveillance. Let me repeat for emphasis: We cannot monitor anyone today whom we could not have monitored at this time last year.

That means we are considering only a very small subset of cases in which the FISA target is an agent of a foreign power – *e.g.*, is knowingly engaged in international terrorism on behalf of an international terrorist group – and is also committing a serious but wholly unrelated crime. In other words, we are talking about international terrorists who also engage in insider trading to line their own pockets (not to finance their terrorism), or spies who also market child pornography. I do not say that such cases could never arise; I do say that they do not arise very often. Especially in the case of U.S. persons, most agents of foreign powers are too busy carrying out their foreign intelligence missions to find time to dabble in serious but unrelated crime.

It is important to note, however, that even where such persons exist, we have always been allowed to monitor them, and we have always been allowed to share with prosecutors evidence of their unrelated crimes. See 50 U.S.C. § 1801(h)(3). Indeed, it is ironic that, because of the way courts have interpreted the term "foreign intelligence information," the government's right to share information concerning an unrelated crime was more clearly established under 50 U.S.C. § 1801(h)(3) than was the government's right to share information concerning terrorism and espionage offenses under 50 U.S.C. § 1801(h)(1). See House Report 62 (making clear that the right to share evidence of a crime with prosecutors under 50 U.S.C. § 1801(h)(3) applies only to crimes that are unrelated to the target's foreign intelligence activities). In such cases, therefore, the only real requirement changed by the Patriot Act was the one that prevented prosecutors from giving advice designed to enhance the possibility of a prosecution for the unrelated crime. The USA Patriot Act allows prosecutors to give more advice in such cases, but (with the caveat about predictions noted above) its effect on the scope of surveillance should be – at most – quite modest. Thus, while not changing who will be subject to FISA surveillance, the "significant

purpose" amendment does provide a substantial benefit by allowing prosecutors and intelligence investigators to share information and advice to best coordinate their overall efforts.

Accuracy

Finally, there is the question of accuracy. The FISC's May 17 opinion describes two sets of FISA cases in which accuracy problems arose. I cannot discuss specifics, but I can say that the two sets of cases were unrelated. In response to these errors, the Department adopted both a short-term and a long-term response.

In the short term, we began by immediately correcting the mistakes with the court. Indeed, the FISC learned of the errors only because we brought them to its attention. We also advised the Congressional Intelligence Committees, consistent with our statutory obligation to keep them "fully inform[ed]" about the use of FISA. 50 U.S.C. § 1808(a). Finally, as the FISC's opinion reveals, the Department's Office of Professional Responsibility (OPR) opened an investigation, which is still pending, and in accord with Department policy, I will not comment on it.

For the long term, we tried to understand the structural reasons that led to inaccuracies. Here is what we discovered: The main challenge to accuracy in FISA applications is that the FBI agent who signs the affidavit describing the investigation for the court is not the agent who actually conducts the investigation. That is true because of the nature of counterintelligence investigations and FISA. By definition, every FISA investigation – an investigation in which FISA is used – is both national and international in scope, involving hostile foreign powers that target this country as a whole. As a result, any given FISA target may be part of an investigation that takes place simultaneously in, for example, New York, Los Angeles, Boston, and Houston.

Although the investigations take place all over the country, FISA applications are prepared, certified, approved, and filed with the FISC exclusively in Washington, D.C. As a result, the person who signs the FISA declaration and swears to it in the FISC is an FBI headquarters supervisor, who coordinates, but does not conduct, the field investigations he is describing for the court in his affidavit. And that is where inaccuracy can creep in: If the headquarters agent has a miscommunication with the agents in the field, his affidavit will be inaccurate.

Given that diagnosis of the problem, the solution followed logically: Require better communication between headquarters and the field. On April 5, 2001, the FBI adopted new procedures, referred to now as the "Woods Procedures," to accomplish that. The Woods Procedures are long and complex, but their basic requirement is for field agents to review and approve the accuracy of FISA applications that describe investigations occurring in their offices. In the same spirit, the Attorney General issued a memorandum in May 2001 requiring direct contact between DOJ attorneys and FBI field agents, and imposing certain other reforms as well.

Both the Woods Procedures and the May 18 memo are unclassified and have previously been provided to the Committee.

I am pleased to say that the accuracy reforms have brought improved results. Perhaps the best unclassified evidence for that is a public speech given by the Presiding Judge of the FISC in April of this year, in which he said, among other things, that "we consistently find the [FISA] applications 'well-scrubbed' by the Attorney General and his staff before they are presented to us," and that "the process is working. It is working in part because the Attorney General is conscientiously doing his job, as is his staff." It was particularly gratifying to hear the judge compliment the FBI. He said: "I am personally proud to be a part of this process, and to be witness to the dedicated and conscientious work of the FBI, NSA, CIA, and Justice Department officials and agents who are doing a truly outstanding job for all of us."

As I said, these are complex issues, and I will be happy now to answer your questions. Thank you.

STATEMENT OF SENATOR KYL

I would like to take a moment to respond to remarks made by Mr. Halperin and Mr. Bass in their prepared testimony with regard to S. 2586, a bill that Senator Schumer and I have introduced to amend the Foreign Intelligence Surveillance Act.

FISA requires that in order for a warrant to issue under that act, a court must find probable cause to believe that the proposed target of the warrant is either an agent of, or is himself, a "foreign power" – a term that is currently defined to only include foreign governments or known terrorist organizations. Requiring a link to governments or established organizations may have made sense when FISA was enacted in 1978; in that year, the prototypical FISA target was a Soviet spy or a member of one of the hierarchical, military-style terror groups of that era, such as West Germany's Badder-Meinhof gang or the Red Army Faction.

Today, however, the United States faces a much different threat. We are principally confronted not by a specific group or government, but by a movement. This movement – of Islamist extremists – does not maintain a fixed structure or membership list, and its adherents do not always advertise their affiliation with this cause. This threat is probably not something that FISA's drafters had in mind in 1978 – in that year, for example, Iran was still the United States's chief ally in that part of the world. But today, the Islamist threat is something that we cannot ignore.

S. 2568 will help the United States to meet this threat by expanding FISA's definition of "foreign power." In addition to governments and designated groups, that term would, under the bill, also include "any person, other than a United States person, or

group that is engaged in international terrorism or activities in preparation therefor." With this change, U.S. intelligence agents would be able to secure a FISA warrant to monitor a foreign national in the United States who is involved in international terrorism -- even if his links to foreign governments or known groups remain obscure.

S. 2568 is directly targeted at lone-wolf terrorists such as alleged 20th hijacker Zaccarias Moussaoui. As FBI Special Agent Colleen Rowley noted in her famous memo – and a point confirmed by Director Meuller in his testimony before this committee – it was the requirement of a foreign-power link that the FBI's National Security Law Unit cited as precluding the issuance of a FISA warrant against Moussaoui prior to the attacks. Indeed, Director Meuller indicated that the current, limited foreign-power definition would have made it difficult for the FBI to secure a FISA warrant against *any* of the September 11 hijackers. As he noted to this committee, "prior to September 11, [of] the 19 or 20 hijackers, * * * we had very little information as to any one of the individuals being associated with * * * * a particular terrorist group."

Congress and this committee have conducted investigations and held numerous hearings examining why our intelligence services failed to prevent the September 11 attacks. Those hearings and investigations uncovered a substantial defect in the current law – a defect that may have prevented the Untied States from stopping the September 11 conspiracy, and that is very likely to hinder future investigations. Simply put, our laws are no longer suited to the type of threat that we face. It is now incumbent on Congress to act on what it has discovered, and to fix those laws.

With these thoughts in mind, it was with some concern that I learned that, in their

written testimony to this committee, Mr. Halperin and Mr. Bass oppose a "Moussaoui fix" to FISA. Mr. Halperin suggested that the Constitution may bar amendments to FISA to cover the lone-wolf terrorist. He stated that the change proposed by S. 2568 is "at odds with the whole structure of FISA", and "would fundamentally alter the statute and would risk being found to be unconstitutional."

Mr. Bass's testimony states his view that proposals such as S. 2568 would transform FISA "from a foreign affairs/national security intelligence tool to a criminal intelligence tool," and would "institutionalize an alienage-based distinction." He concluded that in a "case where there is no basis to allege that a particular individual is an agent of a foreign power [*i.e.*, government or group], that matter is rarely going to be of concern to the National Security Council, the Department of State and the Department of Defense."

Addressing Mr. Bass's last concern first, I would simply note that neither Zaccarias Moussaoui, nor the other 19 hijackers of September 11, gave the F.B.I. much basis to allege that they were agents of a foreign government or group. Yet it is not debatable that the September 11 conspirators, and many other international terrorists who are not acknowledged members of formal organizations, are of deep concern to the United States.

Mr. Bass's principal concern appears to be that a Moussaoui-fix amendment would allow FISA to be used for ordinary criminal investigations solely on the basis of alienage. In this regard, I would point out that S. 2568 would still require *in all cases* that the government show probable cause to believe that the target of the investigation is involved

in international terrorism. A foreign national in the United States engaged only in ordinary criminal activity – or even in domestic terrorism – would not be subject to a FISA warrant under S. 2568.

As for Mr. Halperin's concerns, it is not apparent that maintaining FISA's orientation towards 1970s-era terror threats is "fundamental" to that statute, or why FISA's "structure" would be inconsistent with attempts to intercept lone-wolf terrorists.

More substantial is Mr. Halperin's summary suggestion that S. 2568 would be unconstitutional. By way of reply, I would direct attention to the enclosed letter of July 31, 2002, presenting the views of the U.S. Department of Justice on S. 2586. The letter announces the Department's support for S. 2586. It also provides a detailed analysis of relevant Fourth Amendment caselaw in support of the Department's conclusion that the bill would "satisfy constitutional requirements."

In particular, the Department of Justice emphasizes that anyone monitored pursuant to S. 2568 would be someone who, at the very least, is involved in terrorist acts that "transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." (Quoting 50 U.S.C. § 1801(c)(3).) As a result, a FISA warrant would still "be limited to collecting foreign intelligence for the 'international responsibilities of the United States, and the duties of the Federal Government to the States in matters involving foreign terrorism." (Quoting *United States v. Dugan*, 743 F.2d 59, 73 (2d Cir. 1984).) Therefore, "the same interests and considerations that support the constitutionality of FISA as it now stands would provide

the constitutional justification for S. 2568." The Department of Justice's letter additionally notes that FISA was understood when it was enacted to cover groups as small as two or three persons. The letter concludes that "[t]he interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group * * * and a case involving a single terrorist."

