AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 107–1013

S. 2586 AND S. 2659, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

HEARING ON S. 2586 AND S. 2659, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

JULY 31, 2002

U.S. GOVERNMENT PRINTING OFFICE

90–301 WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

SELECT COMMITTEE ON INTELLIGENCE

BOB GRAHAM, Florida, *Chairman*
RICHARD C. SHELBY, Alabama, *Vice Chairman*

CARL LEVIN, Michigan
JOHN D. ROCKEFELLER, IV, West Virginia
DIANNE FEINSTEIN, California
RON WYDEN, Oregon
RICHARD J. DURBIN, Illinois
EVAN BAYH, Indiana
JOHN EDWARDS, North Carolina

JON KYL, Arizona
JAMES M. INHOFE, Oklahoma
ORRIN G. HATCH, Utah
PAT ROBERTS, Kansas
MIKE DeWINE, Ohio
FRED THOMPSON, Tennessee
RICHARD G. LUGAR, Indiana

THOMAS A. DASCHLE, South Dakota, *Ex Officio*
TRENT LOTT, Mississippi, *Ex Officio*

ALFRED CUMMING, *Staff Director*
BILL DUHNKE, *Minority Staff Director*
KATHLEEN P. MCGHEE, *Chief Clerk*

CONTENTS

Page

Hearing held in Washington, D.C., July 31, 2002

Statement of:

Baker, James A., Counsel for Intelligence Policy, Department of Justice ... 22

Berman, Jerry, Executive Director, Center for Democracy and Technology ... 41

Bowman, Marion E., Deputy General Counsel, Federal Bureau of Investigation ... 14

Fishman, Charles S., Professor of Law, the Catholic University of America ... 47

Manget, Frederic F., Deputy General Counsel, Central Intelligence Agency ... 28

Schumer, The Hon. Charles E., United States Senator from the State of New York ... 7

Shelby, The Hon. Richard C., United States Senator from the State of Alabama ... 4

Supplemental Materials:

Letter dated August 1, 2002 from Philip Heymann ... 59

Letter dated July 30, 2002 from National Association of Police Organizations, Inc. ... 63

HEARING ON S. 2586 AND S. 2659, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

WEDNESDAY, JULY 31, 2002

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC

The Committee met, pursuant to notice, at 2:35 p.m., in Room SDG–50, Dirksen Senate Office Building, the Honorable Bob Graham (chairman of the committee), presiding.

Committee members present: Senators Graham, Feinstein, Kyl, and DeWine.

Chairman GRAHAM. I call the meeting to order.

Today we will discuss two important legislative proposals to amend the Foreign Intelligence Surveillance Act of 1978. We will hear in a few moments from the Senators who have co-sponsored the bill, Senators Kyl and DeWine, who are members of our committee, and Senator Schumer, whom we are fortunate to have joining us today to discuss the bill which he has co-sponsored with Senator Kyl.

I note that some of the questions the Senators may ask the witnesses might require the witnesses to discuss classified information. We are prepared, if necessary, to have a closed session in Hart–219 at the conclusion of the open hearing, should the line of questioning require.

The Foreign Intelligence Surveillance Act, or FISA, provides a statutory framework by which the United States government can secure court orders permitting an electronic surveillance or a physical search of a person inside the United States for purposes of collecting foreign intelligence. Last year, the USA Patriot Act made several changes to FISA to make it more efficient and effective as a tool in the fight against terrorism.

These changes included: permitting an order to issue on a showing by the government that the collection of foreign intelligence is a significant purpose of the surveillance or search—the previous law had required foreign intelligence collection to be the primary purpose; second, permitting roving wiretaps under FISA as they have been available in criminal surveillance context—this change was designed to thwart the ability of a target to evade surveillance by changing hotel rooms or discarding a cellular phone; and finally, extending the duration of FISA orders against targets who are not U.S. persons.

The two bills that we are here to discuss today will provide additional changes to FISA for the purpose of reducing both the nature and scope of the showing the government must make to obtain a surveillance order against suspected terrorists inside the United States who are neither citizens nor legal resident aliens. As we did with the changes made in FISA last year, the Congress must examine revisions of this nature to assure that they strike the proper balance between enhancing our ability to fight terrorism while protecting our privacy and liberties. That is the purpose of the hearing today.

S. 286 was introduced by Senators Schumer and Kyl to provide an additional modification to the FISA application process. Under current law the government has to show the court that the person suspected of engaging in international terrorism is a, quote, "agent of a foreign power"—in other words, if the target is affiliated with a terrorist group which operates overseas. The Schumer-Kyl bill would eliminate the requirement of showing that nexus, but only for potential targets who are neither U.S. citizens or green card holders. Accordingly, under the Schumer-Kyl approach, the government would have to show that the target of the surveillance is, quote, "engaged in international terrorism or activities in preparation therefore."

S. 2659, introduced by Senator DeWine, would change the level of proof that has to be made in a FISA application from the current probable cause to reasonable suspicion. Our witnesses today will explain the difference in the evidentiary standard required. As with the Schumer-Kyl provision, the DeWine amendment would retain the existing higher evidentiary standard of probable cause for U.S. citizens and legal permanent resident aliens. I understand that Senator DeWine has made some modifications to his language and will explain those today.

After the Vice Chairman, who will join us shortly, has made his remarks, I will ask Senators Kyl, DeWine and Schumer to speak about their provisions. After the Senators have completed their comments, I will turn to the first panel, which is comprised of two witnesses from the Department of Justice and the CIA. These will be Mr. Jim Baker who is Chief of the Office of Intelligence Policy and Review at the Department of Justice, and Mr. Marion Spike Bowman, Deputy General Counsel of the FBI. Representing the Director of Central Intelligence is Mr. Fred Manget, Deputy General Counsel of the CIA.

The second panel will provide the perspective of experts from outside the United States government—Mr. Jerry Berman, the Executive Director of the Center for Democracy and Technology, and Professor Clifford Fishman, Professor of Law at the Catholic University Law School.

Senator Shelby has indicated that he will be slightly detained in his arrival. Unless there are other opening statements from Members, I would suggest we turn to Senator Schumer and then Senator Kyl. After the completion of their comments on the legislation they have introduced, then Senator DeWine to comment on his legislation.

Senator Schumer.

[The prepared statements of Vice Chairman Shelby and Senator Schumer follow:]

Statement of Hon. Richard C. Shelby, Vice Chairman,
Senate Select Committee on Intelligence
for FISA Hearing
31 July 2002

Thank you Mr. Chairman.

Before we begin, I would like to thank you for agreeing to hold this hearing. It is a busy time for the Committee and for the Senate, but today's subject matter deserves a timely and public airing. I am pleased that we were able to schedule this hearing prior to the recess.

Mr. Chairman, I would like to welcome all of our witnesses, but especially the distinguished senior Senator from New York, Chuck Schumer. I look forward to hearing your testimony Senator and that of the other witnesses.

Our purpose today is to make our colleagues and the American public aware of the contents and issues surrounding two pieces of legislation: S. 2586, sponsored by Senators Schumer and Kyl; and S. 2659, sponsored by Senator DeWine. These two bills will modify the Foreign Intelligence Surveillance Act of 1978, more commonly known as FISA.

FISA provides a statutory framework for the use of electronic surveillance, physical searches, pen registers and trap and trace devices to acquire foreign intelligence information within the United States. In conjunction with Executive Order 12,333 ["twelve, triple three"], FISA governs how we collect such information.

When dealing with domestic intelligence gathering, there is a constant tension between our obligation to protect our nation's security and our desire to preserve our civil liberties. This tension has intensified since the attacks on September 11.

As interpreted by the federal courts, the Constitution permits warrantless domestic surveillance in order to collect intelligence information, but this power is limited. FISA and Executive Order 12,333 [twelve, triple three] impose additional limitations that are not required under the Constitution.

Some of the most important legal debates in recent months about domestic intelligence surveillance concern these additional restrictions. As we seek to find the right balance between liberty and security, I expect that these debates will continue to focus on the nature and extent of the statutory and administrative limitations imposed by FISA and executive orders.

Our nation is now fighting an enemy who plays by a different set of rules. Consequently, we have found it necessary to alter the rules by which we operate while still preserving our constitutional liberties.

Last October, in response to September 11, Congress passed and the President signed the USA PATRIOT Act. That Act changed some of the rules by which we protect ourselves. Among other provisions Congress deemed necessary, that legislation amended FISA and eased some of the restrictions on foreign intelligence gathering within the United States.

Specifically, the PATRIOT Act provided for roving multipoint electronic surveillance authority, amended FISA provisions with respect to pen registers, trap and trace devices and access to business records, and – perhaps most significantly – allowed applications for FISA surveillance when gathering foreign intelligence is a "significant purpose" rather than simply "the purpose."

In order to protect Constitutional liberties, the PATRIOT Act: expanded the number of judges on the FISA Court, established a private right of action for privacy violations by government personnel, expanded the prohibition against FISA orders based upon an individual's exercise of First Amendment rights, and established sunset provisions for the majority of the FISA modifications.

Mr. Chairman, today we are asked to consider two more changes to FISA. I believe that they are designed by their distinguished sponsors to fill gaps in our surveillance capabilities which have come to light as a result of ongoing investigations and our own Joint Inquiry into the September 11 attacks.

It has become apparent that there are limitations in FISA that allow terrorists to go undetected as they prepare to inflict terrible harm upon our country. If we can remove those limitations while protecting our fundamental liberties, we should do so.

The legislation before us is intended to do just that.

Mr. Chairman, I once again would like to thank you for holding this very important hearing. I applaud Senators Schumer, Kyl and DeWine for authoring some very timely and important legislation and I look forward to a lively and insightful discussion. Thank you.

Statement of Senator Charles E. Schumer
July 31, 2002

As we undergo a review of our intelligence failures leading up to September 11th, we should not, we must not, and we will not forget that we are at war. We cannot forget that we have enemies who are intent on doing us harm. And we must remain vigilant in our efforts to protect America from future attacks.

We've learned from the disclosures regarding Zacharias Moussaoui, the so-called 20th hijacker, that the FBI had abundant reason to be suspicious of him before 9/11 but they didn't act. They didn't seek a warrant to try to dig up the evidence that may have been the thread which, if pulled, would have unravelled the terrorists' plans. And one reason we've been given for why the FBI didn't seek that warrant is that the bar for getting those warrants is set too high.

That's why Senator Kyl and I introduced legislation to amend the Foreign Intelligence Surveillance Act (FISA). We intend to make it easier for law enforcement to get warrants against non-U.S. citizens who are suspected of preparing to commit acts of terrorism.

Right now, the FBI is required to show three things before they can get a warrant for national security-related surveillance.

They must show that the target is engaging in or preparing to engage in international terrorism. We're keeping that requirement.

They must show that a significant purpose of the surveillance foreign intelligence gathering. We're keeping that requirement too.

And they must show that the target is an agent of a foreign power, like Iraq, or a foreign terrorist group, like Hamas or Al Qaeda. That's the hurdle we're removing.

If that last requirement hadn't been in place, there's just no question the FBI could have gotten a warrant to do electronic surveillance on Zacharias Moussaoui. Right now, there may be terrorists plotting on American soil. We may have all kinds of reason to believe they're preparing to commit acts of terrorism, but we can't do the surveillance we need to do because we can't tie them to a foreign power or an international terrorist group. It's sort of a Catch-22 – we need to do the surveillance to get the information we need to be able to do the surveillance.

The simple fact is, it shouldn't matter whether we can tie someone to a foreign power. Whether our intelligence just isn't good enough or whether the terrorist is acting as a lone wolf, shouldn't affect whether we can do electronic surveillance. Engaging in international terrorism should be enough for our intelligence experts to start surveillance.

It's important to note that if we remove that last requirement now, it will immeasurably aid law enforcement without exposing American citizens and permanent legal resident aliens to the slightest additional surveillance.

This is a fair, reasonable, and smart fix to a serious problem. I thank you, Chairman Graham and Vice-Chairman Shelby, for holding this hearing. I look forward to working with you to implement this FISA fix.

STATEMENT OF THE HONORABLE CHARLES E. SCHUMER, UNITED STATES SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. And before I begin, I just want to thank you and the entire Committee. Your Committee is so important to all of us and I think I don't speak only for myself but for the vast majority of the Senate. You, Mr. Chairman, have done an outstanding job in leading this Committee, as has the membership of the Committee. And I think we and the American people are thankful for that.

Chairman GRAHAM. Thank you very much.

Senator SCHUMER. Now, to address the legislation. I'll be brief, and I would ask unanimous consent that my entire statement be placed in the record.

Chairman GRAHAM. Without objection, it is so ordered.

Senator SCHUMER. Mr. Chairman, as we undergo a review of our intelligence failures leading up to September 11th, we should not, must not, and will not forget we're at war and that we have enemies who are intent on doing us harm. We have to remain ever vigilant in our efforts to protect America from future attacks.

That means acting quickly, not just to ensure that the military has the means to fight the war on terrorism, but also to plug the holes in homeland security.

We've learned from the disclosures regarding Zacarias Moussaoui, the so-called 20th hijacker, that even though the FBI had abundant reason to be suspicious of him before 9/11, it didn't act. It didn't seek a warrant to dig up the evidence that may—may—have been the thread which, if pulled, would have unraveled the terrorists' plans. And one reason the FBI didn't seek the warrant is that the bar for getting those warrants is simply set too high.

That's why Senator Kyl and I introduced the legislation to amend the FISA Act. And I want to thank Senator Kyl for his leadership on this and so many other issues. In fact, a couple of the changes to FISA that you mentioned that were done in the Patriot Act were Kyl-Schumer endeavors. We've worked together on many law enforcement issues with at least some measure of success, and I thank him for his partnership on this one and on so many others.

Now, Senator Kyl's and my goal, quite simply, is to make it easier for law enforcement to get warrants against non-U.S. citizens who are preparing to commit acts of terrorism. Right now the government is required to show three things before it can get a warrant for national security surveillance.

First, it must show that the target of the surveillance is engaging in, or preparing to engage in, international terrorism. We keep that requirement in place. Second, it must show that a significant purpose of the surveillance is foreign intelligence-gathering. As you mentioned that was changed a bit by the Patriot Act, as it should have been. We don't change it any further. That one is working just fine.

But, third, it must show that the target is an agent of a foreign power like Iraq, or a foreign terrorist group like Hamas or al-Qa'ida. And that's the hurdle we're removing.

If that last requirement hadn't been in place, there would have been no question within the FBI about whether it could have got-

ten a warrant to do electronic surveillance on Moussaoui. It could have searched his computer files and perhaps—perhaps is underlined—come up with information needed to foil the hijackers' plans. And that may—underline may—have been enough to force someone to put two and two together to add the Moussaoui information with the Phoenix memo and realize that something truly horrible was afoot.

I believe the Vice President, the FBI Director, and the Secretary of Defense when they say other attacks are planned. Right now there may well be terrorists plotting on American soil. We may have all kinds of reasons to believe that specific individuals in our communities are preparing to commit acts of terrorism, but we can't do the surveillance we need to do because we can't tie them to a foreign power.

The simple fact is that in a world where the gravest threats to our freedom can come from a single person, or small group of people, our ability to tie a terrorism suspect to a foreign power cannot and should not be allowed to determine whether we can do surveillance. There may be known wolves out there acting without the support of Iraq or Hamas. There may be terrorists who we just can't link to a foreign power, and that shouldn't matter. If they are meeting the first two standards, if it's possible that they're about to engage in acts of terrorism, it shouldn't matter whether we can link them or not.

In some cases they might not be linked, in some cases it may be a new group that we don't know of, in some cases they may be linked to the group but we can't prove it. But we don't believe that that should really matter. If you're not an American citizen and you don't have a green card, and we have reason to believe that you're plotting terrorism, the FBI should be able to do surveillance.

It's important to note that if our bill becomes law it will immeasurably aid law enforcement without exposing American citizens and permanent legal resident aliens to the slightest additional surveillance. This law will only affect non-citizens and non-green card holders. And the language we're proposing is the same language the Administration sent up here during the debate over the Intelligence Authorization Bill. Attorney General Ashcroft has given his stamp of approval. And I look forward to working with Senator Kyl and perhaps Senator DeWine, if we end up collaborating a little further—Senator Kyl mentioned to me in the subway yesterday that we might be—to help this bill become law.

I just want to reiterate one point, Mr. Chairman. We're still at war, and we're still at risk. We live in funny times where we are at risk but our lifestyle doesn't change a jot. And sometimes we forget the risk that we all face. So we must not only take a critical look at our intelligence failures, but we have to take a constructive approach immediately towards making this a safer America.

