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Law, Constitutional and Public Policy Considerations”
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Mr. Chairman, thank you for the opportunity to testify before the House Permanent Select Committee on Intelligence on constitutional issues concerning the collection of intelligence in the current war against terrorism. I am currently a visiting professor of law at the University of Chicago law school (on leave from my permanent position at the University of California at Berkeley School of Law) and a visiting scholar at the American Enterprise Institute. From 2001-03, I served as deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice, where I worked on issues involving national security and foreign relations. I research and write in the fields of foreign relations and national security law, international law, and constitutional law. The views I present here are mine alone.

Electronic surveillance for foreign intelligence within the United States is regulated primarily by the Foreign Intelligence Surveillance Act of 1978, [50 U.S.C. §§ 1801-1862](#) (FISA). FISA created a foreign intelligence surveillance court, known as the “FISC,” made up of Article III district judges drawn from around the country, which may issue a warrant to conduct a search for foreign intelligence information. Upon application by the Justice Department, the FISC may issue a warrant that authorizes electronic surveillance to “obtain foreign intelligence information” if “there is probable cause to believe that ... the target of the electronic surveillance is a foreign power or an agent of a foreign power” and that “each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent of a foreign power.”

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The definition of foreign power includes international terrorist organizations.

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FISA permits an ex ante search warrant not based on a showing that a target was involved with criminal activity, but on probable cause that the target was linked to a terrorist organization.

FISA proceedings are held ex parte, with only the government represented, in a closed hearing, so that classified information can be discussed with the judges while protecting intelligence sources and methods. At the same time, the warrant permits a search whose fruits may be used in a subsequent prosecution. In the wake of the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, Congress enacted the USA Patriot Act, which amended several provisions of FISA.

Almost all of these provisions amounted to evolutionary

improvements in pre-existing law enforcement powers that updated FISA for modern communications, expanded its effectiveness, and removed barriers to cooperation between intelligence and law enforcement agencies. Thus, for example, the Patriot Act

expanded the scope of FISA warrants nationwide, rather than limiting them to individual judicial districts, and permitted the granting of FISA warrants for a single person and a variety of communications devices, rather than phone number by phone number.

Two provisions of these amendments have caused concerns among civil libertarians. The first changed the standard for granting a warrant. Before passage of the Patriot Act, the government was required to certify that “the purpose” of the search was to gather foreign intelligence information. This standard had led both the FISC and the Justice Department to erect a wall between intelligence and law enforcement agents that prevented them from sharing information gained from FISA warrants on terrorists. In the Patriot Act, Congress amended FISA to require that the government certify only that a “significant purpose” of the search is to collect foreign intelligence. That change was made to reverse a misinterpretation of FISA that had prevailed in the FISC and the Justice Department to preclude cooperation between the foreign intelligence and law enforcement communities.

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The federal courts responded by eliminating the wall between foreign intelligence and law enforcement and moving the FISA system toward a more flexible approach. In its first decision ever, the FISA Court of Appeals reversed the FISC’s attempt to keep law enforcement and foreign intelligence separate after September 11, although it indicated this had returned FISA to its original meaning and that the Patriot Act amendment was unnecessary.

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The Court of Appeals decision is important and instructive. As the FISA Appeals Court found, the FISC initially erected a barrier between searches conducted for intelligence gathering and law enforcement by means of the “primary purpose” test, which required that the primary purpose of a FISA search was to collect foreign intelligence, rather than to engage in the investigation of ordinary crime.

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The FISC

enforced this approach by limiting contact between intelligence and domestic law enforcement personnel on FISA investigations, as a means of preventing intelligence gathered through a FISA warrant from being shared with law enforcement agents and prosecutors.

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The judiciary’s wall of separation between foreign intelligence and law enforcement represented an attempt to contain a warrantless national security approach so as not to contaminate the criminal justice system, based as it is on warrants for the conduct of searches.

It is doubtful that this interpretation of FISA was right. Although FISA required that in order to receive a FISA warrant, a national security official had to certify that “the purpose” of the surveillance was to collect foreign intelligence,

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this ultimately has little

to do with the uses to which that intelligence is put. In other words, if the executive

branch wanted to collect intelligence because it represented a foreign threat to national security, its purpose is consistent with FISA, even if it decides that the most effective use of that information is criminal investigation and trial. Furthermore, the definition of foreign intelligence information includes evidence of conduct, such as espionage, sabotage, and terrorism, which constitutes federal crimes. As the FISA Court of Review concluded, Congress's understanding when it enacted FISA was that criminal prosecution could help in the prevention of foreign threats to the national security.

[10](#)

“Indeed, it is

virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes, most importantly because, as we have noted, the definition of an agent of a foreign power –if he or she is a U.S. person—is grounded on criminal conduct.”

[11](#)

The second provision of the Patriot Act to receive criticism is Section 215.

