

*Hearing of the*  
*United States Senate*  
*Committee on the Judiciary*  
*Subcommittee on the Constitution*

*Tuesday, September 16, 2008*

**“Restoring the Rule of Law”**

**Testimony of Suzanne E. Spaulding**

## **Domestic Spying: Insights for a New Administration**

*"The essential principles of our Government form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation....[S]hould we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety."*

*Thomas Jefferson, First Inaugural Address*

Mr. Chairman, Members of the committee, I'd like to begin by commending you for holding this hearing, and for gathering additional testimony from a wide range of experts, focused not on re-litigating past disputes but on understanding the current and future imperative for upholding the rule of law.

Last week marked the seventh anniversary of the attacks of September 11, 2001. Those attacks quickly led to new laws, policies, and practices aimed at enhancing the nation's security against the terrorist threat. As we anticipate a new Administration, it is appropriate and necessary to assess these changes and endeavor to put in place a long-term, sustainable approach to security that reflects all that we've learned in the intervening years about the nature of the threat today and effective, appropriate strategies for countering it.

We are all familiar with the "soft-on-terror" charge of having a "September 10<sup>th</sup>" mindset." In truth, no American who experienced the horror of September 11 will ever again know the luxury of a September 10<sup>th</sup> mindset. The greater concern is being stuck in a September 12<sup>th</sup> mindset, unable or unwilling to understand the lessons we've learned since those terrible early days. This is the mindset that undermines America's long-term security.

On September 12, 2001, for example, we lived with a deep sense of fragility as we waited in fear for the next attack. Over the subsequent days and years, however, Americans returned to

their daily lives, just as the people of London went back down into the subways after their own attacks. We learned that resiliency is an essential and powerful weapon against terrorism. It means knowing that there may be another attack, but refusing to live in, or make decisions based upon, fear. When politicians and policymakers fall back on that September 12 mindset of fear to convey their message and promote their policies, they undermine that essential public resiliency.

On September 12, we thought we could defeat terrorism by going to war. Today, most of us understand that we are engaged in a battle for hearts and minds, competing against the terrorists' narrative of a glorious "global jihad" that attracts idealistic young people looking for answers. The image of an America committed to the rule of law and ensuring that even suspected terrorists get their day in court is a powerful antidote to that twisted allure of terrorism. Continuing to work towards the ideal of the shining city on the hill, contrary to the fears of some, is how this country will ultimately prevail against the terrorists.

We also sought, in those first days and months after September 11, to "balance" national security and civil liberties, as if they were competing objectives on opposite sides of the scale. We thought we could only get more of one by taking away from the other. Over the past seven years, however, we've been reminded that our values are an essential source of our strength as a nation.

For example, experts agree that the primary reason the U.S. does not face the level of homegrown terrorism threat Europe has experienced is that immigrants are better integrated into American society. Effectively working with Muslim communities in this country is one of the most promising avenues for deterring radicalization of young people. Policies that drive a wedge between those communities and the government or the rest of society frustrate those efforts and thereby threaten our national security.

Yet, on September 12, it seemed to some that our careful system of checks and balances was a luxury we could no longer afford. We've seen since that an avaricious arrogation of power by the executive leads to a dangerously weakened President. Our government is strongest when all three branches are fulfilling their constitutional roles. Still, there are those who would seek to

limit the role of the courts and seem unwilling to insist that the President follow the laws passed by Congress.

We all awoke to a changed world on September 12. But the world has continued to change, and so must our understanding of the threat we now face and how to combat it. The battle for hearts and minds is of tremendous consequence. The enemy is deadly, determined, and adaptive. We cannot defeat it if we are stuck in the past. It is essential, as this committee clearly understands, to move beyond our fears and fully understand what makes us strong.

Brian Jenkins, a hard-nosed national security expert who has been helping us understand and battle the terrorist threat for over 35 years, noted in his recently released book, *Unconquerable Nation*, that “there has been too much fear-mongering since 9/11. We are not a nation of victims cowering under the kitchen table. We cannot expect protection against all risk. Too many Americans have died defending liberty for us to easily surrender it now to terror....Instead of surrendering our liberties in the name of security, we must embrace liberty as the source and sustenance of our security.”

We have to demonstrate that we still believe what our founders understood; that this system of checks and balances and respect for civil liberties is not a luxury of peace and tranquility but was created in a time of great peril as the best hope for keeping this nation strong and resilient. It was a system developed not by fuzzy-headed idealists but by individuals who had just fought a war and who knew that they faced an uncertain and dangerous time. They saw first-hand the how the whims of a single, unchecked ruler could lead a country astray. They knew that in times of fear and crisis, the instinct is to reach for power--and they determined that balancing power between all three branches would protect against that frailty of human nature and ultimately make for wiser, better decisions and a more unified and strong nation.

