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on behalf of the
Center for National Security Studies

Before the Permanent Select Committee on Intelligence
of the United States Senate
on

Legislative Proposals in the Wake of the September 11, 2001 Attacks
Including the
Intelligence to Prevent Terrorism Act of 2001, S. 1448

September 24, 2001

Thank you Mr. Chairman and Vice-Chairman for the opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In its work over the years on legislation from the Foreign Intelligence Surveillance Act to the Intelligence Oversight Act, the Center has begun with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

We appear before you today at a time of great mourning, when it is difficult to turn our thoughts and attention from anything but our grief and trouble. And we appreciate the enormous efforts of those individuals who have put their own grief aside to concentrate on searching for survivors, comforting those who have suffered most directly and finding and holding accountable the perpetrators of these crimes.

It is not too soon to begin thinking about how we can improve our ability to prevent such unspeakable events from occurring again. However, as we do so we must resolve to act in a way that protects our liberties as well as our security and which recalls

the lessons of the past from times when we permitted our concerns for security to accept erosions of our liberty that we now regret. The Alien and Sedition Acts, the internment of Japanese Americans, McCarthyism, and the efforts of intelligence agencies and the FBI to disrupt the civil rights and anti-war movements were not our proudest moments. We must not repeat them or lay the seeds for future abuses.

We owe it to all those innocent people who were murdered to reflect upon those basic principles and values which should inform our discussion today. What distinguishes us as a people from our fellow human beings who committed these terrible acts is our commitment to law and to individual freedom. It is a commitment to law made deliberately, with calm reflection and an opportunity for public debate. The genius of democracy is the understanding that in the noisy and seemingly inefficient marketplace of ideas, the wisest decisions will be made. And certainly there is no more important subject than how to protect both our liberty and security most especially at a time like this when both may be so at risk. The American people look to the Members of this Committee to make law as the founders of the Constitution envisaged when they set up this legislative body, after a full public debate informed by facts, analysis and the chance for reflection. We owe nothing less to those who have been killed and to our children born and to be born.

We commend the Chair and the Vice-Chair for their hard work and quick action to outline proposals intended to help prevent such horrific acts in the future and to focus on needed structural reforms in the intelligence community. We are grateful to this committee for holding public hearings and for inviting the Center for National Security Studies to testify. At the same time, we call upon this committee not to precipitously make changes to long-standing rules on some of the most technically complicated and difficult issues before the Congress .

In urging you to proceed calmly and deliberately we speak on behalf of a coalition of more than 140 organizations from all ends of the political spectrum who last week all agreed on a Statement, which reads in part :

IN DEFENSE OF FREEDOM

> This tragedy requires all Americans to examine carefully the steps our country may now take to reduce the risk of future terrorist attacks. We

> need to consider proposals calmly and deliberately with a determination not to erode the liberties and freedoms that are at the core of the American way of life. We need to ensure that actions by our government uphold the principles of a democratic society, accountable government and international law, and that all decisions are taken in a manner consistent with the Constitution. We can, as we have in the past, in times of war and of peace, reconcile the requirements of security with the demands of liberty. We should resist the temptation to enact proposals in the mistaken belief that anything that may be called anti-terrorist will necessarily provide greater security. We must have faith in our democratic system and our Constitution, and in our ability to protect at the same time both the freedom and the security of all Americans

I ask permission, Mr. Chairman to submit for the record as an attachment to my statement the full statement of the In Defense of Freedom coalition and a list of the organizational and individual signers of the statement. The danger of haste is not just to our civil liberties but equally to our security. We face an equal danger that in the understandable rush to do something, what is done will not be effective in making us any safer, that it will substitute for the difficult analysis and work that is needed to figure out just how to prevent such attacks in the future. This is particularly true with regard to widening surveillance of Americans, where extending the net of surveillance, rather than doing the difficult work of trying to figure out who should be targeted, may well lead to information overload, where it will not be possible for the government to distinguish the important from the insignificant.