Section 215 allows the FISC to grant FISA warrants for tangible items, such as business records and papers, held by third parties. As with the change in the primary purpose test, constitutional concerns raised by civil libertarians may be exaggerated. Individuals generally do not have Fourth Amendment rights in records that are no longer in their possession, and are in the hands of third parties. Once an individual has voluntarily given information to a third party, they can no longer have a reasonable expectation of privacy in that information. The Supreme Court, for example, applied this reasoning to find that the use of pen registers – which record dialed phone numbers – did not require a warrant, because the phone user had voluntarily given the phone numbers to the phone company. In fact, Section 215 provides more protections than the system that existed before.

As I understand it, grand juries have long been able to subpoena documents related to a criminal investigation. Thus, a grand jury investigating the September 11 attacks could subpoena from third parties the same tangible items to which Section 215 permits access. Section 215, unlike grand juries, requires ex ante review of the demand for the tangible item by the FISC. Thus, the Patriot Act actually involves review of a document demand by a neutral magistrate, which is not the case for grand jury subpoenas.

From a constitutional perspective, civil libertarian concerns about the Patriot Act are exaggerated. The Patriot Act's changes to FISA represent a reasonable compromise between civil liberties and the demands of national security that fall well within the Constitution's requirements. FISA itself does not set the maximum reach of the government's surveillance and search powers to combat foreign threats. Rather, the federal government and the executive branch have broader sources of constitutional authority to protect the national security that do not require a warrant in order to engage in searches or electronic surveillance. A review of the constitutional regime governing national security searches shows that FISA and the Patriot Act amendments to it represent reasonable compromises rather than extreme efforts to expand government power at the expense of civil liberties.

It appears clear that the Fourth Amendment's warrant requirement does not apply to surveillance and searches undertaken to protect the national security from external threats. Surveillance of terrorists could be undertaken within two distinct legal regimes. The first is the regular criminal justice system, in which the government may seek a warrant to conduct surveillance of a terrorist suspect's voice or electronic

communications by presenting sufficient evidence of probable cause to an Article III judge.

¹² Surveillance undertaken in this manner would be no different than that used against organized crime groups or drug cartels operating within the United States. A second method, however, could present itself when terrorists undertake direct operations within the territorial United States. During wartime, the military engages in searches and surveillance without a warrant. We do not, for example, require the armed forces to seek a warrant when it conducts visual or electronic surveillance of enemy forces or of a battlefield, or when it searches buildings, houses, and vehicles for the enemy.

¹³ Nor must military operations within the United States operate under a different rule. Were enemy forces to actually invade and operate on the territory of the United States, the Constitution would not require a search warrant for the military to conduct surveillance of the enemy. Every search or observation of confederate forces during the Civil War, for example, did not require a warrant. Therefore, if al Qaeda forces organize and carry out missions to attack civilian or military targets within the United States, government surveillance of terrorists would not be law enforcement so much as military operations. In such circumstances, when the government is not pursuing an ordinary criminal law enforcement objective, the Fourth Amendment requires no search warrant.

¹⁴ The principle that searches undertaken to protect the national security are not subject to the warrant requirement has been recognized by the lower federal courts, not yet by the Supreme Court.

When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes.

¹⁷ In *United States v. United States District Court for the Eastern District of Michigan*, (“*Keith*”), however, the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups.

¹⁸ The court explicitly noted, however, that it was not considering the scope of the President’s surveillance power with respect to the activities of foreign powers within or without the country.

¹⁹ After *Keith*, lower courts found that when the government conducts a search, for national security reasons, of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of criminal law enforcement. In *United States v. Truong Dinh Hung*, for example, the Fourth Circuit observed that “the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, ‘unduly frustrate,’ the President in carrying out his foreign affairs responsibilities.”

²⁰ Several reasons led the Fourth Circuit to find that the warrant requirement did not apply to searches for foreign intelligence information:

- (1) “[a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations,”
- (2) “the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the ‘probable cause’ to demonstrate that the government in fact needs to recover that information from one particular source,” and
- (3) the executive branch “is also constitutionally designated as the pre-eminent authority in foreign affairs.”

[21](#)

To summarize, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, subtle judgments about foreign and military affairs,” and (2) “when the surveillance is conducted ‘primarily’ for foreign intelligence reasons because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

[22](#)

Several other circuits have employed a similar logic, and no other federal appeals courts have taken a different view.

[23](#)

As I noted earlier, the Supreme Court has never passed on the national security exception to the Fourth Amendment’s warrant requirements. Nonetheless, the ability of the government to conduct warrantless searches and surveillance for national security purposes is fully consistent with the Court’s recent approach to the Fourth Amendment. The Fourth Amendment declares that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated.” U.S. Const. amend. IV (emphasis added). The Amendment also declares that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Under the Fourth Amendment, the touchstone for review is whether a search is “reasonable.” According to the Court in *Vernonia School Dist. 47J v. Acton*, “[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”

[24](#)

When law enforcement undertakes a search to discover evidence of criminal wrongdoing, reasonableness generally requires a judicial warrant. But when the government’s conduct is not focused wholly on law enforcement, a warrant may not be necessary. A warrantless search can be constitutional “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”

[25](#)

Thus, the court has found warrantless searches such as random employee drug testing, drunk driving checkpoints, and temporary stops to search for weapons to be

consistent with the Fourth Amendment.

