NSA III: Wartime Executive Power and the FISA Court

United States Senate Judiciary Committee

Statement of

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March 28, 2006

Mr. Chairman,

It is an honor and a privilege for me to appear once again before this distinguished committee to discuss the appropriate standards and procedures for electronic surveillance of international terrorist activity. As the more senior members of the committee know, I had the privilege of testifying on a number of occasions when the committee was considering the enactment of The Foreign Intelligence Surveillance Act (FISA). More recently, I testified on proposed amendments to FISA after 9/11.

I bring to this subject a longstanding commitment to work to resolve perceived conflicts between national security and civil liberties as well as the perspective of someone who has served in three administrations in senior national security positions. I was also the victim of a 21 month warrantless wiretap of my home phone conducted by the Nixon Administration under the guise of national security.

The legal issues relating to the warrantless surveillance program currently being conducted have been extensively analyzed before this committee. I will not revisit ground covered in previous hearings, but wish to express my appreciation to the Chair of the Committee for conducting them, as well as this hearing. (My own legal analysis is attached to this statement and I ask that it be made part of the record along with my written statement). Rather, I want to focus on the policy issues that I believe should guide the committee in addressing possible legislative action.

Let me start with an area of complete agreement. If al Qaeda is calling someone in the United States, the government should be listening. I would have thought that FISA provided all the authority needed to listen to such calls. If the administration believed that the FISA rules were not sufficient it should have come to Congress and asked for an amendment to FISA. Now, if the administration makes the case in public that, following 9/11, greater flexibility is needed to listen in a timely way to such calls, Congress should be prepared to amend FISA as necessary and consistent with the Fourth Amendment—after it is fully briefed on any such need. I will describe below the possible elements of such legislation based on ideas that I understand have been discussed in various congressional offices.

I want to emphasize what I believe to be a fundamental point: Congress cannot legislate in the dark. Before Congress considers further legislation, it must conduct a full and complete investigation of the full range of current activities being carried on outside of the procedures prescribed by FISA. It should also insist that the administration provide a public explanation of what additional authority it believes it needs, with additional detail provided in closed hearings. And Congress should require that, as a condition for granting the additional authority, all surveillance be conducted pursuant to the standards of FISA.

The legislative history of FISA as well as the resolutions and legislation which created the Senate Intelligence Committee and the current oversight commission leave no doubt that this committee has a right to be fully briefed. I had understood that the Attorney

General was to return to continue his testimony. Moreover, the letter that he wrote to the committee after his testimony seemed to call into question the accuracy of the impression left by his responses to questions before this committee, making it all the more important that he testify again. That seems to be a vital next step before the committee considers any legislative approach. The administration has still not released its contemporaneous legal analysis of why it thought the Program was legal when it began or the full extent of the legal authority claimed. Nor has there been an explicit public denial of the existence of additional programs outside of FISA. This committee and the American public are entitled to know if such programs exist without making public details that need to be kept secret. We also do not know what role the telephone companies are playing and what certifications may have been provided to them by the Attorney General.

A review by a small sub-committee of the Intelligence Committee would not be sufficient. There can be no doubt that the Senators who are briefed have a constitutional right to share that information in confidence with all of their colleagues so that the Senate as a whole can determine what should be done.

When these investigations are completed, Congress may determine that some additional legislation is necessary. If so, it should follow the process that led to the enactment of FISA. This would mean extensive hearings on the precise legislation in both the intelligence and judiciary committees as well as adherence to key principles which I now want to briefly discuss.

When Congress considered the request of the Ford and Carter Administrations that it authorize a program under which surveillance could be conducted for national security purposes, it insisted on a number of key provisions, including that surveillance of U.S. persons required a warrant from the FISA court based on a particularized finding of probable cause and that FISA must be the exclusive means for such surveillance. I would like, if I may, to remind the committee of the policy considerations that led Congress to require these procedures. They were valid then and, despite the unsupported claims of some that FISA is obsolete, they remain valid in the post 9/11 environment.

As we learned from the abuses revealed by the Church and Pike Committees, allowing the President – any President – to determine on his own when surveillance is appropriate and to conduct it without judicial review inevitably leads to abuse. We cannot permit faith in any one administration's adherence to the Constitution to override that fundamental insight, well understood by the founders of this nation.

A process authorized by the Congress and providing for particularized judicial review provides the greatest assurance to those who must implement the program in the government and the private sector that it is lawful and that they can implement it without fear of criminal and civil penalties. We owe that to them. One of the main concerns of Congress in enacting FISA and making it the exclusive means was to provide clear guidance to the telephone companies about when they should and should not provide assistance. Moreover, when there are doubts about the constitutionality of a program, those involved in conducting the program will properly balk, thwarting the program, and

there will inevitably be leaks by those deeply troubled by what is being done. It is worth noting that there were leaks of surveillance programs before FISA was enacted and of the current program, but, as far as I am aware, there have been no leaks about programs conducted under FISA.