I trust that the Department of Justice's full analysis, supplied in the enclosed letter, will satisfy any lingering doubts about the constitutionality of S. 2568.

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
GOVERNMENTAL AFFAIRS

United States Senate
WASHINGTON, DC 20510-3802

July 10, 2002

Hon. Robert Mueller
Director,
Federal Bureau of Investigation
9th Street and Pennsylvania Ave.
Washington, DC 20535

Dear Director Mueller:

In a hearing before the Judiciary Committee on June 6, 2002, I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in Illinois v. Gates, 462 U.S. 213, 236 (1983) (citations omitted) as follows:

> As early as *Locke v. United States,* 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.

A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.

I would have thought that the FBI personnel handling FISA applications would have noted this issue from the June 6th hearing; or, in the alternative, that you or other supervisory personnel would have called it to their attention.

It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.

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I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Sincerely,

Arlen Specter

AS/ph

Via Facsimile

bcc: Senator Leahy
Senator Hatch
Senator Grassley

REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING THE USA PATRIOT ACT AND THE FISA PROCESS, TUESDAY, SEPTEMBER 10, 2002, SD-226, 9:30 AM.

Mr. Chairman:

Thank you for holding this important hearing regarding the implementation of the USA PATRIOT Act. As we approach the anniversary of September 11, it is entirely appropriate that we examine the effectiveness of the reforms made by this historic piece of legislation. By conducting oversight, this Committee will be better able to assist the Attorney General in his efforts to keep our Nation safe from terrorism.

In the wake of last year's terrorist attacks, Congress worked in a bipartisan manner to improve our abilities to fight terrorism. The Senate, by an overwhelming margin of 98 to 1, approved the package of reforms that comprise the PATRIOT Act. The PATRIOT Act was designed to make America safer while at the same time preserving our cherished liberties. I strongly supported its passage last year, and I continue to support the reforms made by this important piece of legislation.

In the aftermath of the attacks, Congress determined that amendment of the Foreign Intelligence Surveillance Act

(FISA) was necessary in order to provide for increased cooperation between intelligence officials and law enforcement. Under FISA, intelligence officials are able to secure warrants to search or conduct surveillance on individuals who are associated with foreign powers. FISA warrants enable the Government to conduct searches or surveillance if there is probable cause to believe that the target is the agent of a foreign power. This standard is more relaxed than the standard used for criminal warrants. For example, the Government does not need to show evidence of criminal activity. It is only necessary to show a target's connection with a foreign power. This standard is more lenient because the purpose of the surveillance is associated with matters of national security.

The PATRIOT Act implemented two important reforms with respect to FISA. First of all, the Act made it easier for the Government to conduct surveillance. Previously, in order to secure a FISA warrant, the government had to show that foreign intelligence was the primary purpose of the surveillance. The PATRIOT Act amended the law by requiring that foreign intelligence be a "significant" purpose of the surveillance. The PATRIOT Act also allowed for more

extensive coordination between intelligence and law enforcement officers in order to protect against acts of international terrorism.

In response to the changes in the law, the Department of Justice issued new rules governing FISA warrant applications and the sharing of information between intelligence and law enforcement officers. On May 17, 2002, the Foreign Intelligence Surveillance Court rejected portions of these new procedures as they applied to U.S. citizens and resident aliens. The case is now on appeal to the FISA Court of Review.

I have reviewed the Attorney General's interpretation of current law and the actions taken by the Department of Justice, and I find the Department's positions to be consistent with the reforms made by the PATRIOT Act. The Department has properly construed the changes that Congress made to FISA. For example, the Department has correctly noted that it is now appropriate to secure a FISA warrant if an important purpose of the surveillance is related to a criminal investigation, as long as foreign intelligence remains a significant purpose of the overall investigation. The Department has also appropriately implemented the

provisions of the PATRIOT Act that allow for the coordination of intelligence and law enforcement investigations. When this Committee considered the PATRIOT Act, we meant to enhance information sharing. We concluded that it is dangerous to the safety of our Nation to erect artificial walls between intelligence officers and law enforcement officers. The PATRIOT Act provided for the proper coordination and sharing of information, so that our Government does not fight the war on terrorism with one hand tied behind its back.

Unfortunately, the Foreign Intelligence Surveillance Court held that these new procedures result in an end-run around the strict requirements of a criminal search warrant. By allowing criminal prosecutors to advise intelligence officials on the initiation, operation, or continuation of FISA searches, the Court found a blurring of the line between law enforcement purposes and intelligence purposes.

However, this analysis fails to account for the protections that are still provided for in the FISA regime. First of all, in order to obtain a FISA warrant, the Government must show that there is probable cause to believe that the target is the agent of a foreign power. Law

enforcement officers cannot avoid the stricter requirements of criminal warrants unless they can show a suspect's connection to a foreign power. Second, foreign intelligence must be a significant purpose of the investigation. Therefore, unless foreign intelligence makes up a critical component of the overall investigation, the more lenient standards of FISA are not available to the Government.

With these protections available, there is no need to curtail the changes made by Congress in the PATRIOT Act. Congress did not create a massive loophole in FISA through which all criminal investigations could go. Rather, Congress made reasonable changes that provide the Department with the tools necessary to fight terrorists who reside in our country and who are associated with foreign powers.

Mr. Chairman, I am pleased that we are discussing these important issues relating to FISA and the changes made by the PATRIOT Act. At the end of the day, the courts will decide many of these issues. However, I think it is important for members of this Committee to make known their views about the intent and purpose of the PATRIOT Act. The Department of Justice has done a commendable job in adjusting FISA procedures according to the changes that

Congress made to the law. I would like to welcome our witnesses here today, and I look forward to hearing their testimony.

- END -

UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

Honorable Colleen Kollar-Kotelly
Presiding Judge
Honorable William H. Stafford, Jr.
Honorable Stanley S. Brotman
Honorable Harold A. Baker
Honorable Michael J. Davis
Honorable Claude M. Hilton
Honorable Nathaniel M. Gorton
Honorable John E. Conway
Honorable James G. Carr
Honorable James Robertson

Karen Sutton
Clerk of the Court
Beverly Queen
Deputy Clerk

Dr. Allan Kornblum
Legal Advisor

August 20, 2002

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Arlen Specter
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Charles E. Grassley
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman, Senator Specter, and Senator Grassley:

This letter is in response to your correspondence of July 31, 2002. You have requested a copy of an unclassified Memorandum Opinion and two Orders entered on May 17, 2002, and concurred in by all seven of the judges who were on the United States Foreign Intelligence Surveillance Court ("FISA Court") at the time. After conferring on August 15, 2002, with the ten judges now on the FISA Court, as well as the past presiding judge of the FISA Court, we have all agreed, not only to provide the unclassified opinion and orders to you and the respective Senate Committees that have oversight responsibilities, but also to publish them. Never before has the entire Court issued an unclassified opinion and order, although in the early 1980's Presiding Judge George Hart issued a brief unclassified memorandum opinion affirming that the FISA Court had no jurisdiction to issue warrants for physical searches. As you know, legislation now authorizes such searches. Should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them.

DOJ Building, Room 6212, 10th & Constitution Avenue, N.W., Washington, D.C. 20530

A brief description and explanation of the docket of the Court is in order. In general, the docket reflects all filings with the Court and is comprised almost exclusively of applications for electronic surveillance and/or searches, the orders authorizing the surveillance and the search warrants, and returns on the warrants. All of these docket entries are classified at secret and top secret level. Each application is ruled upon by an individual judge. It is very rare that the FISA Court sits en banc and renders a decision. As already noted, it is equally rare to have unclassified material on the docket. The May 17th order was such a case because the government made a request of the Court, raising an unclassified legal issue, that affected information that had been gathered pursuant to past surveillance orders and search warrants that had been authorized individually by all of the judges on the FISA Court. Therefore, it was appropriate for the Court to sit en banc and consider the request of the government.

You have also requested an explanation as to the genesis for Rule 10 of the FISA Court. Using the model of Title III returns, Rule 10 of the FISA Court was initiated *sua sponte* in 1995 by the judges on the Court to establish a means of notification as to how, in fact, search warrants previously authorized were carried out.

I have provided you with a copy of the Memorandum Opinion and Orders dated May 17th. One order is titled "as amended" because certain clerical errors and editorial changes were made once the whole FISA Court was able to review an earlier version. The May 17th version is the one that appears on the docket. I have also included four unclassified minimization procedures that are the subject of the opinion and orders. To the extent that you or the Committee are interested in the memorandum of law submitted by the government to the FISA Court when it made its request of the Court, the Court has no objection to the government providing it to you.

I have endeavored to respond to the concerns expressed in your letter to the extent that it is appropriate for a judge or court to comment on such matters.

Sincerely,

Colleen Kollar-Kotelly
Presiding Judge, United States
Foreign Intelligence Surveillance Court

Enclosures

Copies to:

Honorable Orrin G. Hatch
Raking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Attention: Bob Filippone
524 Hart Senate Office Building
Washington, D.C. 20510

Honorable Richard C. Shelby
Vice Chairman
Select Committee on Intelligence
United States Senate
Attention: Kathy Casey
110 Hart Senate Office Building
Washington, D.C. 20510

Honorable John Ashcroft
Attorney General
United States Department of Justice
Main Justice Building, Room 5137
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE ALL MATTERS SUBMITTED TO THE :

FOREIGN INTELLIGENCE SURVEILLANCE: **Docket Numbers: Multiple**

COURT :

MEMORANDUM OPINION
(AS CORRECTED AND AMENDED)

I

The Department of Justice has moved this Court to vacate the minimization and "wall" procedures in all cases now or ever before the Court, including this Court's adoption of the Attorney General's July 1995 intelligence sharing procedures, which are not consistent with new intelligence sharing procedures submitted for approval with this motion. The Court has considered the Government's motion, the revised intelligence sharing procedures, and the supporting memorandum of law as required by the Foreign Intelligence Surveillance Act (hereafter the FISA or the Act) at 50 U.S.C. §1805(a)(4) and §1824(a)(4) (hereafter omitting citations to 50 U.S.C.) to determine whether the proposed minimization procedures submitted with the Government's motion comport with the definition of minimization procedures under

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§1801(h) and §1821(4) of the Act. The Government's motion will be GRANTED, EXCEPT THAT THE PROCEDURES MUST BE MODIFIED IN PART.