We have had the Chairman's bill since Saturday morning and the administration's proposals being considered by this committee for two days more than that. We have done our best to provide the Committee with our preliminary analysis of the proposals. But most significantly, we urge you before acting, to hold additional hearings, to obtain in writing the careful analyses needed of what the current authorities are and what changes would be effected by these proposals, why such changes would be useful and what the risks will be. These are very technical and complicated issues, with enormous implications for both civil liberties and our security and we need to act carefully.

If there are specific authorities immediately needed by the current investigators into last week's acts, those authorities could be separated from the rest of the proposals and considered as quickly as possible. But those proposals designed to prevent such

intelligence failures in the future, can only be done wisely and effectively after more is known about the cause of the failure and a public discussion about how to fix them.

On the subject of haste, we welcome the provision that would undo the hasty action of the Senate 10 days ago in repealing the DCI guidelines on recruitment of assets involved in terrorism or other human rights violations. That provision (sec. 815 in the September 13 amendment to H.R. 2500) was apparently based on the misunderstanding that the existing guidelines had prevented the CIA from recruiting terrorist informants, when the guidelines in fact simply required procedures intended to insure that the appropriate high level officials at the agency approved the use of any such informants. They were adopted in response to the report by the President's Intelligence Oversight Board that the CIA had not kept this committee informed as required by law of serious human rights violations. We understand that Section 103 of S. 1448, the Graham-Feinstein bill is intended to override section 815 passed September 13 by specifically authorizing what is already the case, that the CIA may use terrorist informants. We would suggest that the section 103 simply be amended to add that agency officers may do so "pursuant to guidelines or directives issued by the agency."

We have organized our discussion of the proposals before the Committee into three categories:

Changes to the Foreign Intelligence Surveillance Act.

Proposal to allow wiretap evidence obtained overseas in violation of Fourth Amendment standards to be introduced against Americans in US courts; and

Changes to the current authorities of the Director of Central Intelligence and rules regarding sharing of information gathered on Americans with the intelligence community.

I. Proposed changes to the Foreign Intelligence Surveillance Act.

We have attempted to coordinate our testimony with that being presented by the Center for Democracy and Technology. Mr. Berman will provide you with detailed comments on the specific provisions, but since one of us was intimately involved in the lengthy negotiations which led to the enactment of FISA, we wanted to provide you with

some general remarks relating to the structures and purposes of FISA and of the efforts to protect civil liberties while giving the government the authority it needed to conduct electronic surveillance to gather foreign intelligence.

It is important to remember that FISA was a grant of authority to the government to conduct surveillance, which the Supreme Court had held was clearly within the ambit covered by the Fourth Amendment. The Court had suggested that the warrant requirements of the Fourth Amendment might be different in national security matters and Congress and the Administration worked together, with the active involvement of outside groups and scholars, over a period of several years to craft the careful compromise incorporated in FISA.

At the heart of FISA was this trade. Congress would authorize electronic surveillance of foreign powers and their agents within the United States under a standard different and less stringent than required for criminal wiretaps and it would authorize the government never to tell the targets that their conversations were intercepted. In return the government accepted judicial involvement and oversight of the process (carried out in an ex parte rather than adversarial manner however) and a wall to insure that it did not use these procedures to gather information for criminal prosecutions.

Proposals to alter FISA need to be understood in this context. It is not an anomaly that the government has to go back to court more often than under Title III to get authority to continue surveillance of a private person lawfully resident in the United States. Since the person will never be told of the surveillance nor have an opportunity to move to have the surveillance records purged, it is important that a judge check regularly, at least as a surveillance begins, to be sure that the government's suspicion that the person was acting as the agent of a foreign power was correct and that the surveillance was producing foreign intelligence information while minimizing the collection of other information.

We urge you to keep this basic structure in mind as you consider objections to specific provisions. We urge also that you remember the care with which FISA was enacted and maintain the same spirit of skepticism and openness as this committee considers the proposed amendments.