And some of the proposals for expanding powers that I've heard floated give me some reason to pause. They may go too far. But in my judgment at least, Mr. Chairman, this one's a no-brainer. This is a fair, reasonable and smart fix to a serious problem. And I want to thank you, Vice Chairman Shelby, as well as my partner in this endeavor, Senator Kyl, for all their help.

Chairman GRAHAM. Thank you very much, Senator. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

I am aware that Senator Schumer may have to leave here fairly quickly, but before he does I want to say thank you to him. We have worked together on a variety of issues that have helped us to deal with criminal elements and most recently with terrorists. And what we find as we gain experience with the terrorists and work through our legal process is that, here and there, there are some deficiencies. Things change. Circumstances change.

And last century's FISA—it seems odd now to refer to a law in that context—FISA and other laws were developed in the circumstances in which there were known identifiable enemies. And it was fairly easy, therefore, to conceive of a statute in which you would tie the suspect to a foreign power, a specific country, or a terrorist organization by name.

What we've learned, especially in this Committee, is that these terrorists, as Senator Schumer said, are very shadowy figures. They don't have a membership card in a terrorist organization and go to their meeting every Friday night. They are very shadowy folks who move in and out of the United States, who may or may not have affiliation with different terrorist groups who change those affiliations, or who may simply be working with people who would be considered members of those terrorist organizations. And as Senator Schumer said, there are even new organizations beginning.

And so what seemed like a reasonable requirement in the past that you would tie one of these individuals to a specific foreign government—well, very few terrorists now work for a specific foreign government—or to an international terrorist group when they are so shadowy now and they are so compartmentalized in the way that they work and deal even with members of their own group, that we find that those kinds of requirements are now outmoded, don't serve the interests of justice, don't permit us to protect American people. And we can change the requirement very slightly and remain very easily within constitutional limits.

And we have assurances from the Department of Justice, which we'll get later, to this effect, and which would—as both the FBI Director and, I would also note, Agent Colleen Rowley from Minnesota, testified before the Judiciary Committee—would be a very helpful way to amend the statute so that we could deal with this problem of the individual who we have reason to believe, have probable cause to believe, is engaged in some kind of international terrorist activity or planning, but who we can't at this moment connect up to a specific country or terrorist group.

Maybe it's a new group, maybe they don't really have a connection, and they are acting or that individual is acting literally by himself or herself. Or maybe what we'll find is that there is a connection but we won't know it until we actually secure the warrant to do the search that leads us to that kind of evidence.

So this is what we're trying to achieve here. It's very straightforward, very narrow. And I would hope that we could act on it quickly.

We could work with our friends in the Judiciary Committee, of which both Senator Schumer and I are members, and we could get it in—and Senator DeWine, I might add—and that we can move

quickly to get the support of our colleagues and put this important tool into the hands of law enforcement and intelligence agencies here in this country so that we can add one more element to the protection of the American people.

Thank you, Mr. Chairman.

Chairman GRAHAM. Thank you, Senator.

Senator DeWine.

Senator SCHUMER. Mr. Chairman, might I excuse myself, if there are no questions?

Chairman GRAHAM. Thank you very much, Senator.

Senator SCHUMER. I will apologize to Senator DeWine. When they moved the schedule back a little bit, it bumped into something. Thank you.

Chairman GRAHAM. Senator Schumer, thank you very much for your and Senator Kyl's efforts that brought us this legislation to consider this afternoon. And we will try to treat your young child with nurturing care.

Senator SCHUMER. I've met your triplet young grandchildren. If you treat this legislation one-hundredth as well, we'll do just fine.

Chairman GRAHAM. Thank you. But you only have one piece of legislation here.

Senator DeWine.

Senator DEWINE. Mr. Chairman, thank you very much. Let me first congratulate Senator Kyl, Senator Schumer for the legislation that they have introduced. As they indicated, this is really legislation that brings the law up to date to deal with the realities of the danger facing the United States, and the current law really does not do that. And so I congratulate them and I look forward to working with them on this bill.

Let me take a moment, Mr. Chairman, if I could, to discuss a separate bill that I have introduced which is S. 2659. This is a bill to modify the standard of proof required for a FISA order for non-U.S. persons. As we all know, the FISA statute has come under increasing scrutiny in the months since September 11 as citizens and the general public have struggled to make sense out of the terrorist attacks. My FISA reform bill would offer us a chance to improve our intelligence gathering and a chance to improve our ability to prevent future attacks. It would make it more likely that we could use FISA surveillance more often to gather the data that we need to fight terrorism.

And it would address one of the concerns voiced about the FISA problem, and that is that its use has sometimes been encumbered by an overly cautious culture that had grown over the years and that officials responsible for implementing it have been, in certain circumstances, too slow to request the FISA order from the court.

We have talked about the Moussaoui case. Quite frankly, no one knows at this point whether or not the change in the law would have, as I have indicated, would have had any impact on Moussaoui, if that case ultimately would have been moved up the chain as it should have been, and all of the facts are not publicly known. But it is that type of case at least that it would be helpful, I believe, if we saw this change in the law.

In order to enhance the usefulness of FISA and attempt to protect ourselves as much as possible from future attacks, we must

take steps to limit the possibility of such future FISA disputes. S. 2659 would do just that. Specifically, this bill would change the burden of proof which must be met by the government from probable cause to reasonable suspicion, but only in very specific and limited circumstances. That change would only apply for terrorism investigations of non-U.S. persons. This change would be effective for both electronic surveillance and physical searches.

From an operational point of view, this would aid in obtaining FISA orders earlier in the investigation than might be possible otherwise. And, in certain circumstances, it may allow the government to obtain orders they might not get at all. By lowering the standard we hope to avoid situations such as we found in Moussaoui and encourage the OIPR to request FISA orders earlier in the process. The Supreme Court has held that the underlying cause requirement to authorize searches is dictated by the balance of governmental and privacy interests and the governmental interest in protecting national security and preventing terrorist attacks. That is obviously compelling. It's obvious that this is a compelling need to protect United States citizens from this type of attack.

Further, there is case law indicating that the privacy expectation and interest of a non-U.S. person is, in fact, less than of a U.S. person. Lowering the standard will, of course, not remove all disputes. It won't make every case an easy case. No matter what the standard, officials will have good faith disputes over when it is reached. There will always be a case that lands right on the line. However, this legislation decision, like most, requires a careful balancing of the gains from the new standard with the possible problems.

While the new standard will no doubt result in speedier and increased surveillance of potential dangerous non-U.S. persons, we must be cautious not to endorse an overly permissive use of the surveillance powers of FISA. That's why we have been very careful in drafting this bill. The reasonable suspicion standard is, Mr. Chairman, a widely recognized legal threshold with a great deal of history and case law behind it and one that makes sense under the current circumstances. I believe that we have an opportunity to make a change in the law that will improve our odds of preventing future terrorist attacks. I hope the members of this Committee will join me in supporting it.

Thank you very much.

Chairman GRAHAM. Thank you, Senator.

We can now turn to our first panel with representatives of the Department of Justice and the CIA—Mr. Jim Baker, Chief of the Office of Intelligence Policy and Review of the Department of Justice; Mr. Marion Bowman, Deputy General Counsel of the FBI. Representing the Director of CIA is Mr. Fred Manget, Deputy General Counsel.

Gentlemen, do you have opening statements? Mr. Bowman.

[The prepared statement of Mr. Bowman follows:]

Statement for the Record of Marion E. (Spike) Bowman
Deputy General Counsel
Federal Bureau of Investigation
Before the
Senate Select Committee on Intelligence
July 31, 2002

Mr. Chairman and members of the Committee, thank you for inviting me here today to testify on the legislative proposals concerning the Foreign Intelligence Surveillance Act (FISA). Holding this hearing demonstrates your collective and individual commitment to improving the security of our Nation. The Federal Bureau of Investigation greatly appreciates your leadership, and that of your colleagues in other committees on this very important topic.

The Foreign Intelligence Surveillance Act was written more than two decades ago. When adopted, the Act brought a degree of closure to fifty years of discussion concerning constitutional limits on the President's power to order electronic surveillance for national security purposes. A subsequent amendment brought physical search under the Act. In keeping with our standards of public governance, the proposals for the Act were publicly debated over a substantial period of time, compromises were reached and a statute eventually adopted. In the final analysis the standards governing when and how foreign intelligence surveillance or search would be conducted was a political one because it involved weighing of important public policy concerns surrounding both personal liberty and national security. That is how it should be.

In the intervening years FISA has proved its worth on countless occasions in preventing the occurrence or the continuation of harm to the national security. It has been a very effective tool and time has proved that this cooperative effort of the three branches of government can serve to protect the public without eroding civil liberties. Indeed, the legislative history shows that Congress intended that the Executive Branch keep a focus on civil liberties by giving great care and scrutiny every application before it is presented to a judge. We believe that intent has been fulfilled. The fact that an Article III judge is the final arbiter of compliance serves to give additional confidence to the public that the intent of the statute is fulfilled.

When FISA was enacted, terrorism was very different from what we see today. In the 1970s, terrorism more often targeted individuals, often carefully selected. This was the usual pattern of the Japanese Red Army, the Red Brigades and similar organizations listed by name in the legislative history of FISA. Today we see terrorism as far more lethal and far more indiscriminate than could have been imagined in 1978. It takes only the events of September 11, 2001 to fully comprehend the difference of a couple of decades. But there is another difference as well. Where we once saw terrorism formed solely around organized groups, today we often see individuals willing to commit indiscriminate acts of terror. It may be that these individuals are affiliated with groups we do not see, but it may be that they are simply radicals who desire to bring about destruction. That brings us to the legislation being considered today.

The FBI uses investigative tools to try to prevent acts of terrorism wherever we can, but particularly to prevent terrorism directed at Americans or American interests. Most of our

investigations occur within the United States and, for the most part, focus on individuals. Historically, terrorism subjects of FBI investigation have been associated with terrorist organizations. As a result, FBI has usually been able to associate an individual with a terrorist organization pled, for FISA purposes, as a foreign power. To a substantial extent, that remains true today. However, we are increasingly seeing terrorist suspects who appear to operate at a distance from these organizations. In perhaps an oversimplification, but illustrative nevertheless, what we see today are (1) agents of foreign powers in the traditional sense who are associated with some organization or discernible group, (2) individuals who appear to have connections with multiple terrorist organizations but who do not appear to owe allegiance to any one of them, but rather owe allegiance to the International Jihad movement and (3) individuals who appear to be personally oriented toward terrorism but with whom there is no known connection to a foreign power.

This phenomenon, which we have seen to be growing for the past two or three years, appears to stem from a social movement that began at some imprecise time, but certainly more than a decade ago. It is a global phenomenon which the FBI refers to as the International Jihad Movement. By way of background we believe we can see the contemporary development of this movement, and its focus on terrorism, rooted in the Soviet invasion of Afghanistan.

Background

During the decade-long Soviet/Afghan conflict, anywhere from 10,000 to 25,000 Muslim fighters representing some forty-three countries put aside substantial cultural differences to fight alongside each other in Afghanistan. The force drawing them together was the Islamic concept of "umma" or Muslim community. In this concept, nationalism is secondary to the Muslim community as a whole. As a result, Muslims from disparate cultures trained together, formed relationships, sometimes assembled in groups that otherwise would have been at odds with one another and acquired common ideologies. They were also influenced by radical spiritual and temporal leaders, one of whom has gained prominence on a global scale – Usama Bin Laden.

Following the withdrawal of the Soviet forces from Afghanistan, many of these fighters returned to their homelands, but they returned with new skills and dangerous ideas. They now had newly-acquired terrorist training as guerrilla warfare was the only way they could combat the more advanced Soviet forces. They also returned with new concepts of community that had little to do with nationalism. Those concepts of community fed naturally into opposition to the adoption, and toleration, of western culture. As a result, many of the Arab-Afghan returnees united, or reunited, with indigenous radical Islamic groups they had left behind when they went to Afghanistan. These Arab-Afghan mujahedin, equipped with extensive weapons and explosives training, infused radicals and already established terrorist groups, resulting in the creation of significantly better trained and more highly motivated cells dedicated to jihad.

Feeding the radical element was the social fact that this occurred in nations where there was widespread poverty and unemployment. The success of the Arab intervention in Afghanistan was readily apparent, so when the Arab-Afghan returnees came home they discovered populations of young Muslims who increasingly were ready and even eager to view radical Islam as the only viable means of improving conditions in their countries. Seizing on widespread dissatisfaction with regimes that were brimming with un-Islamic ways, regimes that

hosted foreign business and foreign military, many young Muslim males became eager to adopt the successful terrorist-related activities that had been successfully used in Afghanistan in the name of Islam. It was only a matter of time before these young Muslim males began to seek out the military and explosives training that the Arab-Afghan returnees possessed.

Usama bin Laden

Usama bin Laden gained prominence during the Afghan war in large measure for his logistical support to the resistence. He financed recruitment, transportation and training of Arab nationals who volunteered to fight alongside the Afghan mujahedin. The Afghan war was clearly a defining experience in his life. In a May, 1996 interview with Time Magazine, UBL stated: "in our religion there is a special place in the hereafter for those who participate in jihad. One day in Afghanistan was like 1,000 days in an ordinary mosque."

Although bin Laden was merely one leader among many during the Soviet-Afghan conflict, he was a wealthy Saudi who fought alongside the mujahedin. In consequence, his stature with the fighters was high during the war and he continued to rise in prominence such that, by 1998, he was able to announce a "fatwa" (religious ruling) that would be respected by far-flung Islamic radicals. In short, he stated that it is the duty of all Muslims to kill Americans: "in compliance with God's order, we issue the following fatwa to all Muslims: the ruling to kill the Americans and their allies, including civilians and military, is the individual duty for every Muslim who can do it in any country in which it is possible to do it."

Bin Laden was not alone in issuing this fatwa. It was signed as well by a coalition of leading Islamic militants to include Ayman Al-Zawahiri (at the time the leader of the Egyptian Islamic Jihad), Abu Yasr Rifa'i Ahmad Taha (Islamic Group leader) and Sheikh Fazl Ur Rahman (Harakat Ul Ansar leader). The fatwa was issued under the name of the *International Islamic Front for Jihad on the Jews and Christians*. This fatwa was significant as it was the first public call for attacks on Americans, both civilian and military, and because it reflected a unified position among recognized leaders in the radical Sunni Islamic community. In essence, the fatwa reflected the globalization of radical Islam.

There is a terrorist network of extremists that has been evolving in the murky terrain of Southwest Asia that uses its extremist views of Islam to justify terrorism. His organization, al Qaeda is but one example of this network.

Al Qaeda

Although Al-Qaeda functions independently of other terrorist organizations, it also functions through some of the terrorist organizations that operate under its umbrella or with its support, including: the Al-Jihad, the Al-Gamma Al-Islamiyya (Islamic Group - led by Sheik Omar Abdel Rahman and later by Ahmed Refai Taha, a/k/a "Abu Yasser al Masri,"), Egyptian Islamic Jihad, and a number of jihad groups in other countries, including the Sudan, Egypt, Saudi Arabia, Yemen, Somalia, Eritrea, Djibouti, Afghanistan, Pakistan, Bosnia, Croatia, Albania,

Algeria, Tunisia, Lebanon, the Philippines, Tajikistan, Azerbaijan, the Kashmiri region of India, and the Chechen region of Russia. Al-Qaeda also maintained cells and personnel in a number of countries to facilitate its activities, including in Kenya, Tanzania, the United Kingdom, Canada and the United States. By banding together, Al-Qaeda proposed to work together against the perceived common enemies in the West - particularly the United States which Al-Qaeda regards as an "infidel" state which provides essential support for other "infidel" governments. Al-Qaeda responded to the presence of United States armed forces in the Gulf and the arrest, conviction and imprisonment in the United States of persons belonging to Al-Qaeda by issuing fatwas indicating that attacks against U.S. interests, domestic and foreign, civilian and military, were both proper and necessary. Those fatwas resulted in attacks against U.S. nationals in locations around the world including Somalia, Kenya, Tanzania, Yemen, and now in the United States. Since 1993, thousands of people have died in those attacks.

The Training Camps

With the globalization of radical Islam now well begun, the next task was to gain adherents and promote international jihad. A major tool selected for this purpose was the promotion of terrorism training camps that had long been established in Afghanistan. It is important to note, that while terrorist adherents to what we have come to know as al Qaeda trained in the camps, many others did as well. For example, according to the convicted terrorist Ahmed Ressam, representatives of the Algerian Armed Islamic Group (GIA) and its off-shoot the Salafi Groups for Call and Combat (GSPC), HAMAS, Hizballah, the Egyptian Islamic Jihad (EIJ) and various other terrorists trained at the camps.

