ISBN 0-16-046997-X

AMENDING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

HEARING

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

JULY 14, 1994

U.S. GOVERNMENT PRINTING OFFICE

83-912 WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046997-X

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AMENDING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

THURSDAY, JULY 14, 1994

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Committee met, pursuant to call, at 1 p.m., in Room 2118, the Rayburn House Office Building, the Honorable Dan Glickman (chairman of the Committee) presiding.

Present: Representatives Glickman, Coleman, Skaggs, Laughlin, Combest, and Young.

Staff present: Michael W. Sheehy, chief counsel; Stephen D. Nelson, minority counsel; L. Christine Healey, senior counsel; Louis Dupart, senior counsel; Greg Frazier, analyst; Richard H. Giza, senior professional staff member; Patricia M. Ravalgi, analyst; Jeanne M. McNally, executive assistant/chief clerk; Delores Jackson, staff assistant; Mary Jane Maguire, chief, registry.

The CHAIRMAN. Good afternoon. Thank you all for being here. We thank the Armed Services Committee for allowing us the use of their room.

The committee meets today to discuss the legal and policy questions involved in warrantless physical searches conducted in the United States for foreign intelligence purposes.

Of concern is whether such searches, which may include surreptitious entry of the homes of American citizens, can be justified under the Fourth Amendment when they are conducted without a court order or notice to the individual whose property is to be searched.

The Executive Branch has maintained that the President may authorize searches for intelligence purposes pursuant to his inherent constitutional authority in foreign affairs and intelligence matters. Executive Order 12333, issued by President Reagan in 1981, and still in effect, authorizes the Attorney General to approve such searches, without a court order, if the target of the search is a foreign power or an agent of a foreign power.

The committee is also considering Section 9 of S. 2056, reported by the Senate Select Committee on Intelligence on June 30th, which would require a court order, but not notice, for physical searches conducted in the United States for intelligence purposes. The provision is modeled after, and is an amendment to, the Foreign Intelligence Surveillance Act of 1978 [FISA].

I am not convinced the Constitution includes a national security exception to the Fourth Amendment's warrant requirement. Nor am I entirely pursuaded that the reasonableness clause of the

Fourth Amendment is met under current practice. Congress has required a court order for electronic surveillance for intelligence purposes, and I believe we should give additional consideration to the issues involved in requiring court orders for physical searches.

I applaud the administration for being willing to work with the Congress to develop legislation in this area, but before we take action we should fully explore whether legislation, containing standards and procedures similar to FISA, can satisfy the Fourth Amendment when physical searches for intelligence purposes are by definition secret. I expect the testimony at this hearing will be very helpful to the committee.

Our witnesses today are Kenneth Bass, former Counsel for Intelligence Policy, United States Department of Justice, who is now in private practice; Kate Martin, Director, Center for National Security Studies, American Civil Liberties Union; and the Honorable Jamie Gorelick, Deputy Attorney General, who will be here in a few minutes.

I recognize my colleague Mr. Combest.

Mr. COMBEST. Thank you, Mr. Chairman.

We meet today to hear testimony on the necessity for legislation amending the Foreign Intelligence Surveillance Act [FISA], to require a court order to conduct physical searches for foreign intelligence purposes. Historically, Republicans have supported the President's constitutional right to conduct warrantless searches for foreign intelligence purposes. However, the possible risk of losing an espionage case or the possibility of criminal or civil liability of a Federal officer carrying out such a search, in the event of a successful constitutional challenge of the search, requires careful attention to this legislation.

I am mindful of the concerns reflected in the ACLU opening statement that strongly opposes this legislation. The protections enshrined in the bill of rights, in particular the Fourth Amendment right to be secure in one's home from unreasonable search and seizures, are ones that we all hold dear and are sworn to protect.

At the same time, we cannot ignore the fact that foreign powers and their agents pose a direct threat to our national security. I see today as a chance to hear the views of our witnesses on the balances between the requirements of the Fourth Amendment and the President's constitutional right to collect intelligence.

If a statutory scheme for authorizing physical searches for foreign intelligence purposes is to be established, the special circumstances of such searches and the fact that the targets are agents of foreign powers does argue for a process to be established where an independent party, in the case of S. 2056, a FISA-type court, reviews secretly the government's rationale for conducting a search. This provides enhanced protections for the individual while ensuring that the target does not receive notice provoking the loss of intelligence information as well as the destruction of evidence, and the target's possible flight.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We will hear first from Mr. Bass and then Ms. Martin, and then we will have some questions.

STATEMENT OF KENNETH C. BASS III, ESQ., FORMER COUNSEL FOR INTELLIGENCE POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. BASS. Mr. Chairman and Members of the committee, I appreciate the opportunity to appear before you today. My written testimony, I assume, will be incorporated in the record and I will summarize the highlights in my oral presentation.

I come today with the experience of being the first Counsel for Intelligence Policy, in which capacity I had the honor of working on passage of FISA and implementing it within the first year. I strongly support amending FISA to include physical searches within the jurisdiction of the Foreign Intelligence Surveillance Court, but with additional amendments beyond those previously considered by the Senate or by this committee, additional amendments which I believe would help to alleviate but not eliminate some of the objections from the American Civil Liberties Union and others to the present process.

My main reason for supporting the legislation is that if FISA were amended, as has been suggested in general principle, Congress would then ratify a very short-lived policy that we adopted in the Carter administration within the first year of passage of FISA. Within that first year, we decided as a matter of policy, heavily influenced by our considerations of constitutional law, that it was wiser to go to the FISA court for physical search authorization than to rely on inherent executive authority.

Our reasons for that were twofold. First, our view of the Fourth Amendment, as it has been explained to us by the courts over the years, was that there is a clear preference for a judicial warrant for any search, a very strong preference for a judicial warrant for any search. And these are clearly searches. That the exceptions to the preference for a prior judicial warrant all fell into a rubric of exigent circumstances and there are a variety of subcategories that we need not detail here today.

One of those previously believed to be exigent circumstances was the national security exception which this committee well knows began to erode over the years before FISA was passed because of excesses and abuses by the Executive Branch in stretching national security beyond any legitimate bounds and into domestic political activities.

What happened when FISA was enacted, and the Foreign Intelligence Surveillance Court was created, in the view of many of us at the time, was that many of the previous exigent circumstances excuses for not getting a warrant disappeared. Because you have now and have had since 1978 a physically secure facility comprised of judges that are experts in the law and aspects of national security or intelligence searches, whether physical or electronic, who have had ability to understand, to evaluate, and if it ever became necessary, to disagree with the Executive Branch's view of the national interest and statutory requirements.

Once you have in place a court which is available 24 hours a day, 365 days a year, right down the hall from the Attorney General of the United States, when you have that facility, that ability, that judicial independence to authorize a search, it seems to many of us

that the exigent circumstances argument for warrantless physical searches has almost disappeared.

Now, I will not say that the Constitution compels an amendment to FISA to authorize physical searches, but I do think the Constitution realistically interpreted in light of today's real world strongly induces a requirement for a warrant in advance of a physical search for intelligence purposes.

I do not expect any Executive Branch to ever take the position that the President does not have inherent authority to engage in warrantless surveillances. That has been the position of all administrations, and it is likely to continue to be the position. Even post-FISA, that continues to be the case. It is similar to the War Powers debate and other debates that will probably reign among lawyers as long as there are lawyers and the Executive Branch as long as there is an Executive Branch, Legislative Branch and Judicial Branch division of authority.

But the first reason I favor the legislation is I do think it is constitutionally suggested, constitutionally induced, although not compelled at this point in the process. I do not think it is in the national interest to undergo another situation like the Ames case in which there is a risk to the national security from having a warrantless physical search.

I think the risk of invalidation is not something that should be run and is unnecessary, totally unnecessary, to run, because I know of no national security reason why the Foreign Intelligence Surveillance Court should not have authority to issue physical search warrants.

It makes no sense to me to authorize that court to allow you to break and enter a residence for purposes of ELSUR, telephonic or bug surveillance device, which we do allow that court to do, and to deny that court the opportunity to allow the same agents to open a package, to take a briefcase, or, if necessary, to do a search on a residence for intelligence purposes. There is no, in my judgment, national security reason not to do it.

The only argument I have ever heard advanced against doing it within the Executive Branch was the inherent authority argument, and whether a President or administration would endorse the idea of relinquishing part of the inherent authority. President Carter endorsed that idea, President Clinton has endorsed that idea, and in my opinion, the time has come to seize the opportunity and eliminate the cloud that is going to hang over some criminal prosecutions some day needlessly because there is no FISA jurisdiction statutorily right now to do it.

As a matter of policy, we pursued that course because we believed and were ratified in that belief by three decisions of the FISA Court, that that court could in fact securely issue physical search authorities, had the authority to do so. We had an argument that I will not detail but it is alluded to in some public materials, and should be involved as a second check on the Executive Branchs decision that a search was necessary.

I think that policy is still valid today and has remained valid throughout the years. Again, from my perspective, it is long overdue for us to invest in that court the authority in the physical search arena that they have in the ELSUR arena.

That having been said, I am frank to state that there are some things about the FISA act administration that have troubled me for some period of time and that I think get to some of the issues that Ms. Martin will address in her testimony about the balance of privacy interests and national security interests.

I do not think the Constitution properly interpreted requires notice, knock, or inventory.

The cases that I have read have continued to suggest if not hold that where those things are required there remains exigent circumstances exception to knock, to notice, or to inventory. They are preferred but they are not in my view mandated by the Constitution.

If one wants to take the approach of Justice Scalia, there are no words in the Constitution or that can be construed to say knock, notice, and inventory. Those are judicial creatures, they are wise judicial creatures, and they have a place in criminal law. They do not, in my judgment, have a place in intelligence searches.

I go back to the debate we had in 1978 about the criminal standard. I view the intelligence searches whether physical, or electronic surveillance as having a fundamentally different purpose than law enforcement.

They are, when properly undertaken, not undertaken to gather prosecutive evidence, but undertaken in much the same way this committee conducts hearings, to gather facts, to gather facts to inform policy, whether it is military policy or foreign affairs policy, but to inform policy not to prosecute individuals.

We all know and this committee certainly knows that there are transient, volatile, difficult-to-gather facts necessary for national security actions which can sometimes be best obtained through secret devices. Often the secret device is a human agent. The human agent spies without knock, notice, or inventory. And I don't think anyone can rationally suggest that human intelligence collection can only be done if you are wearing a badge that says "I am from the CIA and I want to talk to you."

The same principle in my mind applies to physical searches. When it is necessary to invade someone's privacy for national security purpose to gather information that that individual or organization holds, to me it makes no sense to require notice, inventory, or announcement. Because the very purpose of the surveillance or search is to acquire privately held information to be used in secret deliberations by the government for national security purposes.

If you believe that national security requires secrecy, which I do—although I believe it is carried out excessively by all branches of the government and it ought to be cut back on the degree of secrecy—that concept carries with it an exigent circumstance by necessity that says that knock, notice and inventory are not constitutionally required for intelligence searches.

Now, I recognize that the line between intelligence and law enforcement becomes difficult to administer both in the Executive Branch and in the Judicial Branch. The only case I am aware of that has ever considered the constitutionality of this issue was one I have had involvement in, the Truoung-Humphrey appeal, the Vietnamese spy case. And in that case the trial court and the court of appeals disagreed with my arguments and they held that once

a case has crossed the line from intelligence to law enforcement, that you have to switch from FISA surveillances to Title IIIs.

My view has always been, and continues to be, frankly, that as long as there is a legitimate intelligence purpose, that you can use the FISA procedures for a dual-purpose activity.

But what I think that case stands for and where I think some amendments are needed to FISA is that when we move closer in time to a potential prosecution, there is always in my mind much more of a thumb on the scales on the part of the individual that needs to be reconciled with the needs for secrecy for the United States Government.

My suggestion is a modest one. That is that FISA be amended—certainly if physical search is to be added, but perhaps generally—to authorize the appointment in FISA cases of counsel for the target. Counsel for the target would be afforded access to the application on a sanitized basis, would not know who his or her client was, would not have access to his or her client, but would have access to all the other materials that the judge would have access to to be able to review those materials, to advance arguments as to why the application should not be granted, and should view him or herself as advocate for the target arguing against the warrant.

I do not think it is either unworkable nor do I think it is meaningless to have such a procedure. I know from practical experience in my own tenure that there were applications presented to the FISA Court which entailed close questions, questions on which a reasonable judges could have gone the other way.

Frankly, I believe in some of those cases if the jurist had been aided by an advocate for the target and not just by a clerk as skilled as that clerk has always been, that some of those decisions might have come out differently. I do not think it serves the national interest for every application that has ever been presented to that court to have been approved by that court. I think some turndowns are in the national interest every once in awhile. We have not had any. That is known. That creates an aura of suspicion and an aura of anxiety about the legitimacy of the court that is not well-founded.

I don't think any outrageous cases have been encountered. I have not had access to the court for 15 years now, but I have in my heart no reason to believe it is abused or likely to be abused. But the presence of an independent advocate for the target, certainly in United States person search cases, would in my judgment significantly alleviate some of the concerns about the possibility of abuse of the process.

It is not a radical solution. It is a solution proposed in Canada in 1990. Canada enacted a surveillance statute modeled after ours. Based on our experience, Canada has not seen fit to enact the proposal for advocate for the target yet, but they have gone a lot further than I suggested in recommending it as a legitimate check and balance against some of the excesses that motivate the opposition to this amendment.

Other than that type of additional protection, the other area in which I think FISA could legitimately be analyzed for possible amendments has to do with the post-surveillance review of FISA applications in criminal cases.

Right now from my perspective we err too much on the side of secrecy when it comes to reviewing a FISA warrant after the fact. Once the indictment has been brought, once the case is before the court, I think there is more leeway than the present practice follows for access to the application on the part of defense counsel, for access to the file and for an after-the-fact review of the legitimacy of the surveillance.

I understand the security concerns. I think those security concerns can be met by sanitization and deletion rather than by the present practice, which all too often winds up being totally ex parte with no access on the part of defense counsel to any of the materials.

With those few exceptions to the present policy, the present proposal as emerged from the Senate, I wholeheartedly endorse the concepts and the basic principals of the Senate bill.

[The statement of Mr. Bass follows:]

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Professional Memberships and Activities	Admitted to practice before the United States Supreme Court, U.S. Courts of Appeal for the Fourth Circuit, Virginia Supreme Court of Appeals. Member, American Bar Association, Virginia State Bar Association, Bar Association of the District of Columbia, Fairfax Bar Association. Member, American Academy of Appellate Lawyers. Member, Security Affairs Support Association. Member, Institute of Judicial Administration.

