Department of Justice

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STATEMENT

BY

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BEFORE

THE SENATE SELECT COMMITTEE ON INTELLIGENCE

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DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, D.C.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to testify in support of S. 3197, a bill that would authorize applications for court orders approving the use of electronic surveillance to obtain foreign intelligence information. I want to express, as I have in my previous testimony on the bill, the great significance which I believe the bill to have. As I am sure you know, the bill's provisions have evolved, from the initiative of the President, through bipartisan cooperation and through discussion between the Executive Branch and Members of Congress, in an effort to identify and serve the public interest. Enactment of the bill will, I believe, provide major assurance to the public that electronic surveillance will be used in the United States for foreign intelligence purposes pursuant to carefully drawn legislative standards and procedures. The bill ensures accountability for official action. It compels the Executive to scrutinize such action at regular intervals. And it requires independent review at a critical point by a detached and neutral magistrate.

In providing statutory standards and procedures to govern the use of electronic surveillance for foreign intelligence purposes in this country and in establishing critical safeguards to protect individual rights, the bill also ensures that the President will be able to obtain information essential to protection of the Nation against foreign threats. While guarding against abuses in the future, it succeeds, I trust, in avoiding the kind of

reaction against abuses of the past that focuses solely on these abuses, but is careless of other compelling interests. To go in that direction would bring a new instability and peril. In the area of foreign intelligence, the avoidance of such cycles of reaction is the special responsibility of this Committee. I know you are deeply conscious of this responsibility; I know you are aware that it demands the most dispassionate attention, the most scrupulous care.

I believe that I can best serve the Committee's consideration of the bill by addressing certain concerns about its central provisions that I know have been expressed. At the outset, however, it may be useful for me to describe, in briefest form, the bill's design and purpose.

S.3197 provides for the designation by the Chief Justice of seven district court judges, to whom the Attorney General, if he is authorized by the President to do so, may make application for an order approving electronic surveillance within the United States for foreign intelligence purposes. The judge may grant such an order only if he finds that there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power, and if a Presidential appointee confirmed by the Senate has certified that the information sought is indeed foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. Such surveillances may not continue longer than 90 days without securing renewed approval from the court. There is an emergency provision in the bill which is available in situations in which there is no possibility of

preparing the necessary papers for the court's review in time to obtain the information sought in the surveillance. In such circumstances the Attorney General may authorize the use of electronic surveillance for a period of no more than 24 hours. The Attorney General would be required to notify a judge at the time of the authorization that such a decision has been made and to submit an application to the judge within 24 hours. Finally, the Attorney General must report annually both to the Congress and the Administrative Office of the United States Courts statistics on electronic surveillance pursuant to the bill's procedures.

As I said in my statement to the Senate and House Judiciary Subcommittees, the standards and procedures of the proposed bill are not a response to a presumed constitutional warrant requirement applicable to domestic surveillances conducted for foreign intelligence purposes. Two circuit courts have held that the Fourth Amendment's warrant requirement does not apply to this area; the Supreme Court in the Keith case, and the District of Columbia Circuit in its Zweibon decision, despite broad dicta among its several opinions, have specifically reserved the question. The bill responds then, not to constitutional necessity, but to the need for the branches of Government to work together to overcome the fragmentation of the present law among the areas of legislation, judicial decisions, and administrative action, and to achieve the coherence, stability and clarity in the law and practice that alone can assure necessary protection of the Nation's safety and of individual rights. After thirty-six years in which succeeding Presidents

have thought some use of this technique was essential, I believe the time has come when Congress and the Executive together can take much-needed steps to give clarity and coherence to a great part of the law in this area, the part of the law that concerns domestic electronic surveillance of foreign powers and their agents for foreign intelligence purposes. To bring greater coherence to this field, one must, of course, build on the thoughts and experiences of the past; to give reasonable recognition, as the judicial decisions in general have done, to the confidentiality, judgments and discretion that the President's constitutional responsibilities require; to give legislative form to the standards and procedures that experience suggests, and to provide added assurance by adapting a judicial warrant procedure to the unique characteristics of this area.

