

Testimony of

The Honorable Orrin Hatch

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Mr. Chairman, I want to commend you for holding a hearing on this important issue: the Foreign Intelligence Surveillance Act (FISA) process. The intelligence community and law enforcement agencies rely on FISA to conduct critical intelligence gathering in order to protect our country and prevent further terrorist attacks. I look forward to examining this important issue relating to the FISA process today and am hopeful we will do this in a spirit of bipartisanship. These are complex issues and this 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 11. 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, a broad package of measures that provided law enforcement and the intelligence community with the necessary tools to fight terrorism worldwide and 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 with 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 a 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: 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. 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 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 can not 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 11. 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. I look forward to hearing from each witness. Thank you.

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