Professional Memberships and Activities	Member, National Health Lawyers Association. Senior Fellow, Business Executives for National Security-Education Fund. Appointed Special Master in Washington Post v. Dept. of Defense, U.S. Dist. Ct., D.C. (FOIA case regarding IRAN Hostage Rescue Mission files). Advisor to U.S. Senate Judiciary Committee on Rehnquist, Scalia and Bork Supreme Court Nominations. Member, American Bar Association, International Law Section. Member, American Bar Association, Section on Law Practice Management. Member, American Bar Association, Committee on Entertainment and Sports Industries and Forum Committee on Communications Law. Member, Fairfax County Bar Association, Computer Law Section. Lecturer, National Association of Attorneys General United States Supreme Court Practice.
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University of Chicago Law Review, 74 (Winter 1970).

Contributor, to A Model Negative Income Tax, 78 Yale Law Journal 269 (1968).

TESTIMONY OF KENNETH C. BASS, III
BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE ON PHYSICAL SEARCH AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

July 14, 1994

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss proposals to amend the Foreign Intelligence Surveillance Act of 1978 to provide for judicial authorization of physical searches undertaken for intelligence purposes. While enactment of this authority would, in my opinion, be in the public interest, there are certain aspects of the proposal that merit consideration for additional amendments.

My perspectives on this issue were formed during my service as the first Counsel for Intelligence Policy at the Department of Justice during the Carter Administration. I was part of the team of lawyers that represented the Administration during the enactment of FISA, and my office was established in large part to institutionalize the FISA process within the Department of Justice. We drafted the procedures to implement FISA, developed the basic forms and appellations process that are still in use today, and presented the first applications to the FISA Court.

Our Administration also decided, in effect, to extend FISA beyond its coverage of electronic surveillance and to present applications for physical searches to the FISA Court. As this Committee knows, that policy was subsequently reversed by the Regan Administration and there have not been any physical search applications presented to the FISA Court since 1981. It might be helpful to the Committee to explain briefly why we decided to use the

FISA Court for physical searches and why I continue to believe that that Court should approve physical searches for intelligence purposes.

Our decision to use FISA for physical searches was base on a combination of legal and policy considerations. We all know that decisions of the Supreme Court have established a strong preference for a judicial warrant as the authorization for physical searches and electronic surveillance. As a general rule, the only exceptions from the warrant requirement are "exigent circumstances" and "judicial unavailability," itself a form of exigent circumstances.

For a number of years before FISA the federal courts were presented with legal challenges to the long-standing Executive Branch tradition of warrantless electronic surveillance for so-called "national security" purposes. Over the years most of these surveillances had been directed at what we now call "official establishments" in FISA parlance. The courts had historically been reluctant to invalidate such searches, often expressing a belief that the judicial branch lacked adequate expertise and physical security to deal with national security issues.

This national security exception was stretched to its limits during the Vietnam War when national security became an umbrella that covered infiltration into domestic political groups and was no longer limited to activities targeted against foreign governments and their agents. It became clear that the willingness of the courts to tolerate warrantless searches might not continue in light of clear abuses of that authority. FISA was enacted, in significant part, to avoid further litigation over the legitimacy of warrantless intelligence searches.

Once the FISA Court was established, a basic rationale for not seeking judicial authorization for physical searches had disappeared. FISA created a judicial body with specialized expertise and the requisite physical security. It also created a body of judicial precedent for authorizing secret surveillances and

maintaining the secrecy of those surveillances, as long as the fruits were not used in criminal prosecutions. Within the Carter Administration, that development led some of our lawyers to question the basic legal rationale for continuing to engage in warrantless physical searches after FISA. That analytical concern was coupled with a very strong policy preference on the part of Attorney General Civiletti and other Administration officials for judicial approval, whenever possible, of intelligence searches.

We decided that the FISA judges, each of whom is also a fully-empowered district court judge, had inherent authority to issue warrants for intelligence physical searches and the security procedures of the FISA court provided the judicial mechanisms that had previously been lacking. Since it was now indeed possible to seek a judicial warrant in a manner fully consistent with the national security interests, we concluded that the constitutional preference for a warrant meant we should seek judicial approval.

Our decision was not without controversy within the Executive Branch and here in Congress. We heard at the time that some officials in the Intelligence Community were concerned that we were "going too far" in involving the judiciary in sensitive intelligence matters. We also heard that some Members of Congress were concerned that we were, in effect, amending the statute through executive action. We also heard that some of the FISA judges were troubled by the congressional reaction and began to question whether it was wise for them to continue to authorize physical searches as well as electronic surveillance.

We sought and obtain three physical search warrants. The Regan Administration came to a different conclusion. They decided, however, that the precedents we set could not simply be ignored, so they came up with a relatively unusual procedure. The first time they were faced with the necessity of a physical search for intelligence purposes, they prepared an application for a

FISA Court order, but submitted it with a memorandum explaining that they did not believe the FISA Court had any jurisdiction to issue such orders. They contended, in short, that we and the FISA Court had been wrong as a matter of law.

That application was not subjected to the normal adversarial process, but the issue was instead referred to the clerk of the FISA Court. He prepared a memorandum which agreed with the Regan Administration's position, that memo was circulated to all of the FISA trial judges, and the FISA Court issued a formal order stating that it did not have jurisdiction to issue physical search orders. That order ended the brief legal history of judicial orders for intelligence physical searches.

I continue to believe that the better view of the constitution, FISA and the inherent jurisdiction of the federal judiciary justifies issuance of physical search orders under the existing statute. But clearly it would be better to have explicit statutory authority instead of relying on debatable legal theories. Because I continue to believe that our Constitution embodies a very strong preference for judicial involvement in all searches by the government, and because the FISA Curt procedures are fully compatible with national security interests, I support the concept of amending FISA to explicitly authorize physical search orders in addition to electronic surveillance orders.

There has been an interesting change in position over the years on the part of some of the strongest supporters of FISA. In 1978 the civil liberties community was one of the strongest voices heard in support of FISA. Now that voice is often heard in opposition to extending FISA to physical searches. That opposition is often based on a pragmatic foundation that there will be fewer physical searches for intelligence purposes under the present warrantless regime than there will be if FISA is amended. As a factual matter, the argument

is probably correct. There is no question that FISA provides a certain level of comfort and administrative familiarity that has led to an increase in the level of electronic surveillance for intelligence purposes. I believe a similar increase in the level of physical searches is likely to occur if FISA is amended. But unlike the opponents of this proposal, I believe it is preferable to add the protections of an independent approval from a federal judge as a further protection against a return to the excesses of the past when no official outside the Executive Branch was involved in intelligence searches. The more important principle is that of checks and balances. Our Constitution was not intended to prevent physical searches, but to regulate them through judicial oversight in all but the most exigent circumstances. Since it is now possible to have judicial review and fully protect the national security, that constitutional preference should tip the scales in favor of extending FISA to physical searches, even if that extension means an increase in the level of search activity.

The second fact that forms the basis for opposition is the history of the FISA Court in never refusing to grant an application. That record understandably causes many to question the validity of the judicial process. All of us who have worked with FISA, in the Executive, Judicial and Legislative branches, understand that the approval record of FISA applications is not significantly different than the approval record for Title III applications for law enforcement surveillances undertaken by the FBI. In both cases the applications are subjected to high-level review within the Department of Justice before they are submitted to a court. In both cases there have been a number of refusals of DOJ officials to approve an agency request for surveillance. Thus the cases that reach the courts have been pre-screened to leave only those that are more than merely arguable. When the Attorney General or her designee approves a FISA application, that approval is not the act of a mere advocate, but necessarily

contains an approval that the surveillance is necessary, as well as lawful. The certification process places on the Department of Justice a substantial responsibility to go beyond the traditional duties of counsel and to also make a decision on the balance of national and personal interests that are inherent in any search.

Based on my experience, however, the present statutory scheme does not go as far as it should in insuring that the rights of the surveillance targets, at lest when U.S. persons are targeted, are protected. The FISA procedure, like the criminal warrant process, remains a completely *ex parte* process. No counsel appears in any FISA proceeding on behalf of the target. The total absence of opposing counsel is in my view a deficiency in our system. While virtually every surveillance of an official foreign establishment is, from a legal perspective, a "simple case," most surveillances of U.S. persons involve a more delicate judgmental process. There have been, on a very few occasions, applications to surveil U.S. persons which have raised difficult legal issues that are sometimes very close questions. Nothing in our present process insures that those close questions will be fully aired and subjected to scrutiny from the judiciary. While the routine use of a judicial clerk to screen applications helps flesh out any issues that may be presented in an application, that process is not an adequate substitute for the normal adversary process.

I believe it is possible, in a very small number of cases, to bring the FISA process closer to our normal adversary process without in any way compromising security or the national interest. In those few cases of surveillance targeted at U.S. persons, it is almost always possible to produce a sanitized application package that would not disclose the identity of the target or the human intelligence sources involved in the operation. Such a sanitized application could be given to an attorney in private practice who could undertake

an independent review and appear before the FISA Court to present arguments against issuance of an order. There are now enough former government attorneys who have been involved in the FISA process who could be asked to undertake such reviews on a *pro bono* basis that is feasible to appoint counsel for the targets in many, if not all, applications involving targets who are U.S. persons.

I do not advocate routinely involving counsel for the target in every U.S. person surveillance. Instead I suggest that FISA should include an explicit authorization for the appointment of such counsel, either at the request of the Attorney General, or on the FISA Court's own motion. Occasional use of such counsel would help alleviate some of the present concern over the uniform approval statistics. It would also serve as an additional buffer to any tendency to become too comfortable with the process and therefore to authorize too many physical searches.

Let me close with one other suggestion, though admittedly a very minor one. The Senate version of this legislation adds an entirely new section to FISA. That section is in large part a verbatim repetition of the electronic search provisions of FISA, with the changes necessary to fit physical searches. There are no substantial differences between the existing electronic surveillance standards and the new physical search standards. I would urge the committee to instead look at amending the existing statute by inserting references to physical searches in all appropriate places. Keeping the same statutory structure would produce a far more simply law that creating two essentially identical sections, one for electronic surveillance and one for physical search. Having two sections will not only require more lengthy applications with additional statutory citations, it increases the possibility that over the years a body of legislative changes or judicial precedents could develop in marginally

different ways that could make a relatively simple process unnecessarily complicated.

Mr. Chairman, thank you again for this opportunity to appear before you.

The CHAIRMAN. Thank you.
Ms. Martin.

STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN CIVIL LIBERTIES UNION

Ms. MARTIN. Mr. Chairman and Members of the committee, thank you for this opportunity to testify on the legal and policy questions involved in warrantless searches for national security reasons.

The American Civil Liberties Union testified earlier this year before this committee concerning certain reforms which have been proposed in the wake of the Aldrich Ames case. We support some of those reforms as worthwhile efforts to prevent espionage, which will not sacrifice civil liberties. However, we strongly oppose the present proposal to authorize black-bag jobs—warrantless secret searches of Americans' homes and papers for national security reasons.

Black-bag jobs were one of the worst abuses of civil liberties during the Cold War era and we urge the Congress, instead of authorizing them now, to outlaw them. We believe that warrantless secret searches of Americans' homes are a fundamental violation of the Fourth Amendment, and that the President has no inherent or constitutional authority to authorize such violations.

We were frankly somewhat disappointed that there is no indication that the present administration has closely examined the constitutional question considering both the end of the Cold War in evaluating the question of inherent constitutional authority or that it has examined the actual practice and experience regarding electronic surveillance under the act over the last 15 years.

I wanted to summarize what we set forth in our testimony and basically list what we believe to be the constitutional defects in extending the procedures of the Foreign Intelligence Surveillance Act to physical searches.

The proposed legislation would authorize government agents to break into and search the houses of Americans and photograph their private papers without a warrant. It would authorize them to do that without knocking and announcing their presence before doing that, which we point out poses some danger to the government agents.

It would allow this kind of search without any probable cause to believe that the targets of the search have committed a crime. Perhaps most significantly, it would allow all this without ever informing the Americans that they have been subjected to such a search or seizure.

We further object to the legislation because it authorizes such searches of individuals who are in fact or are about to become targets of criminal investigations. The Aldrich Ames case is an example of this where there was a secret warrantless search done of Mr. Ames' home, at some point far along into the investigation when we believe that the Justice Department clearly contemplated bringing a criminal indictment against him.

The proposed legislation then authorizes the use of evidence seized in these unconstitutional searches against individuals in the

criminal proceedings. Even at that point the bill prohibits any meaningful judicial review of the propriety of the initial authorization of the search, of the execution of the search, or of the use of any information that was seized during the search.

As Mr. Bass mentioned, the current provisions in the Foreign Intelligence Surveillance Act basically provide that if the Attorney General requests, all judicial review even after the target knows they have been searched, can be conducted ex parte in secret, in camera. We do not believe that ex parte, secret judicial review is meaningful judicial review.

In our review of the law under the Foreign Intelligence Surveillance Act, we have found no cases where the target of the search was allowed to see the underlying application and therefore know the basis for the electronic surveillance conducted against him.

Such a procedure is the equivalent of no judicial review at all. In this connection, we note that while judicial approval at the beginning of a search is an important protection, it has never been the sole protection under the Constitution or the Fourth Amendment. And in fact, one of the essential characteristics of judicial review under our constitutional system is that it be adversarial and that it be public.

Neither of those things are present in the current scheme, and in fact there is no basis for any real judicial review of searches conducted under the FISA or under this new proposal.

We also believe the present proposal violates the First and Fourth Amendments by allowing searches based on constitutionally protected political dissent with no probable cause of criminal activity. It does so by providing that one may be deemed an agent of a foreign power based solely on lawful political advocacy in favor of causes or groups currently labeled terrorist or based solely on membership in such groups.

This is an issue that has come up in several different contexts but basically the problem is that as the Supreme Court has recognized you can be a supporter of a terrorist group that engages in both terrorist, unlawful activities and lawful political activities. The PLO is a classic example of that where they did engage in unlawful terrorist activities and at the same time lawful political activities.

We do not believe that the FISA as presently written contains strong enough protections to assure that supporters of such a group or members of such a group are targeted based only on their activities in support of the terrorist activities of that group and not targeted based on their mere membership in the group or their mere political support of that group.

We also object to the proposal because we believe that it provides for secret warrantless searches of individuals suspected of clandestine intelligence gathering in connection with a wide range of activities much less serious than espionage.

For example, if one is suspected of a potential violation of the arms export control laws involving publicly available information, one can be a target of a FISA search under the current standards. There is a case upholding such a search cited in our testimony.

Similarly, if you read the definition of foreign intelligence information in the statute and then the definition of agent of a foreign

power, it is clear that a search would be authorized of a person who is suspected of acting on behalf of the French government and engaging in industrial espionage. That is, spying against a business in the United States, not against the government, which industrial espionage may or may not even be illegal.

While we believe that such industrial espionage when done on behalf of the French government may well be the kind of serious problem that this Congress should look into and prescribe remedies for, we do not believe it is the kind of problem that could ever justify conducting secret warrantless searches and making a fundamental shift in the Fourth Amendment protections inside the United States. Yet, as drafted, the statute would authorize such searches.