### **A New Administration Should Conduct a Comprehensive Review of Domestic Spying**

With this understanding of the national security imperative to respect the rule of law, a new Administration should undertake a comprehensive review of domestic intelligence

activities, including the policies and laws put in place after 9/11 in the rush to fill perceived gaps in authorities and capabilities to detect terrorists inside the US. The threat of further attacks inside the United States presents unique challenges, both to effective intelligence and to appropriate protections against unwarranted government intrusion. The new Administration should assess the effectiveness of our domestic intelligence efforts in meeting these challenges. My testimony today will focus on a key aspect of that review: ensuring that these intelligence activities, policies, and laws support, rather than undermine, the rule of law.

Senator Obama has already said he will ask his Attorney General to conduct a comprehensive review of domestic surveillance. Senator McCain should do the same. In addition, while today's hearing is focused on advice to a new President, in past appearances before this Committee and before the House Judiciary Committee I have urged Congress to undertake a similar review.

The timing is right for such a review. There has been a flurry of activity on domestic surveillance law and policy in recent weeks and months, in the Executive branch, Congress, and the courts. A new Administration should assess these changes, as well as existing policies and laws, to promptly ensure careful implementation of those it deems appropriate and revisions to those that raise concerns.

An Executive branch review can also help to inform legislative action. The deeply flawed legislation to amend FISA passed the Congress this summer with a commitment by the leadership in the House and Senate to re-visit it in the next session. By early next year, we will have the results of the Inspector General (IG) report required in that law. A fuller understanding of all of the electronic surveillance activities that were initiated in the immediate aftermath of the 9/11 attacks and how those activities and programs were modified over time will provide key insights into the pressures that should be anticipated in the future and how to better handle them in law and in practice. Next year's sunset of three provisions of the PATRIOT Act also provides a good context for this kind of comprehensive review.

In addition, the review should be informed by some excellent IG reports already completed, including reports on the use of National Security Letters; by state and local investigations, such as those looking into allegations that local police engaged in surveillance of

antiwar protesters; and by activity in the courts, such as challenges to the application of the third-party record doctrine in light of advances in technology.

### ***Why we need a comprehensive review***

The legal framework for domestic intelligence has come to resemble a Rube Goldberg contraption rather than the coherent foundation we expect and need from our laws. The rules that govern domestic intelligence collection are scattered throughout the US Code and a multitude of internal agency policies, guidelines, and directives, developed piecemeal over time, often adopted quickly in response to scandal or crisis and sometimes in secret. They do not always reflect a firm understanding of why intelligence collection needs to be treated differently than law enforcement investigations, the unique intelligence requirements for homeland security, and the degree to which respect for civil liberties, fundamental fairness, and the rule of law is essential to winning the battle for hearts and minds--and, therefore, essential to our homeland security.

The various authorities for gathering information inside the United States, including the authorities in FISA, need to be considered and understood in relation to each other, not in isolation. For example, Congress needs to understand how broader FISA authority relates to current authorities for obtaining or reviewing records, such as national security letters, section 215 of FISA, the physical search pen register/trap and trace authorities in FISA, and the counterparts to these in the criminal context, as well as other law enforcement tools such as grand juries and material witness statutes.

Executive Order 12333, echoed in FISA, calls for using the “least intrusive collection techniques feasible.” The appropriateness of using electronic surveillance or other intrusive techniques to gather the communications of Americans should be considered in light of other, less intrusive techniques that might be available to establish, for example, whether a phone number belongs to a suspected terrorist or the pizza delivery shop. Electronic surveillance is not the “all or nothing” proposition often portrayed in some of the debates.

### ***How a comprehensive review should be conducted***

A new Administration should initiate a review of all current domestic spying activities, including those that are international but involve collection and dissemination of information about people inside the US. This should include activities not only at FBI and NSA, but also the Department of Defense, the Central Intelligence Agency, the National Geo-spatial Intelligence Agency, entities at DHS, and elsewhere in the federal government, as well as state and local police and other entities. In addition, it should review all current laws, regulations, guidelines, policies, OLC memos, etc., related to domestic spying activities.

At the same time, the Administration should direct the Director of National Intelligence to oversee a thorough assessment of the nature, scale, and scope of the national security threat inside the United States. This is particularly important with respect to the terrorist threat. It seems likely that different detection strategies -- and different tools-- might apply depending upon whether, for example, you are attempting to detect thousands of terrorists inside the US, hundreds, dozens, or even fewer. The harm they could inflict might be similar, but the tools you would use to detect them, and the scale of privacy intrusions that would be justified, may vary.

In addition, a better understanding of the nature of the threat will also inform the assessment of which strategies are most likely to deter those threats. For example, understanding that we are engaged with terrorists in a competition for heart and minds helps us to understand the national security costs of activities, policies, and even terminology that reinforce the terrorists' message or undermine our own message. Similarly, understanding the value of community policing in detecting and deterring terrorist activity may lead to more careful policies about when and how we involve those local police in federal activities.

### ***Key Issues for Review***

Some of the key issues that any comprehensive review should address include:

- A review of the Foreign Intelligence Surveillance Act, including changes enacted as part of the PATRIOT Act and in the amendments this summer, assessing both the statutory language and its implementation.

