

Testimony of
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July 26, 2006

STATEMENT
OF
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING

FISA FOR THE 21ST CENTURY

PRESENTED ON JULY 26, 2006

Thank you, Mr. Chairman, Senator Leahy, and Members of the Committee. I appreciate the opportunity to appear here today to discuss proposed revisions to the Foreign Intelligence Surveillance Act of 1978.

Foreign intelligence surveillance is a critical tool in our common effort to prevent another catastrophic terrorist attack on the United States. The enemies we face operate in obscurity, through secret cells that communicate globally while plotting to carry out surprise attacks from within our own communities. We all recognize the fundamental challenge the War on Terror presents for a free society: To detect and prevent the next 9/11, while steadfastly safeguarding the liberties we cherish. Maintaining the constitutional balance between security and liberty must be our polestar in any legislative effort to reframe the FISA statute.

The past 28 years since the enactment of FISA have seen perhaps the greatest transformation in modes of communication of any period in history. In 1978, almost all transoceanic communications into and out of the United States were carried by satellite, and those communications were intentionally kept largely outside the scope of FISA's coverage, consistent with FISA's primary focus on domestic communications surveillance. At that time, Congress did not anticipate the technological revolution that would bring us global high-speed fiber-optic networks, the Internet, e-mail, and disposable cell phones.

Innovations in communications technology have fundamentally transformed how our enemies communicate, and therefore how they plot and plan their attacks. It is more than a little ironic

that al Qaeda is so expert in exploiting the communications tools of the Internet age to advance extremist goals of intolerance and tyranny that are more suited to the 12th century than the 21st. Meanwhile, the United States, the most advanced Nation on earth, confronts the threat of al Qaeda with a legal regime designed for the last century and geared more toward traditional case-by-case investigations.

The limitations of the traditional FISA process and the acute need to establish an early warning system to detect and prevent further al Qaeda attacks in the wake of 9/11 led the President to authorize the Terrorist Surveillance Program. As described by the President, that program, which has been the subject of prior hearings before this Committee, involves the NSA's monitoring of international communications into and out of the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

This Committee is currently considering several pieces of legislation addressing FISA and the Terrorist Surveillance Program. I want to thank the Chairman for his leadership on these issues and for his hard work in crafting a comprehensive approach that will help us fight terrorists more effectively and gather critical foreign intelligence more efficiently. I also wish to thank Senator DeWine, who sits both here and on the Intelligence Committee; Senator DeWine has also introduced a bill, co-sponsored by Senator Graham, which represents a very positive approach to the issues presented by the Terrorist Surveillance Program. The Administration urges the Committee to approve both of these bills promptly, and we look forward to working with the Congress as a whole as this legislation moves ahead, and with the Intel Committees, where technical changes can be appropriately discussed to ensure that FISA as amended will provide the Nation with the tools it needs to confront our new adversaries.

I intend to focus my remarks today primarily on the Chairman's bill.

Fundamentally, Chairman Specter's legislation recognizes that in times of national emergency and armed conflict involving an exigent terrorist threat, the President may need to act with agility and dispatch to protect the country by putting in place a program of surveillance targeted at the terrorists and designed to detect and prevent the next attack. Article II of the Constitution gives the President authority to act in this way to defend the Nation. The provisions in Chairman Specter's legislation providing that FISA does not interfere with the President's constitutional authority simply reaffirm the same proposition stated by the FISA Court of Review in its seminal decision in 2002. That court "[took] for granted that the President does have that [constitutional] authority," and concluded that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).

At the same time, however, Chairman Specter's legislation will provide an important new role for the Judicial Branch in the review of such presidential programs, in addition to oversight by the Intelligence Committees of the Congress. His bill would add a new title to FISA under which the FISA Court, subject to certain requirements, would have jurisdiction to issue an order approving a program of terrorist surveillance authorized by the President. This legislation would create for the first time an innovative procedure whereby the President (acting through the Attorney General) will be able to bring such a surveillance program promptly to the FISA Court for a judicial determination that it is constitutional and reasonable, in compliance with the

requirements of the Fourth Amendment. The FISA Court would also be authorized to review the particulars of the program and the minimization procedures in place, to help ensure that the surveillance is focused on the terrorist threat and that information collected about U.S. persons is properly minimized. The availability of these procedures and the ability of the FISA Court to issue an order approving a program of electronic surveillance will strongly encourage Presidents in the future to bring such programs under judicial supervision.

As Chairman Specter has announced, in response to this proposal and the other positive innovations contained in the Chairman's bill, the President has pledged to the Chairman that he will submit his Terrorist Surveillance Program to the FISA Court for approval, if the Chairman's legislation were enacted in its current form, or with further amendments sought by the Administration.

Chairman Specter's legislation would also protect sensitive national security programs from the risk of disclosure and uneven treatment in the various district courts where litigation may be brought. Under his bill, the United States (acting through the Attorney General) could require that litigation matters putting in issue the legality of alleged classified communications intelligence activities of the United States be transferred to the FISA Court of Review, subject to the preservation of all litigation privileges. The Court of Review would have jurisdiction to make authoritative rulings as to standing and legality under procedures that would ensure protection of sensitive national security information and promote uniformity in the law.

In addition to the innovations I have described, Chairman Specter's legislation includes several important reforms to update FISA for the 21st century. These changes are designed to account for the fundamental changes in technology that have occurred since FISA's enactment in 1978, and to make FISA more effective and more useful in addressing the foreign intelligence needs of the United States in protecting the Nation from the unique threats of international terrorism.

Changes contained in the Chairman's bill would correct the most significant anachronisms in FISA. Most fundamentally, Chairman Specter's legislation would change the definition of "electronic surveillance" in title I of FISA to return FISA to its original focus on surveillance of the domestic communications of persons in the United States. It would generally exclude surveillance of international communications where the Government is not targeting a particular person in the U.S. This change would update FISA to make it technology-neutral and to reinstate FISA's original carve-out for foreign intelligence activities in light of changes in international communications technology that have occurred since 1978.

The bill would also change the definition of "agent of a foreign power" to include any person other than a U.S. person who possesses or is expected to transmit or receive foreign intelligence information while within the United States. Occasionally, a foreign person who is not an agent of a foreign government or a suspected terrorist will enter the United States in circumstances where the Government knows that he possesses potentially valuable foreign intelligence information, and the Government currently has no means to conduct surveillance of that person under FISA.

Finally, Chairman Specter's bill would also significantly streamline the FISA application process. Among other things, the Chairman's legislation would limit the amount of detail required for applications and would specify that an Executive Branch officer specially designated by the

President to conduct electronic surveillance for foreign intelligence purposes may certify a FISA application. And, very importantly, the "emergency authorization" provisions would be amended to permit emergency surveillance for up to seven days, as opposed to the current three days, and to specify that the Executive Branch officer specially designated by the President may approve emergency authorizations, with appropriate notification to the Attorney General.

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Again, Mr. Chairman, thank you for the opportunity to appear today to discuss this important issue. We look forward to working with Congress on this critical matter.

And, today, we urge the Committee to give speedy approval to the bills introduced by Chairman Specter and Senator DeWine.

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