We are also quite concerned about the use of such searches in investigations where there is not only a foreign intelligence purpose, but also a criminal law enforcement purpose.

I think Mr. Bass is correct, FISA searches are now used—and the Ames case and other cases are examples of this—whenever there is a dual-purpose investigation, both for foreign intelligence purposes and for law enforcement purposes. In such investigations, the Justice Department takes the position that it can use the foreign intelligence procedures and does not have to comply with the criminal standards. We believe this is a fundamental violation of the Fourth Amendment.

The Justice Department's testimony acknowledges that the standards used for foreign intelligence searches do not meet criminal investigation standards. Nevertheless, they use such searches in criminal investigations.

We don't believe that that was the intent of the original Foreign Intelligence Surveillance Act and we are quite troubled by the government's use of this way around the protections of the Fourth Amendment in criminal investigations.

We want to make clear that we do not believe that the legislation would be an improvement over the present situation. While we are extremely disturbed that the Executive Branch takes the position they can execute warrantless physical searches, we do not believe that this statute would provide any additional protections of any real significance to Americans. To the contrary, we believe that the effect of it will be that more searches will be done than are now done and those searches will violate the rights of Americans.

We think it is important to note in considering the constitutionality of such legislation that the Supreme Court has never approved a national security exception to the Fourth Amendment. In the physical search area, the only case is the Abel case involving a Soviet spy who came to this country and was convicted of spying. When the Supreme Court considered the Fourth Amendment challenge that he made to the evidence seized against him, it found that the Fourth Amendment had not been violated. But at the same time the Court made clear that the Fourth Amendment standards applicable to the Soviet spy were the same as would be applicable to any criminal defendant.

Even in the electronic surveillance area, the Supreme Court has never approved an exception to the Fourth Amendment for national security reasons. The Supreme Court in two cases, Katz and Keith,

said that it did not decide whether or not such an exception existed, and after those decisions there are a number of court of appeals cases in the electronic surveillance area finding that there is such an exception. There is no Supreme Court case finding such an exception.

The Supreme Court has acknowledged that there is an exigent circumstance exception to Fourth Amendment requirements, but we do not believe there is any basis for saying national security is an exigent circumstance.

The exigent circumstance test is about whether or not some Fourth Amendment requirements can be ignored in a particular situation because if followed the government would not be able to complete the search.

The classic exigent circumstances cases are where if notice or knock were provided, the evidence would be destroyed so that it could not be seized, or where if notice or knock were provided, the agents executing the search would be in danger.

In the wiretap situation, the exigent circumstances exception exists for the following reason. The exception provides that—when you want to seize wiretaps or seize the contents of conversations, you don't have to give prior notice that you are going to seize the contents of those conversations. The reason why you don't have to give prior notice is that if you did, you would be unable to seize the conversations because the people wouldn't talk on the phone and you wouldn't be able to to have a successful wiretap. None of these exigent circumstances have anything to do with some broad, generalized and vague national security reason.

One of the things we would urge this committee to do is to flesh out on the public record what the administration and the Executive Branch mean when they say there is a national security reason here which amounts to exigent circumstances that require an exception to the Fourth Amendment notice and knock requirements.

As we understand their argument, their argument is not that if they did a physical search for foreign intelligence reasons and they knocked when they did that and told the target that they were there in order to do the search that they would not be able at that moment to seize the entire contents of the suspected spy's house. If they had knocked on Mr. Ames' door, they would have executed the warrant, they would have seized all of his papers, seized the contents of his computer.

But what we understand their problem to be is that at that point, he would be on notice that he was a suspect in a espionage investigation and they would no longer be able to tail him or to find information that might lead to additional evidence about his network, or about the damage that he has done.

The CHAIRMAN. If you can finish up in a minute or if you have a lot more we will have to vote.

Ms. MARTIN. I have probably five minutes, Mr. Chairman, or three minutes.

The CHAIRMAN. Why don't we stop now because we will go vote and come back from the vote. We may get to some of your points in the questioning. Your entire statement will appear in the record, so why don't we go vote and come right back.

[Recess.]

The CHAIRMAN. Why don't we go ahead.

I think we are going to get most of this through questions because we will have a whole series of votes coming up in which——

Ms. MARTIN. If I could make two brief remarks, Mr. Chairman.

The CHAIRMAN. Okay, go ahead.

Ms. MARTIN. When I talk about warrantless searches, I want to explain that we recognize the proposal provides for a court order. We don't believe that the court order would meet Fourth Amendment requirements. Therefore, it doesn't qualify as a warrant.

The other point is that while I understand the Executive Branch to argue that there may be some kinds of foreign intelligence information they will not be able to obtain unless they can conduct secret searches, we don't believe that is a sufficient argument to say that the Fourth Amendment doesn't apply here. The logic of such an argument goes too far. The logic of their argument is that if there were certain kinds of foreign intelligence information that could only be gathered by arresting someone and keeping them detained without charges until they agreed to speak, such detentions would be permissible regardless of what the Constitution says.

I think they have turned the constitutional analysis on its head and that the starting point has to be what the Fourth Amendment requires. Those requirements are set forth in the criminal cases.

[The statement of Ms. Martin follows:]

TESTIMONY

OF

KATE MARTIN

DIRECTOR

CENTER FOR NATIONAL SECURITY STUDIES

ON

BEHALF OF THE

AMERICAN CIVIL LIBERTIES UNION

ON

WARRANTLESS NATIONAL SECURITY PHYSICAL SEARCHES

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
HOUSE OF REPRESENTATIVES

July 14, 1994

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to testify on behalf of the American Civil Liberties Union on the legal and policy questions involved in warrantless physical searches conducted in the United States for national security reasons. The ACLU is a non-partisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights. Its project, the Center for National Security Studies, has long been involved in issues relating to warrantless national security searches, beginning in the mid-1970's. Over the past twenty years, the project has litigated many of the cases challenging these unconstitutional practices. We have also testified many times before Congress concerning this issue, including appearing before this Committee in 1990, in opposition to a proposal very similar to the one being considered today.[1]

INTRODUCTION

Earlier this year, the ACLU testified concerning various counterintelligence reforms proposed in the wake of the Aldrich Ames case. We supported certain reforms which we believe to be worthwhile efforts to prevent and pursue espionage cases without sacrificing civil liberties. In particular we found the

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[1] See Hearings before the House Committee on Intelligence on Physical Searches for Foreign Intelligence Purposes, 101st Cong. 2d Sess. (May 24, 1990) at 25 (testimony of Morton Halperin). Much of the testimony which follows is based on the analysis set forth in our 1990 testimony.

administration proposal to be overall the most measured and appropriate response to the espionage problem.[2]

However, since those hearings, the administration has sought, and the Senate Select Committee on Intelligence has reported, legislation that would authorize secret warrantless physical searches for national security reasons by extending the provisions of the Foreign Intelligence Surveillance Act (FISA) to physical searches. The ACLU opposes this proposal. Black bag job (secret searches of Americans' homes and papers in the name of national security) were one of the worst civil liberties abuses of the cold war. Instead of now approving them, the Congress should outlaw them.

The administration's proposal to apply FISA procedures to physical searches, now embodied in S. 2056, the Counterintelligence and Security Enhancements Act of 1994, as amended, will not, despite supporters' claims, provide greater protection to constitutional rights. Quite to the contrary, it will likely lead to a significant increase in secret warrantless searches in clear contravention of the constitutional rights of Americans.

The proposed legislation would authorize government agents to break into and search the houses of Americans, and photograph their private papers, without a warrant, without knocking before entering, without probable cause to believe that the targets have

[2] See Hearings before the House of Representatives Permanent Select Committee on Intelligence on counterintelligence legislation (May 4, 1994).

committed a crime, and without ever informing Americans that their homes and papers have been searched. It would authorize the government to use the fruits of such illegal searches against individuals in criminal trials or other proceedings. Only when faced with criminal or other charges would individuals learn that their houses or papers had been searched, but even then they would be denied any opportunity to challenge the legality of the search. Indeed, they would not even be told of the basis for the government's determination that it had cause to search their homes. Although the proposed legislation pays lip service to the notion of judicial review of the propriety of such searches, in fact, it sets up a system where the only judicial review consists of secret ex parte proceedings.

The sole answer to these constitutional objections appears to be that because the FISA authorized such procedures regarding electronic surveillance, those procedures should now be applied to physical searches. But this bootstrap argument ignores the constitutional differences between wiretaps and physical searches, the constitutional difficulties in FISA itself, and perhaps most significantly, the fact that FISA was a response to ambiguous Supreme Court precedent indicating the existence of a national security exception to Fourth Amendment requirements applicable to wiretaps. The Supreme Court has never hinted at any such exception for physical searches, to the contrary, even

Soviet spies were granted the full protection of the Fourth Amendment.[2]

If the government is concerned about the security of court procedures for seeking search warrants in espionage cases, secure procedures can be established. If the government is concerned about the uncertainty created in espionage cases by conducting warrantless searches, it should cease conducting such illegal searches. But the government may not violate the fundamental protections of the Fourth Amendment in order to make espionage prosecutions easier or more certain, or even to make it easier to collect foreign intelligence information.

BACKGROUND OF THE CURRENT PROPOSAL

We were extremely disturbed to learn that the United States government in the Aldrich Ames case searched the private home of a United States citizen without obtaining a warrant under the Fourth Amendment.[3] Furthermore, it did so in the course of pursuing a criminal investigation, aimed at using the fruits of this illegal search in a criminal prosecution of the citizen. No matter the nature of the crime, there is no "national security" exception to the Fourth Amendment to justify this violation of one of the most fundamental liberties guaranteed by the

[2] See, United States v. Abel, 362 U.S. 218 (1960), discussed below.

[3] See Affidavit of Leslie G. Wiser, Jr., in Support of Warrants for Arrest and Search and Seizure Warrants, para. 26.

Constitution: the right to be secure in one's home from unreasonable searches and seizures.

Nevertheless, the Executive branch claims the authority to conduct secret warrantless searches of Americans' homes in the name of national security.[4] We are appalled that instead of calling for the repeal of this Executive Order, especially in light of the end of the Cold War, Attorney General Reno instead ordered such a search in the Ames case.

Now that the plea-bargain in the Ames case has forestalled judicial testing of this fundamental constitutional violation, the administration has apparently had second thoughts about this procedure. The current proposal, as reflected in S. 2056, would make searches such as those conducted in the Ames case illegal. This administration, unlike previous administrations, apparently recognizes that the President has no inherent power to conduct warrantless national security physical searches.

However, the proposed procedures do not in our view cure the constitutional defects of the current system of warrantless secret searches. Although searches would have to be authorized by a judge of the Foreign Intelligence Surveillance Court in addition to the Attorney General, such authorization alone does not satisfy Fourth Amendment warrant requirements. It would add no real protection, because the legislation would prohibit any meaningful judicial review of the propriety of the search. There would still be secret searches, conducted according to the same

[4] See Executive Order 12333, § 2.4(c).

standards now used, and even if the search were disclosed, the basis for conducting the search would remain secret.

Enacting this proposal would be worse than doing nothing because congressional approval will in all likelihood give the Executive Branch encouragement to conduct greater numbers of illegal searches.

FOURTH AMENDMENT REQUIREMENTS

The Supreme Court has emphasized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." U.S. v. U.S. District Court ("Keith"), 407 U.S. 297, 313 (1972). In Payton v. New York, 445 U.S. 573 (1980), the Court reiterated that point:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Id. at 589-90 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

The Fourth Amendment prohibits searches without a warrant based on a showing of probable cause of criminal activity. It prohibits searches without providing notice to the targeted

party, without knocking before entering, and without leaving an inventory of items seized. The Supreme Court has recognized exceptions to these fundamental requirements only when there are "exigent circumstances," such that obtaining a warrant or knocking would vitiate execution of the search.

The Supreme Court has never hinted at a national security exception for physical searches. It did however, indicate that there might be a national security exception to Fourth Amendment requirements applicable to electronic surveillance. In response, Congress passed the FISA which does not incorporate Fourth Amendment standards applicable to physical searches.

Knock, Notice and Inventory

One of the essential functions of a warrant is that it provides notice. As the Supreme Court explained in Katz v. United States, 389 U.S. 347, 354, n. 15 (1967), a "conventional warrant ordinarily serves to notify the suspect of an intended search." Indeed, an absolute and fundamental element of any reasonable search or seizure, is that with or without a warrant, when the government engages in the search of real and personal property, it must identify itself and announce its purpose to the inhabitants, and it must leave an inventory of any items seized.[5]

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[5] See Miller v. United States, 357 U.S. 301, 313 (1958) ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in [18 U.S.C.] § 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and

As Justice Brennan explained, "[t]he protections of individual freedom carried into the Fourth Amendment . . . undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home." Ker v. California, 374 U.S. 23, 49 (1963) (Brennan, J., dissenting). Justice Brennan demonstrated through an analysis of British and American common law that "[i]t was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries." Id. at 47.

As the Sixth Circuit has pointed out, "[a]lthough the Supreme Court has not addressed the issue many federal courts have, including this Circuit.... Though each case by itself is less than compelling, their conclusion has been unanimous: the fourth amendment forbids the unannounced, forcible entry of a dwelling in the absence of exigent circumstances."[6]

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the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."); see also id at 313 n.12 ("Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder.").

[6] U.S. v. Francis, 646 F.2d 251, 257-58 (6th Cir. 1981), citing U.S. v. Valenzuela, 596 F.2d 824, 830 (9th Cir. 1979) cert. denied, 44 U.S. 965; U.S. v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976); U.S. v. Mapp, 476 F.2d 67 (2d Cir. 1973); U.S. ex. rel. Ametrane v. Gable, 401 F.2d 765 (3d Cir. 1968). Accord, U.S. v. Mueller, 902 F.2d 336 (5th Cir. 1990); U.S. v. Andrus, 775 F.2d 825, 844 (7th Cir. 1985); U.S. v. Agrusa, 541 F.2d 690, 697 (8th Cir. 1976); U.S. v. Baker, 638 F.2d 198, 202 n. 7 (10th Cir. 1980).

The test for determining exigent circumstances allowing agents to forego prior announcement of a search is whether there is reasonable cause to believe that the notice would endanger the successful execution of the warrant by provoking the destruction of evidence or endangering individuals. WAYNE R. LA FAVE, SEARCH AND SEIZURE, Second Edition, 1987 § 4.8 at 283. Under this rule, prior notice of electronic surveillance is not required because it would defeat the purpose of the surveillance. Katz, 389 U.S. at 354, n.15. Thus wiretap warrants, like those authorized in FISA, are fundamentally different from and constitutionally inadequate as warrants for physical searches.