The Court's analysis and findings are as follows:

JURISDICTION. Section 1803 of the FISA which established this Court provides that the Court "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act." The comparable provision added when the FISA was amended to include physical searches appears in §1822(c) entitled "Jurisdiction of Foreign Intelligence Surveillance Court," and says

> The Foreign Intelligence Surveillance Court shall have jurisdiction to hear applications for and grant orders approving a physical search for the purpose of obtaining foreign intelligence information anywhere in the United States under the procedures set forth in this subchapter. (emphasis added)

Examination of the text of the statute leaves little doubt that the collection of foreign intelligence information is the raison d'etre for the FISA. Starting with its title, foreign intelligence information is the core of the Act:

- foreign intelligence information is defined in §1801(e);
- minimization procedures to protect the privacy rights of Americans, defined in §1801(h), and §1821 (4), must be reasonably designed and consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
- section 1802(b) which authorizes the Government to file applications for electronic

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surveillance with this Court, empowers the judges of this Court to grant orders "approving electronic surveillance of a foreign power or agent of a foreign power for the purpose of obtaining foreign intelligence information." (emphasis added);

- applications for electronic surveillance and physical search must contain a certification from a senior Executive Branch official (normally the FBI Director in U.S. person cases) that "the information sought is foreign intelligence information," that "a significant purpose of the surveillance is to obtain foreign intelligence information," that "such [foreign intelligence] information cannot reasonably be obtained by normal investigative techniques," and "designates the type of foreign intelligence information being sought." (§1804 (a)(7)) Comparable requirements apply in applications for physical searches. (§1823 (a)(7)).
- Applications for physical searches must contain a statement of the facts and circumstances relied on by the FBI affiant to justify his or her belief that the premises or property to be searched contains foreign intelligence information and a statement of the nature of the foreign intelligence information being sought. (§1823 (a)(4)(B) and §1823 (a) (6).

Additionally, the two Presidential Executive orders empowering the Attorney General to approve the filing of applications for electronic surveillances and physical searches, and granting the FBI Director and other senior executives the power to make the certifications required under the Act, specify "the purpose of obtaining foreign intelligence information." (emphasis added)

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(E.O. 12139, May 23, 1979, and E.O. 12949, February 9, 1995). Clearly this Court's jurisdiction is limited to granting orders for electronic surveillances and physical searches for the collection of foreign intelligence information under the standards and procedures prescribed in the Act[1].

SCOPE. Our findings regarding minimization apply only to communications of or concerning U.S. persons as defined in §1801(i) of the act: U.S. citizens and permanent resident aliens whether or not they are the named targets in the electronic surveillances and physical searches. Conversely, this opinion does not apply to communications of foreign powers defined in §1801(a), nor to non-U.S. persons.

METHODOLOGY. The analysis and findings in this opinion are based on traditional statutory construction of the FISA's provisions. The question before the Court involves straight-forward application of the FISA as it pertains to minimization procedures, and raises no constitutional questions that need be decided. Discretion to evaluate proposed minimization procedures has been vested in the Court by the Congress expressly in the Act. (§1805(a)(4) and §1824(a)(4)). The Court's determinations are grounded in the plain language of the FISA, and where applicable, in its legislative history. The statute requires the Court to make the necessary findings, to issue orders "as requested or modified," for electronic surveillances and physical

[1] On April 17, 2002 the Government filed a supplemental memorandum of law in support of its March 7, 2002 motion. The supplemental memorandum misapprehends the issue that is before the Court. That issue is whether the FISA authorizes electronic surveillances and physical searches primarily for law enforcement purposes so long as the Government also has "a significant" foreign intelligence purpose. The Court is not persuaded by the supplemental memorandum, and its decision is not based on the issue of its jurisdiction but on the interpretation of minimization procedures.

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searches, as well as to "assess compliance" with minimization procedures for information concerning U.S. persons. (§1805 and §1824 of the Act).

CONSIDERATION OF THE ISSUE. Prior to May of 1979, when the FISA became operational, it was not uncommon for courts to defer to the expertise of the Executive Branch in matters of foreign intelligence collection. Since May 1979, this Court has often recognized the expertise of the government in foreign intelligence collection and counterintelligence investigations of espionage and international terrorism, and accorded great weight to the government's interpretation of FISA's standards. However, this Court, or on appeal the Foreign Intelligence Surveillance Court of Review having jurisdiction "to review the denial of any application," is the arbiter of the FISA's terms and requirements. (§1803(b)) The present seven members of the Court have reviewed and approved several thousand FISA applications, including many hundreds of surveillances and searches of U.S. persons. The members bring their specialized knowledge to the issue at hand, mindful of the FISA's preeminent role in preserving our national security, not only in the present national emergency, but for the long term as a constitutional democracy under the rule of law.

II

We turn now to the government's proposed minimization procedures which are to be followed in all electronic surveillances and physical searches past, present, and future. In addition to the Standard Minimization Procedures for a U.S. Person Agent of a Foreign Power that are filed with the Court, which we continue to approve, the government has submitted new

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supplementary minimization procedures adopted by the Attorney General and promulgated in the form of a memorandum addressed to the Director of the FBI and other senior Justice Department executives and dated March 6, 2002. (hereafter the Attorney General's memorandum or the 2002 procedures). The Attorney General's memorandum is divided into three sections entitled:

"I. INTRODUCTION AND STATEMENT OF GENERAL PRINCIPLES,"[2]

"II. INTELLIGENCE SHARING PROCEDURES CONCERNING THE CRIMINAL DIVISION," AND "III. INTELLIGENCE SHARING PROCEDURES CONCERNING A USAO."

The focus of this decision is sections II and III which set out supplementary procedures affecting the acquisition, retention, and dissemination of information obtained through electronic surveillances and physical searches of U.S. persons to be approved as part of the government's applications and incorporated in the orders of this Court.

Our duty regarding approval of these minimization procedures is inscribed in the Act, as is the standard we must follow in our decision making. Where Congress has enacted a statute like the FISA, and defined its terms, we are bound to follow those definitions. We cannot add to , subtract from, or modify the words used by Congress, but must apply the FISA's provisions with

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[2]The Attorney General's memorandum of March 6, 2002 asserts its interpretation of the recent amendments to the FISA to mean that the Act can now "be used primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains." The government supports this argument with a lengthy memorandum of law which we have considered. However, the Court has decided this matter by applying the FISA's standards for minimization procedures defined in §1801(h) and §1821(4) of the Act, and does not reach the question of whether the FISA may be used primarily for law enforcement purposes . We leave this question for another day.

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fidelity to their plain meaning and in conformity with the overall statutory scheme. The FISA is a statute of unique character, intended to authorize electronic surveillances and physical searches of foreign powers and their agents, including U.S. persons. "Further, as a statute addressed entirely to 'specialists,' it must, as Mr. Justice Frankfurter observed, 'be read by judges with the minds of *** specialists'."[3]

The Attorney General's new minimization procedures are designed to regulate the acquisition, retention, and dissemination of information involving the FISA (i.e., disseminating information, consulting, and providing advice) between FBI counterintelligence and counter-terrorism officials on the one hand, and FBI criminal investigators, trial attorneys in the Justice Department's Criminal Division, and U.S. Attorney's Offices on the other hand. These new minimization procedures supersede similar procedures issued by the Attorney General in July 1995 (hereafter the 1995 procedures) which were augmented in January 2000, and then in August 2001 by the current Deputy Attorney General. The Court has relied on the 1995 procedures, which have been followed by the FBI and the Justice Department in all electronic surveillances and physical searches of U.S. persons since their promulgation in July 1995. In November 2001, the court formally adopted the 1995 procedures, as augmented, as minimization procedures defined in §1801(h) and §1821(4), and has incorporated them in all applicable orders and warrants granted since then.

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[3]Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 88 S.Ct. 1970 (1968).

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The 2002 procedures have been submitted to the Court pursuant to §1804(a)(5) and §1823(a)(5) to supplement the Standard Minimization Procedures for U.S. Person Agents of Foreign Powers. Both sets of procedures are to be applied in past and future electronic surveillances and physical searches subject to the approval of this Court. Pursuant to §1805(a) and §1824(a) the Court has carefully considered the 2002 intelligence sharing procedures. The Court finds that these procedures 1) have been adopted by the Attorney General, 2) are designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons, and 3) are, therefore, minimization procedures as defined in §1801(h) and §1821(4).

The standard we apply in these findings is mandated in §1805(a)(4) and §1824(a)(4), which state that "the proposed minimization procedures meet the definition of minimization procedures under §101(h), [§1801(h) and §1821(4)] of the Act." The operative language of each section to be applied by the Court provides that minimization procedures must be reasonably designed in light of their purpose and technique, and mean –

> specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, [search] to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.
> §1801(h)(1) and §1821(4)(A).

Thus in approving minimization procedures the Court is to ensure that the intrusiveness of foreign intelligence surveillances and searches on the privacy of U.S. persons is "consistent" with

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the need of the United States to collect foreign intelligence information from foreign powers and their agents.

Our deliberations begin with an examination of the first part of §1801(h) and §1821(4) involving the acquisition, retention and dissemination of U.S. person information. Most of the rules and procedures for minimization are set forth in the Standard Minimization Procedures which will continue to be applied along with the 2002 procedures, and permit exceptionally thorough acquisition and collection through a broad array of contemporaneous electronic surveillance techniques. Thus, in many U.S. person electronic surveillances the FBI will be authorized to conduct, simultaneously, telephone, microphone, cell phone, e-mail and computer surveillance of the U.S. person target's home, workplace and vehicles. Similar breadth is accorded the FBI in physical searches of the target's residence, office, vehicles, computer, safe deposit box and U.S. mails where supported by probable cause. The breadth of acquisition is premised on the fact that clandestine intelligence activities and activities in preparation for international terrorism are undertaken with considerable direction and support from sophisticated intelligence services of nation states and well-financed groups engaged in international terrorism.

The intrusiveness of the FBI's electronic surveillances and sophisticated searches and seizures is sanctioned by the following practices and provisions in the FISA:

- a foreign intelligence standard of probable cause instead of the more traditional criminal standard of probable cause;
- having to show only that the place or facility to be surveilled or searched is being

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used or about to be used without the need of showing that it is being used in furtherance of the espionage or terrorist activities;

- surveillances and searches are conducted surreptitiously without notice to the target unless they are prosecuted;
- surveillances and now searches are authorized for 90 days, and may continue for as long as one year or more in certain cases;
- large amounts of information are collected by automatic recording to be minimized after the fact;
- most information intercepted or seized has a dual character as both foreign intelligence information and evidence of crime (e.g., the identity of a spy's handler, his/her communication signals and deaddrop locations; the fact that a terrorist is taking flying lessons, or purchasing explosive chemicals) differentiated primarily by the persons using the information;[4]
- when facing criminal prosecution, a target cannot obtain discovery of the FISA applications and affidavits supporting the Court's orders in order to challenge them because the FISA mandates in camera, ex parte review by the district court "if the

[4] Sections §1801(h)(3) and §1821(4)(C) require that the minimization procedures must \allow retention and dissemination of evidence of a crime which has been, is being, or is about to be committed. Such crimes are not related to the target's intelligence or terrorist activities, and the information would have to be discarded otherwise because it is not necessary to produce foreign intelligence information. Such retention and dissemination is not relevant to the issues considered in this opinion. Foreign Intelligence Surveillance Act of 1978, H.R. 7308, 95th Congress, 2nd Session, Report 95-1283, Pt.1, p.62.

