Testimony of

# The Honorable Patrick Leahy

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Today in Vermont, Arizona, North Carolina, New York, Wisconsin, Maryland and many other States, Americans are making this great democracy work by casting their votes. This committee meets today as part of its role in the democratic process, focusing oversight on one of the important, but least understood, functions of our government. In particular, we are examining how the Foreign Intelligence Surveillance Act is working - not 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. And in administering a system that rightfully must operate under a shroud of secrecy, process is crucial.

## FISA'S ROLE

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 FISA was originally enacted in the 1970s to curb widespread abuses by Presidents and former FBI officials of bugging and wiretapping Americans without any judicial warrant - based on the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 the 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. Mort Halperin, whose telephone was illegally tapped by high-level officials in the Nixon Administration. I point that out because we need to remind ourselves that these abuses were not ancient history.

## OVERSIGHT OF A SECRET SYSTEM

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 are indispensable. Oversight of a secret system is especially difficult, but in a democracy it is also 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, that 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 cases, 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.

A NEW WINDOW ON THE FISA PROCESS

Our oversight has already contributed to the public's understanding of this process, by bringing to light the FISA court's unanimous opinion rejecting the Justice Department's interpretation of the USA PATRIOT Act's amendments. If it had not been for the prolonged efforts of this committee, 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. As it is, this unclassified opinion was issued in May, but not released until three months later, on August 20, in response to a letter that Senator Specter, Senator Grassley and I sent 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 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 this law is being interpreted and applied.

DOJ'S HANDLING OF THE USA PATRIOT ACT

Because many of the FISA provisions are subject to a sunset, it is particularly important that this committee monitor how the Justice Department is interpreting them. The Department of Justice's brief makes two sweeping claims regarding the USA PATRIOT Act amendments. First, the Department boldly claims that the longstanding definition of "foreign intelligence" adopted by numerous courts for more than 20 years is simply wrong. Specifically, it claims that the notion

that domestic criminal prosecution is separate from foreign intelligence is not valid. Instead, DOJ argues that information obtained for criminal prosecution is now just one type of foreign intelligence information. Therefore, they claim that using FISA for the sole purpose of pursuing a criminal prosecution, as opposed to collecting intelligence, is allowed.

Second, the Department argues 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 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 when the strictures of Title III or 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 (See Brief at 41) the Department cites my statement to support its arguments that there is no longer a distinction between using FISA for a criminal prosecution and using it to collect foreign intelligence. That was not and is not my belief. 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, to make such a sweeping change in FISA 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. Even before enactment of the FISA, courts relied on the non-prosecutorial purpose of foreign intelligence gathering to allow the Executive Branch leeway in conducting surveillance of foreign powers and agents in the United States. The reasoning was that, when true foreign intelligence efforts were involved, normal courts lacked the expertise, the secrecy, and the agility to protect our national security. But courts have always been careful to point out that - unlike traditional intelligence activity - when the actual purpose of wiretap is a normal criminal prosecution even for a serious terrorist crime, that our normal courts were fully competent to handle such matters. In addition, in criminal cases the Fourth Amendment's protections of privacy regain prominence. It creates serious constitutional issues for the DOJ to claim, as it does in its brief, that all these courts are incorrect and that the Department of Justice can use FISA to sidestep the Fourth Amendment's normal probable normal requirements in matters that they know from the outset are going to be normal criminal prosecutions. I am interested to hear the views of our expert panelists on the Justice Department's sweeping arguments.

MAKING FISA WORK AS IT SHOULD

The issues relating to FISA implementation are not just legal issues, however. Our Committee has also held closed sessions and briefings, and we have heard from many of the FBI and Justice Department officials responsible for processing and approving FISA applications. While I cannot detail the results of this oversight in an unclassified forum, I must say this: Before the 9-11

attacks, we discovered that the FISA process was strapped by unnecessary layers of bureaucracy and riddled with inefficiencies. Some of these inefficiencies had to do with the 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 an obsession with covering up mistakes instead of addressing them head on. Even a cursory read of the unanimous FISA Court opinion bears that out. The FISC 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. The problems they cite were evident in the previous administration as well as the current administration. I continue to support Director Mueller's efforts to address these problems, but the going will not be easy.

As we conduct this extensive oversight I have become more convinced that 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 effectively combat terrorism. 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 then 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. FISA is even more important to the nation today than it was a year ago, before September 11, 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. Only then can we act in the nation's best interest.

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