Ressam also reports that cells were formed, dependent, in part, on the timing of the arrival of the trainees, rather than on any cohesive or pre-existing organizational structure. As part of the training, clerics and other authority figures advised the cells of the targets that are deemed valid and proper. The training they received included placing bombs in airports, attacks against U.S. military installations, U.S. warships, embassies and business interests of the United States and Israel. Specifically included were hotels holding conferences of VIPs, military barracks, petroleum targets and information/technology centers. As part of the training, scenarios were developed that included all of these targets.

Ressam, who was not a member of al Qaeda, has stated that the cells were independent, but were given lists of the types of targets that were approved and were initiated into the doctrine of the international Jihad. Ressam explicitly noted that his own terrorism attack did not have bin Laden's blessing or his money, but he believed it would have been given had he asked for it. He did state that bin Laden urged more operations within the United States.

The International Jihad

We believe the suicide hijackers of September 11, 2001 acted in support of the 1998 fatwa which, in turn describes what we believe is the international jihad. During 1997 UBL described the "international jihad" as follows:

> "The influence of the Afghan jihad on the Islamic world was so great and it necessitates that people should rise above many of their differences and unite their efforts against their enemy. Today, the nation is interacting well by uniting their efforts through jihad against the U.S. which has in collaboration with the Israeli government led the ferocious campaign against the Islamic world in occupying the holy sites of the Muslims. . . .[A]ny act of aggression against any of this land of a span of the hand measure makes it a duty for Muslims to send a sufficient number of their sons to fight off that aggression."

In May of 1988, UBL gave an interview in which he stated "God willing, you will see our work on the news. . . ." The following August the East African embassy bombings occurred. That was bin Laden speaking, but it should be remembered that the call to harm America is not limited to al Qaeda. Shortly after September 11 Mullah Omar said "the plan [to destroy America] is going ahead and God willing it is being implemented. . . ." Sheikh Ikrama Sabri, a Palestinian Mufti, said in a radio sermon in 1997, "Oh Allah, destroy America, her agents, and her allies! Cast them into their own traps, and cover the White House with black!" Ali Khameine'i, in 1998, said "The American regime is the enemy of [Iran's] Islamic government and our revolution." There are many other examples, but the lesson to be drawn is that al Qaeda is but one faction of a larger and very amorphous radical anti-western network that uses al Qaeda members as well as others sympathetic to al Qaeda's ideas or that share common hatreds.

Information from a variety of sources repeatedly carries the theme from Islamic radicals that expresses the opinion that we just don't get it. Terrorists world-wide speak of jihad and wonder why the western world is focused on groups rather than on the concepts that make them a community. One place to look at the phenomenon of the "international jihad" is the web. Like many other groups, Muslim extremists have found the Internet to be a convenient tool for spreading propaganda and helpful hints for their followers around the world. Web sites calling for jihad, or holy war, against the West are not uncommon.

One of the larger jihad-related Internet offers primers including "How Can I Train Myself for Jihad." Traffic on this site, which is available in more than a dozen languages, increased 10-fold following the attacks, according to a spokesman for the site.

The lesson to be taken from this is that al Qaeda is far less a large organization than a facilitator, sometimes orchestrator, of Islamic militants around the globe. These militants are linked by ideas and goals, not by organizational structure. The intent is establishment of a state, or states ruled by Islamic law and free of western influence. Bin Laden's contribution to the Islamic jihad is a creature of the modern world. He has spawned a global network of individuals with common, radical ideas, kept alive through modern communications and sustained through forged documents and money laundering activities on a global scale. While some may consider

extremist Islam to be in retreat at the moment, its roots run deep and exceedingly wide. Those roots take many forms, one of which is the focus of this hearing.

In the final analysis, the International Jihad movement is comprised of dedicated individuals committed to establishing the umma through terrorist means. Many of these are persons who attended university together, trained in the camps together, traveled together. Al Qaeda and the international terrorists remain focused on the United States as their primary target. The United States and its allies, to include law enforcement and intelligence components world-wide have had an impact on the terrorists, but they are adapting to changing circumstances. Speaking solely from an operational perspective, investigation of these individuals who have no clear connection to organized terrorism, or tenuous ties to multiple organizations, is becoming increasingly difficult.

The current FISA statute has served the nation well, but the International Jihad Movement demonstrates the need to consider whether a different formulation is needed to address the contemporary terrorism problem. While I cannot discuss specific cases in a public hearing, the FBI has encountered individuals who cannot be sufficiently linked to a terrorist group or organization as required by FISA. The FBI greatly appreciates the Committee's consideration of this issue and looks forward to working with the Committee to find the best approach for appropriate investigation of such individuals.

STATEMENT OF MARION E. "SPIKE" BOWMAN, DEPUTY GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

Mr. BOWMAN. I'm from the FBI, sir. I have a prepared statement which has been furnished to your staff. So in the interest of economy of time, I'd like to pick up on some brief comments that explain some of the operational problems that the FBI sees in terrorism investigations these days.

Chairman GRAHAM. Mr. Bowman, could you pull the microphone—yes, thank you.

Mr. BOWMAN. I'd like to thank Senator Kyl because he's said a number of the things that I was planning to say. So I'll pick up briefly from some of the things where Senator Kyl left off. Senator Kyl is quite correct in saying that things have changed over the last couple of decades and the phenomenon that we see today in terrorism is not the same phenomenon that we saw 20-some years ago. It's absolutely correct to say that we focused FISA and our investigations around individuals who belong to groups, identifiable groups. Usually they were larger ones that we could name.

Through the years we started seeing smaller and smaller groups of individuals. But about three or four years ago we began to increasingly notice that we were focused on individuals who were doing suspicious things, who looked to us as if they had the makings of terrorists but who did not seem to have any particular allegiance to a group. And we sort of looked at this and traced it back and with your permission, Senator, I'd like to explain where we think some of this is coming from.

We believe that a lot of the problem that we see today stems from the Afghan-Soviet war when anywhere from 10,000 to 25,000 Muslims from 43 different countries went to Afghanistan to fight against a vastly superior—technologically superior—force there. And the training that they received there was primarily guerilla training, terrorist type tactics. They also received a lot of religious instruction and terrorist training camps that we're familiar with today were begun at that time.

The war, of course, did end and when those thousands of Muslims returned to their home countries they went back with a lot of training they hadn't had before and with a lot of understanding of a Muslim brotherhood—a community that went beyond the idea of nationalism—that they took back with them. They also took back with them some of the successes that they had in Afghanistan in fighting a vastly superior force and those successes came about through guerilla and terrorist tactics. It wasn't too hard to convince or to explain how successful those tactics were to a number of other dissatisfied persons in the countries they went back to, people who began to believe that that kind of tactic would be a better way for them to develop a better life, to avoid the Western sentiments and so forth that they thought were invading their countries.

If I fast forward now to the year 2002 or actually back around 1999 or 2000, we began to see this spreading out at the edges and we began to see it spreading into the United States as well, to the point that what we had was very much a—I hesitate to say a "movement"—probably a better description is a "network" of individuals who had learned to work together, who had learned terrorist tactics together, who had traveled together, some were edu-

cated together, and they began to spread their ideas throughout an extremist community.

That extremist community eventually made its way into the United States and whereas not too many years ago virtually all of the terrorists that we looked at were affiliated with known organizations or smaller organizations that we could identify, that has begun to change, to the point that today we see essentially three categories of individual that we look at as a terrorist suspect.

The first and still probably the largest is the individual who is associated with some kind of group that we can identify, that we can see. The second is the individual who seems to have connections to a number of groups that we understand, but who owes allegiance to none of them that we can see. And the third is the individual who does not seem to have any allegiance to anyone or at least none that we can spot.

As to the first category of individual, FISA works very well. As to the second category, we have a great deal of trouble trying to understand if the person actually is affiliated with one of the groups that he seems to have contact with, or whether he is just one of the persons who is part of a network of dissatisfied extremists. And as to the third individual, we have no possibility at the moment under the current FISA statute of effectively targeting him because we don't have any kind of affiliation for a foreign power.

That's the situation that the FBI sees today in investigating terrorists. I will leave the rest of my comments for you in the record, you have that now, and I would be happy to take any questions that anybody has. But I think first you probably want to hear from the Department of Justice.

Chairman GRAHAM. Mr. Baker.

[The prepared statement of Mr. Baker follows:]

Department of Justice

STATEMENT

OF

JAMES A. BAKER
COUNSEL FOR INTELLIGENCE POLICY

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

CONCERNING

PROPOSALS TO AMEND
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

PRESENTED ON

JULY 31, 2002

Statement for the Record
of
James A. Baker, Counsel for Intelligence Policy, Department of Justice
Before
The Senate Select Committee on Intelligence
July 31, 2002

I thank the Chairman and Vice-Chairman for inviting me here today to testify on proposals to amend the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. secs. 1801-1811 and 1821-1829, as amended (FISA or the Act).

Introduction

As Counsel for Intelligence Policy in the Department of Justice, I run the Office of Intelligence Policy and Review that prepares and presents all applications for electronic surveillance and physical search under the Act to the Foreign Intelligence Surveillance Court (FISA Court or Court). In that capacity, and operating within a system created and modified by Congress, I welcome the chance to provide the views of the Department on the nature and impact of the changes that have been proposed.

Let me first, however, report in this open forum what, in more detail, we have reported to our oversight committees on the Hill: Congress, in enacting the USA PATRIOT Act, Pub. L. 107-56 (2001), and the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108 (2001), provided the Administration with important new tools that it has used regularly, and effectively, in its war on terrorism. The reforms in those measures have affected every single application made by the Department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going "up" on those suspected terrorists in the United States. One simple but important change that Congress made was to lengthen the time period for us to bring to court applications in support of Attorney General-authorized emergency FISAs. This modification has allowed us to make full and effective use of FISA's pre-existing emergency provisions to ensure that the government acts swiftly to respond to terrorist threats. Again, we are grateful for the tools Congress provided us last fall for the fight against terrorism. Thank you.

I now turn to the two legislative proposals under consideration by your Committee, S. 2586 and S. 2659. You have heard/will hear from my colleague from the FBI on operational developments that may bear upon your consideration of these two proposals; I will provide the Department's legal assessment of S. 2586. As I believe the Committee is already aware, I am unable at this time to provide such an assessment of S. 2659 as introduced or in versions that have been presented to us informally.

S. 2586

The Administration supports S. 2586. This legislation would amend Section 101(a)(4) of FISA, 50 U.S.C. sec. 1801(a)(4), to permit FISA coverage of "any person other than a United States person" engaged in international terrorism or activities in preparation therefor. Current law enables coverage of such an individual only if the Government can establish probable cause that he is an agent or member of an international terrorist organization.

The reforms of FISA in the USA PATRIOT Act and in last year's Intelligence Authorization Act all improved *how* we obtain and retain coverage of international terrorists and other targets defined in section 101 of FISA. S. 2586 would slightly change *who,* under the definitions of that section, can be covered under FISA.

The FBI will describe/has described complications that have occurred in the structures and patterns of international terrorism in past years. The planning by actual international terrorist groups may occur overseas and make it difficult for the FBI to connect an individual terrorist to his group abroad; the communication among international terrorists -- as actual close-knit groups or loose associations -- has become sophisticated and made identities and affiliations more difficult to determine; and the specter of freelancers, sympathizers and volunteers without any "agency" relationship with an international terrorist organization seems very real.

Moreover, a single international terrorist -- with or without the support of an international terrorist group -- can cause grave damage: One person can plant a bomb on an airplane; one person can send anthrax through the mail; one person can assassinate our political leaders; and one person can attack and kill U.S. intelligence officers.

S. 2586 takes account these changes in the structures and dynamics of international terrorism and enables us to meet this type of threat. The bill would, upon a finding by the FISA Court of probable cause that a non-U.S. person is engaged in international terrorism or in preparations therefor, extend coverage under FISA to include that non-U.S. person.

The Department has concluded that S. 2586 is constitutional. The extension of FISA to include an individual, non-U.S. person international terrorist would add only a modest, though vital, increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The governmental interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

In sum, the Administration believes that S. 2586 would be a constitutional and useful reform of FISA that reflects the changes in the structures and patterns of international terrorism

that have occurred in recent years. It is a small change in the *who* of FISA and a complement to the more comprehensive reforms in the *how* of that Act that the Congress passed last fall.

S. 2659

S. 2659 as introduced would, for FISA coverage of non-U.S. persons, amend Sections 105(a)(3) and 304(a)(3) of FISA, 50 U.S.C. secs. 1805(a)(3) and 1824(a)(3), to change the standard required for FISA surveillance or search from "probable cause" to "reasonable suspicion." Under S. 2659, in other words, the court could authorize electronic surveillance or physical search of a non-U.S. person upon facts constituting "reasonable suspicion" that (1) the non-U.S. person targeted is an agent of a foreign power, and (2) the facilities, places, premises, or property against which electronic surveillance or search is to be directed is used or about to be used by the target. Conforming changes would be made elsewhere in the sections of FISA. Authority for electronic surveillance or physical search of U.S. persons would remain at the current "probable cause" standard.

The Department of Justice has been studying Sen. DeWine's proposed legislation. Because the proposed change raises both significant legal and practical issues, the Administration is still in the process of evaluating this legislation.

Conclusion

In the meantime, I thank the Committee for the opportunity to present the views of the Department on the proposals before it today. Your consideration of these bills is a part of your continuing efforts to support this Nation's war against terrorism. We have appreciated the close oversight of Members and staff of the your Committee in these critical matters and the proposals that your attention and expertise have generated.

Once again, I want to express the gratitude of my office and of the Department for the tools you have given us to use in our Nation's war against terrorism. I would be pleased to answer any questions you may have in this forum or, if appropriate, in closed session. Thank you.

STATEMENT OF JAMES A. BAKER, COUNSEL FOR INTELLIGENCE POLICY, DEPARTMENT OF JUSTICE

Mr. BAKER. Thank you, Senator. I also have submitted a written statement for the record and I would just like to briefly summarize a few of the points that are set forth in the written statement that I have submitted.

I am the counsel for intelligence policy at the Department of Justice and head of the Office of Intelligence Policy and Review, which is the office that prepares and presents to the Foreign Intelligence Surveillance Court, the FISA Court, all the applications under the FISA Act for electronic surveillance and physical search of foreign powers and their agents. We are operating under a statute and in a system created and modified by Congress and we execute the laws as they have been set forth by Congress.

Let me just make a comment generally with respect to the changes that Congress made in the Patriot Act and the Intelligence Authorization Act for 2002. The administration has made full and effective use, I believe, of those changes and the changes set forth in those statutes have affected every application that has gone to the FISA Court since the Act became effective.

In my view, the changes have allowed us to move more quickly and more effectively and to also be more focused in our approach in dealing with the kinds of threats that Mr. Bowman made reference to. So we at the Department are grateful for the changes that Congress made in the statute, because I believe they've been important and have been employed effectively.

I'd now like to turn briefly to the two proposals that are before the Committee, S. 2586 and S. 2659. Those have been summarized already by others and I won't seek to repeat that, Senator. My statement makes more extensive comments on that, but let me just make a few comments, at least starting with respect to S. 2586, the Kyl-Schumer bill that amends the definition of a foreign power to include foreign individuals, non-U.S. persons who are engaged in international terrorism or activities in preparation therefor.

In our view, this a change that is warranted by the facts that Mr. Bowman set forth and it is a relatively modest change that affects who would be subject to electronic surveillance under FISA, the Patroit Act and the Intelligence Authorization Act, affect how we go about obtaining FISA orders and the procedures for that. And this is really the first change in who is covered under FISA.

As Mr. Bowman discussed and I think is fairly self-evident in these times, a single terrorist can present a huge threat to the United States' national security and can do things such as attack an airplane with a bomb or put anthrax in the mail, both of which represent great threats to the national security of the United States.

The Department has reviewed the proposed bill and has concluded that it is constitutional, that the extension of FISA to include individual non-U.S. person targets is within the Constitution and is a relatively modest extension of the already existing provisions of the Act which could cover and were initially intended to cover groups as small as two or three people, so this is an extension from two or three people to one person and for the reasons Mr.

Bowman set forth we think it is a legitimate and important and useful reform of FISA.