In addition to knocking and giving notice at the outset of the search, the government, whether or not the occupants are present, must leave an inventory of items seized or, if nothing was taken, a copy of the warrant indicating they were present. See F.R.Crim.P. 41(d) ("The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of

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The Third Circuit has held that the failure to knock and announce sometimes, but not always, violates the Constitution. U.S. v. Nolan, 718 F.2d 589 (3d Cir. 1983). Even this more restrictive reading of the Fourth Amendment would require an assessment of the circumstances of each case and in no way supports a blanket rule providing no announcement or subsequent notice for foreign intelligence reasons.

any property taken.")[7]; see also United States v. Gervato, 474 F.2d 40, 44-45 (3d Cir.), cert. denied, 414 U.S. 864 (1973); Payne v. United States, 508 F.2d 1391, 1394 (5th Cir.), cert. denied, 423 U.S. 933 (1975).

The prohibition against the warrantless and unannounced seizure of papers also protects against photographing them, even if no physical property is actually seized. Taking photographs, or even just looking around, violates the privacy and sanctity of the home and one's papers just as much as the actual seizing of tangible property. These requirements help to ensure that, even with a warrant, the police do not engage in a general search without the knowledge of the occupants and without their having an opportunity to sue for return of materials seized.[8]

National Security Exception

The Supreme Court has never even hinted that it would accept a national security exception for physical searches. In the only Supreme Court case dealing with a warrantless national security physical search, the Court took it for granted that the Fourth Amendment fully applied. Abel v. United States, 362 U.S. 217 (1960). Rudolph Ivanovich Abel, a KGB agent, had come into the

[7] Note that under the FISA, the "warrant" need never be shown to the target if so ordered by the Attorney General. 50 U.S.C. § 1806(f).

[8] See F.R.Crim.P. 41(e): "A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property."

United States illegally in order to operate as a Soviet spy. While ruling that the fruits of a warrantless search could be admitted into evidence because the search was incident to a valid deportation arrest and thus not in violation of the Fourth Amendment, the Court refused to consider the possibility that a different Fourth Amendment standard, let alone that any kind of exception, should apply because the case involved national security. As the Court noted parenthetically: "(Of course the nature of the case, the fact that it was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence.)" Id. at 219-20.

However, the Supreme Court has indicated that there may be a national security exception for electronic surveillance. Historically, electronic communications have been accorded less constitutional protection than one's house and papers; they have not been recognized as being at the core of the Fourth Amendment. It took the Supreme Court 40 years to hold that the Fourth Amendment applied to electronic surveillance and when it did so, it specifically left open the possibility of a national security exception to Fourth Amendment requirements. Katz, 389 U.S. at 358, n. 23, reversing Olmstead v. U.S., 277 U.S. 438 (1938).[9]

[9] The history of Supreme Court approval of electronic surveillance is itself a step by step retreat from the protections always theretofore thought to be essential to the Fourth Amendment. The Fourth Amendment, by requiring that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized," absolutely prohibits indiscriminate searches under general warrants. Payton v. New York, 445 U.S. 573, 583 (1980). For this reason, the ACLU believes that all electronic surveillance violates the Fourth

Again in the Keith case, the Court specifically left open the possibility of a national security exception to the Fourth Amendment for electronic surveillance of "activities of foreign powers or their agents." 407 U.S. at 321. Moreover, the Executive Branch publicly asserted the right to conduct warrantless electronic surveillance for national security reasons for many years before it ever made any such assertion about warrantless physical searches.[10]

In the face of the lesser protection accorded to electronic communications, the Supreme Court's references to a possible national security exception for electronic surveillance and the widespread Executive Branch paractice of such surveilance,

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Amendment because it necessarily constitutes a general search and cannot be particularized.

The Supreme Court, of course, has determined that electronic surveillance does not violate the Fourth Amendment, so long as minimization procedures are employed to meet the particularity requirements and notice is given after the surveillance to meet the notice requirement. Katz v. U.S., 389 U.S. 347 (1967); U.S. v. Donovan, 429 U.S. 412 (1977).

But having permitted electronic surveillance, the Court then upheld warrantless physical entry of a home in order to install an electronic listening device, when no other means are available. Dalia v. U.S., 441 U.S. 238 (1979). The Court upheld such warrantless entry as an exception to the Fourth Amendment involving "exigent circumstances," analogizing in this case to the situation where "'an announcement would provoke the escape of the suspect or the destruction of critical evidence.'" Id. at 247 (quoting United States v. Donovan, 429 U.S. 413, 429 n.19 (1977)).

Under the FISA, Congress retreated a step further and allowed the government to dispense with subsequent notice all together for electronic surveillance conducted for intelligence purposes. The ACLU believes that this failure to require any notice is unconstitutional on its face.

[10] See Senate Rep. on the Counterintelligence and Security Enhancements Act of 1994, No. 103-296 (June 30, 1994) at 29.

Congress passed the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et. seq. The Act provided greater protections than were then in place under Executive Branch practice, but in no way met Fourth Amendment standards for physical searches.

The ACLU reluctantly accepted the FISA as the best possible accommodation in light of the government's practice of conducting warrantless electronic searches and the Supreme Court's creation of a national security exception for electronic searches. However, we have always had doubts about some elements of the FISA and are troubled by its implementation.

The FISA having retreated from basic Fourth Amendment requirements in the area of electronic surveillance -- on the basis that electronic surveillance was different -- this legislation now seeks to apply these weakened standards to the core of the Fourth Amendment, searches of the home. Ignoring history and law, supporters of the legislation now argue that the national security exception for secret electronic surveillance should be extended to physical searches. We disagree. The loosening of Fourth Amendment standards for purposes of electronic surveillance should not in any way affect the clear and unambiguous standards well in place for physical searches and seizures.

The Fourth Amendment has protected electronic communications for only 20 years, but it has protected one's home and papers for 200, and its antecedents reach back almost another 200 years. As Judge Levanthal has pointed out: "While history is not

determinative, physical entry into the home was the 'chief evil' appreciated by the framers of the Constitution . . . . This argues strongly for the proposition that the safeguard against this chief evil is not to be whittled away on abstract grounds of symmetry, merely because the new evil of electronic surveillance was possibly subject to a national security exception when, in 1967, it came to be regulated by constitutional doctrine."[11] U.S. v. Ehrlichman, 546 F.2d 910, 937-38 (1976) (Levanthal, J., concurring) (citing United States v. United States District Court [Keith], 407 U.S. 297, 313 (1972)).[12]

CONSTITUTIONAL DEFECTS IN THE PROPOSED LEGISLATION

The proposal to apply FISA procedures to physical searches is unconstitutional for all the following reasons:

[11] As Attorney General Levi recognized: "An entry into a house to search its interior may be viewed as more serious than the overhearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other." Quoted by Judge Levanthal at 546 F. 2d at 938.

[12] The only case ruling on the constitutionality of warrantless national security searches upheld them in some instances, but not all and did not address searches of one's home. In U.S. v. Truong, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982), the court of appeals upheld the admission into evidence of the fruits of two warrantless searches of sealed packages that Truong had given to a government informant for delivery overseas. The court ruled that the searches were valid under the Fourth Amendment so long as their primary purpose was for intelligence gathering. But the court also held that once the primary purpose of the investigation had shifted to gathering criminal evidence, as it did, then a warrant was required. For this reason, the court upheld the suppression of the fruits of a third package search that occurred after the shift in focus occurred. The Supreme Court declined to rule on the matter.

-- It provides for secret warrantless searches of homes and papers: it does not require government agents to announce themselves before entering to execute a search; it does not require subsequent notice that there has been a search or any inventory of the items seized. While providing for court orders in advance of such searches, such orders would not satisfy Fourth Amendment warrant requirements because they do not notify the suspect of an intended search.[13]

-- It provides for searches and seizures without probable cause to believe that the target has engaged or is about to engage in criminal activity.

-- It prohibits any meaningful judicial review of the propriety of the initial authorization or the execution of the search, or the use or dissemination of seized materials. Judicial review, an essential check on abuses, is only meaningful when the target of the search can challenge it in a public, adversary proceeding. Under the proposal, court proceedings concerning the legality of the search and its execution -- in the few instances when there even are such proceedings -- will almost always be conducted in secret and ex parte, without the participation of the target. The FISA requires courts to review the application for the search and the materials generated by the search ex parte and in camera upon request of the Attorney General. 50 U.S.C. § 1806(f). Under FISA, the Attorney General always makes such request. We have found no reported case where

[13] See Katz v. United States, 389 U.S. at 354 n.15.

the target of a FISA wiretap was allowed to review the initial application, and usually she is not even permitted to review the transcripts of her own conversations taped by the government. Without access to such materials, targets of FISA searches are denied any meaningful opportunity to contest the basis for or the execution of the FISA search.[14] Indeed, recent decisions by the Ninth and D.C. Circuits have gone even further and held that targets of FISA surveillance may be denied not only the opportunity to see the government's application, but even the opportunity to appear and be heard before a court rules such surveillance legal.[15]

-- It permits the government to conduct secret warrantless searches of individuals who are targets of criminal investigations and avoid Fourth Amendment requirements so long as

[14] See U.S. v. Belfield 629 F.2d 141 (D.C. Cir. 1982); In the Matter of A Warrant, 708 F.2d 27 (1st Cir. 1983); U.S. v Duggan, 743 F.2d 59 (2d Cir. 1984); U.S. v. Cavanagh, 807 F.2d 787 (9th Cir. 1987); U.S. v Ott, 827 F.2d 473 (9th Cir 1987); U.S. v. Badia, 827 F.2d 1458 (11 Cir., 1987); U.S. v. Wu-Tai Chin, Memorandum Opinion and Order, Criminal No. 85-263-A (E.D.V.A., 1986). See also, In re Grand Jury Proceedings, 856 F.2d 685 (4th Cir. 1988); U.S. v. Sarkissian, 841 F.2d 959 (9th Cir. 1988). U.S. v. Spanjol, 1989 U.S. Dist. LEXIS 9896 (D.C. ED PA, 1989); Matter of Kevork, 788 F.2d 566 (9th Cir. 1986).

[15] United States v. Hamide, 914 F.2d 1147, 1151 (9th Cir. 1990); ACLU Foundation of So. Calif. v. Barr, 952 F.2d 1060 (D.C. Cir. 1991). In that case, permanent residents who the government sought to deport based on their First Amendment activities, American-Arab Anti-Discrimination Committee v. Meese, 714 F.Supp. 1060 (C.D. Cal. 1989), were informed that they had been subject to FISA surveillance. The government then secured a completely ex parte ruling that the surveillance was legal in a proceeding in which the residents were not even allowed to participate. That ruling then foreclosed forever any adversary hearing on the legality of the surveillance.

the government asserts a "foreign intelligence" purpose, in addition to a law enforcement purpose.

-- It provides for the use of such illegally seized evidence against individuals in criminal cases.

-- It provides no real protection against dissemination of any seized information and indeed specifically contemplates that the government will disseminate information seized from United States citizens to foreign intelligence services, when the citizens will not even know of the seizure.

-- It violates the First and Fourth Amendments by allowing searches based on constitutionally protected political dissent, with no probable cause of criminal activity, by providing that one may be deemed an agent of a foreign power based solely upon lawful political advocacy in favor of causes or groups currently labeled terrorist, or based solely on membership in such groups.

-- It authorizes secret warrantless searches of individuals suspected of "clandestine intelligence gathering" in connection with a wide range of activities much less serious than espionage; for example, potential violations of the export control laws involving publicly available information,[16] or industrial espionage involving solely private not government information without regard to whether such "espionage" is even a crime.

[16] See United States v. Posey, 864 F.2d 1487 (9th Cir. 1989) (FISA search authorized to target person suspected of exporting unclassified information available under the Freedom of Information Act).

-- It makes an unconstitutional distinction between U.S. and non-U.S. persons, when the Fourth Amendment applies equally to all persons within the United States.

EVEN IS THERE WERE A NATIONAL SECURITY EXCEPTION TO THE FOURTH AMENDMENT, WHICH THERE IS NOT, THE GOVERNMENT HAS MADE NO SHOWING OF ANY NECESSITY.

No governmental purpose can justify ignoring the Fourth Amendment by sanctioning a warrantless, nonconsensual invasion into the privacy of one's home or papers. However, even if the Fourth Amendment permitted such balancing, the government's interest in collecting foreign intelligence would not outweigh the serious infringement on individual rights that results from such searches.

Indeed, supporters of this proposal have not even advanced any national security justification for codifying this unconstitutional relic of the Cold War. The reasons which have been advanced not only do not justify this wholesale assault on the Fourth Amendment, they are all reasons to outlaw secret searches not to authorize them. Outlawing such searches would meet all the objectives outlined in the Senate report, it would bring "greater legal certainty to this area, from the standpoint of avoiding problems with future espionage prosecutions, and from the standpoint of protecting federal officers and employees from potential civil liability." See Senate Report 103-296 at 41, "The Counterintelligence and Security Enhancements Act of 1994,"

June 30, 1994. Outlawing such searches is the only way to "protect[] the constitutional rights of Americans." Id.

We also note that the justifications cited in the Senate report for this proposal are all law enforcement, not foreign intelligence rationales: i.e., to improve the "deterring, detecting, and prosecuting [of] espionage." See Rep. at 1, 19, 20, 41. While the crime of espionage is an especially serious one, the Fourth Amendment requires the same protections in investigating and prosecuting it, as it does for other serious crimes. The difficulties attendant upon following Fourth Amendment requirements in espionage and intelligence investigations are equally present in other large scale investigations involving organized crime, money laundering, or international narcotics offenses. Nevertheless, the Framers determined that individual rights should not be sacrificed to considerations of expediency.

In this connection, Congress should require a public explanation from the Justice Department about why it searched Aldrich Ames' house without a warrant, at a time when it clearly contemplated criminal charges against him. Presumably its foreign intelligence purpose in doing so was to learn as much as possible about Ames' activities and what information he had disclosed. While we recognize the importance of this kind of damage assessment, we also point out that the Constitution places limits on the means the government may employ to learn such information; e.g., a spy may not be tortured even if that is the

only way to learn certain intelligence. Nor may the government conduct secret warrantless searches of Americans' homes and papers in the name of collecting intelligence.

During the Cold War, many restrictions on the civil liberties of Americans were imposed because they were thought necessary to the defense of the very existence of the United States. Black bag jobs for national security reasons were among the most serious violations. Now the threat to our existence is gone, and while the United States still faces difficulties and dangers it does not face a military adversary threatening our existence. Collecting foreign intelligence information must no longer be used as a justification for abridging fundamental rights.

The Congress should demand of the executive branch that it cease its unconstitutional practice of conducting warrantless secret national security searches.

CONCLUSION

Accordingly, Congress should pass no law that authorizes secret warrantless national security physical searches. On the contrary, we urge Congress to prohibit such searches. However, if Congress is not prepared to take such action, we believe that it would be better to do nothing and leave the status quo. Legislation authorizing such searches would likely lead to a significant increase in such searches in clear contravention of the constitutional rights of Americans.