In addition, American citizens are entitled to know the rules under which they may be subject to surveillance by their government in the name of national security. This is so for several reasons. First, it is necessary to avoid paranoia and to secure the necessary support of the American people for the appropriate steps needed to reduce the risk of terrorist attacks. I cannot tell you how many times I have assured innocent Americans that they could not be the subject of electronic surveillance because the Justice Department would never seek a warrant, the FISA court would never conclude that there was the necessary probable cause, and warrantless surveillance were prohibited. In addition, the public is entitled to know what the rules are so that, if they believe the law requires reconsideration, they can seek change by lobbying the President and the Congress and by exercising their right to vote.

Because of these policy concerns, as well as the dictates of the Fourth Amendment, I urge the Congress to reaffirm, through oversight and, if necessary through legislation, the core principle of the FISA system that surveillance of Americans and all persons within the United States requires warrants based on particularized probable cause that the target of the surveillance meets criteria specified in the legislation.

It is against these criteria that I want to assess the two bills that are before this committee and to suggest the possible outlines of an alternative approach to legislation on this issue – should Congress determine after investigating the matter that legislation is needed. Before explaining why I believe that both of these bills fail to meet the criteria I have laid out, I want to express my deep appreciation to the Chairman for his determination to find a way to restore FISA as the exclusive means for electronic surveillance for national security purposes and to insure that all surveillance is consistent with the Fourth Amendment and is conducted under the supervision of the FISA court. Needless to say, I share all of those objectives.

I have four primary concerns with the current draft of the chairman's bill (S. 2453). First, it authorizes far more than the program, which the President and the Attorney General have described as the Terrorist Surveillance Program, already under way. Second, it does not require particularized probable cause related to the target of the surveillance. Third, the scope of what is covered is ambiguous. Finally, it does not deal with the exclusivity issue.

The Attorney General assured the committee that calls could be subject to surveillance only if there was reason to believe that at least one of the parties was overseas and that one of the participants was a terrorist related to 9/11 and covered by the Authorization to Use Military Force (AUMF). He also told the committee that the surveillance was narrowly focused and designed to prevent terrorist acts. S. 2453 goes far beyond these circumstances in a number of ways:

- it permits surveillance to gather any foreign intelligence information, not just information related to terrorist activity;

- it permits surveillance of all terrorist groups and not just al Qaeda;

- it permits surveillance of persons who engage in clandestine intelligence activities, which may not even be illegal, and not just terrorist activity;

- it permits the interception of electronic communications between two persons, both of whom are in the United States.

I do not understand why the Congress would grant new authority to the President to conduct electronic surveillance in situations that go far beyond the need described by the Attorney General to this committee. I understand that many people believe that there are one or more additional programs that are not conducted pursuant to FISA. That may well be true, but I do not see what is accomplished by trying to guess what those programs may cover, since the Congress could easily end up granting authority that imperils privacy even though it is not even needed, and not granting the authority which the government believes that it needs. This is especially so when the President has made clear that he will continue to assert the right to conduct programs beyond FISA even if granted this additional authority. In my view, any additional grant of authority should track the problem which led to the program as explained by the Attorney General to this Committee. I will return to this point.

The second major problem with S. 2453 is that it authorizes the FISA court to approve an entire program and does not permit the court to review individual surveillances to determine if they meet the standards of the law and the Fourth Amendment. Thus it does not provide for the particularized probable cause which I believe the Constitution requires and goes far beyond the standards that the Supreme Court has approved for surveillance of criminal enterprises.

The third issue I would raise is that S. 2453 is ambiguous about the circumstances under which the government could seek approval for a program. While I fully understand the difficulties of drafting with unambiguous language in this area, I must say that it is not clear what the bill does authorize.

The circumstances under which the Court may authorize a program are laid out in Section 703 (a) (7) of S. 2453. I have read the section carefully many times and conferred with others about it. The language of the paragraph permits two interpretations, but, with respect, neither appears to make sense or to be what was intended.

One reading of the language is that it permits the FISA court to authorize an entire program covering perhaps hundreds of targets based on a finding that at least one of the calls to be intercepted will include a person covered by S. 2453. The Attorney General,

under this reading, would not have to make any representation about any of the other individual surveillances under the program. That surely cannot be the Senate's intent.