The standards and procedures contained in the bill, particularly its provision for prior judicial approval, draw upon the traditional criminal law enforcement search warrant model, the pattern followed in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The bill's provisions necessarily reflect, however, the distinct national interest that foreign intelligence surveillances are intended to serve. The primary purpose of such surveillances is not to obtain evidence for criminal prosecution, although that may be the result in some cases. The purpose, instead, is to obtain information concerning the actions of foreign powers and their agents in this country--information that may often be critical to the protection of the Nation from foreign threats. But while the

departures from the criminal law enforcement model reflect this distinct national interest, they are limited so that there are safeguards for individual rights which do not now exist in statutory form. The bill is based on a belief that it is possible to achieve an accommodation that both protects individual rights and allows the obtaining of information necessary to the Nation's safety. As Justice Powell said in the Keith case: "Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."

The bill allows foreign intelligence surveillance only of persons who there is probable cause to believe are agents of a foreign power. Moreover, the agency must be of a particular kind, directly related to the kinds of foreign power activities in which the Government has a legitimate foreign intelligence interest. Thus, persons--not citizens or resident aliens--are deemed agents only if they are officers or employees of a foreign power. The standard is much higher for a citizen or resident alien. For the purpose of this bill, a citizen or resident alien can be found to be an agent only if there is probable cause to believe that the person is acting "pursuant to the direction of a foreign power," and "is engaged in clandestine intelligence activities,

sabotage, or terrorist activities, or who conspires with, or knowingly aids or abets such a person in engaging in such activities." Perhaps I should say to the committee that an earlier draft of the bill was not phrased in terms of clandestine intelligence activities, but rather in terms of the somewhat simpler term "spying." Whatever phrase is used, in combination with the clause "pursuant to the direction of a foreign power", is intended to convey the requirement that there is probable cause to believe that the target of the surveillance is indeed a secret agent who operates as part of the foreign intelligence network of a foreign power. It is at this crucial point that the judge must be satisfied before he gives permission for the surveillance.

I understand that there have been suggestions to the Committee that electronic surveillance of citizens and permanent resident aliens should not be allowed absent a determination that such persons are violating federal law. My own view is that the concept of "foreign agent" safely cannot be limited in this way. As I noted in a letter to Senator Kennedy, most of the activities that would, under the bill, allow surveillance of citizens and resident aliens, constitute federal crimes; other foreign agent activities -- for example, foreign espionage to acquire technical data about industrial processes or knowledge about foreign personnel and facilities in this country -- do not constitute federal crimes. Yet information about the latter activities may be vital to the national interest, not because

the activities are or should be criminal, but because they are undertaken clandestinely within the United States "pursuant to the direction of a foreign power," the standard employed in the bill.

The point is critical. I realize it has been suggested that federal criminal statutes could be broadened sufficiently to reach all clandestine activities of foreign agents covered by the bill's standard. Of course doing so would in no way limit the bill's reach. More important, any such effort would be based on a fundamental misconception. The purpose of criminalization, and of prosecutions for crime, is to deter certain activities deemed contrary to the public interest. The purpose of foreign intelligence surveillances is, of course, to gain information about the activities of foreign agents, not so much because those activities are dangerous in themselves -- although they almost always are -- but because they provide knowledge about the hostile actions and intentions and capabilities of foreign powers, knowledge vital to the safety of the Nation. Indeed, it may be the case, and has been the case on occasions in the past, that such knowledge, provided through monitoring foreign agent activities, is more vital to the Nation's safety than preventing

or deterring the activities through criminal prosecutions. In short, the question, for purposes of properly limiting foreign intelligence surveillances, is not whether activities of foreign agents are now, or should be made, criminal offenses, but rather whether the activities are such that knowledge of them, gained through carefully restricted and controlled means, is essential to protection from foreign threats. While the answers to these two questions have a high correlation, the correlation is by no means necessarily complete.

I know that a certain discomfort comes in departing from the criminal law model of allowing searches only to obtain evidence of crime. But the probable cause and reasonableness standards of the Fourth Amendment are not measured exclusively by the interest in detecting and thus deterring violations of criminal law. Searches for purposes other than criminal law enforcement historically have been permissible, if reasonable in light of the circumstances and the governmental interest involved. Information concerning the activities of foreign agents engaged

in intelligence, espionage or sabotage activities is a valid--indeed a vital Government interest. I believe that that interest should be the proper standard of permissible surveillances under this legislation.