With respect to the provisions in S. 2659, this is the provision that would change the standard with respect to non-U.S. persons from probable cause to reasonable suspicion and the Department has been studying Senator DeWine's proposal. But because the proposed change raises both significant legal and practical issues, the Administration is still in the process of evaluating the legislation.

In the meantime, I'd like to thank the Committee for the opportunity to be here today and to do whatever I can to support your efforts in the nation's war against terrorism. And I would be pleased to answer any questions to the extent I can in an open session or, if necessary, in a closed session. Thank you, Senator.

Chairman GRAHAM. Thank you very much, Mr. Baker.

Mr. Manget.

[The prepared statement of Mr. Manget follows:]

Opening Remarks
before the
Select Committee on Intelligence of the
United States Senate
by
Frederic F. Manget
Deputy General Counsel
Central Intelligence Agency

31 July 2002

For over twenty years, the Foreign Intelligence Surveillance Act (FISA) has defined how the Intelligence Community conducts electronic surveillance – and, for nearly a decade, physical searches – that target spies, terrorists, and other individuals of foreign intelligence interest operating within the United States. Since FISA's enactment, however, these targets and their means of communication have changed. Intelligence Community collection efforts are increasingly challenged by the shifting nature of intelligence targets. Sensible amendments to FISA will forward Intelligence Community efforts to collect crucial foreign intelligence against these nimble targets.

Mr. Chairman . . . Mr. Vice-Chairman . . . I would like to thank the Committee for its swift legislative action in the wake of the heinous terrorist attacks of September 11, 2001. Legislation introduced by the Chairman, considered by this Committee, and ultimately included in the USA PATRIOT Act ~~of 2001~~, removed artificial statutory barriers to law enforcement information sharing with the Intelligence Community and clarified the authorities of the DCI

with respect to FISA. The USA PATRIOT Act enhanced the ability of intelligence to coordinate with law enforcement and, consistent with the protection of the civil liberties of U.S. persons, improved the ability to collect foreign intelligence under FISA. I appreciate the opportunity to represent the DCI as this Committee considers two pending bills that also propose sensible amendments to FISA.

- S. 2586 – proposed by Senators Schumer and Kyl – would amend FISA to permit targeting of foreign nationals engaged in international terrorism or activities in preparation for international terrorism, even without evidence that the foreign national is operating as an agent of a foreign group, such as al-Qa'ida.
- S. 2659 – proposed by Senator DeWine – would lower the burden of proof for securing a FISA order against a foreign national from "probable cause" to "reasonable suspicion".

Both these bills would increase the ability of the U.S. Government to collect information concerning foreign nationals of foreign intelligence interest within the United States. Through access to the intelligence collected under these proposed authorities, the Intelligence Community would be better able to inform the decisions of policy makers and war fighters. The DCI generally supports statutory changes that – consistent with the Constitution – would enhance our ability to use FISA as a collection tool and to prevent potential terrorist attacks. We have reviewed and support the changes proposed in S. 2586; however, the Administration is still studying S. 2659 and is not prepared to take a position on that bill. In addition, we would defer to the Department of Justice for the final Constitutional analysis of both bills.

Terrorists who would harm this nation should not be able to conduct their activities under

the protective cloak of unnecessarily restrictive FISA requirements that have not kept pace with changes in the nature of our enemies. Balancing the civil liberties of U.S. persons against the President's Constitutional authorities to protect national security was the overriding concern of Congress when the FISA was passed. These amendments would refine this delicate balance to better account for current operational realities without damaging important privacy equities of Americans. It is my understanding that the Department of Justice believes the amendment proposed by S. 2586 conforms to Constitutional principles; however, I am not aware that they have reached a decision on the potential Constitutional impact of S. 2659.

Thank you, again, for the opportunity to testify regarding these proposals. We look forward to working with the Administration and Congress to discuss these and other needed improvements to intelligence capabilities – carefully balancing the interests of national security with the privacy rights guaranteed by the Constitution.

STATEMENT OF FREDERIC F. MANGET, DEPUTY GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Mr. MANGET. Thank you, Mr. Chairman.

For over 20 years, the Foreign Intelligence Surveillance Act has defined how the intelligence community conducts electronic surveillance and, for nearly a decade, physical searches that target spies, terrorists and other individuals of foreign intelligence interest operating within the United States. Since FISA enactment, however, these targets and their means of communication have changed. Intelligence community collection efforts are increasingly challenged by the shifting nature of intelligence targets. Sensible amendments to FISA will forward intelligence community efforts to collect crucial foreign intelligence against these nimble targets.

Mr. Chairman, I would like to thank the Committee for a swift legislative action in the wake of the terrorist attacks of September 11th. Legislation introduced by the chairman, considered by this Committee and ultimately included in the USA Patriot Act, removes artificial statutory barriers to law enforcement information-sharing within the intelligence community and clarifies the authorities of the DCI with respect to FISA. The Patriot Act enhanced the ability of the intelligence community to coordinate with law enforcement and, consistent with the protection of civil liberties of U.S. persons, improved the ability to collect foreign intelligence under FISA.

I appreciate the opportunity to represent the DCI as this Committee considers two pending bills that also propose sensible amendments to FISA. Both these bills would increase the ability of the U.S. government to collect information concerning foreign nationals of foreign intelligence interests within the United States. Through access to the intelligence collected under these proposed authorities, the intelligence community will be better able to inform the decisions of policymakers and warfighters. The DCI generally supports statutory changes that, consistent with the Constitution, would enhance our ability to use FISA as a collection tool and to prevent potential terrorist attacks.

We have reviewed and support the changes proposed in S.2586. We understand the Administration is still studying S.2659 and is not prepared to take a final position on that bill. In addition, we would defer to our colleagues in the Department of Justice about the final constitutional analysis but, in general, we agree with the current review. Terrorists who would harm this nation should not be able to conduct their activities under the protective cloak of unnecessarily restrictive FISA requirements that have not kept pace with the change in the nature of our enemies.

Balancing the civil liberties of U.S. persons against the President's constitutional authority to protect national security was the overriding concern of Congress when FISA was passed. These amendments would refine this delicate balance to better account for current operational realities without damaging important privacy equities of Americans. It's my understanding that the Department of Justice believes the amendment proposed by S.2586 conforms to constitutional principles and we certainly agree with that.

Thank you again for the opportunity to testify regarding these proposals and we look forward to working with the Administration

and the Committee and the Congress to discuss these and other needed improvements to intelligence capabilities, carefully balancing the interests of national security with the privacy rights guaranteed by the Constitution.

Thank you, Mr. Chairman. I'll be glad to discuss any further questions or information.

Chairman GRAHAM. Thank you very much. I have a few questions. We will follow the five-minute question round using the first to question being the first to arrive and so that will be Senator Kyl, Senator DeWine and Senator Feinstein, in that order.

With the foreign power requirement eliminated from the FISA legislation and with the two remaining requirements being engaged in international terrorism or preparing to engage in international terrorism, could a standard criminal wiretap be used to collect information against these persons without the use of FISA? I would ask that question of Mr. Baker and Mr. Bowman.

Mr. BOWMAN. Well, what you are looking for, what you need as a predicate for FISA and for a Title III are two different things. In the Title III, you have to have a criminal act or a preparation for a criminal act.

Chairman GRAHAM. Is not international terrorism a criminal act?

Mr. BOWMAN. Yes, sir. It would be a criminal act if it's carried out. So if you have enough information to show that you have an individual who is preparing to engage in a criminal act, then a criminal wiretap would most likely be available to you.

Chairman GRAHAM. What are the implications of proceeding against the same person on the same set of facts through FISA as opposed to Article III?

Mr. BOWMAN. Well, that's a very interesting question, Senator. The purpose for Title III is to get a prosecution. The purpose for FISA is to gain information. And the implications are historically, from a case law perspective, are that you have to be careful that you are not using an intelligence technique in order to gain criminal information for prosecution. It's not necessarily the case, in my opinion—and this is my opinion, sir—that you really have to separate them because your purposes may be entirely different. You may have a purpose of foreign intelligence and a purpose of criminal law in looking at any particular individual or circumstance, and they can both stand, I think, on their own merits.

Chairman GRAHAM. Any other comments on that question?

Mr. BAKER. Senator, I guess would say in my experience when you're trying to prevent terrorist acts, that is really what FISA was intended to do and it was written with that in mind. The standards that are set forth in there and the practical realities of how you operate a FISA are better suited, in my view, to being able to understand the nature of a particular threat and then to be able to try to prevent it. FISA, in my experience, in practice is a highly flexible statute and has proven effective in this area. And so to my mind it is a better tool to use in these cases, it seems to me.

Chairman GRAHAM. Mr. Manget, I'd like to ask a general question which affects the context in which the two bills we're considering today will be evaluated. In the USA Patriot Act, section 901 strengthened the role of the DCI—not in his capacity as Director of the Central Intelligence Agency but, rather, in his community-

wide responsibilities—giving him some additional authority in terms of prioritizing the uses of FISA and then disseminating the information which was gathered from a FISA wiretap. Could you describe what progress has been made by the DCI in terms of implementing these provisions?

Mr. MANGET. Yes, Mr. Chairman. In fact, I believe we have a classified staff briefing set up for tomorrow to go into further detail. But I can certainly say that the vigor with which the FISA tool is being used and coordinated most effectively, and most especially with the FBI, is unprecedented, higher than anyone can remember, driven certainly by the events of September 11th, but also by the new authorities.

The Director has, in effect, ordered the coordination through the centers which are organized at the agency with a DCI authority to bring in people from different parts of the agency and different parts of the community to, in effect, direct all resources and targeting decisions, and FISA is an important part of that.

As you know, Mr. Chairman, we have extensive crossassignments of FBI special agents with agency officers in the two counterterrorist operations, and they communicate on a daily basis. We have received, I can say—and probably tomorrow you'll get the exact number—a great deal of disseminations already from the FBI from FISA operations. And certainly the consensus at the center, which is the action arm directed by the DCI to carry this out for terrorism purposes, they're very happy with the progress being made to coordinate FISA direction, collection and dissemination.

Chairman GRAHAM. Thank you.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. Just to follow up one more aspect of the question the Chairman asked, is it true that another reason or one of the main reasons to use FISA is the fact that you can protect classified information?

Mr. BOWMAN. Yes sir.

Senator KYL. Much more easily than in a Title III situation?

Mr. BOWMAN. Yes, sir. And a terrorism investigation historically leads to—it's fairly broad because normally it leads from one person to another, one organization to another. And so it's imperative that, first of all, what we are doing be kept confidential.

Secondly, a lot of the information that we receive for this does come from other classified sources, so the ability to handle the classified aspects of information in FISA is absolutely critical to effective investigations of terrorism.

Senator KYL. And just to reiterate, it is still necessary—instead of showing that there is a crime or the planning of a crime that justifies going to the court to get a warrant here, you're telling the court that you are looking at a situation of international terrorism and that is what opens the door in effect to ask the court for a FISA warrant . Is that correct?

Mr. BOWMAN. That's correct, sir.

Senator KYL. And let me—and this is another question for Mr. Bowman—there has been a criticism that changing this FISA standard will exacerbate the FBI's analysis problem by flooding an

overloaded system with lower quality information. How do you respond to that criticism?

Mr. BOWMAN. Well, sir, the fact of the matter is that we have, as everybody knows, struggled with an analytical problem because our investigations are more or less crisis driven. We are looking at individuals in the United States and our efforts have gone primarily into the investigative part of the Bureau rather than the analytical part. Director Mueller is changing that very rapidly. We are beefing up substantially our ability to analyze what we are getting. We're getting substantial help from the DCI on that, not only with personnel but with training and they're lending their expertise on to how to analyze it. I guess my response to that, sir, is that I can't change the past but I think what we're doing now is the right way for the future.

Senator KYL. Obviously my question was misunderstood or wasn't articulated accurately. What I was trying to say is, are we changing the law by this bill to an extent that it's going to all of a sudden open the floodgates to information flooding into the FBI, to the point that you're not going to be able to handle all of this new information——

Mr. BOWMAN. My apologies.

Senator KYL [continuing]. Given the fact that there was deficiency in the analytical capability in the past?

Mr. BOWMAN. My apologies for misunderstanding you, sir. No, I actually think the answer is no. At this point in time, we're talking about a discrete grouping of people. We're not looking at thousands of people out there. Right now I can't even tell you we're looking at hundreds that fit into the category. But certainly, whatever it is, it's not going to substantially overload the FBI.

Senator KYL. Okay. And a final question and I think, Mr. Baker, probably primarily directed to you, but all three of you certainly can respond. It's actually a two-part question. First of all, do you see any negative or any particular negative impact on civil liberties—and I don't limit it to American citizens, but also to non-Americans who are here in the United States—sufficient to justify a criticism of the bill that the benefits to intelligence interests are not sufficient to justify a negative impact on civil liberties? It's really two part: one, is there really a negative impact on civil liberties; and, second, on balance, is the change that we're making here warranted?

Mr. BAKER. As Mr. Bowman suggested, if we expect that there are cases out there that would fit within this new category, then you would invariably have surveillances of additional targets. So you would be, you know, connecting electronic surveillance and potentially physical search of those targets and that raises all the same kinds of civil liberties questions that FISA does to begin with.

But nevertheless, you would have had—before you get to that point, you would have had a finding by a neutral and detached magistrate, and indeed in this case a sitting federal judge, district court judge, that all of the requirements of the statute are met and that there's probable cause to believe that this individual is engaged in international terrorism activities, or activities in preparation therefor. You also have certifications by the Director of the FBI that this is legitimate for an intelligence purpose and approval

by the Attorney General that the application meets the requirements of the Act. So you would have more surveillances perhaps but they would be done in accordance with all the other provisions of FISA. And FISA, as you know, when it was enacted was designed to carefully balance national security versus individual liberties.

Senator KYL. And—I'm sorry.

Mr. BAKER. I'm sorry. I was going to say the effect is probably not that much greater than already exists. And on balance, given the kinds of threats that we face, it would seem to me that the balance tilts in favor of going forward with the provision.

Senator KYL. And since Senator Feinstein was not here for the statement that you made with respect to constitutionality of the Schumer-Kyl legislation, would you reiterate what you said for her benefit?

Mr. BAKER. Just very briefly and right to the point, the Department's looked at this and it's our determination that the statute is fully constitutional and the Administration supports it.

Senator KYL. Thank you.

Chairman GRAHAM. Thank you.

Senator DeWine.

Senator DEWINE. Mr. Chairman, thank you very much.

Gentlemen, I realize that the Administration is not yet prepared to take a position in regard to the constitutionality of the bill that I have introduced. But in that analysis, don't you start with the proposition that all presidents have in fact asserted that foreign intelligence searches do not actually require a warrant at all? Isn't that the underpinning basis of the law? All presidents have maintained that.

Mr. BOWMAN. Yes, sir. That's accurate.

Senator DEWINE. And so when you analyze this issue, it seems to me, from the Administration's point of view, unless the Administration is going to change its mind on that position—and that's been a position held by Democrat and Republican administrations—a proper analysis of this, as you looked at the warrant requirement of the Fourth Amendment, that you would at least start with that, would you not?

Mr. BOWMAN. We'd certainly start, I think, with the history of national security surveillance under the authority of the executive, yes, sir.

Senator DEWINE. Let me ask maybe a general question and then I can get into a specific question, because I think one of the things that this Committee needs to know and Congress needs to know is what practical effect the two bills would have on the activity that you gentlemen are engaged in every day for this country. Can you tell whether or not there have been cases that were close cases in regard to the probable cause threshold?

Mr. BOWMAN. Yes, sir, there have been.

Senator DEWINE. I assume some come down on one side and some come down on the other.

Mr. BOWMAN. Yes, sir. Under the current statute, some of them are simply too hard. We can't get there. Some of them we have been able with investigation to push it over. Again, it's been one of those things where we take it to the Department of Justice. An

Article III judge looks at it and the ones we've managed to push over, an Article III judge has determined they're okay.

Senator DEWINE. And you'd also agree that reasonable suspicion is a standard that is a somewhat lower standard although it's a standard that has been defined by law. Do you agree with that?

Mr. BOWMAN. Yes, sir.

Senator DEWINE. Let me give you a couple of hypotheticals, if I could and we'll see if you want to tackle these in regard to the Kyl-Schumer amendment and in regard to the DeWine amendment.

Let me start with this one. A philosophy student from Japan comes to the United States and begins purchasing quantities of ammonium nitrate and fuel oil and he also belongs to an obscure religious cult not known to have been involved in terrorist activities before. I think it's pretty clear that Kyl's amendment would change how you approach it. Any comment about how our amendment would? Or maybe those are not enough facts, Mr. Baker, I don't know.