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Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security." §1806(f)) and §1825(g)

It is self evident that the technical and surreptitious means available for acquisition of information by electronic surveillances and physical searches, coupled with the scope and duration of such intrusions and other practices under the FISA, give the government a powerful engine for the collection of foreign intelligence information targeting U.S. persons.

Retention under the standard minimization procedures is also heavily weighted toward the government's need for foreign intelligence information. Virtually all information seized, whether by electronic surveillance or physical search, is minimized hours, days, or weeks after collection. The principal steps in the minimization process are the same for electronic surveillances and physical searches:

- information is reduced to an intelligible form: if recorded it is transcribed, if in a foreign language it is translated, if in electronic or computer storage it is accessed and printed, if in code it is decrypted and if on film or similar media it is developed and printed;
- once the information is understandable, a reviewing official, usually an FBI case agent, makes an informed judgment as to whether the information seized is or might be foreign intelligence information related to clandestine intelligence activities or international terrorism;
- if the information is determined to be, or might be, foreign intelligence, it is logged

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into the FBI's records and filed in a variety of storage systems from which it can be retrieved for analysis, for counterintelligence investigations or operations, or for use at criminal trial;

- if found not to be foreign intelligence information, it must be minimized, which can be done in variety of ways depending upon the format of the information: if recorded the information would not be indexed, and thus become non-retrievable, if in hard copy from facsimile intercept or computer print-out it should be discarded, if on re-recordable media it could be erased, or if too bulky or too sensitive, it might be destroyed.

These same principles of minimization are applied to all information collected, whether by electronic surveillance or physical search. The most critical step in retention is the analysis in which an informed judgment is made as to whether or not the communications or other data seized is foreign intelligence information. To guide FBI personnel in this determination the Standard Minimization Procedures for U.S. Person Agent of a Foreign Power in Section 3.(a)(4) Acquisition/Interception/Monitoring and Logging provide that "communications of or concerning United States persons <u>that could not be</u> foreign intelligence information or are not evidence of a crime . . . may not be logged or summarized." (emphasis added). Minimization is required only if the information "<u>could not be</u>" foreign intelligence. Thus, it is obvious that the standard for retention of FISA– acquired information is weighted heavily in favor of the government.

This brings us to the third and perhaps most complex part of minimization practice, the

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dissemination and use of FISA – acquired information. Recognizing the broad sweep of acquisition allowed under FISA's definition of electronic surveillance (and, subsequently, physical searches), coupled with the low threshold for retention in the "could not be foreign intelligence" standard, Congress has provided guidance for the Court in the FISA's legislative history:

> On the other hand, given this degree of latitude the committee believes it is imperative that with respect to information concerning U.S. persons which is retained as necessary for counterintelligence or counter terrorism purposes, rigorous and strict controls be placed on the retrieval of such identifiable information and its dissemination or use for purposes other than counterintelligence or counter terrorism. (emphasis added)[5]

> The judge has the discretionary power to modify the order sought, such as with regard to the period of authorization . . . or the minimization procedures to be followed. (emphasis added)[6]The Committee contemplates that the court would give these procedures most careful consideration. If it is not of the opinion that they will be effective, the procedures should be modified. (emphasis added)[7]

Between 1979 when the FISA became operational and 1995, the government relied on the standard minimization procedures described herein to regulate all electronic surveillances. In 1995, following amendment of the FISA to permit physical searches, comparable minimization procedures were adopted for foreign intelligence searches. On July 19, 1995, the Attorney General issued Procedures for Contacts Between the FBI and Criminal Division Concerning FI and Foreign Counterintelligence Investigations, which in part A regulated "Contacts During an FI

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[5] Id. at 59.

[6] Id at 78.

[7] Id. at 80.

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or FCI Investigation in Which FISA Surveillance or Searches are Being Conducted" between FBI personnel and trial attorneys of the Department's Criminal Division. The Court was duly informed of these procedures and has considered them an integral part of the minimization process although they were not formally submitted to the Court under §1804 (a)(5) or §1823(a)(5). In January, 2000 the Attorney General augmented the 1995 procedures to permit more information sharing from FISA cases with the Criminal Division, and the current Deputy Attorney General expanded the procedures in August 2001. Taken together, the 1995 procedures, as augmented, permit substantial consultation and coordination as follows:

a. reasonable indications of significant federal crimes in FISA cases are to be reported to the Criminal Division of the Department of Justice;

b. The Criminal Division may then consult with the FBI and give guidance to the FBI aimed at preserving the option of criminal prosecution, <u>but may not direct or control</u> the FISA investigation toward law enforcement objectives;

c. the Criminal Division may consult further with the appropriate U.S. Attorney's Office about such FISA cases;

d. on a monthly basis senior officials of the FBI provide briefings to senior officials of the Justice Department, including OIPR and the Criminal Division, about intelligence cases, including those in which FISA is or may be used;

e. all FBI 90-day interim reports and annual reports of counterintelligence investigations, including FISA cases, are being provided to the Criminal Division, and must now contain a section explicitly identifying any possible federal criminal violations;

f. all requests for <u>initiation or renewal of FISA authority</u> must now contain a section devoted explicitly to identifying any possible federal criminal <u>violations</u>;

g. the FBI is to provide monthly briefings directly to the Criminal Division

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concerning all counterintelligence investigations in which there is a reasonable indication of a significant federal crime;

h. prior to each briefing the Criminal Division is to identify (from FBI reports) those intelligence investigations about which it requires additional information and the FBI is to provide the information requested; and

i. since September 11, 2001, the requirement that OIPR be present at all meetings and discussions between the FBI and Criminal Division involving certain FISA cases has been suspended; instead, OIPR reviews a daily briefing book to inform itself and this Court about those discussions.

The Court came to rely on these supplementary procedures, and approved their broad information sharing and coordination with the Criminal Division in thousands of applications. In addition, because of the FISA's requirement (since amended) that the FBI Director certify that "the purpose" of each surveillance and search was to collect foreign intelligence information, the Court was routinely apprised of consultations and discussions between the FBI, the Criminal Division, and U.S. Attorney's offices in cases where there were overlapping intelligence and criminal investigations or interests. This process increased dramatically in numerous FISA applications concerning the September 11th attack on the World Trade Center and the Pentagon.

In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used sub rosa for criminal investigations, the Court routinely approved the use of information screening "walls" proposed by the government in its applications. Under the normal "wall" procedures, where there were separate intelligence and criminal investigations, or a single counter-espionage investigation with overlapping intelligence and criminal interests, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA

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intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney-client intercepts occurred, Justice Department lawyers in OIPR acted as the "wall." In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, this Court became the "wall" so that FISA information could not be disseminated to criminal prosecutors without the Court's approval. In some cases where this Court was the "wall," the procedures seemed to have functioned as provided in the Court's orders; however, in an alarming number of instances, there have been troubling results.

Beginning in March 2000, the government notified the Court that there had been disseminations of FISA information to criminal squads in the FBI's New York field office, and to the U.S. Attorney's Office for the Southern District of New York, without the required authorization of the Court as the "wall" in four or five FISA cases. Subsequently, the government filed a notice with the Court about it's unauthorized disseminations.

In September 2000, the government came forward to confess error in some 75 FISA applications related to major terrorist attacks directed against the United States. The errors related to misstatements and omissions of material facts, including:

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a. an erroneous statement in the FBI Director's FISA certification that the target of the FISA was not under criminal investigation;

b. erroneous statements in the FISA affidavits of FBI agents concerning the separation of the overlapping intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant U.S. attorneys;

c. omissions of material facts from FBI FISA affidavits relating to a prior relationship between the FBI and a FISA target, and the interview of a FISA target by an assistant U.S. attorney.

In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications. After receiving a more detailed explanation from the Department of Justice about what went wrong, but not why, the Court decided not to accept inaccurate affidavits from FBI agents whether or not intentionally false. One FBI agent was barred from appearing before the Court as a FISA affiant. The Court decided to await the results of the investigation by the Justice Department's Office of Professional Responsibility before taking further action.

In March of 2001, the government reported similar misstatements in another series of FISA applications in which there was supposedly a "wall" between separate intelligence and criminal squads in FBI field offices to screen FISA intercepts, when in fact all of the FBI agents were on the same squad and all of the screening was done by the one supervisor overseeing both investigations.

To come to grips with this problem, in April of 2001, the FBI promulgated detailed procedures governing the submission of requests to conduct FISA surveillances and searches, and to review draft affidavits in FISA applications, to ensure their accuracy. These procedures are

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currently in use and require careful review of draft affidavits by the FBI agents in the field offices who are conducting the FISA case investigations, as well as the supervising agents at FBI headquarters who appear before the Court and swear to the affidavits.

In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors. These incidents have been under investigation by the FBI's and the Justice Department's Offices of Professional Responsibility for more than one year to determine how the violations occurred in the field offices, and how the misinformation found its way into the FISA applications and remained uncorrected for more than one year despite procedures to verify the accuracy of FISA pleadings. As of this date, no report has been published, and how these misrepresentations occurred remains unexplained to the Court.

As a consequence of the violations of its orders, the Court has taken some supervisory actions to assess compliance with the "wall" procedures. First, until September 15, 2001 it required all Justice Department personnel who received certain FISA information to certify that they understood that under "wall" procedures FISA information was not to be shared with criminal prosecutors without the Court's approval. Since then, the Court has authorized criminal division trial attorneys to review all FBI international terrorism case files, including FISA case files and required reports from FBI personnel and Criminal Division attorneys describing their discussions of the FISA cases. The government's motion that the Court rescind all "wall" procedures in all international terrorism surveillances and searches now pending before the Court,

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or that has been before the Court at any time in the past, was deferred by the Court until now, at the suggestion of the government, pending resolution of this matter.

