



Department of Justice

STATEMENT

OF

STEVEN G. BRADBURY
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
LEGISLATIVE PROPOSALS TO UPDATE
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

PRESENTED ON
SEPTEMBER 6, 2006

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Thank you, Chairman Coble, Ranking Member Scott, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss proposed revisions to the Foreign Intelligence Surveillance Act of 1978, or “FISA.”

As we approach the five-year anniversary of 9/11, the single deadliest foreign attack on U.S. soil in our Nation’s history, we recognize what our enemies well knew long before 9/11—we are at war. The enemies we face today operate in obscurity, through secret cells that communicate globally while plotting to carry out surprise attacks from within our own communities. Less than one month ago, British security services neutralized a planned attack—perhaps only days from execution. These terrorists planned to use sophisticated explosives, capable of evading airport screenings, to blow up perhaps a dozen airliners bound for the United States.

We can all agree that foreign intelligence surveillance is a critical tool in our common effort to prevent another catastrophic terrorist attack on the United States. At the same time, we all recognize the fundamental challenge the War on Terror presents for a free society: We must detect and prevent the next 9/11, while steadfastly safeguarding the liberties we cherish. As we seek to reframe FISA, we must ensure that we maintain the constitutional balance between security and liberty.

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

Innovations in communications technology have fundamentally transformed how our enemies communicate, and therefore how they plot and plan their attacks. It is more than a little ironic that al Qaeda expertly exploits the communications tools of the Internet age to advance extremist goals of intolerance and tyranny that are more suited to the 12th century than the 21st. Meanwhile, the United States, the most advanced Nation on earth, confronts the threat of al Qaeda with a legal regime primarily designed for the last century and a cold war adversary that no longer exists.

The President authorized the Terrorist Surveillance Program in the wake of 9/11 in order to establish an early warning system to detect and prevent further al Qaeda

attacks. As described by the President, that Program, which has been the subject of numerous prior congressional hearings and extensive oversight by the Intelligence Committees of both Houses of Congress, involves the NSA's monitoring of international communications into and out of the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The Terrorist Surveillance Program places the initial decision to target communications for interception in the hands of highly trained intelligence professionals, subject to rigorous oversight. This program preserves the speed and agility necessary for wartime surveillance.

Congress is currently considering several pieces of legislation addressing FISA and the Terrorist Surveillance Program. I want to thank the members of Congress for their hard work toward crafting a comprehensive approach that will help us protect the Nation from terrorists and other foreign threats, gather critical foreign intelligence more effectively, and still protect civil liberties. In particular, I want to thank Representative Wilson, who sits on the Intelligence Committee and has introduced a bill, cosponsored by Chairman Sensenbrenner and Chairman Hoekstra of the Intelligence Committee, which seeks to move FISA into the 21st Century.

I intend to focus my remarks today on Rep. Wilson's bill.

Fundamentally, Rep. Wilson's legislation recognizes that in times of armed conflict involving an exigent terrorist threat, the President may need to act with agility and dispatch to protect the country by putting in place a program of electronic surveillance targeted at the terrorists and designed to detect and prevent the next attack. We see promise in this bill, and hope we can work with the Congress in producing

legislation quickly that addresses the threats that face the Nation. This bill, however, would require the President to wait for the United States to be attacked before he could initiate an electronic surveillance program designed to protect against terrorist attack. The President cannot and should not wait for thousands of Americans to die before initiating vital intelligence collection, and we urge that this provision be amended to allow for a program when the best intelligence indicates a severe threat of attack.

Article II of the Constitution already gives the President authority to take such actions to defend the Nation. To use the words of the FISA Court of Review, nothing in FISA (or any other statute) could “encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). It is important that Congress support and assist the President in performing this most solemn constitutional obligation. Legislation that purports to eliminate the President’s authority to protect the Nation or to channel that authority through procedures that were never meant to apply during armed conflict and that are inadequate in that context creates an unnecessary conflict between the political Branches and puts the Nation at greater risk.

Rep. Wilson’s bill also includes several important reforms to update FISA for the 21st century. These changes are designed to account for the fundamental changes in technology that have occurred since FISA’s enactment in 1978, and to make FISA more effective and more useful in addressing the foreign intelligence needs of the United States, especially in protecting the Nation from the unique threats of international terrorism. Importantly, the bill reflects an understanding that the key to reforming FISA—to improving our intelligence capabilities while preserving civil liberties—rests not in multiplying the number of lawyers or in adding layers of review.

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

The bill would also change the statutory definition of “agent of a foreign power”—*i.e.*, who can be subject to FISA surveillance—to include any person other than a U.S. person who possesses or is expected to transmit or receive foreign intelligence information while within the United States. Occasionally, a foreign person will enter the United States in circumstances where the Government knows that he possesses valuable foreign intelligence information, but where that person’s relationship with a foreign power or international terrorist organization is unclear. Unfortunately, the Government currently has no means to conduct surveillance of that person under FISA.

Finally, the bill would significantly streamline the FISA application process. Among other things, the bill would limit the amount of detail required for applications and would amend the “emergency authorization” provision to permit emergency surveillance for a longer period, as opposed to the current three days—the period within which an application would have to be submitted and approved by the FISA Court or the emergency surveillance cease. (Currently, Rep. Wilson’s bill would make it five days;

we suggest that it be seven.) These provisions offer a good start toward important improvements to the existing FISA process, but further refinements are appropriate. The Executive Branch has worked hard to solve the problems presented by updating a statute as important and complicated as FISA. We believe that we can offer many technical improvements to this part of Rep. Wilson's bill, and we look forward to working with her and Congress to make these critical changes.

We believe that any legislative package must also deal with the litigation arising from the Terrorist Surveillance Program and other alleged classified communications intelligence activities. Such litigation undeniably risks national security by increasing the risk of additional disclosures and by subjecting vital intelligence activities to the unpredictability of varying (sometimes conflicting) court decisions.

We urge Congress to act to protect sensitive national security programs from the risk of disclosure and disparate treatment in the various district courts where litigation may be brought.

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

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