[26](#)

In these cases, the government's purpose was not the ordinary criminal law enforcement, but the achievement of other objectives, such as reducing deaths on the nation's highways or maintaining safety among railway workers. Even though the conduct might also constitute a violation of the law, the non-law-enforcement purpose of the search relieves government of the need to obtain a judicial warrant, and may allow it to even use the fruits of the search for prosecution later.

In creating these exceptions to its warrant requirement, the Court has still required that the search be "reasonable." In the context of warrantless searches, the Court has asked whether, under the totality of the circumstances, the "importance of the governmental interests" has outweighed the "nature and quality of the intrusion on the individual's Fourth Amendment interests." See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). If so, the government's search is reasonable under the Fourth Amendment.

The factors favoring warrantless searches for national security reasons are compelling under the current circumstances created by the war on terrorism. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order – the need to defend the nation from direct attack. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."

[27](#)

The compelling nature of the government's interest here may be understood in light of the Founders' express intention

to create a federal government "cloathed with all the powers requisite to the complete execution of its trust."

[28](#)

Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies.

Intelligence gathering is a necessary function that enables the President to carry out that authority. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the Presidency rather than Congress.

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack

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If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate,

dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. The current situation, in which Congress has recognized the President's authority to use force in response to a direct attack on the American homeland, has changed the calculus of a reasonable search. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself.

[30](#)

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies the idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. FISA is not so much an authorization for national security searches, which were conducted for many years before its passage in 1978, as a safe harbor that helps support the reasonableness determination made by the executive branch in the arena of national security searches.

This approach is the only way to understand the FISA Court of Appeals' discussion of whether FISA warrants are warrants under the Fourth Amendment. It seems clear that they are not. Fourth Amendment warrants require a showing of probable cause that "the evidence sought will aid in a particular apprehension or conviction for a particular offense" and "must particularly describe the things to be seized as well as the place to be searched."

FISA warrants require only that the government show that probable cause exists to believe that the target of the surveillance is the agent of a foreign power. When the target is a U.S. person, the Fourth Amendment and FISA standards for probable cause are similar, since the conduct that a U.S. person need engage in to fall within FISA also falls within federal criminal statutes. Nonetheless, even in such cases, FISA appears to require a lesser showing of probable cause than would apply in domestic criminal cases. FISA warrants, therefore, are not "warrants" as that term is used in the Fourth Amendment. Their showing of probable cause is not that required by the Amendment. All FISA warrants need meet, simply as a type of government action, is that they authorize conduct that is "reasonable."

In light of this case law and FISA's statutory structure, it is clear that both FISA and the Patriot Act's amendment are a compromise. Under the current interpretation of the Fourth Amendment, the government could do more than it is doing now in the name of national security. FISA itself is a compromise in that it requires the executive to go to a court to get a warrant at all; in the past, the executive branch could engage in a search for national security reasons without having to get a judge's permission. Courts have recognized that the executive branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. This deferential approach recognizes that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect the national security, the courts should not deny him the authority to conduct warrantless intelligence searches. The FISA process is

simply a process, agreed upon by the President and Congress, for national security searches, but it is not the constitutional floor for such a process.

It is also not unconstitutional to establish a standard for FISA applications that may be less demanding than the domestic criminal standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that of defending the nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might today. As national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. In this context, FISA and the Patriot Act's amendment to it are a moderate compromise compared to what the government could do under the current Fourth Amendment regime, which permits the conduct of surveillance without any warrants – i.e., any ex ante judicial review – at all. Amendments to FISA by the Patriot Act are consistent with the Fourth Amendment because they adapt the statutory structure to a new type of counter-intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that "[I]ntelligence and criminal law enforcement tend to merge in [the] area" of foreign counterintelligence and counterterrorism.

[32](#)

September 11's events

demonstrate that the fine distinction between foreign intelligence gathering and domestic

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S. Rep. No. 95-701, at 11.

9

law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time, received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, must take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation.

I hope that this discussion of the constitutional principles has made clear that the Fourth Amendment permits the federal government substantial discretion to engage in the

surveillance and search of foreign terrorists. Courts, most recently the FISA Appeals Court, have agreed that national security surveillance against foreign threats need not receive ex ante judicial approval in the form of a warrant, as is the case with searches for normal law enforcement. As FISA creates an ex ante warrant process, a structure upon which the Patriot Act has built, it represents a compromise for national security surveillance that is well within constitutional requirements.