U.S. House of Representatives
Committee on the Judiciary

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Mr. Chairman,

It is a great pleasure for me to appear again before this committee with regard to the Foreign Intelligence Surveillance Act.

I need to be frank, however, in saying that I am deeply troubled by the amendments to FISA passed by the Congress before the August recess. I am troubled because Congress granted to the Executive branch broad authority, in violation of the Fourth Amendment, to intercept the phone calls and emails of persons in the United States. Moreover, any person who is committed to the constitutional principle of checks and balances should be seriously concerned because:

Congress enacted this legislation without any opportunity for hearings and debate and without the input of civil libertarians who are as dedicated to our security as they are to the protection of civil liberties and constitutional rights.

Congress enacted legislation the meaning of which is simply not deducible from the words in the text. Clearly, the Administration insisted on this language and rejected a text offered by the congressional leadership because it wants to conduct interceptions not permitted under the alternative language. However, it has not explained why that surveillance is necessary nor what interceptions are permitted under the language as enacted but not under the alternative language.

The legislation enacted by the Congress at the insistence of the President excludes the FISA court from any meaningful role in permitting the surveillance to go forward. Whether the Constitution always requires a warrant for intelligence surveillance remains an open question, but there is no question that the role of the FISA court has been critical in providing assurance to the intelligence community that it would get the cooperation it needs and to the public that the Constitution was being protected. Despite strong criticism from both the left and the right, the FISA court in my view has played the role that Congress intended it to play by forcing the administration to think carefully and by reviewing its actions.

The telephone companies and ISPs are being sent a dangerous message that they should and must cooperate with a request to facilitate interception of messages simply on the say-so of the Attorney General.

The legislation does not reaffirm that FISA is the sole means for intercepting conversations and emails in the United States for intelligence purposes.

Not included on this list of chief concerns is the accusation that the passage of the legislation will lead to the interception of phone calls and emails that the intelligence community should not be reading. I have no idea if that is the case or not but neither

does anyone else in the public and most of the Congress. That very uncertainty is simply unacceptable and a threat to both our liberty and our security.

The bipartisan and strong public support of the FISA was ruptured by the Administration's tactics. This broad support was essential in creating a system which endured from one administration to another and which enjoyed strong congressional and public support.

Congress, working with leaders of the intelligence community and the public needs to restore the bipartisan support for an effective FISA and it needs to do so quickly.

The enactment of the initial FISA bill following the Watergate and intelligence scandals provides some important lessons which should guide the Congress in that process. Since I was deeply and continuously involved in those careful negotiations, I thought I could be most useful to the committee in describing some of that history.

The enactment of FISA was triggered in large part, as I believe these recent amendments were, by concerns expressed by the telephone company. In those long gone days, there was just one telephone company (and no internet). AT&T and the FBI had a simple arrangement. An official at the Bureau would simply call the AT&T security officer and give him a phone number. Nothing more was needed and the calls were flowing into the local FBI field office.

As the scandals broke, the FBI learned that some of these numbers were not the Soviet Ambassador, but White House and NSC officials and journalists as well as business leaders and civic leaders, including Martin Luther King, Jr. Some of those who learned that they were overhead (including me and my family) sued the phone company along with government officials. AT&T had had enough and warned the Justice Department that the days of blind cooperation were over.

Attorney General Levi on behalf of the Ford Administration came to the Congress and asked for legislation. Congress agreed to authorize interceptions for intelligence purposes under a different standard than for criminal wiretaps but only after insisting on four essential principles:

- surveillance could occur only after the FISA court issued an order or the situation fit into a few tightly drawn and fully specified exceptions to the warrant requirement.
- the phone company would be required to cooperate if given a court order or a certification by the Attorney General that the situation met one of the limited specified exceptions and that the requirements spelled out in FISA for such an exception had been fully satisfied.
- No U.S. person or any person in the United States would be the target of surveillance except if the FISA court found individualized probable cause about that person.
- The draft legislation needed to be subject to full public hearings as well as classified hearings at which the meaning of each phase in the legislation was fully explained and civil liberties groups were given an opportunity to testify.

We must go back to these core principles. The Congress must insist that senior officials of the intelligence community testify in public and in private before the Judiciary as well as the Intelligence Committees and explain in detail what meaning they attach to each of the new and arcane phrases in the bill. These officials should also explain why they seek this language to accomplish the objectives that they assert are what motivates the request for legislation. Administration officials must also explain in detail why the earlier bills drafted by the Congress in response to the described need did not accomplish these objectives.

Then there must be an opportunity for private citizens and groups to testify as to

their understanding of the draft bill and the requirements of the Constitution. Then there should be private and public conversations to seek to arrive at a consensus that would restore the bipartisan and broad public support for FISA. Then the committees should conduct open mark ups and the bills should be debated on the floor of both houses and if necessary in a conference committee.

The final legislation should make clear that it is the sole means by which the executive branch can intercept communications in the United States or from Americans anywhere for intelligence purposes. It should enforce that assertion by directing the phone companies and ISPs to cooperate when they receive a court order or a certification that the surveillance is within the narrow exceptions to the warrant requirement specified in the statute. All private persons should be on clear notice that if they cooperate with surveillance in any other circumstances that they will be subject to state as well as federal civil and criminal penalties.

I have said almost nothing about the substance of what changes need to be made in FISA. I have not done so in part because I expect other witnesses will discuss these issues. More important I think it is premature. There is enough information in the public domain to know that Congress has given the Administration far more unchecked power than the Constitution permits or our security requires. At the same time, there is far from enough public information to know how to restore the balance that FISA had until last month and from which we all benefit.

Mr. Chairman, I once again want to express my appreciation to you and to the committee for inviting me to participate in this hearing and I would be pleased to respond to your questions.