Testimony of Dr. Morton H. Halperin
Senior Fellow, The Council on Foreign Relations,
and
Chair, Advisory Board, Center for National Security Studies
Before
The United States Senate Judiciary Committee
Subcommittee on the Constitution, Federalism, and Property Rights
U.S. Senator Russell D. Feingold, Chairman
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Mr. Chairman,

It is a very great pleasure for me to appear again before this distinguished sub-committee.

Since the text of the legislation remains a moving target I thought it would be more useful if I stepped back and discussed a few issues in more general terms.

This committee does not have to be reminded that intelligence agencies have in the past abused their authority to spy on and even disrupt lawful political activity under the guise that those protesting the actions of our government were in fact agents of a foreign power. Now we are told that the efforts of Congress to expose those abuses, especially the work of the Church Committee, is somehow responsible for the failure of the CIA to learn about and prevent the tragic acts of September 11. This is an outrageous characterization, both because in a democracy we must be able to discuss abuses of power and discuss how to prevent them, but even more because the Church Committee report did not lead to any legislation limiting the authority of intelligence agencies. In fact, to this day, Congress has not legislated any limits on the ability of the CIA or other intelligence agencies to conduct surveillance in the United States and abroad beyond that initial prohibition in the act creating the CIA that asserted that the CIA would have no internal security functions.

This brings me to FISA which is a grant of authority by the Congress to the President and not a limit on what authority would otherwise exist. Since there is a good deal of confusion about this I want to take a moment to remind the Committee how FISA came about. I speak from having been deeply involved in the process which led to the enactment of FISA.

Until the mid-1970s the executive branch regularly conducted electronic surveillances for "national security" purposes without a court order. It was only after the Supreme Court held that wiretaps were covered by the Fourth Amendment and the scandals revealed by the Church and Pike Committees opened the intelligence agencies to threats of lawsuits and damages that the government reconsidered its position and decided that it needed

congressional authorization to conduct electronic surveillance for national security purposes.

(In the interest of full disclosure, I should note for the record that I was the subject of a 21 month warrantless wiretap of my home telephone from 1969-71. After I and my family filed suit the court found that the surveillance violated our constitutional rights. Reading the governments logs of your private phone calls for an extended period does bring sharply into focus the danger of abuse and the value of privacy).

FISA thus arose from a request from the government for authority to conduct electronic surveillance for national security purposes. The government explained that it could not use Title III procedures for a number of reasons including its desire to gather foreign intelligence information even when no crime was suspected and its unwillingness ever to provide notice that it had conducted a surveillance.

Congress debated long and hard about FISA and enacted legislation that was substantially different from the original draft submitted by the administration with the usual demand that it be enacted immediately and without any changes.

In the end Congress struck a deal with the administration with the support of some civil libertarians including me (I then spoke for the ACLU on these issues). The basic compromise was this: Congress gave the executive branch the authority to conduct electronic surveillance for national security purposes under a lesser standard than the probable cause that it would gather evidence of a crime. Equally important, the government was given permission to keep the surveillance secret and not provide the notice required by Title III when the surveillance ended. In return the government agreed to judicial supervision, and provisions to minimize the interception of non-germane information. Most important, it was agreed that the government would not use the FISA procedures if it was conducting a criminal investigation and would switch to a Title III warrant if it began a criminal investigation.

Subsequently, in 1994 Congress broadened FISA to include physical searches which can be conducted even against the homes of Americans without a warrant, without knock or notice, and without ever informing the person that the government has surreptitiously acquired information from his home. I believe that this provision is clearly unconstitutional and the Supreme Court seems to agree (See Richards v. Wisconsin (1997) holding that a blanket exception allowing no-knock entries for warrants served in drug cases violated the 4th Amendment). But that is for another day. For our purposes, we need to keep in mind that we are talking about the secret searches of the homes of Americans and not just wiretaps of foreign embassies.

It is from this perspective that the proposed amendments to FISA must be examined.

The most disturbing provision in the administration draft bill is the one permitting the government to initiate a FISA surveillance even when the primary purpose of the government is to gather evidence for a criminal prosecution. As I said, FISA authority was

given to the government for situations in which it was not seeking to indict individuals for crimes, but rather to gather information for foreign intelligence purposes. To now permit these procedures to be used in a criminal investigation would almost certainly be unconstitutional and would certainly be dangerous.

Whether the change in the law is from "the" to "a" or to "significant" the result is the same. The Executive would always be able to use FISA to conduct surveillance whenever it believed that the people being surveilled were agents of a foreign power thus circumventing the notice and probable cause requirements of the Fourth Amendment.

Any legitimate problem that the government has in this area can be cured either by explicitly permitting exchanges between law enforcement officials and those conducting a FISA surveillance or by permitting the government to seek two warrants for the same surveillance, as the Senate Intelligence Committee leaders have suggested.

A second problem with the administration bill is the effort to permit the government to get warrants for six months or a year for FISA searches of individuals it suspects are agents of a foreign power as it now has for foreign powers themselves. Here again, some history may help to explain why this provision was written as it was and why it should not be changed.

When FISA was being debated in the Congress the shorter time limits on warrants applied to all targets. The government pointed out that it made no sense to go back so often if the target was, say, the Soviet embassy. And so Congress agreed to permit longer warrants for foreign powers themselves. Now the government seeks to bootstrap using this difference to argue that it should not be required to seek frequent warrants against agents of a foreign power. We need again to recall that the government has been granted the authority to wiretap a person, even an American citizen, or secretly break into his home and surreptitiously remove his papers. It is not too much to ask that the government return regularly to a specially selected judge in a separate court with full security protections to demonstrate that it was right in thinking that the target was an agent of a foreign power engaged in illegal activity.

With the indulgence of the Committee I would like to comment on two other matters raised by the Administration's draft.

The first relates to the provisions which permit the government to share information gathered for law enforcement purposes, including Title III surveillance and grand jury testimony, with intelligence officials. Given the activities of terrorists who operate both in the United States and abroad, I believe that such sharing is appropriate, but I believe it needs to be limited in several ways. First, when the information is gathered under judicial supervision, the court's approval should be required for the transfer. Second, the information transferred should be limited to Foreign Intelligence Information as that term is defined in FISA. Third, the disclosure should be limited to those officials who are directly involved in a terrorism investigation. Finally, the information should be marked and

safeguarded so that these restrictions can be enforced, much as classified information is marked and stored.

Finally, I want to comment on the extraordinary proposal to include disclosure of the names of covert agents in the new list of federal terrorism crimes. This is a speech crime which has no place in this list. I was deeply involved in the development of this statute as well. Again, although the administration, in this case as with FISA, both Democratic and Republican, insisted on immediate action and no changes, Congress deliberated carefully for several years. Before it enacted the statute it insisted on a number of safeguards to insure that it would not prevent the press from publishing information it had acquired by legitimate means. For example, Congress inserted a bar on conspiracy provisions so that a reporter could not be accused of conspiring with a source. This protection and many others would be swept away if this crime remains on the list of federal terrorism crime.

Mr. Chairman, there is an important lesson in the history of the enactment of FISA and the Intelligence Agents Identities Act. It is that if we take both national security and civil liberties seriously, and if we work hard and take the time that we need we can find solutions that protect them. The Congress deserves high praise for not giving in to the administration's demand that it act first and read later in the face of the unbelievable and unfathomable events of September 11. We have gone very far in a very short time from the administration's first draft. With a little more time and a little more give and take, I believe we can arrive at a text which strikes an appropriate balance. I urge you to stay at the task.

I commend the sub-committee for holding this hearing. I appreciate the opportunity to testify and would be pleased to answer your questions.