Given this history in FISA information sharing, the Court now turns to the revised 2002 minimization procedures. We recite this history to make clear that the Court has long approved, under controlled circumstances, the sharing of FISA information with criminal prosecutors, as well as consultations between intelligence and criminal investigations where FISA surveillances and searches are being conducted. However, the proposed 2002 minimization procedures eliminate the bright line in the 1995 procedures prohibiting direction and control by prosecutors on which the Court has relied to moderate the broad acquisition retention, and dissemination of FISA information in overlapping intelligence and criminal investigations. Paragraph A.6. of the1995 procedures provided in part:

> Additionally, the FBI and the Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives. (emphasis added)

As we conclude the first part of our statutory task, we have determined that the extensive acquisition of information concerning U.S. persons through secretive surveillances and searches authorized under FISA, coupled with broad powers of retention and information sharing with criminal prosecutors, weigh heavily on one side of the scale which we must balance to ensure that the proposed minimization procedures are "consistent" with the need of the United States to obtain, produce, and disseminate foreign intelligence information. (§1805(a)(4) and §1824)(a)(4))

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III

The 2002 minimization rules set out in sections II and III, "Intelligence Sharing Procedures Concerning the Criminal Division" and "Intelligence Sharing Procedures Concerning a USAO," continue the existing practice approved by this Court of in-depth dissemination of FISA information to Criminal Division trial attorneys and U.S. Attorney's Offices (hereafter criminal prosecutors). These new procedures apply in two kinds of counterintelligence cases in which FISA is the only effective tool available to both counterintelligence and criminal investigators:

1) those cases in which separate intelligence and criminal investigations of the same U.S. person FISA target are conducted by different FBI agents (overlapping investigations), usually involving international terrorism, and in which separation can easily be maintained, and

2) those cases in which one investigation having a U.S. person FISA target is conducted by a team of FBI agents which has both intelligence and criminal interests (overlapping interests) usually involving espionage and similar crimes in which separation is impractical.

In both kinds of counterintelligence investigations where FISA is being used, the proposed 2002 minimization procedures authorize extensive consultations between the FBI and criminal prosecutors "to coordinate efforts to investigate or protect against" actual or potential attack, sabotage, international terrorism and clandestine intelligence activities by foreign powers and their agents as now expressly provided in §1806(k)(1) and §1825(k)(1). These consultations propose to include:

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II. A. "Disseminating Information," which gives criminal prosecutors access to "all information developed" in FBI counterintelligence investigations, including FISA acquired information, as well as annual and other reports, and presumably ad hoc reporting of significant events (e.g., incriminating FISA intercepts or seizures) to criminal prosecutors.

II. B. "Providing Advice," where criminal prosecutors are authorized to consult extensively and provide advice and recommendations to intelligence officials about "all issues necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities." Recommendations may include advice about criminal investigation and prosecution as well as the strategy and goals for investigations, the law enforcement and intelligence methods to be used in investigations, and the interaction between intelligence and law enforcement components of investigations.

Last, but most relevant to this Court's finding, criminal prosecutors are empowered to advise FBI intelligence officials concerning "the initiation, operation, continuation, or expansion of FISA searches or surveillance." (emphasis added) This provision is designed to use this Court's orders to enhance criminal investigation and prosecution, consistent with the government's interpretation of the recent amendments that FISA may now be "used primarily for a law enforcement purpose."

In section III," Intelligence Sharing Procedures Concerning a USAO," U.S. attorneys are empowered to "engage in consultations to the same extent as the Criminal Division under parts II. A and II. B of these procedures," in cases involving international terrorism.

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A fair reading of these provisions leaves only one conclusion -- under sections II and III of the 2002 minimization procedures, criminal prosecutors are to have a significant role directing FISA surveillances and searches from start to finish in counterintelligence cases having overlapping intelligence and criminal investigations or interests, guiding them to criminal prosecution. The government makes no secret of this policy, asserting its interpretation of the Act's new amendments which "allows FISA to be used primarily for a law enforcement purpose."

Given our experience in FISA surveillances and searches, we find that these provisions in sections II.B and III, particularly those which authorize criminal prosecutors to advise FBI intelligence officials on the initiation, operation, continuation or expansion of FISA's intrusive seizures, are designed to enhance the acquisition, retention and dissemination of evidence for law enforcement purposes, instead of being consistent with the need of the United States to "obtain, produce, and disseminate foreign intelligence information" (emphasis added) as mandated in §1801(h) and §1821(4). The 2002 procedures appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches. This may be because the government is unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous. In either case, the FISA's definition of minimization procedures has not changed, and these procedures cannot be used by the government to amend the Act in ways Congress has not. We also find the provisions in section II.B and III. wanting because the prohibition in the 1995 procedures of criminal

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prosecutors "directing or controlling" FISA cases has been revoked by the proposed 2002 procedures. The government's memorandum of law expends considerable effort justifying deletion of that bright line, but the Court is not persuaded.

The Court has long accepted and approved minimization procedures authorizing in-depth information sharing and coordination with criminal prosecutors as described in detail above. In the Court's view, the plain meaning of consultations and coordination now specifically authorized in the Act is based on the need to adjust or bring into alignment two different but complementary interests – intelligence gathering and law enforcement. . In FISA cases this presupposes separate intelligence and criminal investigations, or a single investigation with intertwined interests, which need to be brought into harmony to avoid dysfunction and frustration of either interest. If criminal prosecutors direct both the intelligence and criminal investigations, or a single investigation having combined interests, coordination becomes subordination of both investigations or interests to law enforcement objectives. The proposed 2002 minimization procedures require the Court to balance the government's use of FISA surveillances and searches against the government's need to obtain and use evidence for criminal prosecution, instead of determining the "need of the United States to obtain, produce, and disseminate foreign intelligence information" as mandated by §1801(h) and §1821(4).

Advising FBI intelligence officials on the initiation, operation, continuation or expansion of FISA surveillances and searches of U.S. persons means that criminal prosecutors will tell the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic

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surveillance), what techniques to use, what information to look for, what information to keep as evidence and when use of FISA can cease because there is enough evidence to arrest and prosecute. The 2002 minimization procedures give the Department's criminal prosecutors every legal advantage conceived by Congress to be used by U.S. intelligence agencies to collect foreign intelligence information, including:

- a foreign intelligence standard instead of a criminal standard of probable cause;
- use of the most advanced and highly intrusive techniques for intelligence gathering; and
- surveillances and searches for extensive periods of time;

based on a standard that the U.S. person is only using or about to use the places to be surveilled and searched, without any notice to the target unless arrested and prosecuted, and, if prosecuted, no adversarial discovery of the FISA applications and warrants. All of this may be done by use of procedures intended to minimize collection of U.S. person information, consistent with the need of the United States to obtain and produce foreign intelligence information. If direction of counterintelligence cases involving the use of highly intrusive FISA surveillances and searches by criminal prosecutors is necessary to obtain and produce foreign intelligence information, it is yet to be explained to the Court.

THEREFORE, because

- the procedures implemented by the Attorney General govern the minimization of electronic surveillances and searches of U.S. persons;
- such intelligence and criminal investigations both target the same U.S. person;

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- the information collected through FISA surveillances and searches is both foreign intelligence information and evidence of crime, depending upon who is using it;
- there are pervasive and invasive techniques for electronic surveillances and physical searches authorized under the FISA;
- surveillances and searches may be authorized for extensive periods of time;
- notice of surveillances and searches is not given to the targets unless they are prosecuted;
- the provisions in FISA constrain discovery and adversary hearings and require ex parte, in camera review of FISA surveillances and searches at criminal trial;
- the FISA, as opposed to Title III and Rule 41 searches, is the only tool readily available in these overlapping intelligence and criminal investigation;
- there are extensive provisions in the minimization procedures for dissemination of FISA intercepts and seizures to criminal prosecutors and for consultation and coordination with intelligence officials using the FISA;
- criminal prosecutors would, under the proposed procedures, no longer be prohibited from "directing or controlling" counterintelligence investigations involving use of the FISA toward law enforcement objectives; and
- criminal prosecutors would, under the proposed procedures, be empowered to direct the use of FISA surveillances and searches toward law enforcement objectives by advising FBI intelligence officials on the initiation, operation, continuation and expansion of FISA authority from this Court,

The Court FINDS that parts of section II.B of the minimization procedures submitted with the Government's motion are NOT reasonably designed, in light of their purpose and technique, "consistent with the need of the United States to obtain, produce, or disseminate foreign intelligence information" as defined in §1801(h) and §1821(4) of the Act.

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THEREFORE, pursuant to this Court's authority under §1805(a) and §1824(a) to issue ex parte orders for electronic surveillances and physical searches "as requested or as modified," the Court herewith grants the Governments motion BUT MODIFIES the pertinent provisions of sections II. B. of the proposed minimization procedures as follows:

The second and third paragraphs of section II.B shall be deleted, and the following paragraphs substituted in place thereof:

"The FBI, the Criminal Division, and OIPR may consult with each other to coordinate their efforts to investigate or protect against foreign attack or other grave hostile acts, sabotage, international terrorism or clandestine intelligence activities by foreign powers or their agents. Such consultations and coordination may address, among other things, exchanging information already acquired, identifying categories of information needed and being sought, preventing either investigation or interest from obstructing or hindering the other, compromise of either investigation, and long term objectives and overall strategy of both investigations in order to ensure that the overlapping intelligence and criminal interests of the United States are both achieved. Such consultations and coordination may be conducted directly between the components, however, OIPR shall be invited to all such consultations, and if they are unable to attend, OIPR shall be apprised of the substance of the consultations forthwith in writing so that the Court may be notified at the earliest opportunity."

"Notwithstanding the foregoing, law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or

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expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives."

These modifications are intended to bring the minimization procedures into accord with the language used in the FISA, and reinstate the bright line used in the 1995 procedures, on which the Court has relied. The purpose of minimization procedures as defined in the Act, is not to amend the statute, but to protect the privacy of Americans in these highly intrusive surveillances and searches, "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information."

A separate order shall issue this date.

All seven judges of the Court concur in the Corrected and Amended Memorandum Opinion.

Royce C. Lamberth

ROYCE C. LAMBERTH
Presiding Judge

DATE: 5-17-02
6:40 p.m.