The CHAIRMAN. I appreciate your testimony. I think you raise some very interesting points.

A lot of my colleagues, and a lot of my constituents, are very surprised when they find out notwithstanding all the TV spectacle of O. J. Simpson, that the United States Government on occasion has the ability, or believes it has the ability, to enter one's home without a court order and without a warrant. Recognizing that there is obviously a split of opinion on whether this is constitutional or not, the fact of the matter is that on occasion, although infrequently, it does happen. As you indicated, it happened in the Ames case and it is something that not a lot of people recognize.

We have talked about some of the public policy issues. Whether we are talking about national security reasons or exigent circumstances, I think both are trying to get at the same point but calling it different things, although they may have different constitutional implications. I understand that.

This is an important subject for a hearing. It is in the Senate bill, of course, and so we want to try to figure out by having a hearing, if this is something we should work on as we go to conference or not.

Let me ask you this question so that I understand it, Mr. Bass and Ms. Martin: Do you believe that FISA protections for electronic eavesdropping satisfy any constitutional problems in terms of doing a wiretap? That is, do you believe what we have done on electronic eavesdropping is well within the constitutional purview of the Fourth Amendment?

Mr. BASS. On the constitutional issue I believe it, but more importantly every court that reviewed it reached the same conclusion. The issue is reasonableness and it is reasonable.

The CHAIRMAN. Ms. Martin.

Ms. MARTIN. We believe that certain aspects of the FISA procedure, even as applied to electronic surveillance, are unconstitutional. Most notably the fact that the target of the FISA surveillance may never be notified that they were subject to surveillance, and in addition that there is no adversary judicial review of the propriety of the surveillance.

The CHAIRMAN. Okay. In the area of physical searches, Mr. Bass has discussed the possibility of requiring the appointment of counsel to essentially represent the, "unnamed party" with, I presume, reasonable access to the nature of the case and what is involved.

Mr. BASS. Yes.

The CHAIRMAN. I wonder how you would feel about that?

Ms. MARTIN. Well, we wouldn't have any objection to that, but we do not think that it would cure the constitutional problem. It adds another layer of review before the search is executed. However, the basic principle of our system of checks and balances requires that the search be made public and that a person have the opportunity to hire their own lawyer to make an adversary attack on the search. That is what is necessary here.

I don't believe a lawyer who doesn't know who his client is can do the same kind of job representing him as can a lawyer who knows the client and knows the circumstances.

The CHAIRMAN. Mr. Bass, would you comment on that?

Mr. BASS. I would agree with the last point. Without knowledge of your client, you cannot do as effective a job. It is a question of checks, balances and compromises as well as if you know the client.

The intelligence area is different. It will always remain different. The best example I can give you is the reported case, the Truoung Humphrey case, which did involve physical searches.

It is very important for the Congress I think and the public when considering this issue not to be myopically focused on black-bag jobs at residences because that is not what we are talking about. What we were talking about overwhelmingly is physical search of packages, bags, courier compartments, if you will, and not personal residences.

The facts in Truoung Humphrey, as publicly reported, were that we knew that a U.S. government employee was couriering packages for the Vietnamese. We did not know what was in the packages. We were able to search one of the packages fortuitously because in the Department of Justice view, the package did not have an expectation of privacy because of the way it was tied and secured and we were able to obtain custody of that package and to search it and find there were classified documents in the package.

That discovery occurred so early in the process that we would never have been able to find out the scope, extent of both the injury and the persons involved if we had been required to serve an inventory.

The CHAIRMAN. How do you respond to that, Ms. Martin?

Ms. MARTIN. Mr. Chairman, that is a problem which arises in all investigations, criminal investigations of complicated, complex conspiracies, for example, international drug smuggling investigations. You always have to weigh whether if you do a search and thus put individuals on notice that they are suspects versus not doing the search at that time and going forward with other aspects of the investigation. The Constitution is not a perfect information gathering system for the government.

The CHAIRMAN. I understand that, but what if instead, let's say there is reason to believe this person was a courier for secrets of the Vietnamese? What if we had reason to believe he was a courier for secrets to deliver and explode an atomic weapon in downtown Manhattan and you as prosecutor had reason to believe this is serious stuff here and he is part of an international terrorist network? How would you feel about that?

If he were given notice—that is, this was an emergency, he could kill 50,000 people unless something were done immediately. How do you deal with that?

Ms. MARTIN. I think that would clearly come within the exigent circumstances exception recognized by the Supreme Court. The FISA and the present proposal go way beyond that. We would not have any problem in saying there has to be a procedure whereby you can stop that.

The CHAIRMAN. You are saying that exigent circumstances, things like having to act in an emergency type of situation, are exceptions to the Fourth Amendment. Obviously the court has upheld those. But what you don't accept is a blanket national security exception that doesn't relate to exigent circumstances?

Ms. MARTIN. That is right and that relates to collection of information.

The CHAIRMAN. Now, this issue about—let me find my notes—criminal versus intelligence. At some point an intelligence matter becomes a criminal matter and—or it may, it may not in some cases. The point has been made that the Fourth Amendment would apply clearly in criminal cases. I get by implication Ms. Martin is saying what starts out as an intelligence case becomes a criminal case and the government knows it and uses the intelligence excuse to avoid complying with the Fourth Amendment. How do you handle that, Mr. Bass?

Mr. BASS. Factually and historically that is not a correct statement of history, at least since 1978.

Again, the Truoung Humphrey case is illustrative. When that case began, it was not a criminal case. We didn't know whether we had a crime, we didn't know who the parties were, and in fact that case did not turn criminal until a very extensive discussion eventually elevated to President Carter went on between the CIA and the Department of Justice as to whether, in the parlance, we could "burn" the agent involved because we had a very valuable CIA asset whose cover was blown by prosecuting that case.

Until that decision was made to blow her cover, that case was an intelligence activity. We wanted to know what the Vietnamese were getting from our government and that was important whether there was a prosecution or not.

As important as Ms. Martin's concerns are, they are the tail, they are not the dog. Overwhelmingly FISA searches, whether you are talking about ELSUR searches or talking about the physical searches, at least in my experience, are intelligence matters, not law enforcement matters.

The reason there is as much concern is because the ones that always become visible are the ones that turn criminal. Once they turn criminal, I understand and am sympathetic with the concerns and legitimacy of the concerns. But we can't let those concerns drive the train when the bulk of that train is for an entirely different purpose.

I think it is important as the committee considers and the public considers the constitutional issues, to remember the Fourth Amendment is not dealing exclusively with criminal activity. There is an entire area of administrative searches: fire marshal searches, school searches. It applies to any search by the government for any purpose. And the trappings of the criminal procedure, the Federal rules of criminal procedure for warrants simply do not apply when it comes to administrative searches.

For me it is rather simpleminded but rather important to remember that an intelligence search is not inherently a criminal search.

The CHAIRMAN. On the issue of post-warrant review, I think you spoke to that, Mr. Bass, but I don't think Ms. Martin has.

Is there any way that we could provide in the statute any post-warrant review?

Ms. MARTIN. Well, there is—at a minimum, the statute can provide that when the fruits of the search are used in criminal or other proceedings, that the target of the search is entitled to see

the application for the search and other underlying materials. And as Mr. Bass suggested, perhaps there might be names or other details that might be sanitized but that you have an absolute right to see the basic materials in order to be certain that there is some kind of review.

That, of course, would only apply in the cases where the government tells someone that they have been searched.

The CHAIRMAN. Are you worried, Ms. Martin, that the statutory requirement that we add the court order on a search of physical property will result in significant additional searches of physical property.

Ms. MARTIN. We are.

The CHAIRMAN. Is that an underlying concern? The fact we require this in wiretaps, I don't know if that has resulted in a radical increase in the number of wiretaps or not in the intelligence area, but I gather that you are concerned it will make it too easy to get a court order under these circumstances because they are rarely, if ever, rejected.

Ms. MARTIN. That is exactly our concern. I might note that in the Keith case when the Supreme Court said that surveillance for domestic security reasons was unconstitutional, after the case the government abandoned any efforts to obtain authorization to conduct such surveillance. There is no authorization to conduct that kind of surveillance.

I might just add that we have another more theoretical concern in addition to the increase in the number of searches. Based on the experience under the FISA, and the development of Fourth Amendment law, if the Congress approves these kinds of procedures as consonant with Fourth Amendment standards, in its view you will see a significant and fundamental weakening of Fourth Amendment standards. That will be the effect when the proposed standards and procedures are challenged in court, especially given the makeup of the Federal judiciary these days. They are very deferential to claims of national security, what some would characterize as overly deferential.

The effect will be that a protection that everyone thought they had—that Federal agents can't break into your house without a warrant and knocking on your door—will be gone in national security cases, and the definition of national security cases can be expanded. We think it is already too broad.

The CHAIRMAN. I appreciate your testimony.

I will yield to Mr. Combest, but I generally feel that we ought to include this language in law but it may need to be expanded to provide a few more protections. I have to tell you, in the hands of an oppressive government this could be an extraordinary tool if national security is not very well defined or if people don't have a basically honest view of what constitutes national security.

In the last decade, we saw certain circumstances where in the wrong hands this could have been a real problem. I think there is some legitimacy for concern in this area.

Mr. BASS. If I could just respond to that comment, Mr. Chairman, I agree with your concern. I think 200 years of our history have shown that the judiciary in this country, thank God, has been there to step in to look at such things as the Pentagon Papers case,

a whole host of cases in which the judiciary has stood strong. It is a very vital check.

The CHAIRMAN. As long as they don't view the approval of the search as kind of perfunctory, routine activity. As long as they take it as an independent review, that is okay.

Mr. BASS. But I think the fact of the matter is the reason why I think there has been a hundred percent track record on FISA surveillance is in large part integrity of the Executive Branch. As the committee knows, the degree of review before they are ever submitted to a FISA Court is the highest review I know of exceeding Title III review authority in terms of the integrity of the process.

Can it go amok? Sure it can go amok.

Laws never prevent lawlessness. It is an inherent syllogism. But they are designed to check it and give somebody else a second view of what to do with it. I think while there is legitimate concern about abuse of physical search authority, that that concern appeals to the value of having the judge in there and not having the constitutional cloud over the future.

The CHAIRMAN. Mr. Combest.

Mr. COMBEST. Thank you, Mr. Chairman.

It will be obvious I will ask not many, just a couple questions, but non-attorney questions, it being that I don't always understand the application of the law as you do. But it is my understanding that, as was indicated, that it is rare if ever that a FISA Court would turn down an application under FISA. But it is also my understanding that it is extremely rigorous to get to that point, that it is not uncommon that prior to their either turning down or accepting, that there is additional information required that there has to be had a weighing in by not just simply one person saying we would like to pursue. There has to be a very rigorous, detailed application which would be filed and it is not uncommon for there to be a necessity to go back and get additional information to justify the action that the FISA Court would take.

How clear is it in the legal process, in your minds and opinions, to distinguish between the time that it is an intelligence search versus a criminal search? It seems to me to be a very gray area particularly when you have agencies involved in the initial intelligence-gathering portion that will be the same agencies that are involved in the prosecution once it becomes a criminal case.

How clear is it from the legal standpoint to distinguish between those two?

Ms. MARTIN. Well, I am of course on the outside of the government. I don't see how the government can make an absolute distinction once it has identified an individual whom it suspects may have committed a crime, for example, the crime of espionage. So once it focuses its investigation on an individual, it seems to me it is difficult to say what the investigation is, unless a decision is made from the beginning that you will not prosecute that individual.

Now, my understanding is that in the last 20 years it was rare to bring prosecutions in espionage cases so it was much easier to say it was a foreign intelligence investigation rather than a criminal investigation.

Now, the policy is to prosecute and therefore you have these dual-purpose investigations and that is what we object to. When there is a dual purpose, the criminal standards should apply.

Mr. BASS. Mr. Combest, I agree with Ms. Martin. From the government's perspective in the ongoing investigation, it is very difficult but not impossible to know when the line has been crossed. There are a couple of hallmarks in my mind of when that line is crossed. When the government seeks to prosecute, it is clearly crossed, and you don't go to the grand jury without the bureaucratic approval and it is crossed. When you convene a grand jury, it is crossed. We don't use grand juries often in mixed-purpose cases; we go straight for an arrest without doing a grand jury investigation. That will continue to be the case.

The Department of Justice in the Truoung Humphrey case, the seasoned criminal prosecutors didn't have a lot of trouble knowing when the line was approached; indeed, it was a memo from the criminal division that says "I think we were getting close to criminal prosecution," that tipped the scales for the judiciary in that case.

I think it is possible to know when you cross the line. I am not sure it is relevant, however, to know when you cross the line. The distinction that was drawn in the Truoung case was a distinction between a warrantless search and a criminal versus intelligence purpose. Once FISA was passed that distinction disappeared because the courts have continued to accept a FISA warrant as fully sufficient for constitutional purposes for gathering information for dual purposes and dual uses.

I understand Ms. Martin objects to that, but in terms of the law, that is what the law is and I have no reason to believe the Supreme Court would disagree with those unanimous decisions of the district courts and circuit courts.

So the issue I think becomes one in which you again focus on the area that I suggested needs further attention, that is the post-indictment review.

I agree very much with Ms. Martin we need to improve that area and provide more access. I don't think I would go as far as she would in terms of how much information counsel gets, but I think the judiciary, for understandable reasons, errs on the side of secrecy and not on the side of disclosure. I don't think that tendency will ever be changed unless the Congress gives them a little nudge or a push.

Mr. COMBEST. When you spoke of the proposals for the advocate for the target, that is a unique idea. Is that in place anywhere that you are aware of?

Mr. BASS. Not that I am aware of. Canada proposed it and it is my understanding based on discussions with the embassy this morning, it is still under consideration but not adopted. They would have gone further than I suggested.

Mr. COMBEST. I do not disagree with you both on the concerns that if you have an idea who your client is, I guess, you know a question would come to my mind about there would have to be some protection of that attorney, the advocate, in the case that that person in behalf of an unknown client made a recommendation that actually took place and that client was found to be to be

blameless and that you would have to, I guess, look at what potential you would have for legal liability recourse to the advocate?

But you are suggesting that that advocate would have the same information included but nothing more or nothing less than what would be presented to the court in making the determination about the allowance of the search?

Mr. BASS. Mr. Combest, I think for practical reasons the advocate, number one, is an advocate for the target. The advocate will argue that the order should not issue.

Mr. COMBEST. I understand.

Mr. BASS. So other than I guess potential, issues of adequacy of counsel I don't think there is a risk for the civil attorney to perform that role. If there were, we could do as we did in the vaccine case, we could immunize the attorney. That is not a problem. I don't think the attorney needs to have all the information that is before the court.