- The recent amendments focused on meeting a particular need asserted by the current Administration and, as noted earlier, many Member of Congress stated their view that it was a deeply flawed bill and should be re-visited in the coming session of Congress. Beyond that, however, what seemed lost in the debate is the need to reassess FISA more generally in light of the vastly higher level of international communications engaged in by Americans today, via the Internet as well as by phone, than was the case in 1978. Does it still adequately protect innocent Americans from unwarranted government intrusion into their private communications?
- In addition, the electronic and physical search provisions of FISA, complex from their inception, have become virtually impenetrable to nearly all but those who work with it on a daily basis—and perhaps even to those unfortunate souls! Is there a way to simplify this regime to ensure compliance, enhance the prospects for effective oversight, and improve public trust?
- This review should include careful consideration of the important role of judges. As Supreme Court Justice Powell wrote for the majority in the *Keith* case, “The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. ...But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.”
- A review of the legal regime for national security letters (NSLs) and its implementation.
  - The legal authorities for issuing NSLs are scattered throughout the US Code, with different triggers, targets, scope, and safeguards. Recent IG reports document widespread misuse of this broad authority by the FBI. However, FBI is not the only federal agency with authority to issue NSLs; any agency engaged in intelligence analysis can also issue NSLs. That includes CIA and intelligence

components in the Department of Defense. A comprehensive review should consider whether the authority to issue national security letters should be brought within a single provision of law, which government entities should have this authority, and what safeguards are needed to protect against abuse, including a possible role for the judiciary. Legislation introduced by the Chairman of this Subcommittee, Senator Feingold, offers thoughtful suggestions on each of these issues.

- The First Amendment implications of domestic spying activities, including safeguards to protect against political spying and other investigations of First Amendment protected activities, as well as the chilling effect of current and proposed policies and activities.
  - Most of the debate about domestic surveillance has centered on the application of the Fourth Amendment. However, it is equally important to ensure that domestic spying activities do not infringe upon or unnecessarily chill activities protected by the First Amendment. For example, most laws and policies in this area include a prohibition on engaging spying “based solely upon activities protected by the First Amendment.” Presumably, this means the spying could be based almost entirely on First Amendment activities, so long as there is some other basis, too, no matter how insignificant. A careful review should include an assessment of how this language is interpreted in guidance, such as the new Attorney General guidelines, and in practice.
  
- The need for a legal framework for government data-collection and data-mining practices that addresses government access to both private information, such as financial and communications records, and “public” information collected by private data-brokers, which is then collected or collated in various databases, such as millions of records in the FBI’s Investigative Data Warehouse;
  - This should include an assessment of whether collection of massive amounts of data from third parties for purposes of data-mining still falls within the “third-party record doctrine” as envisioned by the Supreme Court (in cases holding that there is no Fourth Amendment privacy interest in records such as phone

logs or bank account information held by a third party), or whether a difference in quantity—given the ability of technology to turn massive amounts of those records into a detailed picture of an individual’s daily life-- becomes a difference in kind.

- It should also include an assessment of rules prescribing what can/should be done with information once it’s collected, (e.g., Who in USG should get to see/use it? For what purposes? Under what retention rules?), and whether there are there adequate safeguards to protect against unwarranted and discriminatory uses of such information to interfere with the right to travel and work, including the denial of security clearances.
- Whether there are adequate safeguards against inappropriate and discriminatory profiling, targeting, and selective enforcement, by law enforcement and intelligence personnel in the name of counterterrorism;
  - In addition to concerns about fundamental fairness and appropriate use of scarce enforcement resources, activities and policies that appear discriminatory against certain communities or demographics should be carefully assessed in light of their potentially negative impact on our overall counterterrorism strategy.
- The appropriate role, if any, for the various federal, state, and local entities currently engaged in domestic intelligence activities.
  - The first step is to identify all players engaged in domestic intelligence activities. This includes collection and analysis—particularly since technology increasingly blurs the line between these two categories. As noted, the focus is generally on FBI, but many other agencies and elements are also involved. Moreover, proposed changes to the Code of Federal Regulations would further expand the intelligence role of state and local police. Do all of these entities have a unique and essential role, or can fewer entities be called upon to collect and/or analyze domestic intelligence in a way that meets the needs of others? Does each entity adequately understand its role and limitations? Are necessary safeguards in place

to prevent abuse? Are there appropriate oversight mechanisms for all of this activity?

- The need to enhance transparency and oversight--in both the Executive Branch and the Congress-- with regard to domestic intelligence in order to sustain public support, improve the quality of intelligence, and ensure respect for the rule of law.

This last bullet may be the most important aspect of any comprehensive review. Today's hearing is evidence that this Committee fully understands the importance of transparency and oversight, particularly with regard to intelligence activities operating within a democracy.

Mr. Chairman, let me close by again commending you for all of your efforts to ensure that a new Administration places an appropriately high priority on restoring America's commitment to the rule of law. I very much appreciate the opportunity to participate in this important endeavor.