The alternative interpretation is that the Attorney General must certify that each and every surveillance meets the criteria of the statute. The problem with that interpretation is that it produces a null set. Let me explain. S. 2453 says that the Attorney General can only use this procedure if he concludes that he cannot get a warrant from the FISA court under current law. The circumstances in which the government can seek a warrant under the new legislation are limited to situations in which a FISA warrant could be obtained. Specifically, the Attorney General needs to certify that the target is either a foreign power or an agent of a foreign power or a person who has been in communication with a foreign power or an agent of a foreign power and is seeking to commit an act of international terrorism. If he reaches that conclusion, then he can seek a FISA warrant and by the terms of this legislation cannot seek a warrant under the new program.

I am forced to conclude that the intent of the paragraph must have a third meaning and would urge you to redraft it to make that intent clear.

S. 2453 does attempt to put an additional limit on surveillance of persons within the United States, capping surveillance at 45 days. However, it appears that this limit can be overcome either by applying for an approval of a new program or by asserting that the AUMF authorizes the surveillance.

The fourth major problem with S. 2453 is that it fails to insist that the President conduct all electronic surveillance within the expanded authority granted by the Congress. I would urge the Congress to seek such a commitment from the President before enacting any legislation and I will suggest below some legislative changes that might well compel acceptance of this approach.

(My concerns about the Chairman's bill (S. 2453) are described in greater detail in a memorandum prepared by my long term comrade-in-arms on these matters, Jerry Berman and his colleagues at CDT. I attach a copy to this statement and ask that it be made part of the record.)

The second bill referred to this committee, introduced by Senator DeWine and others (S. 2455), shares many of the difficulties of S. 2453, including authorizing surveillance in situations that go far beyond the need described by the administration, not requiring particularized probable cause, and not requiring that it be the exclusive means. However, the difficulties with S. 2455 are even more serious. It authorizes indefinite warrantless surveillance (albeit in 45-day increments) of persons in the United States. In addition, while it seems to require probable cause that certain factual predicates have been met, it actually permits surveillance under the much lower standard of "reasonable likelihood" that the program is focused on a group that may be engaged in activities in preparation of a potential act of international terrorism. Moreover, these determinations are made by the executive branch on its own with no judicial review. (My concerns about S. 2455 are

described further in a different memorandum prepared CDT. I attach a copy to this statement and ask that it be made part of the record.)

Such sweeping proposals should be deferred unless and until a clear showing has been made to Congress as to why they are necessary. Should Congress seek to legislate based on the record currently before it, such legislation should respond to the specific needs that have been asserted by the government rather than to conjectures as to what additional needs may exist. Based on conversations I have had with various congressional offices I believe that legislation which includes the following elements might have broad support:

1. **Authorize additional emergency procedures under FISA to deal with the problem explained by the Attorney General to this committee**. As I understand the Attorney General's testimony, the sole reason he presented why FISA could not be used was that the emergency procedure was not flexible enough. This would be solved by including in the legislation provisions along the following lines:

   a. The Attorney General would be authorized to establish a program with appropriate procedures and criteria for initiating surveillance in emergency situations with appropriate minimization procedures. Under this program he could authorize designated officials of the NSA to initiate emergency surveillance of conversations when there are grounds to believe that one of the persons on the call is a member of al Qaeda and that one of the persons is outside the United States.
   b. Within 72 hours of initiating any emergency surveillance under this program, NSA would need to submit a request for authority to the AG specifying the basis for the belief. If the AG approves the surveillance, it can continue. If he disapproves it, the surveillance must be terminated and all the fruits destroyed.
   c. Within 72 of approving an emergency surveillance under this program the Attorney General must submit a request to the FISA court for a warrant under the existing FISA standards. If the court rejects the warrant, the surveillance must be discontinued and the fruits destroyed.

2. **Amendments to FISA to reaffirm Congress' clear intent that FISA be the exclusive means to conduct electronic surveillance within the United States and of US persons for intelligence purposes.** My legal analysis and that of many others, including most persuasively that by David Kris, which I assume this committee has, makes it unmistakably clear that Congress intended that FISA and Title III be the exclusive means of conducting electronic surveillance. Congress could reaffirm this position and make it clear that it rejects the executive branch's strained interpretation by amending the sections of FISA which deal with criminal penalties, civil penalties, and the obligations of private persons, including telecommunications companies, to refer specifically to activities conducted pursuant to FISA or Title III. This would mean, for example, that any

certification provided by the Attorney General to a telephone company would need to certify in specific terms that the statutory requirements of FISA had been satisfied as is the clear intent of the current statute.

3. **Sunset the new authority in one year.**

4. **Direct the Intelligence and Judiciary Committees to conduct a full inquiry and to report back to the Senate within six months any additional legislation that may be required in light of the facts.**

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Mr. Chairman, I am grateful for this opportunity to testify and, of course, would be delighted to answer any questions.