Mr. BAKER. I was going to say, Senator, I think I would be generally reluctant in an open session to discuss hypotheticals, just for concern of what it might reveal. So that would be my sort of gut reaction to dealing with hypotheticals in general, sir.

Senator DEWINE. You and I have had these discussions in closed sessions and we will continue that discussion.

Thank you, Mr. Chairman.

Senator FEINSTEIN [presiding]. I think it's my turn next. I'm inclined to support the Kyl-Schumer bill but as I understand it, gentlemen, in some cases the government can show probable cause that an individual is in fact engaged in international terrorism or preparation for acts of terrorism. But the government may be unable to show that the individual is affiliated with a particular foreign power. And as I understand the bill, the need to show this is reduced. Now, the question is, this solution may well eliminate a fundamental justification for the original FISA legislation that the United States government as a sovereign state should be able to probe the secrets of nations, groups and organizations who are dangerous to its security.

Can we accomplish the same end without impacting the philosophy behind FISA by building into the law the same presumption that we adopt in everyday life for ourselves—that individuals who are planning or engaged in acts of terrorism are almost certainly working with or on behalf of a group, an organization or a nation, no matter how small that group might be. If you have two or three, it is a group. That presumption is in accord with all the open source and classified intelligence I'm familiar with. What would your views be of such a compromise solution?

Mr. BAKER. One thing that leaps to mind, Senator, is I think I would be concerned that still the FBI might be faced with cases where all the evidence seems to indicate in fact that the person was not connected. We might have affirmative evidence indicating that the person was not connected to any group and was a true, quote/unquote, "lone wolf." And even with the presumption in those cases—and they would probably few in number but they would still exist—we would still have the same problem and still perhaps be stymied from being able to go forward on those kinds of cases.

Senator FEINSTEIN. Let me put it a little differently. We're taking two steps here. One, we're eliminating the need to establish the link with a foreign government and, second, we're reducing the burden of proof for the warrant. I wonder, do you all believe that both of those are necessary, or that just the first might work?

Mr. BAKER. Well, the Administration, as I mentioned earlier, has determined that it supports the first bill, the Kyl-Schumer amendment to decouple or delink the requirement that the person be engaged in or be connected to an international terrorist group. But we are still evaluating the second provision in terms of lowering the standard with respect to a non-U.S. person. So for right now we are only prepared to support the first part.

Senator FEINSTEIN. Mr. Chairman, the question that I had was it might be well to do the first and hold up on the second and see how the first functions, and that is the first being the Kyl-Schumer bill, and wait before we lower the burden of proof for the warrant. I don't know if you have a view on that.

But how soon will the Administration have a position on the second?

Mr. BAKER. I'm not sure, Senator. We're moving forward with it. We believe it requires a thorough analysis of all the legal and practical implications of the amendment. So I would hope it would be as soon as possible, Senator.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Chairman GRAHAM [presiding]. Senator Kyl.

Senator KYL. Mr. Chairman, since Senator Feinstein still has a green light, would it be appropriate for me to ask the witnesses a follow-up question to Senator Feinstein's question? I might have misunderstood. But Senator Feinstein may have implied in the question that even the Kyl-Schumer bill was moving away from the underlying philosophy of FISA of a connection to a foreign situation. You do have to have the foreign situation. It is the Foreign Intelligence Surveillance Act. Is it not true that we still retain—in fact, you have to have by probable cause the elements of non-U.S. or foreign persons, number one, and, two, international terrorism, even with the Kyl-Schumer legislation? So that the underlying philosophy of foreign intelligence is still maintained with our amendment; is that not correct?

Mr. BAKER. I think that's right, Senator. If you go back and look at some of the considerations that went into the enactment of FISA in the first place, trying to deal with foreign threats from outside the United States, where the ability of the government to investigate things that are happening outside are more difficult. The types of information that you want to obtain with a foreign intelligence surveillance are different from, say, law enforcement. You are going to be longer range in your scope to try and obtain information to really understand what's going on here and understand the nature of the threat, the focus on prevention, as I mentioned earlier, and the need to protect the sources and methods as you mentioned. All those still exist with respect to your bill and I think those were the same kinds of considerations that were in play when FISA was first enacted.

Chairman GRAHAM. Thank you. I'd like to ask just a couple of concluding questions. In reference to particularly Senator DeWine's

bill, it's been my understanding that a very high percentage of the applications for FISA warrants are in fact granted by the FISA court. Is that correct, and can one of you provide me with what is the statistical level of approval of FISA applications by the court?

Mr. BAKER. Senator, the FISA court has approved all of the applications that the government has submitted to it. There was one exception for sort of a technical reason many years ago but they've all been approved.

Chairman GRAHAM. I don't want to nag about perfection, but one of the concerns is that whenever you are hitting a thousand, that may mean that you're only coming to bat when you have a relatively inept pitcher. And I'm concerned as to whether we're being aggressive enough under the current law in pushing for FISA applications—and the Moussaoui case may be a good example of that—where we might lose one occasionally but we are pushing what we think are the legal limits of what is available under FISA. A, is that a legitimate criticism? Are we being risk-averse. in the requests that are being made? Is Moussaoui an example of that risk averseness, and how would the two pieces of legislation that are being considered today affect that?

Mr. BAKER. Senator, if I could comment on some part of that and then defer to my colleagues, first of all, I see all the FISA applications before they go to the Attorney General and I would submit to you that we are being appropriately aggressive in our use of FISA. I can't say any more in an open session with respect to that but I submit that that is the case.

Secondly, I believe Judge Lamberth, the former presiding judge of the FISA court, has spoken on a couple of occasions in public with respect to the interaction between the court and the Department and I believe, as he said, that they ask questions, they probe, they try to get the nitty gritty of what's going on with the case and ask us for additional information. So there is an interchange between the court and the Department during the process of which additional information is provided to the court to satisfy the court that we are, you know, justified in seeking the coverage that we are.

With respect to the Moussaoui case, I'll defer on that because the Moussaoui matter never made it across the street to my office. So I'd leave my comments at that then, Senator.

Mr. BOWMAN. Senator, I think that one of the things that we have to keep in mind is—well, two things really.

One is when FISA was passed the Congress told us that we should be scrubbing these things very carefully before it ever gets to the Article III judge. And I think that between the intelligence agencies and the Office of Intelligence Policy and Review we have done that. It is not always easy to get an application up to a standard for the court, but we work at them. And we don't just walk away from something because we think we might have a problem. Frankly, it would not bother me a bit to lose a case in front of the FISA court.

But we do work them extremely hard and sometimes, working with Mr. Baker's office and mine, it takes us a fair amount of time to put together a FISA that meets the standard. We are, after all, dealing with persons who are trying to hide their activities and

hide their associations and so forth and sometimes it just takes a little extra gumshoe work on the part of special agents to dig up the information that's necessary. But I don't think it would be fair to say we are risk averse.

Senator DEWINE. Mr. Chairman.

Chairman GRAHAM. Are there any other questions?

Senator DeWine.

Senator DEWINE. Mr. Chairman, I would just like to follow up on that, not with a question but maybe just an additional comment. First of all let me just say, gentlemen, that I appreciate the work that all of you do. This is very, very difficult work. I can't think of anything more important in government that is being done than the work that you are doing, and all of us I know on this Committee appreciate it very much.

The subject of this hearing, though, really is whether or not the law that we have been operating now for better than two decades does in fact need to be changed. Congress on several occasions has made some changes, generally at the request of the Administration, at the request of the Justice Department.

For Congress to exercise its obligation to determine whether or not the law should be changed presents in the case of FISA a unique problem. The problem is that we have, as a country and Congress, created a court that is by definition a secret court. And it's a situation where what you do every day is not done in public. What you do every day is in private. It is unique in our jurisprudence, this ex parte relationship, a relationship that you and the court are going back and forth, you are supplying them information, they are supplying you with direction.

I share Senator Graham's questioning at least about whether or not if you bat 100 percent you are taking enough cases there. I appreciate your answer that you were getting guidance from the court. That does not though answer the question that we have to answer to the American people, and that is whether or not the current law, as it is being interpreted by the court, is protecting the American people. Is it doing what it should be doing? I have no doubt you are following the direction of the court and I have no doubt the court is trying to follow the direction of Congress as they think Congress laid down the law over 20 years ago. But the question that I have is whether or not the court has strayed from that, whether the court is interpreting it differently than we presently today think it should be interpreted, because we have the obligation under our system of justice and our checks and balances to write the law.

So that's the only reason that we are looking very closely at this. It's the reason that I am looking at it and I'm going to continue to do that and continue to try within the confines that we have, where it is difficult to get answers, understandably, in open session, but where it's even difficult to get answers in closed session to find out exactly what is going on inside that court.

And I think it is a matter of national security. And this is one member of this Committee and one Member of Congress that is going to continue to try to get answers because I don't think we can ask our colleagues to vote on any proposed changes, to determine whether any changes are needed at all, unless we have really the

opportunity to know what is going on, better than we do today, inside that court.

Thank you, Mr. Chairman.

Chairman GRAHAM. Are there any other questions of this panel?

Yes, Senator Kyl.

Senator KYL. Mr. Chairman, just not a question but if I think I take one thing from this hearing it kind of started with what Mr. Bowman testified. We have a statute that talks about foreign power and foreign intelligence organizations. And that just isn't the way the world operates any more. We now have a sort of amorphous cause, a philosophical/religious cause out there in the world today with a lot of people of different affiliations supporting to one degree or another that cause and acting in furtherance of that cause. Some of them are tied to each other in different ways, some are not.

But because that's the new circumstance, at a minimum we need to make the change that Senator Schumer and I have suggested to recognize that reality. They no longer get their membership card in an organization and pay their dues, so that's an exaggeration, of course. But they're really not acting, necessarily, on behalf of an organization to which they've ever affiliated or a country but rather on behalf of an idea. And they're probably dealing with some people in connection with that.

But to try to tie all of that up into an organization in some cases simply isn't—not only is it difficult and not possible but it may not be actually the fact, it may not be the case. And that, I think, more than anything, is what really justifies the change that Senator Schumer and I are seeking to make here. And since it clearly, I believe, does fall within the constitutional parameters here, as I said, I hope we can move our legislation quickly.

And I, by the way, am very intrigued by the question that Senator DeWine asked here as well, and I think we need to pursue that as well.

Chairman GRAHAM. Thank you very much, gentlemen. We appreciate your information, your experience and your insights and sharing those with us this afternoon. Thank you.

Panel number two will be Mr. Jerry Berman and Professor Clifford Fishman of Catholic University.

Mr. Berman is currently the Director for the Center for Democracy and Technology. He formerly was chief legislative counsel for the ACLU and helped draft the FISA legislation. He currently serves as the chair of the Advisory Committee to the Internet Caucus.

Professor Fishman is Professor of Law at the Catholic University's Columbus School of Law, where he teaches criminal law, criminal procedure and evidence. A graduate of Columbia University Law School, his professional career includes service as an assistant district attorney in New York, and as chief investigating assistant district attorney in the Special Narcotics Prosecutor's Office of the city of New York. He has extensive trial experience and is a published author on issues of evidence and wire-tapping.

Mr. Berman.

[The prepared statement of Mr. Berman follows:]

07/31 '02 09:39 NO.236 02/05

Amending FISA: The National Security and Privacy Concerns Raised by S.2659 and S.2586

Testimony of Jerry Berman
Executive Director
Center for Democracy and Technology

Senate Select Committee on Intelligence
July 31, 2002

Summary

Mr. Chairman, Mr. Vice-Chairman, members of the Committee, thank you for the opportunity to testify at this hearing in the ongoing and critical exploration of how to improve our nation's antiterrorism efforts while maintaining the free and open society that is the hallmark of our American way of life.

We have been asked to comment on both S.2659 (sponsored by Senator Michael DeWine), a bill to lower the probable cause standard for obtaining terrorism FISA orders applicable to alien residents in the United States, and S.2586 (sponsored by Senator Charles Schumer and Senator Jon Kyl) a bill to designate certain "individuals" as "foreign powers" under FISA.

As a representative of CDT and as someone who worked to draft FISA in 1978, I believe that S. 2659 and S. 2586, however well-intentioned, are unlikely to serve our intelligence interests enough to justify their *negative* impact on civil liberties.

Both create grounds for serious constitutional challenges by defendants in criminal cases if information collected under these warrants are used as evidence in criminal prosecutions. Given the changes made in the USA-PATRIOT, which allows information collected under FISA to be used in criminal prosecutions, we can expect more cases like this

to arise. Constitutional uncertainty is not good for civil liberties, or for a coherent intelligence process.

Even if upheld by the courts, these new FISA provisions will further erode traditional civil liberties. FISA warrants are already a departure from traditional probable cause warrant requirements. FISA secret searches violate our traditional understanding that searches, except in emergencies, require prior notice and service of the warrant. FISA allows wiretaps and searches of homes and offices that may never be disclosed to the target even if based on erroneous or false information. Before we expand FISA, our reasons should be compelling and the case for expansion carefully documented.

The argument that these lower standards apply to aliens ignores the fact that our Bill of Rights protects persons not citizens; that it is important for law enforcement and intelligence agencies to have the trust and cooperation of the communities who will feel most targeted by these changes; and that many of the people aliens communicate with are their U.S. friends and neighbors who will inevitably be included on the tapes and in the files made under these provisions.

Mr. Chairman, making sure there are strong reasons for using intrusive techniques is essential for the preservation of our open society freedoms. In our view, the case for S. 2659 (the reasonable suspicion bill introduced by Senator DeWine) and S. 2586 (the individual as foreign power bill introduced by Senators Schumer and Kyl) has not been made and therefore they should not become law.

- **The problems these bills purport to address are problems of analysis, not problems with FISA's standards. Lowering FISA's standards will exacerbate the analysis problem by flooding an overloaded system with lower quality information.** An emerging lesson from September 11 is the huge problem faced in analyzing the vast information already collected, and changing FISA's probable cause and foreign power requirements would make that problem even worse.

- **Both bills will lead to increased surveillance without adequate judicial oversight.** S. 2586 stands FISA on its head by designating individuals themselves as foreign powers, allowing the secretive and powerful FISA procedures reserved for our nations fights against foreign governments to be turned against individuals acting alone. S. 2659 would allow FISA warrants to issue without probable cause, inevitably leading to more surveillance of both non-US and related US persons. And the public perception, created by the bills, that the US is targeting specific communities will further diminish our intelligence gathering within those communities.
- **Both bills raise serious constitutional questions.** S. 2659 would allow FISA warrants to issue without probable cause; even when applied to non-US persons, FISA's lack of suppression remedies or minimization procedures will lead to more information being gathered about U.S. persons as well; both issues raise constitutional questions. S. 2586 contravenes the very foreign power rationale that underpins FISA, and would provide a backdoor to avoid constitutional protections for individuals. Both are likely to end up in the courts.

Both bills are being considered before the conclusion of this Committee's own important exploration of the intelligence problems surrounding September 11 and ongoing counter-terrorism efforts. At the very least, it is premature to further curtail civil liberties without completing this factual inquiry and reporting on its findings to the American people.

Finally, we believe the Committee needs to hear from other voices before proceeding. Six witnesses have been brought before this committee to testify in support of this bill, but many others would be willing to discuss the serious impacts on privacy, security, and constitutional liberties to give the Committee a more balanced perspective.

Once again, I urge you to be deliberate and measured in your consideration of far-reaching changes to our surveillance laws. We look to working with you, your staff, and members of the Administration to improve out nation's antiterrorism efforts consistent with the Constitution and our American values.

The Center for Democracy and Technology is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values for the new digital

communications media. Our core goals include enhancing privacy protections and preserving the open architecture of the Internet. Among other activities, CDT coordinates the Digital Privacy and Security Working Group (DPSWG), a forum for more than 50 computer, communications, and public interest organizations, companies and associations working on information privacy and security issues.

STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. BERMAN. Thank you. I appreciate again the opportunity to testify before the Senate Select Committee on Intelligence. After many, many hearings 20 years ago or so, I did not expect to be back reviewing and revising and thinking about FISA. But I think it's necessary given our new circumstances and our new war on terrorism and the threats that confront us.

But it is important that we understand the context of how FISA came about and that when we consider changes to it that they be carefully thought about and deliberated and be done with great care. I believe that the two statutes, both the statute proposed by Senator DeWine and the statute proposed by Senator Schumer and Mr. Kyl, we've worked together on many issues, and however well meaning I believe that both statutes raise significant constitutional questions and significant questions about whether they will improve or hinder or make any difference in our intelligence mission as we go forward.

