Testimony of

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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.