

Testimony of
The Honorable Chuck Grassley

September 10, 2002

Thank you Mr. Chairman for holding this important hearing today regarding the work being done by the Foreign Intelligence Surveillance Court and those entities responsible for bringing their investigations before it. The Foreign Intelligence Surveillance Act provides a statutory framework for electronic surveillance in the context of foreign intelligence gathering. Investigations for this purpose give rise to a tension between the Government's legitimate national security interests and the protection of an individual's privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and personal privacy interests in this sensitive arena.

However, in the past, there have been problems in the FISA process; a misunderstanding of the rules governing the application procedure, varying interpretations of the law, and a lack of communication amongst all those involved in the FISA application process. The Zacarias Moussaoui investigation is a recent example of this.

Compounding the problem is the attitude of "careerist" senior FBI agents who rapidly move through sensitive positions. This "ticket punching" is routinely allowed to take place at the expense of maintaining critical institutional knowledge in key positions. This has exacerbated the process and I believe severely hampered the ability of the Government to apply FISA properly.

All these problems demonstrate that there is a dire need here for a thorough review of procedural and substantive practices. I believe that this Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself.

Government transparency is a constitutional presumption in a self-governing nation worried about government abuses. I'm not saying the FISA process is fatally flawed, but rather its administration and coordination needs review and improvement.

What made the headlines recently was the refusal of the FISA court to grant the Justice Department new surveillance and investigative authority.

In its opinion, the court emphasized that the FBI had previously submitted 75 inaccurate applications that sometimes contained downright false information to the Court for search warrants and wiretaps.

Let me clarify that these abuses of the FISA Court's trust by the FBI did not take place under Mr. Ashcroft's watch. Rather, the misuse of its powers occurred while Janet Reno was attorney general and Louis Freeh headed the FBI.

The misleading representations made by the FBI included: an erroneous statement by the FBI director that a FISA target was not a criminal suspect; erroneous statements in FISA affidavits by some FBI agents concerning a purported "wall" between intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant United States attorneys; and, omissions of material facts from FBI FISA affidavits concealing that a FISA target had been the subject of a prior criminal investigation.

The government similarly reported several instances of noncompliance with a promised "wall of separation" between foreign intelligence gathering and criminal prosecution. Mr. Ashcroft subsequently began an investigation as to who was responsible for this noncompliance. That was the right thing to do and I commend him for looking into this matter.

But now, the Justice Department is appealing the FISA court's denial of the new authority it asked for in March because it needs these new powers in the war against terrorism.

The Department argues that under changes authorized by the USA Patriot Act, it could undertake searches and wiretaps "primarily for a law enforcement purpose, so long as a significant foreign-intelligence purpose remains."

What's at stake in the conflict between the Justice Department and the FISA court is whether this country can secure its liberties against terrorism without compromising them. I think we can. Established by Congress in 1978, the court allows the FBI to conduct electronic surveillance and physical searches in gathering foreign intelligence on terrorism and espionage.

But, unlike regular court warrants for criminal investigations, FISA doesn't require the FBI to show that a crime is "being" committed to obtain a FISA warrant.

Due process means the justice system has to be fair and accountable when the system breaks down, as it did in the failure of the FBI to adhere to the rule of law, and the failure of the FISA court to hold the FBI accountable for so long. What I find troubling is the failure of Congress to exercise its oversight power over the FBI and the Justice Department while all this noncompliance was going on under the watch of Janet Reno and Louis Freeh.

As an illustration of the result of the breakdown in the FISA process, FBI Special Agent Coleen Rowley wrote in a letter to FBI Director Mueller, "There was a great deal of frustration expressed on the part of the Minneapolis office toward what they viewed as a less than aggressive attitude from headquarters." "The bottom line is that headquarters was the problem."

I was glad to hear Director Mueller say earlier this year; "There is no room after the attacks for the types of problems and attitudes that could inhibit our efforts."

Many things are different now since the tragic events of last September, but one thing that hasn't changed is the United States Constitution. We here in Congress must work to guarantee the civil liberties of our people, while at the same time, meet our obligations to America's national security. There needs to be a proper balance.