The types of cases I am particularly familiar with is the case in which the legal issue is not so much a factual one as a mixed fact-law conclusion, are the facts stated in the application sufficient to give a reasonable grounds to believe that the individual may be an agent of a foreign power.

I know. And anyone who worked in the area, and Members of this committee know because of our experiences, that you can make arguments about whether these facts are as has been suggested by Ms. Martin, but that is indicative of an agent of a foreign power or of a free-wheeling individual who just happens to share views that are can consistent with those of a foreign power.

That is an important issue. It is an issue that right now he has never litigateed. It is presented by the Department of Justice, it is reviewed by a judge, but it is only human nature. No matter how good your judge, nor matter how potentially anti-Executive Branch their philosophy may be, it is my belief, and I think history has shown us, the judiciary can never be expected to make a fully informed decision without an advocate in there making as strong an argument as you can on the other sides.

I don't think you need the knowledge of the client to do that, nor do I think you need access to the client to do that in at least some cases. Do you need it in every case? No, you don't. Do you need it in the establishment cases? No, you don't. Do you need it in the non-U.S. person cases? Probably not. Do you need it in every U.S. person case? Maybe not, but should the court have authority to order it, yes, they should.

Mr. COMBEST. Did you have any comments, Ms. Martin?

Ms. MARTIN. One interesting thing about this proposal is that it, I think, assumes that the FISA procedure that requires Justice Department review and then presentation to a judge of the Foreign Intelligence Surveillance Court, is not enough review, and that there would be some usefulness in adding this additional review.

We don't think this is enough review because we think the kind of review you need is court review by the person who was searched.

Mr. COMBEST. Thank you very much.

The CHAIRMAN. Mr. Coleman.

Mr. COLEMAN. Thank you, Mr. Chairman.

I think you answered one of Mr. Combest's questions that in terms of the idea you might have counsel representing an unknown target that may not be completely new. We do it in a number of civil and criminal cases from time to time. We do it in ad litum types of cases. It does occur. It has been done. I don't think it is something we couldn't draft and figure a way to make it work. I think indeed it could.

Ms. Martin, is your position basically that, as I understand the current status, we don't have FISA review? The cases cited, the Humphrey case, was a warrantless personal search, as I understand it. Since we don't have a statute, the administrations, as pointed out by Mr. Bass, believe that they have the authority consistently, and believe they have an exception to the Fourth Amendment for those kinds of national security reasons, I guess is the term they would use. They have the ability now to do that.

It seems to me your position is sort of, well, let's roll the dice and say we are certain the administration doesn't have it, no President has that authority and a court will eventually so rule. We don't want to have a statute such as amendments added to the Senate bill. That is giving up too much as it is, because your belief is the courts will rule that the Fourth Amendment is the Fourth Amendment and applies to everything and you are going to have to, regardless of the target, regardless of the issue, nonetheless abide by what the Fourth Amendment says, period.

Ms. MARTIN. That is not exactly our analysis.

Mr. COLEMAN. Okay.

Ms. MARTIN. I would hesitate to predict that the Supreme Court is going to agree with our view of the Fourth Amendment. Our analysis is not based on that. It is based on the following. We believe the only thing this proposal adds is review by a judge of a foreign intelligence surveillance court.

Mr. COLEMAN. If I can interrupt, that is more than you have now.

Ms. MARTIN. Yes, but we don't believe that that cures any of the fundamental problems. The fundamental problem is that the search is secret and that there is no adversary review.

Mr. COLEMAN. Again, if I can interrupt, but certain exigencies is the term we use, may indeed be permitted by the court to not have to acknowledge the notice, the knock, and the inventory. Is that right? Or am I missing the point here?

Ms. MARTIN. Well, you know, I actually could not predict what the court would have done in the Ames case about that search. I think that the Justice Department feels that it is uncertain whether that search would have been ruled unconstitutional and I think that is the answer, it is uncertain.

Our analysis is, that if you add this level of review by the judge of the FISA Court, but you still permit secret searches and you still permit lessened probable cause standards, all that will happen is there will be a lot more searches being done in violation of the Fourth Amendment. The additional review by that judge doesn't make up for more unconstitutional searches being conducted.

Now, if the searches were not secret, we would have a completely different view of the matter.

Mr. COLEMAN. Again, we are talking here about the foreign intelligence—national security issues only. Right? We need to be sure. We discussed a lot of other cases, hypotheticals, but we are talking about national security cases.

Ms. MARTIN. There is a foreign intelligence purpose for the search, but such searches include those done in the course of criminal espionage investigations. The foreign intelligence purpose sweeps in an enormous number of kinds of investigations.

Mr. COLEMAN. The Ames case is an example. I happen to agree at some point earlier than when the physical search of the residence took place without notice, without a warrant, that there was certainly some anticipation that criminal charges would result; that, in fact, he became a suspect under the old rules of evidence. He was a suspect, Mr. Ames or Mrs. Ames or both. It seems to me that you are right. We are not sure what a court would do—it would seem to me a court would say a warrantless search would be in violation of the Fourth Amendment.

Therefore, you would not be able to even use the evidence that was seized, whatever it was that was determined to be the fruits of that search. I would suggest to you that because we didn't have a trial, we will not ever know whether or not there is not enough evidence to convict without what we gained from the results of a search. Otherwise, why would there be a plea of guilty? Whatever assumptions we make, I would say to you we are still left basically with the fact that if we leave things as they are and do nothing, we will continue to have instances such as the Ames case.

I think that that would be one thing you could say, even though there may be some uncertainty on the part of the prosecutors or agents who determine to do warrantless searches; they may still occur. Is it a good result or should we, as is proposed by the Senate language at least some judicial review even if it is a surveillance court as opposed to the United States District Court?

Is that what we are talking about here?

Ms. MARTIN. That seems to be the issue. It appears that if you pass this legislation, we will have more instances like the Ames case. There will be review by the Foreign Intelligence Surveillance Court, but there will still be secret searches done according to inadequate standards.

I might point out that this problem of getting a warrant and giving notice of a search comes up in all criminal investigations, especially in criminal investigations of enterprises, of drug smuggling, domestic terrorism. You always have this problem. You always have to make the judgment whether or not you want to make the search now and put someone on notice or you want to wait and gather more information. We do not believe that additional review by a judge on the Foreign Intelligence Surveillance Court will make any real difference, except that it will mean there are more secret searches of Americans' homes.

Mr. COLEMAN. I want to express my agreement with you about your overall statement with respect to the Fourth Amendment, but again I am one of those who wants very much to see at least a judicial review.

I think that that gives all Americans some belief that the Constitution means something; that, indeed, you cannot go and do

these things. Even though it is perfunctory to go get an arrest warrant, a search warrant, whatever warrant law enforcement or government may be seeking, at least somebody else is looking at it. I am one of those who thinks that there is nothing wrong with that. Right now we do not have someone else looking at it.

I think we are gambling that the Supreme Court of the United States is going to say no, the Fourth Amendment applies to everything. You cannot have any warrantless searches, period, without certain exigencies that you come up with that have been written into case law. I would say to you, I think that that—once again, we are leaving out something that is very important for the public. That is at least we do have somebody else looking at what the government is attempting to do.

Ms. MARTIN. We think that it is only a small part of judicial review; that the essence of judicial review is that it is public and that it is adversarial. So when you go get a warrant from a magistrate for an arrest or search, which is done ex parte, everyone knows that after the arrest or search, you can go to court and have a public, adversarial hearing in front of a judge, and that is the essence of judicial review. We are not getting that in this proposal. I agree with you completely: judicial review is very important and is the key part of the checks and balances system. That is what is missing here.

Mr. COLEMAN. Mr. Bass, is there a way to add that as an amendment? You suggested adding that?

Mr. BASS. I think you can add post-indictment mandated review and a fuller extent than the current statute does. If Congress tilts the scales a little bit with skillfully crafted language, I think we may have more effective review by the judiciary than we do. Every single amendment of the judiciary in the Congress from, in my lifetime, has been to bend over backwards in favor of secrecy, overclassification. I think it is high time we took a more realistic view of it.

Mr. COLEMAN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Laughlin.

Mr. LAUGHLIN. Ms. Martin, I was late getting here. I apologize for being a little confused. When you stated since I arrived if searches are not secret, we have no problem. What do you mean by "not secret" and "have no problem".

Ms. MARTIN. I meant if the executive branch seeks the authority to conduct searches for foreign intelligence purposes and those searches were then accompanied by knock and notice and some form of judicial review after the search of the propriety of the search, we would have a completely different case here. One of our key objections here is that the search remains secret in most instances; and then all kinds of things follow from that.

Mr. LAUGHLIN. Since I arrived, you also told the Chairman you had no problem in the example he gave of the agent traveling around with a panel with a nuclear device calculated to—or that happens to be detonated in Manhattan killing 50,000 people. You have no problem with that search?

Ms. MARTIN. No, I don't. I think that present law already would authorize a search in that situation without any doubt.

Mr. LAUGHLIN. The gentleman to my left, and he generally is to my left, although he is from west Texas——

The CHAIRMAN. So is everybody.

Mr. LAUGHLIN [continuing]. Suggested the 50,000 figure may be a little light; a little low. You seem not to have a problem when life is at stake, but using the Aldrich Ames case as an example, before the search was made it appears with the hindsight we have from reading the media, that here is an individual who was a traitor to the country and he at least had the appearance of blood on his hand by passing information to the Soviets. You object to the search of his residence without a warrant. I fail to connect where you are drawing the difference that one is okay and the other is not.

Ms. MARTIN. Well, our position is that even individuals accused of or guilty of treason are entitled to the protection of the Fourth Amendment which means a search with a warrant. At the same time, we agree that if timing is such that the requirement to get a warrant is going to mean that you cannot prevent New York City from being blown up, there is an exception to the warrant requirement. In that case, you can proceed and not get the warrant to prevent New York City from being blown up.

That is not the same thing as when you want to find and seize evidence of treason by an individual. That in itself is not a good enough reason to ignore the warrant requirement.

Mr. LAUGHLIN. Even though the evidence of treason seems to suggest that murders are taking place by the information being passed by the individual?

Ms. MARTIN. We do not deny the seriousness of the crimes that were charged against Mr. Ames. That is the situation in all serious criminal investigations; that there are serious crimes at stake. In all of those investigations, the Fourth Amendment requires a warrant unless there are exigent circumstances.

Mr. LAUGHLIN. It seems in the treason cases you want to give the accused notice that he is accused and our government is going to look for the evidence of his treason.

Ms. MARTIN. We simply want the suspects—people accused of treason or—people accused of murder or any serious crime—to be given constitutional protections which means following the Fourth Amendment warrant requirement. I am not even sure the Justice Department would disagree with me about that, since they are not claiming the right to do a warrantless search on the grounds that this person has committed some really serious crime, but on unrelated grounds.

Mr. LAUGHLIN. Would you support the premise anyway that even an American citizen forfeits his or her, or some of his or her constitutional rights, when they get involved in the area of treason?

Ms. MARTIN. Well, with all respect, I don't think that issue is posed here.

Mr. LAUGHLIN. Okay.

Ms. MARTIN. I don't understand the Justice Department to take that position here. I might point out that the Constitution itself, not the amendments, specifically restricts the government's ability to charge people with treason. It is the one protection for individual

rights contained in the original constitution; and it is in the context of national security.

Mr. LAUGHLIN. Mr. Chairman, that is all I have.

Thank you very much, Ms. Martin.

The CHAIRMAN. Thank you both. This has been very interesting. It probably is a subject that has been underreviewed by this body of government. We appreciate your testimony.

We now have our representative in the Justice Department Jamie Gorelick. Ms. Gorelick is the Deputy Attorney General. At some point we will close. I think you have a statement in open session; right?

STATEMENT OF HON. JAMIE GORELICK, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Ms. GORELICK. Yes. Probably there are some questions that I can answer in open session. I may look to my colleagues for advice with respect to particular answers as to whether——

The CHAIRMAN. If you think—we will obviously mutually agree to this. If we are reaching a point where we are talking about particular cases or anything like that, we obviously would go into closed session.

Ms. GORELICK. Thank you, Mr. Chairman, members of the committee. You have asked for our views on the provision of the Senate Select Committee on Intelligence's counterintelligence bill that establishes a procedure for court orders approving physical searches conducted in the United States for foreign intelligence purposes.

At the outset, let me emphasize two very important points. First, the Department of Justice believes and the case law supports that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General.

Second, the administration and the Attorney General support legislation establishing judicial warrant procedures under the Foreign Intelligence Surveillance Act for physical searches undertaken for intelligence purposes. However, whether specific legislation on this subject is desirable for the practical benefits that it may add to intelligence collection or undesirable as too much of a restriction the President's authority to collect intelligence necessary for the national security purposes, depends on how the legislation is crafted.

Here I want to clarify remarks that were contained in the prepared statement that were circulated earlier to the committee. The Senate Intelligence Committee bill by reflecting existing FISA procedures achieves in our view an appropriate balance between the practical benefits to intelligence collection and the President's responsibility to protect the Nation. After the Senate committee markup, however, we identified several issues that deserve further consideration and we have recommended changes to the Senate committee. Both the Department and that committee and this committee are working to address these concerns and there do not appear to be any major areas of disagreement.

That said——

The CHAIRMAN. I might just suggest that you ought to communicate with us those changes as well, because this is probably not something we are going to have in our bill when we are on the House Floor, but when we get to conference, we need to have that. We will need time to review these things.

Ms. GORELICK. Mr. Chairman, I believe those concerns have been communicated to the staff level. There are some I will be able to discuss today.

That having been said, the Department of Justice believes that Congress can legislate in the area of physical searches as it has done with respect to electronic surveillances and we are prepared to support appropriate legislation. A bill that strikes the proper balance between the President's ability to obtain intelligence necessary to guarantee our Nation's security on the one hand, and the preservation of basic civil rights on the other will be an important addition to our commitment to democratic control of intelligence functions. Such a bill would also provide additional assurances to the men and women who serve this country in intelligence proceedings that their activities are proper and necessary.

In considering legislation in this area, however, it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.

Rule 41 of the Federal Rules of Criminal Procedure requires a judicial warrant to search and seize, one, property that evidences—that constitutes evidence of a crime; two, contraband, that is the fruits of a crime or things otherwise illegally possessed; or, three, property designed or intended for use as the means of committing a crime. Normally, the federal officer conducting the search is required to serve a copy of the warrant on the person whose property is being searched and to provide a written inventory of the property seized.

These rules then, the construct of procedures outlined in Rule 41, would defeat the purposes of foreign intelligence searches, which are very different from searches that are used to gather evidence of a crime. Physical searches to gather foreign intelligence, first and foremost, depend on secrecy. If the existence of these searches were known to the foreign power targets—and I emphasize that these are foreign power targets—they would alter their activities to render the information useless. Accordingly, a notice requirement, such as the one applicable to criminal searches, would be fatal to the intelligence mission.