We must understand that even if the courts upheld these proposals that FISA was a major departure from our traditional probable cause law. It was a special court. It's a secret court.

The nine judges are not picked by the 9th Circuit in a lottery; they're picked by the chief justice of the United States Supreme Court. I considered him a conservative jurist, and concerned about national security. So when that court, and how it works, it's very important that we look at it. It's a departure already from probable cause. It's probable cause that you're an agent or a foreign power and you may be engaged in criminal activities, so it's already a reasonable suspicion standard.

I understand that it only covers aliens, and an attempt to limit it to aliens. But there are many aliens in this country, and most of us began as aliens in this country. And it's important that that is a community, that you want to make sure that you're both wanting to make sure to catch the terrorists within it, but you're also asking for a great deal of cooperation from it. And you want to make sure that they don't feel they're under a great and unjustified intelligence net.

The changes are being proposed to deal with—I think we are talking about all across America, and all across the Congress, with the creation of a new Department of Homeland Security, that we need better intelligence analysis. The FBI Director sat up here and said we're three years behind in our information technology, and that we need better analysis, better means and smarter intelligence.

The question is whether the FISA standards, as enacted 25 years ago, are in our way. And my argument is I have—of course, I'm not privileged to the investigation that you're conducting, and I would very much hope that we wait to pass legislation to get the results of that investigation. But there are several factors which would argue that the current, the FISA as existed prior to 9/11 may have been sufficient, but that there are problems elsewhere.

Inspector Rowley came, said they had a guy trying to fly an airplane, you know the facts, without trying to land it. But no one put it together with the facts in Phoenix where 12 Arab foreigners were

trying to learn to fly, or with the President's briefing in August that they were going to use airplanes for sabotage or hijacking purposes, or a memo that was out there from Mr. Kenneth Williams from the radical fundamentalist unit that airplanes and hijackings might be used.

And there was also information from the French, how reliable I do not know, but that Moussaoui was a part of a terrorist organization. If that information existed and had been brought together, why wasn't an application tried? And I have talked to people who say that the problem wasn't the standards, the problem was the failure to bring that information together. And that there was a second problem which is a committee factor running around within the Justice Department, partly brought on by filing false affidavits in a prior case, wanting to have a 1,000 batting average, not liking terrorist cases. Nothing that you change in terms of standards is going to do anything about that.

Let's come back quickly, and I know time is limited, to the standard changes. Creating a lone wolf or individual foreign power turns FISA upside down. It was to study foreign governments, foreign threats, major threats, and it added terrorist organizations because they were a new kind of threat. But they're in there and if you're an agent or connected to them, you're covered.

But to say that an individual is a foreign power turns intelligence upside down, which is trying to connect the dots between organizations and within organizations. I think that if you have information on Moussaoui that doesn't meet a FISA court warrant, you might have met a Title III warrant. But to try and change FISA and lower it by changing that standard I don't think may help you. You still have to prove, as Mr. Kyl pointed out, that the person is engaged in international terrorism activities. And I believe that in 99 percent of the circumstances you are going to have to say that he's a member of a group. So the court is, in looking at an order under the Kyl-Schumer bill, I think, is back in the same place with the Justice Department saying we ain't got the evidence, not without the connections.

And the second point that I would make is that if we put the two together and lowered the standard to reasonable suspicion, as Mr. DeWine proposes, I believe that is clearly unconstitutional. One: the Abel case says the Constitution applies to aliens. The Keith case, which ruled that intelligence—that wiretaps—can be applied to domestic cases said lower standards can be used. But we are talking about a new mixed statute, which is not only intelligence but criminal and can be used for criminal prosecution purposes.

And if the court finds that you're using FISA to get criminal prosecutions, there will be great questioning of the basis on which you gather that information and the Constitution, Fourth Amendment, says "probable cause" and I agree, in final, with the Attorney General said it is the Constitution is getting in our way and that's the point. And that's the point—the Constitution here—and it is in your way.

Thank you very much.

Chairman GRAHAM. Thank you very much, Mr. Berman.

Professor Fishman.

[The prepared statement of Mr. Fishman follows:]

Statement and Memorandum of

Clifford S. Fishman
Professor of Law
The Catholic University of America
Concerning S 2586 and S 2659
July 31, 2002

I thank the Committee for giving me the opportunity to testify today about these two bills.

S. 2586

S. 2586 is a useful proposal which closes a gap in FISA by permitting surveillance of an individual whom the Government can show came to this country to commit an act of terrorism, even if it lacks evidence connecting him to a foreign country, terrorist organization or other group. Even a "lone wolf" might use his phone or computer, for example, to obtain, from innocent people, the information or materials he needs to be able to kill, destroy, and disrupt. S. 2586 would make it easier for the Government to find out whether the suspect is in fact a terrorist -- and if so, to stop him, and identify his accomplices, if any.

As to its constitutionality: I can think of no theory why surveillance that would be lawful where two or more people are suspected, should be unlawful when an evil man is acting alone.

S 2659

S 2659 is more problematic. Currently FISA surveillance is permissible only if the Government has "probable cause" -- the same quality of information required for a search warrant or to make an arrest -- that the target is an agent of a foreign power or international terrorist organization or group. "U.S. persons" would continue to be protected by the probable cause requirement, but only "reasonable suspicion" -- the same quality of information needed to stop someone temporarily, question him and frisk him for weapons – would be needed to tap or bug or search a non-U.S. person.

The bill appears to address the Zacarias Moussaoui case. As we now know, FBI field agents in the midwest suspected well before September 11 that Moussaoui was a terrorist and sought a FISA search warrant, but officials at FBI headquarters turned them down because they concluded the field agents lacked probable cause. If the legal standard had been reasonable suspicion, perhaps the FBI would have gotten the order -- and the outrage of September 11 might have been prevented.

And that is the first and main reason why, despite my qualms, I am for S 2569, because it could significantly help the Government interdict terrorism.

Still, I acknowledge the potential for substantial intrusion into privacy, and that some doubts exist about its constitutionality.

It is a well-established principle that people who are in the United States illegally or only temporarily enjoy somewhat less legal protection than citizens and green card holders. This supports the constitutionality of requiring less information (i.e. only reasonable suspicion) to authorize surveillance of such people than is required to surveil U.S. persons.

We must remember, however, that such electronic surveillance and physical searches inevitably would intrude into the privacy, not only of the "non-U.S. person" who is the target, but of many "U.S. persons" as well -- anyone the target talks to on the phone, shares space with or communicates with by computer, depending on the kind of surveillance. Until now the law has not permitted that degree of intrusion without a search warrant (or "interception order") supported by probable cause. Thus, the proposal "boldly goes where no law has gone before."

I support S 2659 for a second reason: it reduces the likelihood that courts will be tempted to "define probable cause down" to help fight terrorism. Theoretically, "probable cause" means the same thing -- a "fair probability" that evidence of wrongdoing will be uncovered -- regardless of what the authorities are looking for -- a single marijuana cigarette, a video cassette shoplifted from a local store, or evidence of a conspiracy to blow up buildings or poison an entire city. But it is simple common sense that a judge will view the Government's showing more liberally in the latter situation. (If there is anyone in the room who volunteers to be the judge who turns down a warrant that could prevent the next September 11, please raise your hand.)

But if judges take a more liberal approach to defining "probable cause" in terrorism investigations, this could spill over into probable cause determinations in a normal law enforcement context -- which might have a more serious impact on privacy than the creation of the narrow, tightly tailored exception to the probable cause requirement proposed in S. 2659.

I support S. 2659 for a third reason: I am confident that existing legal protections and practical, pragmatic considerations provide sufficient guarantees against excessive, wide-ranging invasion of privacy. The primary legal protection is FISA's "minimization" provision: investigators are required to minimize the interception, retention or distribution of evidence that does not reveal foreign intelligence information or evidence of crime. And from a pragmatic and practical perspective, the Government lacks the resources or the desire to engage in broad, wholesale surveillance of non-U.S. persons.

In sum, despite my reservations, I believe S. 2659 is a sound proposal and will ultimately be upheld as constitutional, because it is narrowly tailored to fit a compelling need, and because it passes the ultimate constitutional test: the surveillance authorized by the proposal is "reasonable" under the circumstances.

Thank you.

Clifford S. Fishman
Professor of Law
The Catholic University of America
202-219-5026
Fishman@law.cua.edu

CLIFFORD S. FISHMAN

The Columbus School of Law
Catholic University of America
Washington, D.C. 20064
202-635-5140

14403 Pecan Drive
Rockville, Md 20853
301-871-6162

EDUCATION

Juris Doctor (cum laude) Columbia University Law School, New York, New York (1969).

Bachelor of Arts, University of Rochester, Rochester, N.Y. (1966)

BAR MEMBERSHIPS

United States Supreme Court; Maryland; District of Columbia; United States Court of Appeals for the District of Columbia Circuit; United States Court of Appeals for the Second Circuit; United States District Courts for the Eastern and Southern Districts of New York, and for the District of Columbia.

SUMMARY OF PROFESSIONAL EXPERIENCE

Current position, July, 1977 to present: Professor of Law, Columbus School of Law, The Catholic University of America. Courses taught: Criminal Procedure, Evidence, Criminal Law.

1990-1991: consultant, United States Department of Justice, on matters relating to HIV and the criminal law.

1984-1986: consultant, President's Commission on Organized Crime, on matters relating to electronic surveillance.

1969-1977: eight years as a prosecutor in New York City; extensive jury and non-jury litigation; supervised and conducted several multi-agency (city, state, federal) investigations; wrote and supervised execution of thirty-five eavesdropping warrants; responsible for administration, management and legal training of forty-attorney prosecutor's office.

EMPLOYMENT HISTORY

Present position: since 1977 I have been a Professor of Law, Columbus School of Law, The Catholic University of America. Courses taught: evidence; criminal law; criminal procedure; administration of criminal justice; professional responsibility. Concurrently with teaching, I occasionally take court assignments to represent indigent defendants (in which capacity I complain bitterly about prosecutors doing to me what I delighted in doing to defense attorneys when the shoe was on the other foot), consult (pro bono) with Justice Department officials and staff of the Senate Judiciary Committee on matters relating to criminal justice, and have testified before subcommittees of the House and Senate Judiciary Committees.

August, 1969-July, 1977: Assistant District Attorney in the New York County District Attorney's Office, serving under District Attorneys Hogan, Kuh and Morgenthau, and in New York City's Special Narcotics Prosecutor's Office.

As an Assistant District Attorney I tried dozens of jury trials; wrote and supervised the execution of more than thirty interception (wiretapping and eavesdropping) orders; wrote search warrants leading to the seizure of untold quantities of heroin, cocaine, and marijuana (not to mention a 200-pound bog of peat moss); and also oversaw the purchase of the most expensive kilogram of pancake mix in the history of American law enforcement.

During this period, I served as Executive Assistant District Attorney, Special Narcotics Prosecutor's Office, New York City, where I was responsible to the Special Narcotics Prosecutor for management, supervision and training of forty-attorney legal staff; preparation of budgetary requests to city, state and federal agencies; and liaison with other law enforcement agencies.

I also served as Chief Investigating Assistant District Attorney, Special Narcotics Prosecutor's Office. In this capacity I supervised all investigations conducted by the Special Narcotics Prosecutor's Office. I reviewed and approved all applications for interception orders sought by that office; supervised execution of such orders; and oversaw recruitment and utilization of informants, and all grand jury presentations. I served as liaison with District Attorneys' and United States Attorneys' Offices, New York City Police Department, Drug Enforcement Administration and other agencies in multi-agency investigations and prosecutions. I Drafted legislative proposals concerning classification of methadone and marijuana violations and concerning plea bargaining restrictions for the New York State District Attorneys' Association in 1974-1975; and a proposal concerning methadone enacted into law in 1975. Aspects of the plea bargaining proposal were enacted into law in 1976; aspects of the marijuana proposal were enacted into law in 1977.

PUBLICATIONS

1. Treatise, **Wiretapping and Eavesdropping,** 2d edition, Clark, Boardman Callaghan now Westgroup), 1995) (with co-author Anne T. McKenna) (2 volumes). Supplemented annually.

2. **Jones on Evidence (seventh edition),** Lawyers Cooperative Publishing Company/West Group, Rochester, NY (volume 1, 1992; volume 2: 1994; volume 3, 1998; volume 4, 2000; subsequent volumes still to come). Supplemented annually.

3. **A Student's Guide to Hearsay,** 2d ed., Matthew Bender (1999) (first edition was published in 1990).

4. Consent, Credibility and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior, 44 Catholic University Law Review 709 (1995).

5. "Police Trespass and the Fourth Amendment: A Wall in Need of Mending," 22 John Marshall Law Review 795-824 (1989).

6. "Technologically Enhanced Visual Surveillance and the Fourth Amendment: Sophistication, Availability and the Expectation of Privacy," 26 American Criminal Law Review 315-358 (1988).

7 "Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice," 22 Georgia Law Review 1-87 (1987).

8 "Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and the Questions Still Unanswered," 34 Catholic University of America Law Review 277-395 (1985).

9 "Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent," 29 Catholic University of America Law Review 557-596 (1980).

10. "The 'Minimization' Requirement in Electronic Surveillance: Title III, the Fourth Amendment, and the Dread *Scott* Decision," 28 American University Law Review 315-361 (1979).

11. "The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy," 51 St. John's Law Review 41-97 (1977).

12 "Investigative Techniques in Narcotics Law Enforcement" (monograph), prepared for National College of District Attorneys, October, 1976.

STATEMENT OF CLIFFORD S. FISHMAN, PROFESSOR OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA

Mr. FISHMAN. Thank you, Mr. Chairman.

I thank the committee for giving me the opportunity to testify today about these two bills. S. 2586 is a useful proposal which closes a gap in FISA by permitting surveillance of an individual whom the government can show came to this country to commit an act of terrorism even if it lacks evidence connecting him to a foreign country, terrorist organization or other group. Even a lone wolf might use his computer or telephone, for example, to obtain from innocent people the information or materials he needs to be able to kill, destroy or disrupt. S. 2586 would make it easier for the government to find out whether the suspect is in fact a terrorist and, if so, to stop him and to identify his accomplices, if any.

As to its constitutionality, I can think of no theory why surveillance that would be lawful where two or more people are suspected should be unlawful when an evil man is acting alone. And if the committee wishes later, I could spell out the differences in a situation like that between FISA and Title III and why FISA might be necessary even though Title III is available.

S. 2659 is a bit more problematic. Currently FISA surveillance is permissible only if the government has probable cause—the same quality of information required for a search warrant or to make an arrest—that the target is an agent of a foreign power or international terrorist organization or group. U.S. persons would continue to be protected by the probable cause requirement but only reasonable suspicion, the same quality of information needed to stop someone temporarily, question and frisk him for weapons, would be needed to tap or bug or search a non-U.S. person.

The bill appears to address the Zacarias Moussaoui case. As we now know, FBI agents in the field believed they had what was necessary for a FISA warrant. They were turned down by FBI headquarters. If the legal standard had been reasonable suspicion, perhaps the FBI would have gotten the order and the outrage of September 11 might have been prevented. And that is the first and main reason why, despite my qualms, I am in favor of S. 2569 because it could significantly help the government interdict terrorism. Still, I acknowledge the potential for substantial intrusion into privacy that bill presents and that some doubts exist about its constitutionality.

It is a well established principle that people who are in the United States illegally or only temporarily enjoy somewhat less legal protection than citizens and green card holders. This supports the constitutionality of requiring less information—that is, only reasonable suspicion—to authorize surveillance of such people than is required to surveil U.S. persons. But I would want to study the question further. I've been studying and practicing and writing about the Fourth Amendment for 30 years. My gut reaction is that S. 2659 would be constitutional but I'd be much more comfortable if I could study it more extensively before expressing a final opinion.

We must remember moreover that such electronic surveillance and physical searches inevitably would intrude into the privacy not only of the non-U.S. person who was the target but of many U.S.

persons as well—anyone the target talks to on his telephone or shares space with or communicates with by computer, depending upon the type of surveillance. Until now the law has not permitted that degree of intrusion into anyone without a search warrant or interception order based on probable cause. Thus, this proposal boldly goes where no law has gone before.

