Testimony of

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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.

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 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.

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. FISA lends itself to this approach since procedures for dealing with international terrorism are separately included within the statute. 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 by a foreign power or an agent of a foreign power" (underlining 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.