In addition to requiring that there be probable cause to believe that the subject of proposed surveillance is an agent of a foreign power, the bill also provides that the Assistant to the President for National Security Affairs or another appropriate Executive official appointed by the President and confirmed by the Senate must certify to the court that the information sought and described in the application is foreign intelligence information. Such information is defined in the bill as "information deemed necessary to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power or its agents"; "information, with respect to foreign powers or territories, which because of its importance is deemed essential to (a) the security or national defense of the Nation or (b) to the conduct of the foreign affairs of the United States"; or "information deemed necessary to the ability of the United States to protect the national security against foreign intelligence activities."

I understand it has been suggested to the Committee that the court, in passing on applications for electronic surveillances, should be required to determine whether the information sought is foreign intelligence information as defined in the bill, rather than accepting the certification to that effect by a high Presidential appointee with national security responsibilities.

I think the definition of "foreign intelligence information" contained in the bill itself indicates why this proposal would be unwise. The determination of whether information is or is not foreign intelligence information necessarily will require the exercise of judgment as to degree of importance and need--judgment that must be informed by the most precise knowledge of national defense and foreign relations problems, and accurate perception of legitimate national security needs. Unless judges are to be given a continuing responsibility of an Executive type, with constant access to the range of information necessary, under the proposal,to deal intelligently with the questions they would face, I doubt that the courts generally would be willing to substitute their judgments for those which the Executive already has made. Of course, if mistakes are made, the costs could be incalculable. It must be noted in this connection that, in major part, it was precisely the felt incapacity of the courts to make judgments of this sort, and recognition that responsibility for such judgments properly resides in the Executive, that led the Fifth Circuit in Brown and the Third Circuit in Butenko to conclude that the Fourth Amendment imposes no warrant requirement in this area. Indeed, the proposal could work a result quite the reverse of what its proponents would want. There would be a certain ease in proposing surveillance

if the responsibility for determining its need lay ultimately with the court.

The point cannot be stressed too strongly. As it now stands, the bill places the responsibility for determining need where it belongs--in those officials who have the knowledge, experience, and responsibility to make the judgment, and who have been nominated by the President and confirmed by the Senate to aid in carrying out his constitutional duty to protect the Nation against foreign threats. With such responsibility clearly placed, there comes, in the long term at least, accountability--to the President,of course, but ultimately to the Congress, and to the people. I believe that this protection provided by clearly focused responsibility, when coupled with the probable cause requirement of the bill, a requirement that demands a kind of judgment the courts can responsibly make, ensures reasonable and certain barriers to abuse.

Finally, I want to express my understanding of the bill's section 2528, which deals with the reservation of Presidential Power. The bill's definition of electronic surveillance limits its scope, to gain foreign intelligence information when the target is a foreign power or its agents, to interceptions within the United States. The bill does not purport to cover interceptions of all international communications where, for example, the interception would be accomplished outside of the United States, or, to take another example, a radio transmission does not have both the sender and all intended recipients within the United States. Interception of international communications,

beyond those covered in the bill, involves special problems and circumstances that do not fit the analysis and system this bill would impose. This is not to say that the development of legislative safeguards in the international communications area is impossible. I know it will be extremely difficult and will involve different considerations. I believe it will be unfortunate, therefore, to delay the creation of safeguards in the area with which this bill deals until the attempt is made to cover what is essentially a different area with different problems. An additional reason for the reservation of Presidential power is that, even in the area covered by the bill, it is conceivable that there may be unprecedented, unforeseen circumstances of the utmost danger not contemplated in the legislation in which restrictions unintentionally would bring paralysis where all would regard action as imperative. The Presidential power provision, therefore, simply makes clear that the bill was not intended to affect Presidential powers in areas beyond its scope, including areas which, because of utmost danger, were not contemplated by Congress in its enactment. In the reservation of Presidential power, where the circumstances are beyond the scope or events contemplated in the bill, the bill in no way expands or contracts, confirms or denies, the President's constitutional powers. As the Supreme Court said of Section 2511 (3) of Title III, "Congress simply left Presidential powers where it found them."

In conclusion, I want to emphasize the critical safeguards the bill would erect: clear accountability for official action, scrutiny of the action by Executive officials at regular intervals and prior, independent judgment, as provided, by a detached, neutral magistrate. I believe that the bill's enactment would be a significant accomplishment in the service of the liberty and security of our people.