Moreover, only in extremely rare cases could a good faith representation be made that the purpose of the search was to gather evidence of a crime. In addition, because of the nature of clandestine intelligence activities by foreign powers, it is usually impossible to describe the object of the search in advance with sufficient detail to satisfy the requirements of the criminal rules.

Intelligence activities are directed at long-range objectives. Their exact targets are often difficult to identify and their focus is much less precise than criminal enforcement activities. Information gathering for policy maker and prevention, rather than prosecution, is its primary focus. Prosecution is but one of many possible options

that may be pursued at a later date. Thus, the Rule 41 requirements for the purpose of the search and ultimate notice to the person searched simply cannot be squared with the clandestine nature of searches directed at foreign powers or their agents.

This fundamental difference was recognized by Congress when the Foreign Intelligence Surveillance Act was enacted. In FISA, the privacy interests of individuals are protected not by mandatory notice, but through in-depth oversight of foreign intelligence electronic surveillance by all three branches of government and by expanded minimization procedures.

The Department of Justice has consistently taken the position that the Fourth Amendment requires all searches to be reasonable, including those conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. For the reasons I just mentioned, however, the Department believes that the warrant clause of the Fourth Amendment is inapplicable to such searches. We are satisfied therefore, that Attorney General approval of foreign intelligence searches pursuant to the President's delegation of authority in Executive Order 12333 meets the requirements of the Constitution.

Pre-FISA case law relating to electronic surveillance in the Fifth, Ninth, Third, and Fourth Circuits have confirmed this view.

There are fewer cases dealing with physical, as distinguished from electronic, searches, but it is important to recognize that, for Fourth Amendment analysis purposes, courts have made no distinction between electronic surveillances and physical searches.

Additionally, when the Supreme Court determined that warrant requirements applied to electronic surveillance for domestic intelligence purposes in the Keith case, it specifically declined to apply this holding to foreign powers or their agents.

There were foreign intelligence physical searches involved in the Truong case that were upheld by the Fourth Circuit in 1980. And, in 1986, the United States District Court for the Eastern District of Virginia, in an unpublished opinion in the Chin case, upheld an Attorney General authorized physical search based on the Truong case. It was upheld on the basis of presidential authority.

In 1984, during hearings on FISA, the Senate Intelligence Committee requested a legal opinion from the Department of Justice on the constitutionality of Attorney General approved intelligence searches. The unclassified version of this opinion was subsequently published in volume 35 of the Catholic University Law Review and is the definitive statement of the law on this issue.

As I stated earlier, the Department believes that the existing directives and the procedures governing foreign intelligence searches satisfy all constitutional requirements. Nevertheless, I reiterate the administration's willingness to support appropriate legislation that does not restrict the President's ability to conduct foreign intelligence necessary for the national security. We need to strike a balance that sacrifices neither our security nor our civil liberties.

If we can achieve such a balance—and I believe we can—if we use the basic provisions of the Foreign Intelligence Surveillance Act—we will accomplish a number of important objectives.

First, we will reaffirm our commitment to democratic control of intelligence activities. Second, by requiring the approval of a neutral judicial officer supervisor of physical searches as is presently required for electronic surveillance under FISA, we will remove any doubt concerning the legality of these searches. Finally, we will provide additional assurances that the patriotic individuals who serve law enforcement in intelligence—who serve this country in law—in intelligence positions that their activities are proper and necessary.

I appreciate the opportunity to appear before the committee and I would be happy to answer any questions that you have.

[The statement of Ms. Gorelick follows:]

Department of Justice

STATEMENT OF

JAMIE S. GORELICK

DEPUTY ATTORNEY GENERAL

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

WARRANTLESS PHYSICAL SEARCHES CONDUCTED IN THE

U. S. FOR FOREIGN INTELLIGENCE

PRESENTED ON

JULY 14, 1994

Mr. Chairman and Members of the Committee:

You have asked for my views on the provision of the Senate Select Committee on Intelligence's counterintelligence bill that establishes a procedure for court orders approving physical searches conducted in the United States for foreign intelligence purposes.

At the outset, let me emphasize two very important points. First, the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General.

Second, the Administration and the Attorney General support, in principle, legislation establishing judicial warrant procedures under the Foreign Intelligence Surveillance Act for physical searches undertaken for intelligence purposes. However, whether specific legislation on this subject is desirable for the practical benefits it might add to intelligence collection, or undesirable as too much of a restriction on the President's authority to collect intelligence necessary for the national security, depends on how the legislation is crafted.

The language currently found in the Senate Intelligence Committee bill raises a number of significant concerns and is not acceptable to the Administration without some additions and modifications. We are working with that Committee to address these concerns, and there do not appear to be any major areas of

disagreement. I am hopeful that an agreement will be reached.

That being said, the Department of Justice believes that Congress can legislate in the area of physical searches as it has done with respect to electronic surveillances, and we are prepared to support appropriate legislation. A bill that strikes the proper balance between adequate intelligence to guarantee our nation's security, on one hand, and the preservation of basic civil rights on the other will be an important addition to our commitment to democratic control of intelligence functions. Such a bill would also provide additional assurances to the dedicated men and women who serve this country in intelligence positions that their activities are proper and necessary.

In considering legislation of this type, however, it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.

Rule 41 of the Rules of Criminal Procedure requires a judicial warrant to search and seize (1) property that constitutes evidence of a crime; (2) contraband, that is the fruits of a crime or things otherwise illegally possessed; or (3) property designed or intended for use as the means of committing a crime. Normally, the federal officer conducting the search is required to serve a copy of the warrant on the person whose property is being searched and to provide a written inventory of the property seized.

These rules would defeat the purposes and objectives of foreign intelligence searches, which are very different from searches to gather evidence of a crime. Physical searches to gather foreign intelligence depend on secrecy. If the existence of these searches were known to the foreign power targets, they would alter their activities to render the information useless. Accordingly, a notice requirement, such as exists in the criminal law, would be fatal.

Likewise, only in extremely rare cases could a good faith representation be made that the purpose of the search was to gather evidence of a crime. In addition, because of the nature of clandestine intelligence activities by foreign powers, it is usually impossible to describe the object of the search in advance with sufficient detail to satisfy the requirements of the criminal law.

Intelligence is often long range, its exact targets are more difficult to identify, and its focus is less precise. Information gathering for policy maker and prevention, rather than prosecution, are its primary focus. Prosecution is but one of many possible options that may be pursued at a later date. The Rule 41 requirements for the purpose of the search and ultimate notice to the person searched simply cannot be squared with the clandestine nature of searches directed at foreign powers or their agents.

This fundamental difference was recognized by Congress when the Foreign Intelligence Surveillance Act was enacted. In FISA,

the privacy interests of individuals are protected not by mandatory notice but through in-depth oversight of foreign intelligence electronic surveillance by all three branches of government and by expanded minimization procedures.

The Department of Justice has consistently taken the position that the Fourth Amendment requires all searches to be reasonable, including those conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. For the reasons I just mentioned, however, we believe that the warrant clause of the Fourth Amendment is inapplicable to such searches. We are satisfied, therefore, that Attorney General approval of foreign intelligence searches pursuant to the President's delegation of authority in Executive Order 12333 meets the requirements of the Constitution.

Pre-FISA case law relating to electronic surveillance in the Fifth, Ninth, Third, and Fourth Circuits have confirmed this view. Additionally, when the Supreme Court determined that warrant requirements applied to electronic surveillance for domestic intelligence purposes in the Keith case, it specifically declined to apply this holding to foreign powers or their agents.

There are fewer cases dealing with physical, as distinguished from electronic, searches, but it is important to recognize that, for Fourth Amendment analysis purposes, courts have made no distinction between electronic surveillances and physical searches.

There were foreign intelligence physical searches involved in the Truong case that were upheld by the Fourth Circuit in 1980. And, in 1986, the United States District Court for the Eastern District of Virginia, in an unpublished opinion in the Chin case, upheld an Attorney General authorized physical search based on the Truong case.

In a 1976 case, United States v. Ehrlichman, the D.C. Circuit went to some lengths to point out that whatever search authority the President has can be exercised by the Attorney General, but not by other officials. The court, however, did not squarely define the extent to which the President had authority to authorize foreign intelligence searches.

In 1984, during hearings on the FISA, the Senate Intelligence Committee requested a legal opinion from the Department of Justice on the constitutionality of Attorney General approved intelligence searches. The unclassified version of this opinion was subsequently published in volume 35 of the Catholic University Law Review and concluded that the President has this inherent authority and may delegate it to the Attorney General.

As I stated earlier, we believe that existing directives that regulate the basis for seeking foreign intelligence search authority and the procedures to be followed satisfy all Constitutional requirements. Nevertheless, I reiterate the Administration's willingness to support appropriate legislation that does not restrict the President's ability to collect foreign

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intelligence necessary for the national security. We need to strike a balance that sacrifices neither our security nor our civil liberties.

If we can achieve such a balance -- and I believe we can if we use the basic provisions of the Foreign Intelligence Surveillance Act -- we can accomplish a number of things. First, we will reaffirm our commitment to democratic control of intelligence functions. Second, by mirroring the FISA process including the involvement a neutral judicial official, we will remove any doubt from the minds of reasonable persons concerning the legality of these searches. And finally, we will also provide additional assurances to the patriotic individuals who serve this country in intelligence positions that their activities are proper and necessary.

I appreciate the opportunity to appear before you and would be happy to answer any questions the Committee may have.

The CHAIRMAN. Let me just ask you a couple of quick questions. Some questions I think we will reserve until we close the session.

Before you Mr. Bass testified that perhaps we ought to add a requirement that we have a counsel for the target, like a guardian ad litem, who would be there to review the matter. How do you feel about that?

Ms. GORELICK. This is not an issue that I had raised before hearing Ken Bass's interesting and informative testimony earlier. Let me say this: Both at the Defense Department and as Deputy Attorney General, I have had occasion to review FISA applications. The process that has gone through in developing those applications is extraordinarily thorough and careful.

When an agency proposes a FISA search, a FISA surveillance, there are numerous and very hard-nosed questions asked by the unit responsible for the development of the application. Applications and proposed applications are frequently kicked back. They are viewed very thoroughly. They are voluminous. They are reviewed by several agencies. And within the Department of Justice, they are viewed at my level and personally at the Attorney General's level.

The court that reviews these applications has available to it at the time it reviews the applications the affiant, the FBI agent who is responsible for the application, and frequently asks hard questions about the appropriateness of the use of FISA in those circumstances. So I will say to you that I think the process is one that does now work. The fact that we have the approval rate that we do bespeaks the thoroughness of the process and not a cursory review on the part of the judiciary.

The CHAIRMAN. So the inference from the testimony from the ACLU is that—I don't mean to put words into their mouth because I think their testimony was very erudite—but that this could become a routine process, a perfunctory process particularly if it were too convenient, too available. Your testimony would be that, at least with respect to these kinds of warrants under FISA that is not the case?

Ms. GORELICK. That is not the case. I have discussed this matter briefly with Kate Martin, whose testimony I thought was quite interesting and provocative.

I am sympathetic to the concerns that are raised. The problem, of course, is that a complete dialogue with the ACLU and people who have similar concerns is impossible because we cannot reveal the specifics that would allow us to put meat on the bones. As this committee knows, this committee oversees that process.

The CHAIRMAN. Let me ask you something. Right now, of course, you do not have warrants issued for physical searches but you do for electronic wiretaping. You indicate there is a whole procedure you go through for FISA?

Ms. GORELICK. Yes.

The CHAIRMAN. The procedure for physical searches, when that comes up, as a matter of practice, do you go through the same procedure?

Ms. GORELICK. Yes. We look at exactly the same issues right now.

The CHAIRMAN. The only difference is you do not have an independent member of the judiciary signing the warrant? It is done by the Attorney General herself?

Ms. GORELICK. Yes.

The CHAIRMAN. We will have more questions.

Mr. Combest?

Mr. COMBEST. Ms. Gorelick, as national security matters, concerns are becoming closely linked, we talk about counterterrorism, counterproliferation, counternarcotics, spotting organized crime. Are we not getting much closer to the point at which intelligence is an arm of law enforcement?

Ms. GORELICK. There are numerous areas in which intelligence and law enforcement missions overlap, particularly in the counterterrorism area. We are very careful to—we have many, many procedures to ensure that law enforcement procedures are followed where appropriate; but there are areas in which these concerns overlap.

The CHAIRMAN. Would you yield?

Mr. COMBEST. Absolutely.

The CHAIRMAN. We may want to walk you through case studies and perhaps cases during the closed session.

I think Mr. Combest asks you a very good question. These are dual-purpose issues. Hypothetically you have somebody we are looking at for intelligence reasons, but this person is involved in narcotics, in terrorism, in weapons proliferation, a whole ball of wax, the whole nine yards. Assume you have a consummate international criminal terrorist spy at hand.

The question is, what do you do in those circumstances? Do you say which item is quantifiably more? It is 41 percent intelligence, 28 percent law enforcement; sounds like a race for President.

Ms. GORELICK. Let me make two points. First, remember that the issue at hand involves only physical searches directed at agents of a foreign power. We are not talking about the kinds of concerns about domestic security or the normal counternarcotics case. We are talking about terrorists who are agents of a foreign power. That is an extraordinary case. That is not an ordinary case.

Second, as Mr. Bass I think aptly and correctly noted, criminal law enforcement interests in those circumstances are the tail, not the dog. The principal interest of the United States in those circumstances is preventing harm. It is preventing a building from getting blown up. It is informing ourselves about the nature of the foreign power's efforts and the nature of the agent's efforts so we can best protect ourselves.

If at the end of the line we also happen to be able to prosecute, that is a tool in our arsenal; but many, many, many of these cases do not end up with criminal sanctions being applied even though the conduct is criminal.

In many, many instances, the aim is to protect the United States in the other ways that we have available to us.

The CHAIRMAN. Thank you.

Mr. COMBEST. Mr. Chairman, I believe I will waive any further questions until the closed session.

The CHAIRMAN. Mr. Coleman?

Mr. COLEMAN. Thank you, Mr. Chairman.

I guess the question I had was when you point out that these are extraordinary cases, and we are dealing here with physical searches of agents of a foreign power, then the rest of it is really not as relevant because it is the tail that is the criminal part and the dog is the United States' interests protection.

It seems to me the Justice Department would have a vested interest in advocating what the Senate amendment does and is not putting into question and leaving up to some future court whether or not these warrantless searches are okay, that the President has this inherent power?

It seems to me that a prosecutor would want to know going in that, well, at least we did have a proceeding although it was under FISA, we had an independent source look at and provide us with a warrant. It seems to me that that is something we ought to be wanting to do. At least if I was in the Justice Department I would want that.

I have to be honest with you, I was kind of surprised at the position of the Justice Department and the administration and the Attorney General, that you had a number of significant concerns with the Senate language and that it was not acceptable without additional modifications. Did you give us a list of those modifications?