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE ALL MATTERS SUBMITTED TO THE :

FOREIGN INTELLIGENCE SURVEILLANCE : Docket Numbers: Multiple

COURT : 02-429

ORDER
(AS AMENDED)

Motion having been made by the United States of America, by James A. Baker, Counsel for Intelligence Policy, United States Department of Justice, for the Court to approve proposed minimization procedures entitled Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI, to be used in electronic surveillances and physical searches authorized by this Court, as well as a supporting memorandum of law, and a supplemental memorandum, which filing was approved by the Attorney General of the United States, and full consideration having been given to the matters set forth therein, the Court finds:

1. The President has authorized the Attorney General of the United States to approve applications for electronic surveillance and physical search for foreign intelligence purposes, 50 U.S.C. §1805(a)(l) and §1824(a)(1);

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2. The motion has been made by a Federal officer and approved by the Attorney General, 50 U.S.C. §1805(a)(2) and §1824(a) (2);

3. The proposed minimization procedures entitled Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI as modified herein, meet the definition of minimization procedures under §1801(h) and §1821(4) of the Act, 50 U.S.C. §1805(a)(4) and §1824 (a) (4).

WHEREFORE, IT IS ORDERED,

A. The aforementioned minimization procedures are herewith modified, pursuant to this Court's authority under 50 U.S.C. §1805(a) and (c) and 50 U.S.C.§1824(a) and (c), to delete the second, third, and fourth paragraphs from Section I of the proposed minimization procedures. A revised statement of "General Principles" that is not inconsistent with the Court's opinion may be included in the Attorney General's memorandum.

B. The aforementioned minimization procedures are further modified, pursuant to this Court's authority under 50 U.S.C. §1805(a) and (c) and 50 U.S. C. § 1824(a) and (c), to delete the second and third paragraphs from Section II. B and substitute the following paragraphs in place thereof:

"The FBI, the Criminal Division, and OIPR may consult with each other to coordinate their efforts to investigate or protect against foreign attack or other grave hostile acts, sabotage, international terrorism, or clandestine intelligence activities by foreign powers or their agents. Such consultations and coordination may address, among other things, exchanging information

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already acquired; identifying categories of information needed and being sought; preventing either investigation or interest from obstructing or hindering the other; compromise of either investigation; and long term objectives and overall strategy of both investigations in order to ensure that the overlapping intelligence and criminal interests of the United States are both achieved. Such consultations and coordination may be conducted directly between the components; however, OIPR shall be invited to all such consultations, and if they are unable to attend, OIPR shall be apprized of the substance of the meetings forthwith in writing so that the Court may be notified at the earliest opportunity."

"Notwithstanding the foregoing, law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives."

C. Use of the aforementioned minimization procedures as modified, in all future electronic surveillances and physical searches shall be subject to the approval of the Court in each electronic surveillance and physical search where their use is proposed by the Government pursuant to 50 U.S.C. §1804(a)(5)) and §1823 (a)(5).

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WHEREFORE, IT IS FURTHER ORDERED, pursuant to the authority conferred on this Court by the Foreign Intelligence Surveillance Act, that the motion of the United States to use the aforementioned minimization procedures as modified, in all electronic surveillances and physical searches already approved by the Court, as described in the Government's motion, is GRANTED AS MODIFIED herein.

A separate Memorandum Opinion has been filed this date. The motion of the United States has been considered by all of the judges of this Court, all of whom concur in the Memorandum Opinion and in the Order. The Court has also adopted a new administrative rule to monitor compliance with this Order as follows:

Rule 11, Criminal Investigations in FISA Cases

All FISA applications shall include informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutors at the Department of Justice or a United States Attorney's Office.

All seven judges of the Court concur in this Amended Order.

Royce C. Lamberth
ROYCE C. LAMBERTH
Presiding Judge,
United States Foreign Intelligence
Surveillance Court

Signed 5-17-02 6:40 P.M. E.S.T.
Date Time

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U.S. Foreign Intelligence
Surveillance Court

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE ALL MATTERS SUBMITTED TO THE:

FOREIGN INTELLIGENCE SURVEILLANCE: COURT **Docket Numbers: Multiple**

ORDER

Motion having been made by the United States of America, by James A. Baker, Counsel for Intelligence Policy, United States Department of Justice, for the Court to clarify its order of April 22, 2002 in the above captioned matter, and full consideration having been given to the matters set forth therein, the motion to clarify is granted and the Court's order and memorandum opinion of April 22, 2002 in this matter are amended as follows:

1. The language of the Court's order and memorandum opinion of April 22, 2002 are amended to include the following substitute sentence in the second paragraph of the modified minimization procedures to read: "Additionally, the FBI and the Criminal Division shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives."

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2. The government also asks that the Court clarify whether its use of the term "law enforcement officials" in the substitute minimization language adopted by the Court "applies to FBI agents as well as to prosecutors." The Court's own opinion states as follows:

> The Attorney General's new minimization procedures are designed to regulate the acquisition, retention and dissemination of information involving the FISA (i.e., disseminating information, consulting, and providing advice) between FBI counterintelligence and counter-terrorism officials on the one hand, and FBI criminal investigators, trial attorneys in the Justice Department's Criminal Division, and U.S. Attorney's Offices on the other hand. (emphasis added) (Opinion, 6-7).

The Court uses, and intended to use, the term "law enforcement officials"in conjunction with the source and context from which it originated , i.e. the recent amendment to the FISA in which Congress expressly authorized consultations and coordination between federal officers who conduct electronic surveillances and physical searches to acquire foreign intelligence information and "Federal law enforcement officers." (50 U.S.C. §1806 (k) and §1825 (k). The new minimization procedures apply to the minimization process in FISA electronic surveillances and physical searches, and to those involved in the process – including both FBI agents and criminal prosecutors.

Contrary to the assumption made in the government's motion, all of the judges of this Court concurred in both the opinion and order of April 22, 2002.

5-17-02
Date: 6:45 p.m.

Royce C. Lamberth
ROYCE C. LAMBERTH
Presiding Judge
United States Foreign Intelligence
Surveillance Court

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CONCURRING IN THE ORDER: 5/17/02

William H. Stafford, Jr.

Honorable William H. Stafford, Jr.
Judge, United States Foreign
Intelligence Surveillance Court

Honorable Stanley S. Brotman
Judge, United States Foreign
Intelligence Surveillance Court

Honorable Harold A. Baker
Judge, United States Foreign
Intelligence Surveillance Court

Honorable Michael J. Davis
Judge, United States Foreign
Intelligence Surveillance Court

Claude M. Hilton

Honorable Claude M. Hilton
Judge, United States Foreign
Intelligence Surveillance Court

Nathaniel M. Gorton

Honorable Nathaniel M. Gorton
Judge, United States Foreign
Intelligence Surveillance Court

Office of the Attorney General
Washington, D. C. 20530

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MAR 7 2002
U.S. Foreign Intelligence Surveillance Court

March 6, 2002

MEMORANDUM

TO: Director, FBI
Assistant Attorney General, Criminal Division
Counsel for Intelligence Policy
United States Attorneys

FROM: The Attorney General John Ashcroft

SUBJECT: Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI

I. INTRODUCTION AND STATEMENT OF GENERAL PRINCIPLES

Unless otherwise specified by the Attorney General, these procedures apply to foreign intelligence (FI) and foreign counterintelligence (FCI) investigations conducted by the Federal Bureau of Investigation (FBI). They are designed to ensure that FI and FCI investigations are conducted lawfully, particularly in light of requirements imposed by the Foreign Intelligence Surveillance Act (FISA), and to promote the effective coordination and performance of the criminal and counterintelligence functions of the Department of Justice (DOJ). These procedures supersede the procedures adopted by the Attorney General on July 19, 1995 (including the annex concerning the Southern District of New York), the interim measures approved by the Attorney General on January 21, 2000, and the memorandum issued by the Deputy Attorney General on August 6, 2001. Terms used in these procedures shall be interpreted in keeping with definitions contained in FISA. References in these procedures to particular positions or components within the Department of Justice shall apply to any successor position or component.

Prior to the USA Patriot Act, FISA could be used only for the "primary purpose" of obtaining "foreign intelligence information." The term "foreign intelligence information" was and is defined to include information that is necessary, or relevant, to the ability of the United States to protect against

foreign threats to national security, such as attack, sabotage, terrorism, or clandestine intelligence activities. See 50 U.S.C. § 1801(e)(1). Under the primary purpose standard, the government could have a significant law enforcement purpose for using FISA, but only if it was subordinate to a primary foreign intelligence purpose. The USA Patriot Act allows FISA to be used for "a significant purpose," rather than the primary purpose, of obtaining foreign intelligence information. Thus, it allows FISA to be used primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains. See 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B).

The Act also expressly authorizes intelligence officers who are using FISA to "consult" with federal law enforcement officers to "coordinate efforts to investigate or protect against" foreign threats to national security. Under this authority, intelligence and law enforcement officers may exchange a full range of information and advice concerning such efforts in FI or FCI investigations, including information and advice designed to preserve or enhance the possibility of a criminal prosecution. The USA Patriot Act provides that such consultation between intelligence and law enforcement officers "shall not" preclude the government's certification of a significant foreign intelligence purpose or the issuance of a FISA warrant. See 50 U.S.C. §§ 1806(k), 1825(k).

Consistent with the USA Patriot Act and with standards of effective management, all relevant DOJ components, including the Criminal Division, the relevant United States Attorney's Offices (USAOs), and the Office of Intelligence Policy and Review (OIPR), must be fully informed about the nature, scope, and conduct of all full field FI and FCI investigations, whether or not those investigations involve the use of FISA. Correspondingly, the Attorney General can most effectively direct and control such FI and FCI investigations only if all relevant DOJ components are free to offer advice and make recommendations, both strategic and tactical, about the conduct and goals of the investigations. The overriding need to protect the national security from foreign threats compels a full and free exchange of information and ideas.

II. INTELLIGENCE SHARING PROCEDURES CONCERNING THE CRIMINAL DIVISION

A. Disseminating Information.

The Criminal Division and OIPR shall have access to all information developed in full field FI and FCI investigations

except as limited by orders issued by the Foreign Intelligence Surveillance Court, controls imposed by the originators of sensitive material, and restrictions established by the Attorney General or the Deputy Attorney General in particular cases. See 50 U.S.C. §§ 1801(h), 1806(a), 1825(a).

The FBI shall keep the Criminal Division and OIPR apprised of all information developed in full field FI and FCI investigations that is necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities, subject to the limits set forth above. Relevant information includes both foreign intelligence information and information concerning a crime which has been, is being, or is about to be committed. The Criminal Division and OIPR must have access to this information to ensure the ability of the United States to coordinate efforts to investigate and protect against foreign threats to national security, including protection against such threats through criminal investigation and prosecution, and in keeping with the need of the United States to obtain, produce, and disseminate foreign intelligence information. See 50 U.S.C. §§ 1801(h)(1), 1806(k), 1825(k).