I support S. 2659 for a second reason. It reduces the likelihood that courts will be tempted to define probable cause down to help fight terrorism. Theoretically, probable cause means the same thing—a "fair probability" that evidence of wrongdoing will be uncovered—regardless of what the authorities are looking for—a single marijuana cigarette, a videocassette shoplifted from a local store or evidence of a conspiracy to blow up buildings or poison an entire city.

But it is simple common sense that a judge will view the government's showing more liberally in the latter situation. If there is anyone here in the room who volunteers to be the judge who turns down a warrant that could prevent the next September 11, please raise your hand. But if judges take a more liberal approach to finding probable cause in terrorism investigations, this could spill over into probable cause determinations in the normal law enforcement context, which might have a more serious impact on privacy than the creation of the narrow, tightly tailored exception to probable cause requirements proposed in S. 2659.

I support S. 2659 for a third reason. I am confident that existing legal protections and practical pragmatic considerations provide sufficient guarantees against excessive wide-ranging invasions of privacy. The primary legal protection is FISA's minimization provision. Investigators are required to minimize the interception, retention or distribution of evidence that does not reveal foreign intelligence information or evidence of crime. And from a pragmatic and practical perspective, the government lacks the resources or the desire to engage in broad wholesale surveillance of non-U.S. persons.

In sum, despite my reservations, I believe S. 2659 is a sound proposal and will ultimately be upheld as constitutional because it is narrowly tailored to fill a compelling need and because it passes the ultimate constitutional test: the surveillance authorized by the proposal is reasonable under the circumstances.

Thank you.

Chairman GRAHAM. Thank you, Professor.

Mr. Berman, if it could be shown to the FISA's court satisfaction under either the current standard or the standard suggested by Senator DeWine that a non-U.S. person is engaging in international terrorist activities or is preparing to do so, what, in your opinion, does the additional requirement in the current FISA law that the person must also be an agent of a foreign tourist group add to the protection of the civil liberties of the potential target?

Mr. BERMAN. What it adds to is, first of all, there is a limitation on whether preparation can be merely First Amendment activity. There is—the question I think is whether we are going to change our intelligence investigative authority away from surveillance of organizations and into surveillance of individuals. And I think that is a major change and it is actually the beginnings of creating a domestic intelligence agency. We've never had one. It is the poten-

tial use of the lower standards for criminal investigative purposes that I am concerned about.

Chairman GRAHAM. Professor Fishman, could you give us your opinion on that question?

Mr. FISHMAN. I don't see any significant deterioration of civil liberties by allowing security officials to go after a lone wolf the way they are now allowed to go after a group of two people.

Mr. BERMAN. Excuse me. Under our——

Chairman GRAHAM. Excuse me.

Mr. BERMAN. I'm sorry.

Chairman GRAHAM. Professor, did you have any further comment?

Mr. FISHMAN. No.

Chairman GRAHAM. Mr. Berman.

Mr. BERMAN. If there's a lone wolf and he's engaged in terrorist activities in the United States, he should be a Title III warrant and he should be investigated by a criminal investigative authority so he can be brought to justice and arrested and stopped from doing a terrorist act. That is what should happen when it's an individual. That is well within the authority of the FBI. It's well within their counterintelligence mission and it's what I think the American public wants to see happen. Why are we changing this into an intelligence focus? What is wrong with the authority of our criminal laws to bring someone to justice and get them off the streets and prosecute them? If you have probable cause of a crime, arrest them.

Chairman GRAHAM. Yes. Mr. Fishman.

Mr. FISHMAN. Quite often, I think Title III would be the way to go in this case. But there are many circumstances in which Title III might not be appropriate. Title III applications and orders are processed in the normal court system. In matters concerning foreign intelligence and antiterrorism, greater security is called for. The FISA court provides that.

FISA and Title III have very different minimization procedures. Under FISA, it is lawful to capture everything and then weed out what is to be retained. Title III, by contrast, generally requires minimizing at the time the communication occurs. If we're talking about national security, the more inclusive approach authorized by FISA is appropriate.

Finally, Title III requires eventual disclosure of the suspect of the fact that an order was obtained and that surveillance was conducted, whether or not any criminal charges are filed against him. Normally, that is as it should be.

Under FISA, by contrast, unless the surveillance results in criminal charges, the target does not have to be notified about the surveillance; and even if charges are brought, the target is entitled to much less information under FISA than under Title III. S. 2586 gives national security officials the option of avoiding any disclosure to the target where national security interests outweigh the importance of bringing criminal charges.

Now, wholesale wiretapping without ever disclosing what's going on clearly does impinge or threaten civil liberties. But I don't think there's any record of that being done regularly under FISA now, nor do I think that is likely to occur if the Kyl-Schumer bill is enacted.

Mr. BERMAN. May I respond for just one moment? I think it's interesting that you propose this in extraordinary circumstances, there may be cases where might what proceed under Title III is of such importance to national security that we ought to track it under FISA when an individual is concerned. That might be an—that's not part of legislation that's pending. It's interesting.

What is also interesting is you don't want to—I think you said, you do not want a routine use of FISA where the normal due process rules of disclosure to an attorney in a case if a prosecution is brought, rules of evidence that apply, minimization is—doesn't apply under FISA—those are extraordinary circumstances and they ought to apply. And particularly if you're beginning to use FISA as a criminal investigative standard, which has happened under the Patriot Act. It now has a dual purpose. And we civil libertarians and I think many of you and the Congress are worried about are we helping our intelligence agencies but also creating a back door around our due process requirements in our criminal justice system.

Chairman GRAHAM. Thank you, Mr. Berman.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

This is a good discussion; I appreciate both of you being here. I especially appreciate Professor Fishman's response to your concern, Mr. Berman, about—I mean, it seemed to me you were kind of attacking the fundamental premise of FISA altogether, that you prefer we just not even have it, if you had your druthers.

Mr. BERMAN. I honestly didn't say that. I helped to draft it and I was very much in support of it.

Senator KYL. So you still think FISA is a good idea then?

Mr. BERMAN. FISA?

Senator KYL. Yes.

Mr. BERMAN. Absolutely.

Senator KYL. Okay. I was beginning to wonder.

Mr. BERMAN. Go back, I got a pen.

Senator KYL. I accept what you say. [Laughter.]

But out by saying that we need better intelligence analysis and that the problem, as Agent Rowley pointed out was a problem of follow-up and so on and the change in statute won't help that, and that's all true. There are many problems, one of which is a substantial change in circumstances about how terrorists operate. So all of the other red herrings, I would assert, are not really relevant to our inquiry here. We have to solve those problems too. But this is another problem we have to solve.

Mr. BERMAN. Let me—may I make——

Senator KYL. Let me just finish because I have a question for you here. You said that the lone wolf aspect of Kyl-Schumer turns FISA upside down, and it changes from a look at an organization to an individual and that's why it changes it upside down. You know, if we said we have to look at the KKK or organizations and we could never look at a Timothy McVeigh, for example, then I think we'd have the analogy in the Title III situation.

But taking it right back to FISA situation, you've got this shoe bomber, Richard Reed. I don't know all the circumstances, we can't discuss them in this situation. But here's a guy who appeared—he

was a non-U.S. person coming from a foreign country, he was obviously intending to blow up an international flight—in other words conducting terrorism, internationally—but I'm not sure that we can connect him up to an organization, a terrorist organization. He attended a mosque in London with a bunch of other shady characters; doesn't necessarily mean that he's connected to a specific organization. Should we be precluded because of those facts from looking at him, where, if we could prove that he was talking to one other guy, then we could look at him? You see, it didn't seem to me that that rationale is a valid one.

Mr. BERMAN. I'm sorry. It doesn't mean when you can't open a FISA investigation or an intelligence investigation that you don't open an investigation. Presumably, our criminal law enforcement people are following around, collecting information.

Senator KYL. Let me be more precise about my question, then. If we are warranted, where there are two or more.

Mr. BERMAN. Yes.

Senator KYL. Under FISA, which you helped to write and support.

Mr. BERMAN. Yes.

Senator KYL. Then why wouldn't we be warranted as long as there has to be probable cause of the international terrorism connection with an individual, not using the FISA process to further investigate him?

Mr. BERMAN. I just think again, it was meant to—the purpose of giving broad search and secret search and very broad authority was to allow intelligence agents to make very serious connections between the members, the purposes of organizations, so it's like organized crime. And it's a very different, far more intrusive investigation and that's why it applies to groups.

And I'm just going to insist on that line, that maybe two or more people, and I might want it to be 10 or more people, but it has a justification in that—because of the leeway that we give to that—those investigations. And I don't think that we're talking about not investigating. We're talking about——

Senator KYL. Using the FISA process.

Mr. BERMAN. We're also talking about the lower you make that process, I think the more you rely on wiretapping.

Senator KYL. What's the rationale for distinguishing between the individual who is doing something just as heinous as the individual talking to a buddy of his about doing that same act?

Mr. BERMAN. I'm making no distinction except in which investigative bucket do you put that.

Senator KYL. I don't think you can make—in other words, if FISA is warranted in the first, I don't understand why FISA is not warranted in the second. Professor Fishman, what's your view on that?

Mr. FISHMAN. As I've said, I think that what the law says is lawful for two or more people ought to be lawful in investigating one person.

Mr. BERMAN. Well, then, we shouldn't have a criminal investigative rule at all. I mean, we just ought to have just a large intelligence investigative operation operating under less than probable cause or evidentiary rules.

Senator KYL. In matters other than in international terrorism?

Mr. BERMAN. The discussion about——

Senator KYL. You don't really believe that, do you? I mean, you are being facetious.

Mr. BERMAN. Excuse me?

Senator KYL. Are you being facetious? Or do you really believe that?

Mr. BERMAN. Believe what?

Senator KYL. That we shouldn't have a Title III situation then.

Mr. BERMAN. No, I believe we should have a Title III situation. But I do believe that the intelligence authority and the intelligence investigations should belong to group organizations. And you can't—I think when people hear that you've defined an individual, that Moussaoui is now a foreign government or a foreign power, that there will be a lot of head scratching by many people who try to think about intelligence investigations and what they're about.

Senator KYL. Professor Fishman.

Mr. FISHMAN. In a safer world I would agree with Mr. Berman. Unfortunately, that's not the world we live in now. We have to take reasonable measures to protect ourselves and our institutions. I think this is a reasonable measure.

Senator KYL. Thank you.

Chairman GRAHAM. Thank you, Senator.

Senator Kyl.

Senator DEWINE. Thank you, Mr. Chairman.

Chairman GRAHAM. I'm sorry, Senator DeWine, I apologize.

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Chairman, I think we've had a very enlightening and very good discussion with two scholars. I'm not sure that I can add a lot. I think that their willingness to engage each other, which always livens things up a little bit and makes our job a lot easier, was very good.

Let me just say that I have been in touch, Mr. Chairman, with Professor Phillip Heymann, a former Deputy Attorney General, who would like to submit testimony for the record in support of S. 2659. That testimony is forthcoming. I would now ask the Chairman to keep the record for a few days so we can accept that testimony.

Chairman GRAHAM. Without objection, so ordered.

[The statement for the record of Mr. Heymann follows:]

HARVARD LAW SCHOOL
522 HAUSER HALL
CAMBRIDGE · MASSACHUSETTS · 02138

PHILIP B. HEYMANN
James Barr Ames Professor of Law
Director of Center for Criminal Justice

TEL (617) 495-3137
FAX (617) 495-1110
e-mail: heymann@law.harvard.edu

August 1, 2002

The Honorable Michael DeWine
U.S. Senate
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator DeWine,

I strongly support an amendment to the Foreign Intelligence Surveillance Act (FISA) to permit intelligence surveillance of non-U.S. persons (i.e. temporary visitors to the United States) on reasonable suspicion that they fall into those categories in the Act which describe international terrorists. This standard – less than "probable cause" – would provide a significant new protection against terrorist activity without interfering with the rights of people permanently living in the United States.

When we have reason to believe someone is "visiting" the United States to engage in terrorism against us, we need to gather information about his plans and associates. There are three options. (1) The FBI can use physical or other forms of less intrusive surveillance for some sustained period in the hope of building enough "probable cause" for a far more promising use of electronic surveillance or physical search under FISA. (2) We can often arrest the visitor for a violation of the immigration laws and question him while in detention. (3) Finally, with the proposed amendment, we could use the FISA statute to discover the plans and associates of any visitor we had good reason to suspect was involved in international terrorism. The first is slow and ineffective, especially if the visitor is careful not to provide additional evidence by hiding his activities while in the United States. The second assumes implausibly that non-coercive interrogation will prove fruitful in most cases and will not dangerously alert colleagues. The third is by far the most promising.

Electronic surveillance is also likely to be far less disruptive of the individual's life than is our present detention of hundreds of suspects on immigration charges. Indeed, the total interference with the visitor's civil liberties is limited. There is very little of the most serious risk: government spying on those seeking to exercise democratic political liberties. The visitor will rarely be playing any role in our democratic process. While he is visiting within the United States, there will be a very real impact on the visitor's privacy rights, but the loss of privacy is temporary and the situation -- visiting a foreign country -- is one where expectations of privacy are low.

In short, if I am correct that a high percentage of the people who pose serious dangers of terrorism within the United States will be visitors or illegal entrants, an ability to monitor their conversations and engage in physical searches with less than probable cause but with reasonable suspicion will discourage terrorist activities, will prove the most useful way to gather information about those activities which are not discouraged, will rarely threaten anyone's political liberties, and will involve a real but only temporary invasion of privacy -- an intrusion far preferable for most visitors to the risks of detention and interrogation.

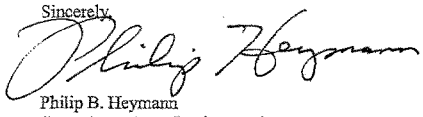
I should add that I fear that public attacks on officials at the FBI or the Department of Justice who correctly apply the present "probable cause" standard, in good faith, to deny FISA surveillance even of a visitor who we have reason to suspect is involved in terrorist activities will discourage and prevent honest and careful review of all requests for FISA surveillance. All the protections that the statute provides to U.S. persons (citizens and resident aliens) will be threatened by public, administrative, and congressional pressure to allow intelligence searches. Honest judgment about "probable cause" in these cases of U.S. persons will be much more likely if a "reasonable suspicion" standard is applicable when the individual is only temporarily in the United States as a visitor, and the danger is very great. By carving out the category I've described, the seriousness of the review of the factual basis for surveillance of citizens and resident aliens is more likely to be insisted on.

Finally, while the matter of constitutionality is far from certain, I believe there is a very good chance that the Supreme Court would sustain the change I've proposed under the reasoning of its decision in the United States vs. Verdugo-Urquidez. The standard

that was applied in that case, to allow the search abroad of the home of an alien in U.S. prison, was whether the alien has "come within the territory of the United States and developed substantial connections with the country." I think the Supreme Court would find that a visiting alien, who was reasonably suspected of coming to the United States to attack it, had not developed the "substantial connections with the country" that is required for full Fourth Amendment protection. Chief Justice Rehnquist wrote for the Court that full protection is only available to "the people" – "a class of persons who are part of a national community." Any challenge to the amendments would be particularly unlikely to succeed in the case of anyone who entered the country without permission.

I would be happy to have this letter treated as my testimony. I am therefore attaching a short resume.

Sincerely,



Philip B. Heymann
James Barr Ames Professor of Law

Cc: Senator Charles Schumer
Senator Jon Kyl

Senator DEWINE. In addition, Mr. Chairman, I would like to submit at this time a letter of support from the National Association of Police Organizations for S. 2659.

Chairman GRAHAM. Without objection, so ordered.

[The statement for the record of the National Association of Police Organizations follows:]

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.
Representing America's Finest
750 First Street, N.E., Suite 920 • Washington, D.C. 20002-4241
(202) 842-4420 • (800) 322-NAPO • (202) 842-4396 FAX
www.napo.org ~ E-mail: napo@erols.com

EXECUTIVE OFFICERS

THOMAS J. SCOTTO
President
Detectives' Endowment Association of New York City

THOMAS J. NEE
Executive Vice President
Boston Police Patrolmen's Association

EDWARD W. GUZDEK
Recording Secretary
Police Conference of New York

JIM THOMPSON
Treasurer
Florida PBA

TED HUNT
Sergeant-at-Arms
Los Angeles Police Protective League

SANDRA J. GRACE
Executive Secretary
New Bedford (MA) Police Union

NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

JULES BERNSTEIN
LINDA LIPSETT
Legislative Consultants

July 30, 2002

The Honorable Mike DeWine
United States Senate
140 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator DeWine:

On behalf of the National Association of Police Organizations (NAPO) representing 220,000 rank-and-file police officers from across the United States, I would like to bring to your attention our wholehearted support for S. 2659. This legislation will amend the Foreign Intelligence Surveillance Act (FISA) by expanding surveillance ability on non-United States persons who are suspected of terrorist activities.