Ms. GORELICK. Let me say two things.

I have amended orally the written statement to which you are referring because we think it is important for this committee to understand that we agree with your sentiment that it is better on balance to have a provision such as this in the law, for the reasons that you state.

We have some minor issues with some of the definitions that we have alerted the staff to on both sides; but I felt in looking at the written statement that had been prepared that it was more negative than it should be toward the overall goal of the legislation; and, in fact, the very part of the statement that you refer to was the one that I—we have changed.

Mr. COLEMAN. Let me——

The CHAIRMAN. I will go vote now so I can come back and start the closed portion.

Mr. COLEMAN. Let me ask this question. A couple of issues were raised by Mr. Bass earlier. We alluded to a few of them: one, whether or not we could have an adversarial-type hearing before the FISA court, and whether or not that would be something the administration or the Justice Department would think would be beneficial or more of a hindrance; and then secondly, the term we used with Mr. Bass was post-indictment hearing.

You know, I have to be honest with you, I see nothing wrong with either one of those as amendments to what the Senate has done if we went down this path. I recognize the administration's position, as you pointed out, all since the 1940s all of them have been the same. The Executive Branch believes it doesn't need any of these authorities.

I think that is, as I said in my first question to you, a terrible thing to put the Justice Department through or any prosecutor through. Let's hope this will be okay when we get to the Supreme Court, or any appellate court for that matter. You lose the case.

The CHAIRMAN. Will the gentleman yield?

Mr. COLEMAN. Persons guilty of treason——

The CHAIRMAN. I recognize Mr. Combest for a motion. Then I will get back to you.

Mr. COMBEST. Pursuant to Rule 3 of the Rules of Procedure of the Permanent Select Committee on Intelligence and Rules 11 and 48 of the Rules of the House of Representatives, I move that at an appropriate time the remainder of today's meeting be closed to the public because the matters to be discussed will disclose information necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States.

Ms. MCNALLY. Mr. Glickman.

The CHAIRMAN. Aye.

Ms. MCNALLY. Mr. Coleman.

Mr. COLEMAN. Aye.

Ms. MCNALLY. Mr. Laughlin.

Mr. LAUGHLIN. Aye.

Ms. MCNALLY. Mr. Combest.

Mr. COMBEST. Aye.

Ms. MCNALLY. Four yes, Mr. Chairman.

The CHAIRMAN. The motion is agreed to.

We will go vote.

Mr. Coleman?

Mr. LAUGHLIN. Mr. Chairman, I have no questions in this session.

The CHAIRMAN. Mr. Coleman can finish.

Mr. COLEMAN. Thank you.

Where was I? I guess I was talking about the issue of whether or not you think that in the post-indictment hearing that the defendant would have a right to know what the rationale and reasons were for the search? That is not preliminary. That is not early, as might be the case in a regular criminal case, but at least at some point that defendant is provided that opportunity.

Ms. GORELICK. Mr. Coleman, I agree first of all with your preliminary observation that certainly the process is better for the integrity of the prosecutorial process; and for that matter, the peace of mind of law enforcement. I think it is better for the American citizen as well to know that the Judicial Branch is involved in a process that is occurring right now, albeit on a very rare basis.

With respect to the two procedural suggestions made by Mr. Bass, let me address the issue of post-indictment, post-conviction notice. The concept of the Senate bill is that it would import into the process for review of physical searches the same procedures currently applicable to electronic surveillance under FISA and those procedures contemplate, one, a notice to an aggrieved person, that is a person who has been overheard prior to trial, that person can then make a motion to suppress and a motion to discover or obtain any applications or orders that led to the search.

Now, the Attorney General may come in at that stage and file an affidavit under oath that the disclosure or an adversary proceeding would harm the national security; and at that point, the court—this is not the FISA Court, this is the district court hearing the criminal case—may disclose to the person who has been searched under appropriate security procedures or protective orders portions of the application or other materials relating to the surveillance where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

So there is currently in the law such a process that requires both the Attorney General to make an assessment of the national security interests at that point in time, after the person has been indicted in disclosure of the underlying application and order, and for a judge—again, not the FISA court that sat on the original FISA application, but a judge in that proceeding to make an independent determination as to the propriety of disclosing the underlying material. So there is such a procedure extant in the law.

With respect to Mr. Bass' second proposal, one, I only heard for the first time sitting here today as I was listening to his very interesting and I think enlightening testimony, I don't have a considered view; but as I told the Chairman, I have been struck both in my role as general counsel to the Defense Department and now as Deputy Attorney General with the extraordinary efforts that go into the development of a FISA application, the thoroughness, the thoughtfulness as to whether the particular facts meet the requirements of the statute, the attention that is paid by the FISA court itself, the number of questions that are asked by the court about the applications.

And so the suggestion—and I don't attribute anything to this other than the fact that the ordinary citizen does not in fact know what these applications look like or what the process looks like, the process is one that is quite thorough and quite thoughtful and in my personal opinion quite protective of the interests sought to be protected by the statute.

Mr. COLEMAN. What about Ms. Martin's, I don't know if that has come up since you have been testifying, position that indeed by doing this, by leaving things as they are and not having a process by which the FISA Court can issue those warrants, there will be more applications to do so? Will the number of searches therefore increase?

Ms. GORELICK. It is impossible to predict, but let me observe a similar argument was made when the proposal for FISA was initially made; and the fact of the matter is that the number of FISA applications has gone up and down but it has not simply gone up. In fact, in recent years it has leveled off.

I don't have any reason to be able to predict anything different. I will tell you that we have had an increase in investigations of antiterrorism throughout our efforts; and that could in itself lead to more applications; but it is, as I say, very difficult to predict.

I think that there are incentives to proceed via a warrant when one knows that one is going to end up in a criminal proceeding, when one knows. So I think that it is not likely that there will be a vast increase in the use of unconsented physical search applications, but again it is not—it is not something I can safely predict.

Mr. COLEMAN [presiding]. We have had some hearings in the legislative subcommittee of this committee with respect to those times at which—it wasn't just counterterrorism, but I think one of the most problematic areas was counternarcotics—wherein the disclosure of sources can become very problematic vis-a-vis the prosecution in moving forward, someone must decide whether or not it is

worthy of the disclosure of those sources somewhere during a criminal proceeding. I think in a sense this is not so different from some of the testimony we heard before.

I am very hopeful we could actually draft legislation but the problem as the Chairman pointed out is that the drafting of that legislation will wind up occurring in the conference with the Senate. I think that will be our biggest difficulty.

I would like to say on behalf of myself, as a member of this committee, I would like very much to have all of the witnesses who have testified here today address that specific issue; that is the language that the Senate now proposes, and which is part of the public record. You know have to do it, if you you would like to do it, I would appreciate it. I think it would be helpful to the House Committee and the conferees and the staff to have your views as to what—make some assumptions.

Number one, we are going to pass something that will give the prosecutors the authority to get a warrant in a FISA court. What should be a part of that? What kind of language do we need or should we have? From your perspective only. I don't need to get into debates or arguments. We can do that in the House-Senate conference. I would like to have your individual views about that and any other suggestions you may have.

I think it is wrong for us in this committee—I just voted to close it. I am not sure when the appropriate time to do that is either. I think a lot of times we tend to do that too much. I agree with another statement that Mr. Bass made earlier about our tendency to want to make things too secret sometimes when in fact we should be discussing these as we are doing today in the open. I applaud the Chairman for that.

I appreciate very much having your testimony.

I just have been advised I have a couple of minutes to cast my vote. I will go do that. I will recess the committee until the Chairman returns. Be right back. Thank you.

Ms. GORELICK. Thank you.

[Recess.]

The CHAIRMAN [presiding]. I think we are still in open session. I just wanted to ask you one more question before going to closed session.

I think it is important for you to state for the record in a generic fashion what kind of foreign intelligence information you get from these searches that you couldn't get in some other fashion. I think that that is an important point that needs to be put in the record. I am not asking for any particular case; I am asking generically, why do you need to have this kind of authority for intelligence purposes? What do you get out of these searches?

Ms. GORELICK. Well, let me give one hypothetical answer and one real-life answer. The real-life answer can be found in the Truong case where the physical search authorized by President Carter and Attorney General Bell revealed that an employee of the State Department was, in fact, providing classified State Department cables to the North Vietnamese that undermined our position in the negotiations. You would not have been able to get that with a Rule 41 warrant procedure. You would not have been able to specify what you were looking for. You would have notice in advance. Even if

you hadn't notified in advance, you would have had to say what you were looking for was evidence of a crime and you probably would not have had the predicate for that; so there you could see in real life what one example would be.

Another example would be that a foreign intelligence officer of a foreign country has arranged for a package to be carried surreptitiously to his superiors abroad. We would not be able to describe the packages but we suspect they contain U.S. classified intelligence information. Under these circumstances, the specificity requirements of Rule 41 could not be met.

That would be another example. I could provide additional examples in closed session.

Let me see if there is anything else that I may say in opening session.

Another example would be the use of a search in a case like the World Trade Center, where have reason to believe that someone is participating in the development of an explosive device. That is the kind of information that one might come across.

The CHAIRMAN. That is, of course, a criminal situation?

Ms. GORELICK. It may or may not be depending upon what stage in the inquiry you are at. I mean, you may not in that circumstance be at a point where you have enough information to have a criminal investigation.

The CHAIRMAN. What would you suspect to get in the search of a residence? One of the issues here—you were talking about package searches, those kinds of things—is that, given the fact people believe their home is their castle, which I do, you do, I am sure most people do, should special standards apply?

Again, in a generic sense, we are trying to figure out what you would get from an intelligence perspective that you would need to use as authority in connection with the search of a residence?

Ms. GORELICK. Well, hypothetically, any of the information could be in a residence as is in a home or a car. I will, I hope, be able to provide in closed session some comfort on the issue of whether the government is willy-nilly searching people's homes versus the more limited and less intrusive kinds of searches of packages and other searches that do not trigger the kind of concern that you were referring to. I would like to be able to give you some data on that; but hypothetically, the same kind of information could be in a home as well as an office or anywhere else.

The CHAIRMAN. I think that it is appropriate time to go ahead and close the discussion, so I would ask everybody who is not supposed to be here to leave.

[Whereupon, at 3:35 p.m., the committee proceeded to further business in executive session.]

APPENDIX

Office of the Deputy Attorney General
Washington, D.C. 20530

September 19, 1994

Honorable Dan Glickman
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515-6415

Dear Mr. Chairman:

Following the hearing conducted by the Permanent Select Committee on Intelligence on July 26, 1994, you submitted additional questions for the record. My answers to those questions are attached.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Jamie S. Gorelick

QUESTIONS FOR THE RECORD

Counterintelligence Restructuring

Hearing of July 26, 1994

1. For the record, what are the disadvantages of enunciating a clear policy in law (1) that the FBI should be notified when information comes to an agency's attention which indicates classified information is being, or may have been, disclosed in an unauthorized manner in violation of U.S. law and (2) that the FBI should have complete and timely access to an agency's employees and records for purposes of its investigation?

ANSWER: As I stated at the hearing, the administration's view is that it is not necessary to legislate in this area. Good faith implementation of the Presidential Decision Directive 24 will bring about the changes required to permit the FBI to effectively investigate counterespionage cases.

In addition, legislation is inherently inflexible. The President should retain the ability to decide on what basis information should be disclosed from one part of the Executive branch to another. This provision of the legislation could also threaten the President's authority to "control access to information bearing on national security", an authority that "flows primarily from [the] constitutional investment of power in the President [as Commander in Chief and head of the Executive Branch] and exists quite apart from any explicit congressional grant." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citation omitted).

2. The Administration suggested in discussions with the Senate Select Committee on Intelligence that subsection (c)(1)(A) of Section 3 be amended to refer to the origin (rather than the source) of the information and to add the requirement that the unauthorized disclosure be in possible violation of U.S. law. Please explain why the distinction between source and origin is important and why the addition of "possible violation of U.S. law" is desirable?

ANSWER: As I stated in the hearing, the administration opposes this section of the bill as unnecessary and inflexible. Before the administration position was reached, however, these two changes were discussed because (1) the CIA felt that "source" was a term of art in the intelligence community that might lead to confusion if used in this context, and (2) the CIA wished to make clear that security violations and/or inadvertent disclosures were not investigated by the FBI as espionage cases.

3. The Fact Sheet on Presidential Decision Directive 24 quoted from the "recent DCI and Attorney General Joint Task Force on Intelligence Community-Law Enforcement Relations." The task force report has been of substantial interest to the Committee. The PDD suggests that the report is finished. What is the status of the report? When will it be made available to the Committee?

ANSWER: A draft report was prepared by the task force. However, I have not yet approved this report for submission to the Attorney General because I believe it should be more specific and include steps that the Department of Justice is taking to better coordinate intelligence community/law enforcement matters. It will be made available to the Committee after these concerns have been addressed.

4. Please provide specific examples of why Section 4 of S. 2056 is "absolutely essential." Please explain what benefits, if any, Section 4 would bring to an FBI investigation that could not be obtained through each of the following: (1) Section 801 of H.R. 4299 (pertaining to consort [sic] to disclosure of financial records given by U.S. government employees with access to classified information); (2) Section 123 of H.R. 1015; or (3) legislation that would give the FBI access solely to information on a consumer credit report pertaining to the names and addresses of financial institutions defined under the Right to Financial Privacy Act.

ANSWER: Section 4 of S. 2056 would provide a very valuable investigative tool to the FBI in counterintelligence investigations. The access to financial records provided by the Right to Financial Privacy Act is not useful if the Bureau does not know where those financial records are located. Consumer credit reports contain comprehensive and accurate lists of financial and credit institutions. If this section is enacted, this information could be obtained more quickly and efficiently than is presently the case.

Although these same records would be available if U.S. government employees were to consent to such access as a condition of receiving security clearances, such authorizations would not reach non-employees, such as foreign officials and certain family members of employees. Most importantly, however, these consent forms would not include the subjects of FBI international terrorism investigations. In these investigations, analysis of financial records is in many cases the only way to learn the full extent and scope of an international terrorist

organization's activities. Obtaining financial information on a timely basis is critical to the FBI's mission of combatting international terrorism, and consumer credit reports provide a "roadmap" to such information.

While section 123 of H.R. 1015 would authorize access to consumer reports by the FBI, it would do so only with a court order and require notice to the consumer reporting agency that a particular investigation has been completed. These requirements are inconsistent with the sensitive nature of counterintelligence and international terrorism investigations, and are unduly burdensome for information that is routinely available upon request to commercial entities across the country. H.R.1015 would also prohibit the FBI from sharing consumer credit information with other agencies, such as the Department of Defense, that also have responsibilities for conducting counterintelligence investigations.

Finally, although not the best alternative, giving the FBI access only to information in a consumer credit report that identifies financial and credit institutions is worth further consideration if such access can be obtained through a certification from appropriate officials in the Bureau.