The FBI shall also keep the Criminal Division and OIPR apprised of information developed in full field FI and FCI investigations that concerns any crime which has been, is being, or is about to be committed. See 50 U.S.C. § 1801(h)(3).

As part of its responsibility under the preceding paragraphs, the FBI shall provide to the Criminal Division and OIPR copies of annual Letterhead Memoranda (or successor summary documents) in all full field FI and FCI investigations, and shall make available to the Criminal Division and OIPR relevant information from investigative files, as appropriate. The Criminal Division shall adhere to any reasonable conditions on the storage and disclosure of such documents and information that the FBI or OIPR may require.

All information acquired pursuant to a FISA electronic surveillance or physical search that is disseminated to the Criminal Division shall be accompanied by a statement that such information, or any information derived therefrom, may only be used in any criminal proceeding (including search and arrest warrant affidavits and grand jury subpoenas and proceedings) with the advance authorization of the Attorney General. See 50 U.S.C. §§ 1806(b), 1825(c).

B. Providing Advice.

The FBI, the Criminal Division, and OIPR shall consult with one another concerning full field FI and FCI investigations except as limited by these procedures, orders issued by the Foreign Intelligence Surveillance Court, and restrictions established by the Attorney General or the Deputy Attorney General in particular cases.

Consultations may include the exchange of advice and recommendations on all issues necessary to the ability of the United States to investigate or protect against foreign attack, sabotage, terrorism, and clandestine intelligence activities, including protection against the foregoing through criminal investigation and prosecution, subject to the limits set forth above. Relevant issues include, but are not limited to, the strategy and goals for the investigation; the law enforcement and intelligence methods to be used in conducting the investigation; the interaction between intelligence and law enforcement components as part of the investigation; and the initiation, operation, continuation, or expansion of FISA searches or surveillance. Such consultations are necessary to the ability of the United States to coordinate efforts to investigate and protect against foreign threats to national security as set forth in 50 U.S.C. §§ 1806(k), 1825(k).

The FBI, the Criminal Division, and OIPR shall meet regularly to conduct consultations. Consultations may also be conducted directly between two or more components at any time. Disagreements arising from consultations may be presented to the Deputy Attorney General or the Attorney General for resolution.

III. INTELLIGENCE SHARING PROCEDURES CONCERNING A USAO

With respect to FI or FCI investigations involving international terrorism, the relevant USAOs shall receive information and engage in consultations to the same extent as the Criminal Division under Parts II.A and II.B of these procedures. Thus, the relevant USAOs shall have access to information developed in full field investigations, shall be kept apprised of information necessary to protect national security, shall be kept apprised of information concerning crimes, shall receive copies of LHMs or successor summary documents, and shall have access to FBI files to the same extent as the Criminal Division. The relevant USAOs shall receive such information and access from the FBI field offices. The relevant USAOs also may and shall engage in regular consultations with the FBI and OIPR to the same extent as the Criminal Division.

With respect to FI or FCI investigations involving espionage, the Criminal Division shall, as appropriate, authorize the dissemination of information to a USAO, and shall also, as appropriate, authorize consultations between the FBI and a USAO, subject to the limits set forth in Parts II.A and II.B of these procedures. In an emergency, the FBI may disseminate information to, and consult with, a United States Attorney's Office concerning an espionage investigation without the approval of the Criminal Division, but shall notify the Criminal Division as soon as possible after the fact.

All information disseminated to a USAO pursuant to these procedures, whether or not the information is derived from FISA and whether or not it concerns a terrorism or espionage investigation, shall be disseminated only to the United States Attorney (USA) and/or any Assistant United States Attorneys (AUSAs) designated to the Department of Justice by the USA as points of contact to receive such information. The USAs and the designated AUSAs shall have appropriate security clearances and shall receive training in the handling of classified information and information derived from FISA, including training concerning restrictions on the use and dissemination of such information.

Except in an emergency, where circumstances preclude the opportunity for consultation, the USAOs shall take no action on the information disseminated pursuant to these procedures without consulting with the Criminal Division and OIPR. The term "action" is defined to include the use of such information in any criminal proceeding (including search and arrest warrant affidavits and grand jury subpoenas and proceedings), and the disclosure of such information to a court or to any non-government personnel. See also U.S. Attorney's Manual §§ 9-2.136, 9-90.020. Disagreements arising from consultations pursuant to this paragraph may be presented to the Deputy Attorney General or the Attorney General for resolution.

All information acquired pursuant to a FISA electronic surveillance or physical search that is disseminated to a USAO shall be accompanied by a statement that such information, or any information derived therefrom, may only be used in any criminal proceeding (including search and arrest warrant affidavits and grand jury subpoenas and proceedings) with the advance authorization of the Attorney General. See 50 U.S.C. §§ 1806(b), 1825(c). Whenever a USAO requests authority from the Attorney General to use such information in a criminal proceeding, it shall simultaneously notify the Criminal Division.

Office of the Attorney General
Washington, D.C. 20530

July 19, 1995

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
Director, FBI
Counsel for Intelligence Policy
The United States Attorneys

FROM: The Attorney General

SUBJECT: Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations

The procedures contained herein, unless otherwise specified by the Attorney General, apply to foreign intelligence (FI) and foreign counterintelligence (FCI) investigations conducted by the FBI, including investigations related to espionage and foreign and international terrorism. The purpose of these procedures is to ensure that FI and FCI investigations are conducted lawfully, and that the Department's criminal and intelligence/counterintelligence functions are properly coordinated.

A. Contacts During an FI or FCI Investigation in Which FISA Surveillance or Searches are Being Conducted

1. If, in the course of an FI or FCI investigation utilizing electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act (FISA), facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI and OIPR each shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The FBI shall inform OIPR when it initiates contact with the Criminal Division. After this initial notification, the Criminal Division shall notify OIPR before engaging in substantive consultations with the FBI, as discussed in paragraph 5, below.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division and OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate

because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI or OIPR raises legitimate and significant criminal law enforcement concerns, it shall inform the FBI and OIPR. The Criminal Division may, in appropriate circumstances, contact the pertinent U.S. Attorney's Office for the purpose of evaluating the information. Thereafter, the FBI may consult with the Criminal Division concerning the investigation to the extent described in paragraphs 5 and 6, below.

4. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

5. The Criminal Division shall notify OIPR of, and give OIPR the opportunity to participate in, consultations between the FBI and Criminal Division concerning an FI or FCI investigation. If OIPR is unable or does not desire to participate in a particular consultation, the Criminal Division will, after the consultation takes place, orally inform OIPR of the substance of the communication in a timely fashion.

6. Consultations between the Criminal Division and the FBI shall be limited in the following manner: The FBI will apprise the Criminal Division, on a timely basis, of information developed during the FI or FCI investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution. (For example, the Criminal Division may provide advice on the handling of sensitive human sources so that they would not be compromised in the event of an ultimate decision to pursue criminal prosecution.) The Criminal Division shall not, however, instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches. Additionally, the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives.

7. In a FISA renewal application concerning such an investigation, OIPR shall apprise the Foreign Intelligence Surveillance Court (FISC) of the existence of, and basis for, any contacts among the FBI, the Criminal Division, and a U.S.

Attorney's Office, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation.

8. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

9. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

B. Contacts During an FI or FCI Investigation in Which No FISA Surveillance or Searches Are Being Conducted

1. If, in the course of an FI or FCI investigation in which FISA electronic surveillance or physical searches are not being conducted, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI shall notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The Criminal Division may, in appropriate circumstances, contact the pertinent U.S. Attorney's Office for the purpose of evaluating the information.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division, and notice to OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI raises legitimate and significant criminal law enforcement concerns, it shall notify the FBI and OIPR. Thereafter, the FBI may consult with the Criminal Division concerning the investigation.

4. The Criminal Division will be responsible for orally informing OIPR of its contacts and consultations with the FBI concerning such an investigation.

5. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in

any contact, and briefly summarizing the content of any communication.

6. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

7. If, during an FI or FCI investigation, a FISA electronic surveillance or search is undertaken after the FBI has consulted with the Criminal Division, the procedures set forth in section A., above, shall apply.

8. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

Office of the Attorney General
Washington, D. C. 20530

July 19, 1995

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
United States Attorney, Southern District of New York
Director, FBI
Counsel for Intelligence Policy

FROM: The Attorney General

SUBJECT: Effect of Procedures Governing FBI-Criminal Division Contacts During FI/FCI Investigations on Specific Instructions Concerning Separation of Certain FCI and Criminal Investigations

The memorandum issued by me today regarding procedures for contacts between the FBI and the Criminal Division concerning foreign intelligence and foreign counterintelligence investigations does not affect the specific instructions, contained in a memorandum from the Deputy Attorney General issued March 4, 1995, governing the separation of certain foreign counterintelligence and criminal investigations. Those instructions remain in effect.

U. S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Through: THE DEPUTY ATTORNEY GENERAL 1/12/2000

From: Gary G. Grindler 1/12/2000
Principal Associate Deputy Attorney General

Jonathan D. Schwartz
Associate Deputy Attorney General

Subject: To Recommend that the Attorney General Authorize Certain Measures Regarding Intelligence Matters in Response to the Interim Recommendations Provided by Special Litigation Counsel Randy Bellows

Timetable: As soon as possible

Discussion: The purpose of this memorandum is to recommend that you authorize certain measures regarding intelligence matters in response to the three interim recommendations provided by Special Litigation Counsel Randy Bellows in a letter to you dated October 19, 1999 (Tab A.) Our recommendations are the product of a working group comprised of senior members of three components -- CRM, FBI, and OIPR -- which met several times late last year and with Bellows on January 4, 2000. As outlined below, our recommendations are supported by the working group with respect to Bellows' first and third interim recommendations, but not his second interim recommendation.

Bellows' first interim recommendation is that you send a memorandum to the relevant components to reinforce the view that the "1995 Procedures," contained in a memorandum from you dated July 19, 1995 (Tab B), are still in force and must be strictly followed. There is unanimity within the working group that the 1995 Procedures set forth the correct substantive standard with respect to notification to CRM, *i.e.*, when "facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed." For the reasons stated forth in Bellows' letter, however, most working group participants acknowledge that the 1995 Procedures are not being fully implemented in practice.