Under current FISA law, the FBI must show probable cause in order to place non-U.S. persons under surveillance if they are under suspicion of terrorist involvement. If enacted, S. 2659 would change the law to require only reasonable suspicion to obtain the same authorization. This legislation would lower the burden the FBI must meet in court to respond to a possible threat while still protecting the checks and balances of the warrant process. This legislation would further give the law enforcement and intelligence community the tools they need to closely monitor non-U.S. persons where there is a reasonable suspicion that they are planning terrorism to harm Americans.

We want to thank you for introducing this important legislation and look forward to working with you to insure the bill's enactment.

Sincerely,

William J. Johnson
Executive Director

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement through legislative and legal advocacy, political action and education. Founded in 1978, NAPO now represents more than 4,000 police unions and associations, 220,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

Senator DEWINE. Thank you very much, Mr. Chairman.

Chairman GRAHAM. Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

I agree this has been very interesting. Let me just kind of informally talk with you for a couple of minutes because it seems to me that when FISA was written the world was very different. The Berlin Wall wasn't down. We were talking about Soviet spies. We were talking about KGB. And the entire intelligence apparatus was extraordinarily different because there there was a direct connection to a government. Senator Kyl, I think, spoke correctly. The world is very different now.

Let me ask you this question, Mr. Berman. Right now—and this is hypothetical—right now in flight schools we learn that there are people who fit the definition of foreign, that one or two of them have visited al-Qa'ida facilities, another might have been a product of a radical madrassa in Peshawar. Should the United States government be able to get a FISA warrant?

Mr. BERMAN. I have a proposal, which is——

Senator FEINSTEIN. No, no, answer my question.

Mr. BERMAN. It's too—give me your example again.

Senator FEINSTEIN. I just gave you the example.

Mr. BERMAN. It's two are at a flight school—I'm sorry, I——

Senator FEINSTEIN. All right, you have a couple of foreigners at a flight school today, and we learn or the government learns about them that one or two of them have visited or been part of an al-Qa'ida training camp.

Mr. BERMAN. Yes.

Senator FEINSTEIN. Should the government be able to get a FISA warrant?

Mr. BERMAN. They should be able to get a FISA warrant.

Senator FEINSTEIN. Supposing you have an individual that's been schooled in a radical fundamentalist madrassa who is in this country trying to buy a precursor chemical, should you be able to get a FISA warrant?

Mr. BERMAN. You may not have enough probable cause because you can't connect him to a group. You may—but you can investigate them. But I don't know whether you'd have enough for probable cause.

Senator FEINSTEIN. See, that's where I think the world has changed, because these are the very threats. You can't prevent it from happening if you can't get enough ahead of it. And that's what the FISA warrant allows you to do that the civil side does not.

Mr. BERMAN. But if we bring the standard down to reasonable suspicion so that we can take care of cases like this——

Senator FEINSTEIN. I'm not talking about that. I'm just talking about the one bill. I'm just talking about the Kyl-Schumer bill, which takes out foreign power, because none of these people are connected to a foreign power.

Mr. BERMAN. But if you look at the definition, this is one of the things that I've been trying to talk over with your experts on your Committee. The definition of a foreign power in this section is someone engaged in international terrorism. And since it falls under the probable cause that someone is a foreign power do you

have to show probable cause that they are engaged in terrorist activity.

Senator FEINSTEIN. Well, of course, isn't that probable cause right then and there? I mean, I think, it's interesting to me that with Moussaoui the Department did not pursue a FISA warrant.

Mr. BERMAN. I'm just saying that——

Senator FEINSTEIN. So they didn't take this step——

Mr. BERMAN [continuing]. If it's probable cause——

Senator FEINSTEIN [continuing]. Because they didn't believe they could satisfy it. It's also very interesting to me that their batting average is so high. I'm amazed at that, which indicates to me they haven't brought all that many warrants, frankly. And I mean if you believe there's a problem out there, and I happen to believe there is a problem out there, I happen to believe there are people that want to——

Mr. BERMAN. Let me just——

Senator FEINSTEIN [continuing]. Wreak terrible damage on American citizens.

Mr. BERMAN. I'm now going to play on the lone wolf side for a second. But what I want to understand is why that changes the analysis that the Justice Department applied to it, which is they needed probable cause that Moussaoui was engaged in international terrorist activities. They said, we didn't have—there's two different stories. And you have the facts. We had probable cause to believe that he was engaged in terrorist activity, but we couldn't tie him to a specific foreign power on our list. There's another side which is that, hey, we just didn't have probable cause, but he was engaged in terrorist activity. All we knew is that he was at a flying school, and we didn't have more.

Why would, if they had to have the evidence of a crime and not just that they could name the group, what evidence—the Schumer-Kyl bill is still requiring evidence that the Justice Department may not have granted—may have said, we don't have the evidence to grant this warrant, even with their change. So would the change change the situation? That's my question to you.

Senator FEINSTEIN. Appreciate that. Mr. Fishman, do you have a comment?

Mr. FISHMAN. I think in a limited number of cases the Kyl-Schumer bill would, in fact, give the government the opportunity to do what it otherwise could not. Take for example the situation of a foreigner who looks like he's trying to put together the same materials as Terry McNichols used to blow up the building in Oklahoma City. He's a foreigner. He's from, let's say, the Mideast. But no evidence connects him to any organization. In that situation one currently now could not use FISA to obtain a surveillance order against him.

And there may be reasons why Title III simply would not be the way to go for the reasons I discussed earlier. So I think that's the sort of rare situation that Kyl-Schumer would, in fact, give the government the opportunity to do what needs to be done that under current law it could not.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Mr. BERMAN. May I ask one more question for your Committee to ask the powers that be?

Senator FEINSTEIN. Sure.

Mr. BERMAN. The standard is agent of a foreign, which is where changing the law in this area—so an agent is now an individual or a foreign power is now an individual is engaged in international terrorism or activities in preparation thereof. In the U.S. section, it says, provided solely that none of that should involve simply First Amendment activities.

The question is, does this pick up a visitor who makes a speech, you know, I hate the United States, in London or in Palestine. They come to the United States. Are they now engaged in international terrorism or activities in preparation thereof and therefore every American that may talk to them on the telephone is now under surveillance or potentially on a watch list?

Senator FEINSTEIN. I don't know if in preparation—I don't think so but I don't know that "in preparation of" means raising money for. If it does, my answer would be, I think, yes. If you're doing that to raise money to commit a terrorist act, I think that's a bona fide issue.

Mr. BERMAN. One thing that was, when FISA was enacted, however it was done, there was—it's a very complicated statute and there was a complicated legislative history to support it. One of the things I found most troubling, not about the changes that have been made in Patriot and so on, although I've got some problems, but the unwillingness where there are hard questions of this Justice Department to be willing to state in legislative history what they mean about certain things so that courts and reviewers can look at it. This opposition to legislative history leaves you with a plain text definition, which is very unsatisfying in very complicated policy areas like this.

I would urge a legislative history accompanying any legislation that you mark.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Chairman GRAHAM. I'd like to ask another question relative to Senator DeWine's bill. What is the practical difference in what the requesting agency, the FBI for instance, would have to show in order to be able to meet the current standard of probable cause or the standard that's being suggested, which is reasonable suspicion?

Mr. FISHMAN. We're talking about shades of gray, Senator. It's difficult to define other than if you've studied the cases enough, you develop an instinct for what satisfies which standard and which does not. That's not a satisfactory answer, I realize. Probable cause is a darker shade of gray than reasonable suspicion. That's the best answer I can give. It's not a good answer at all.

Chairman GRAHAM. Let's say if this were a 100-yard track and probable cause to get to the end would require you to get to 80, where would reasonable suspicion—how close is reasonable suspicion? Is it a 60 or is it a 78?

Mr. FISHMAN. I'd say it's probably closer to 30 or 35.

Chairman GRAHAM. It's that far below probable cause?

Mr. FISHMAN. We're talking abstractions but all that reasonable suspicion requires is the officer has to be able to say, this is what I've seen, this is what I've learned. Applying my experience and expertise, this is why I suspect this person might be about to do something wrong. Probable cause requires a fair probability that

something illegal is being done or incriminating evidence will be found. "Fair probability" sounds like it means "more probable than not." But it does not mean that. It means less than preponderance of the evidence. That's the difficulty.

It's fascinating. Probable cause, that phrase, is in the Constitution. Several Supreme Court decisions and tens of thousands of lower court decisions have focused on probable cause since the Fourth Amendment was ratified. Yet we still don't know for sure what it means. The best the Supreme Court has come up with is, based on all the circumstances, is there a fair probability of criminality or that incriminating evidence will be found. That's the best the courts have come up with.

Mr. BERMAN. It has a kind of Stevens talking about pornography quality to it. We know it when we see it, but I think it's—Terry or reasonable suspicion has been we have enough to make a Fourth Amendment intrusion, which means we stop, frisk, look around. But that's based a lot on appearances and informant information and so on. In order to conduct a more intrusive search—home, telephone—we want something more concrete and articulable than just the facts and circumstances which say, I think a crime is happening. We think that it has to be facts which say, we are reasonably not certain, but we have reasonable grounds to believe that if we keep pursuing, we are going to find the crime is real.

Mr. FISHMAN. The reason the Supreme Court more or less invented the reasonable suspicion test in Terry is because the police procedure involved in Terry, "stop and frisk," is much less intrusive than the types of procedures normally requiring probable cause. A stop or a frisk, a brief questioning, a patdown, however upsetting it is to the individual, is nowhere as intrusive as a search of the home or an arrest, or a search of a person's pockets and so on.

What's unusual, perhaps even radical, about Senator DeWine's proposal is that it would take the reasonable suspicion standard and apply it to an extremely intrusive form of surveillance. There's nothing more intrusive than surreptitious electronic surveillance of communications. It would be a radical change from the current state of the law. I think it would nonetheless be upheld as constitutional because it is very tightly drawn and because of necessity in which we find ourselves, given the sick and dangerous world that we exist in. But it clearly is a significant departure from the entire range of reasonable suspicion jurisprudence the Supreme Court has given us to date.

Mr. BERMAN. And my last comment, if it's the last comment, is that I don't think a case has been made how this standard if applied, would put us in any real different factual circumstances than we were in the cases that we're looking at. And if you can't show a major pay-off, why risk the constitutional uncertainty and increase the pool of people that may end up on a watch list, and we don't know where we're going with all of this, how far the intrusion is going to be, whether you're going to be stopped, whether you're going to be searched, whether you're going to be followed. I understand our country is under a serious threat but the pressure on civil liberties is also going to be serious and we want to maintain that balance.

Chairman GRAHAM. Senator Kyl.

Senator DeWine.

Senator DEWINE. Just a follow-up, if I could. Mr. Fishman, you have pointed out in your testimony that under our bill we are talking about non-U.S. persons. We're not talking about U.S. citizens. We're not talking about resident aliens, legal resident aliens. We are talking about non-U.S. persons. And you've also in your testimony—Mr. Berman disagrees with you in his written testimony—have said that the courts have made some distinction between the way non-U.S. persons and U.S. persons can be treated. Is that correct?

Mr. FISHMAN. Particularly non-U.S. persons who are here unlawfully. Yes.

Senator DEWINE. Unlawfully. Let me, if I could, quote from Terry and ask you if this is—not if it's a correct quote, I'm reading directly from the Supreme Court, but is this the essence of it. If it's not, then you can add something to it.

Mr. Chairman, I think when we look at reasonable suspicion, it is helpful to look at this part of Terry. The court says, "In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion."

Is that basically the essence of it?

Mr. FISHMAN. Yes, Senator. That's the standard that the Court enunciated in Terry and has stuck to ever since. It's not enough to have a hunch. It's not enough to have an inarticulable feeling. There has to be some evidence put together with other circumstances and experience which justify the reasonable suspicion. That's correct.

Senator DEWINE. Then it goes on to say, "It is imperative that the facts be judged against an objective standard. Would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution to believe the action taken was appropriate?"

Mr. FISHMAN. Precisely, Senator.

Senator DEWINE. That it is in fact an objective standard as well?

Mr. FISHMAN. Yes, it is. The Court has insisted on that throughout, yes.

Senator DEWINE. We've finally found, Mr. Chairman, something that both our witnesses can agree on as far as what the law is.

Mr. FISHMAN. Absolutely.

Mr. BERMAN. We agree on that.

Senator KYL. Mr. Chairman, could I just ask one more question.

Chairman GRAHAM. Okay.

Senator KYL. One of the ideas that I originally had—and I'm not proposing this right now because it would require Senator DeWine's concurrence and we haven't had a chance to visit about it—but one possibility here is to take the Kyl-Schumer as one change to reduce the requirement of the organizational connection but maintaining the probable cause requirement to international terrorism. And then flip the coin over and say, however, if you have reasonable suspicion—if you can prove—if there is probable cause to believe that the individual is acting in concert with known terrorists as part of an international terrorist organization or is an agent of a foreign power—in other words, you've got a probable

cause requirement to establish that, which is the existing law—then you could reduce the evidence of the planning to commit or is in the process of committing an act of terrorism to the reasonable standard test that Senator DeWine has suggested.

The idea behind that being that, if you can demonstrate the connection to an agent of a foreign power or to a terrorist organization, then it would warrant a lower standard to get in and find out what's on this person's computer or what's in his home. But if you can't establish by probable cause the connection to the foreign government or terrorist organization, then you're going to have to have the existing probable cause standard.

Mr. FISHMAN. In other words, probable cause of the connection to the group would be enough, plus reasonable suspicion that this particular individual is engaged in terrorist activities?

Senator KYL. Correct.

Mr. BERMAN. There's another formulation of that which if you want to drop the—if you lower the probable cause prong of whether someone is an agent of a foreign power. In other words, we're not sure, rather than playing with the individual versus is a foreign power, then you might raise the evidentiary prong of the second part which is if we don't know, that we don't have probable cause that it's a terrorist group, we have to have something more like probable cause of a crime as a second prong of the test.

Senator KYL. Well, that's exactly what I was saying though. I mean that's the Kyle-Schumer provision. You still have to have the probable cause of the crime or the terrorism, you know, but you don't have to have the probable cause with the connection of the foreign country because maybe there isn't one. But there is still—and I understand the confusion because of the way we're doing this. We're changing a definition and I would agree with you, Mr. Berman, about one thing. It's not done in the most clearcut way. You know, you're your own agent, but you're a foreign person and therefore you could be connected to an act of international terrorism if we can prove that you're engaged in a terrorist activity.

Mr. BERMAN. Right.

Senator KYL. So you get there but you have to connect the dots to get there and I understand that that does make it a little bit more confusing. But, if there is no probable cause nexus to foreign government or terrorist organization, then it seems to me that our bill is warranted, that you can focus on the individual but would have to have probable cause of the act of terrorism. Whereas, if you can make that connection to the foreign country or terrorist organization, then that would warrant you in applying a lesser standard—the DeWine standard—with respect to the terrorist activity that you're focused on. Wouldn't that be a possible way to approach this?

Mr. BERMAN. I'd like to meet and talk about what we mean here because I've always read the second prong of the statute as a quasi-reasonable suspicion standard already. It is probable cause to believe that you are an agent of a foreign power and then it is who may be engaging in terrorism or activities. It's not who is—where we have probable cause to believe that he is engaged.

Senator KYL. See, I think you're correct and that's why I don't think that Senator DeWine's change really does that much damage

to the intent of FISA to begin with. Do you have any comment on that, Mr. Fishman?

Mr. BERMAN. You don't want to say it that—you want to make sure that it does some—if it doesn't affect the statute then——

Senator KYL. Then why proceed, is what you're saying, yes?

Mr. FISHMAN. I hate to come on like a law professor but what can I do? That's what I am. I'd feel much more comfortable looking at the language rather than giving an off-the-cuff reaction, although it's an intriguing idea.

Senator KYL. That's fair. Thank you, Mr. Chairman.

Chairman GRAHAM. Are there any further questions?

Again, I want to thank both of you. I share the opinion that's been expressed by the Members of the value of having two thoughtful, knowledgeable individuals give us the benefit of their evaluation of the other's comments. That helps to sharpen the issue, for which we are both appreciative and the beneficiary.

If there's no further discussion or questions, this hearing is closed.

[Whereupon, at 4:33 p.m., the hearing was adjourned.]

○