

ORAL STATEMENT OF  
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U.S. DEPARTMENT OF JUSTICE

CONCERNING THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

BEFORE THE SENATE JUDICIARY COMMITTEE

OCTOBER 31, 2007

Chairman Leahy, Ranking Member Specter, and Members of the Committee, thank you for this opportunity to testify. I am proud to be here today to represent the Department of Justice and to discuss this important issue with you.

I'd like to take a few minutes to discuss the following three specific points. I'd like to explain:

- First, why it is I believe Congress should permanently legislate the core provisions of the Protect America Act.
- Second, how it is that we've gone about implementing the Protect America Act with significant oversight mechanisms and congressional reporting.
- And third, what our preliminary views are on the thoughtful bipartisan bill reported out of the Senate Intelligence Committee two weeks ago --The FISA Amendments Act of 2007 (S. 2248).

Before I do that, I'd like to express our appreciation for the attention Congress has given to the issue of FISA modernization. Congress has held numerous hearings and briefings on this issue over the past year or so. That process produced the Protect America Act -- which was a very significant step forward for our national security -- and, in the Senate, it culminated in the bipartisan bill referred to this Committee, S. 2248, which was voted out of the Senate Intelligence Committee on a strong 13-2 vote. We applaud Congress for its initiative on this issue and its willingness to consult with us as it moves forward on FISA modernization.

Protect America Act

Let me turn now to why I believe that the core provisions of the Protect America Act need to be made permanent. The Government's surveillance activities are a critical -- if not the most critical -- part of our investigative effort against international terrorists and other national security threats. By intercepting these communications, we get an insight into their capabilities, their plans and the extent of their networks -- information that is absolutely essential to tracking and disrupting terrorist plots before they ripen into terrorist attacks.

Before the Protect America Act, however, our surveillance capabilities were significantly impaired by the outdated legal framework in the FISA statute. FISA established a regime of court review for our foreign intelligence surveillance activities, but not for all such activities.

The court review process that Congress designed in 1978 applied primarily to surveillance activities within the United States -- where privacy interests are the most pronounced -- and not to overseas surveillance against foreign targets -- where cognizable privacy interests are minimal or non-existent.

While this construct worked at first, with the vast changes in telecommunications technology in the last 29 years a good number of our surveillance activities directed at persons overseas -- which were not originally intended to fall within FISA -- became subject to FISA, requiring us to seek court authorization before initiating surveillance and effectively conferring quasi-constitutional protections on terrorist suspects and other national security targets overseas -- a process that significantly and increasingly hampered our intelligence collection efforts over the past 29 years.

Over that same period, we were facing an increasing threat from Al Qaeda and other international terrorists, and it was the combination of those two factors -- the expanding burden of the FISA process and the increasing threat -- that brought us to the point where we needed to update FISA. In April of this year, the DNI submitted to Congress a comprehensive proposal to modernize the FISA statute. As the summer progressed, Congress recognized the immediate need to address the rising threat environment and passed the Protect America Act in early August, clarifying that overseas surveillances are not subject to FISA court review. Within days, we implemented the new authority, and the DNI has announced that we have filled the intelligence gaps that were caused by FISA's outdated provisions.

#### Implementation of the Protect America Act

We have recognized from the moment the Protect America Act was passed that Congress would reauthorize this authority only if we could demonstrate to you and the American public that we can -- and will -- exercise this authority responsibly and conscientiously. To that end, we imposed oversight upon ourselves that is well beyond that required by the statute, and we committed to congressional reporting substantially beyond the requirements of the statute. In the process, we have established a track record of our responsible use and implementation of the Protect America Act -- a track record that provides solid grounds for Congress to permanently reauthorize the authority.

Against that backdrop, the Senate Intelligence Committee recently voted out S. 2248 on a bipartisan 13-2 vote. While we are still reviewing it, we believe it is a balanced bill that includes many sound provisions. It would allow our intelligence professionals to collect foreign intelligence against targets located outside the United States without obtaining prior court approval, and it provides retroactive immunity to electronic communication service providers that assisted the Government in the aftermath of September 11<sup>th</sup>. We believe this immunity provision is necessary -- both as a matter of fundamental fairness to those providers that stepped up to assist us and as a way of ensuring that providers will continue to provide vital cooperation in our surveillance efforts. The bill also remedies the possible over breadth concerns that some had regarding the Protect America Act, and it includes significant oversight mechanisms and Congressional reporting requirements. We therefore are optimistic that S. 2248 will lead to a bill the President can sign.

We do, however, have concerns with certain provisions in S. 2248 – in particular, the bill’s sunset provision and the provision that would extend the role of the FISA Court outside our borders by requiring a court order when we need to surveil a United States person who is acting as an agent of a foreign power outside the United States. We look forward to working with this Committee and Congress to address those concerns and to seize this historic opportunity to achieve lasting FISA reform that will improve our ability to protect both our country and our civil liberties.

Thank you again for the opportunity to appear before you. I look forward to answering your questions.

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