In our meeting with Bellows, he indicated that, since he submitted his October 19, 1999, letter, he had decided that he may recommend in his final report significant alterations to the 1995 Procedures, specifically those procedures regarding the scope of the "advice" that CRM may provide to the FBI. Because Bellows hopes (but could not say definitively) that he would submit his final report to you in late February or March of this year, the working group agreed that you should refrain at this time from sending out the memorandum described in Bellows' first interim recommendation. Once you receive his final report, the working group will consider all of his final recommendations promptly, suggest changes (if any) to the 1995 Procedures, and then prepare a memorandum for you to send to the relevant components. In the meantime, the valid concerns Bellows has raised about the lack of implementation of the notification provisions of the 1995 Procedures should be addressed through a combination of briefings and the provision of letterhead memoranda (LHMs), as discussed below.

Bellows' second interim recommendation is that the FBI begin providing to CRM automatically all LHMs regarding full FCI investigations of U.S. persons, at or before the time the LHMs are provided to OIPR. In making this interim recommendation, Bellows correctly notes that there is substantial overlap between the substantive notification standard in the 1995 Procedures, which is quoted above, and the standard for opening full FCI investigations set forth in the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, *i.e.*, "on the basis of specific and articulable facts giving reason to believe that a person, group or organization is or may be" involved in one or more of seven categories of activities.

CRM supports this recommendation. While OIPR has raised the concern that this recommendation may raise legal problems regarding the primary purpose test, we agree with your preliminary assessment that the mere one-way flow of intelligence information from the FBI to CRM in this fashion should raise no meaningful legal concern. The FBI is of several minds on this issue as of the date of this memorandum. Certain key individuals support this interim recommendation; some are opposed; and some only want to provide espionage-related LHMs to CRM during this interim period.

A critical issue in this regard is the uncertainty regarding what ultimately will be Bellows' final recommendation regarding the permissible "advice" that CRM may provide the FBI. It is critical because, as the working group members agree, the mass production to CRM of all LHMs on U.S. persons -- many of which are written at a fairly general level -- inevitably will lead to significant increased dialogue between CRM and FBI about intelligence matters.

In this context, some at FBI have recommended that, at this point, you take no action regarding LHMs until Bellows issues his final report. To the extent Bellows' final report is, in fact, forthcoming in a matter of weeks, we might be inclined to follow this suggestion. Nonetheless, because Bellows' could not provide a firm assurance that his final report will issue by the end of March, and because the second interim recommendation is an important prophylactic measure for the reasons offered by Bellows, we recommend at this time that

espionage-related LHMs that fall within the seventh category of activities in the Attorney General's FCI Guidelines be provided as a matter of course to CRM.

We make this recommendation for three reasons. First, the seventh category of activities is limited to persons, groups, or organizations that are "engaged in activities that violate the espionage statutes." By its terms, this seventh category necessarily involves violations of federal criminal law. The other six categories, by contrast, are not specifically tied to activities that "violate" other criminal statutes, although it should be pointed out that terrorist activity within the United States presumably would violate U.S. statutes. Second, there is agreement within the working group that LHMs that fall within the seventh category are relatively limited in number and typically provide such significant, detailed information that additional dialogue between CRM and the FBI may be limited or unnecessary. Third, any concerns that may exist that LHMs in the other six categories will not be provided to CRM during this interim period should be ameliorated by the briefings discussed in the next section. Those briefings should include *all* cases that meet the substantive notification standard set forth in the 1995 Procedures, and the LHMs for those cases should be available for review by CRM.

Bellows' third interim recommendation is that the FBI immediately begin providing critical case briefings to CRM about FCI investigations. After discussing the briefing recommendation with the working group we propose the following briefing protocol in response to this interim recommendation:

- On a monthly basis, the Assistant Director for the FBI's National Security Division and the Assistant Director for the FBI's Terrorism Division (ADs) will brief the Principal Associate Deputy Attorney General and the Counsel for OIPR on significant intelligence matters. Collectively, these individuals will comprise the "Core Group."

- The Assistant Attorney General for the Criminal Division (AAG) and his or her Chief of Staff will be asked to join that portion of the Core Group's meeting that involves a briefing from the ADs on intelligence matters that the Core Group believes satisfies the substantive notification standard contained in the 1995 Procedures.

- The AAG may provide, as he believes appropriate, the heads of CRM's Terrorism and Violent Crime Section (TVCS) and its Internal Security Section (ISS) as well as the Deputy Assistant Attorney General responsible for those sections with the information he obtained during the portion of the monthly briefing that he attended.

- At this juncture, the only affirmative step that the heads of TVCS and ISS may take is to seek additional information from the ADs or their designees about the matters in question. The ADs or their designees are required to provide all of the

information sought by the heads of TVCS and ISS, unless the Core Group agrees otherwise. A representative of OIPR should be present for meetings, wherein this additional information is provided. Or if the information is provided in writing copies should be simultaneously provided to OIPR.

- At this juncture, the only affirmative step that the heads of the TVCS and ISS may take is to provide the AAG and the responsible Deputy Assistant Attorneys General with the information they obtained from the ADs or their designees. If the AAG believes that CRM either should obtain more information or take any affirmative step (*e.g.*, contact a United States Attorney's Office, issue a grand jury subpoena, seek authorization for a Title III wiretap), he must first consult with the Core Group.

- The Attorney General and/or Deputy Attorney General should be consulted whenever the Core Group cannot reach agreement on any matter before it.

CRM, OIPR, and the FBI have agreed on this briefing protocol.

APPROVAL _____

DATE: January 21, 2000

DISAPPROVAL _____

OTHER _____

James K. Robinson
Frances Fragos Townsend
Ronald D. Lee
Larry Parkinson

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 6, 2001

MEMORANDUM

TO: Criminal Division:
Michael Chertoff, Assistant Attorney General
Bruce Swartz, Deputy Assistant Attorney General
Jim Reynolds, Chief, TVCS
John Dion, Chief, ISS

Office of Intelligence Policy and Review:
James Baker, Counsel for Intelligence Policy

FBI:
Thomas Pickard, Acting Director
Larry Parkinson, General Counsel
Neil Gallagher, Assistant Director, NSD
Dale Watson, Assistant Director, CTD
David Knowlton, Assistant Director, INSD

FROM: Larry D. Thompson

SUBJECT: Intelligence Sharing

This memorandum clarifies current Department of Justice policy governing intelligence sharing, and establishes new policy. On July 19, 1995, the Attorney General adopted Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (1995 Procedures). The 1995 Procedures remain in effect today. On January 21, 2000, the Attorney General adopted additional measures regarding intelligence sharing in response to the Interim Recommendations proposed by Special Litigation Counsel Randy Bellows (Interim Measures). The Interim Measures also remain in effect today. The purpose of this memorandum is to restate and clarify certain important requirements imposed by the 1995 Procedures and the Interim Measures, and to establish certain additional requirements. This memorandum does not discuss all

of the current requirements, and the fact that a particular requirement is not discussed here does not mean that it is no longer in effect.

1. Sharing Information.

The 1995 Procedures require the FBI to notify the Criminal Division when "facts or circumstances are developed" in an FI or FCI investigation "that reasonably indicate that a significant federal crime has been, is being, or may be committed." This notification requirement is mandatory and is to be followed by the FBI absent a specific exemption for a particular investigation granted by me or the Attorney General after discussions with the Core Group (see Part 4). Several aspects of the notification requirement bear emphasis.

First, the "reasonable indication" standard as used in the 1995 Procedures is identical to the "reasonable indication" standard in the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, which use it as the standard for the initiation of federal criminal investigations. Those guidelines explain that term as follows: "The standard of 'reasonable indication' is substantially lower than probable cause. In determining whether there is reasonable indication of a federal criminal violation, a Special Agent may take into account any facts or circumstances that a prudent investigator would consider. However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient."

Second, the term "significant federal crime" should be understood to include any federal felony. Thus, for example, the term includes various offenses that fall under the jurisdiction of the Criminal Division's Internal Security Section, such as espionage (18 U.S.C. 793, 794) and unauthorized removal of classified material (18 U.S.C. 1924). It also includes various offenses that fall under the jurisdiction of the Criminal Division's Terrorism and Violent Crime Section, such as use of a weapon of mass destruction (18 U.S.C. 2332a) and providing material support to a designated foreign terrorist organization (18 U.S.C. 2339B).

Third, when notification is required under the reasonable indication" standard, it is required without delay. Notification should be made to the appropriate Deputy Assistant Attorney General in the Criminal Division with oversight review of the Terrorism and Violent Crime Section or the Internal Security Section. Where appropriate, immediate notification (by secure telephone if necessary) should precede a more complete discussion at a monthly briefing (see Part 3).

Fourth, in keeping with paragraphs A.1 and B.3 of the 1995 Procedures, the FBI shall inform OIPR before it contacts the Criminal Division pursuant to the notification provisions in any FI or FCI case, whether or not FISA activity is being conducted. OIPR shall be given a reasonable opportunity to be present for such contacts.

2. LHMs.

All Letterhead Memoranda (LHMs) in FI or FCI cases, and all FBI memoranda requesting initiation or renewal of FISA authority, shall contain a section devoted explicitly to identifying any possible federal criminal violation meeting the 1995 Procedures' notification standards (see Part 1).

The FBI will provide to OIPR two copies of all LHMs in FI or FCI cases involving U.S. persons or presumed U.S. persons. This requirement includes LHMs in both espionage and terrorism cases, and is therefore an expansion of the Interim Measures. OIPR will make one copy of these LHMs available for pickup by the Criminal Division. The Criminal Division shall adhere to any reasonable conditions on the disclosure of the LHMs that the FBI or OIPR may require.

3. Monthly Briefings.

The FBI shall provide monthly briefings to the Criminal Division concerning all FI and FCI investigations that meet the 1995 Procedures' notification standards (see Part 1).

Prior to each briefing, the Criminal Division shall, based on the LHMs received under Part 2, identify for the FBI the investigations about which it requires additional information. The FBI shall provide the Criminal Division with that information at the briefing. In addition, the FBI shall brief the Criminal Division on any other matters that meet the current notification standards (see Part 1) and that, for

whatever reason, the FBI did not previously disclose to the Criminal Division.

OIPR shall be provided with reasonable advance notice of these briefings and may attend them.

4. Core Group.

The Interim Measures established a Core Group consisting of the FBI Assistant Directors for the Counterterrorism and National Security Divisions, the Counsel for OIPR, and representatives of the Office of the Deputy Attorney General. The Core Group is to resolve disputes concerning application of the 1995 Procedures in particular cases. Thus, for example, if the FBI or OIPR is uncertain whether a particular case satisfies the "reasonable indication" standard for notifying the Criminal Division, the matter shall be brought to the attention of the Core Group. Other disagreements that arise from application of the 1995 Guidelines shall also be brought to the attention of the Core Group. The Core Group will then make a recommendation to me or to the Attorney General for a final decision on the matter.