In this connection, it is also important to remember that investigations of terrorism pose particularly difficult problems because of the intersection of First Amendment, Fourth Amendment and national security concerns. Unlike international narcotics investigations, it is important to distinguish between those engaged in criminal terrorist activity and those who may share in the religious or political beliefs of the terrorists, or even their ethnic background, without engaging in any unlawful acts.

Regarding specific proposals on both FISA and changes to other statues permitting national security investigations of financial records and other information, we refer you to Mr. Berman's testimony in addition to our comments below.

Elimination of the primary purpose requirement, Administration bill sec. 153.

We want to stress our concern, as spelled out by Mr. Berman, about the administration's proposal to eviscerate the original premise of the FISA , that its procedures would only be employed when the primary purpose of the surveillance was to gather foreign intelligence. The administration's proposal in section 153 would turn the statutory scheme on its head by allowing the use of FISA surveillance when the government's primary purpose is to bring criminal charges against an individual, a change which we believe would violate basic Fourth Amendment guarantees.

--Duration of authority to conduct surveillance and searches of non-U.S. persons under FISA. Graham –Feinstein bill, sec. 202, Administration bill, sec. 151.

These sections would extend the period allowed for the conduct of FISA surveillance and searches of non-U.S. persons from 90 days and 45 days respectively, to one year for both surveillance and searches. For the reasons outlined above, the current limitations are an integral part of the balance intended to provide judicial supervision of the use of secret wiretaps and secret searches targeted against individuals, who, while not permanent residents or U.S. citizens may well be long-time legal residents and are protected by the Fourth Amendment. The statute currently provides one-year authorization for surveillance and searches of embassies and similar establishments, because the Fourth Amendment does not apply to foreign embassies. If there is some necessity, other than to avoid inconvenience, for longer authorizations for individuals, we would suggest considering an amendment that would allow extended authorizations on a second application if the government made a showing that the initial surveillance or

search did in fact obtain foreign government information. In such a case, the second order could authorize electronic surveillance for an additional six months, rather than the current 90 days, and authorize physical searches for 90 days rather than the currently allowed 45 days.

II. Proposal to allow wiretap evidence obtained overseas in violation of Fourth Amendment standards to be used against Americans in US courts. Administration bill, section 105.

As described by the administration, section 105 of its bill would provide that United States prosecutors may use against American citizens information collected by a foreign government even if the collection would have violated the Fourth Amendment. As the administration points out, as criminal law enforcement becomes more of a global effort, such information will come to play a larger role in federal prosecutions and indeed other provisions of the administration bill would extend the extraterritorial reach of U.S. criminal law to even more crimes than are currently covered today.

Section 105 would for the first time codify the extraordinary view that as the United States works to promote the rule of law throughout the world and to extend the reach of U.S. criminal law, it should leave the Bill of Rights behind. Implicit in this approach is the view that the Constitution is merely an inconvenience to law enforcement rather than acknowledging it as the best instrument yet written to govern the relations of a government to the governed.

Certainly, it is not obvious how to implement the protections of the Fourth Amendment against unreasonable searches and seizures in a new era of global law enforcement. It is an issue that has just begun to be examined by the courts. While a bare majority of the Supreme Court has held that the Fourth Amendment does not apply to the search and seizure of property owned by a nonresident alien and located in a foreign country, (United States v. Verdugo-Urquidez, 494 U.S. 259) it has affirmed that the Fifth and Sixth Amendments do protect Americans overseas. Reid v. Covert, 354 U.S. 1 (1957). The question must also be considered under international human rights law, as it is quite likely that unreasonable searches and seizures that don't meet Fourth

Amendment standards also violate existing human rights treaties signed by the U.S. The question of how to implement Fourth Amendment protections for overseas searches will probably at some point require congressional action, but it is a difficult and complicated issue that cannot be adequately addressed in the context of an emergency response to last week's terror attack.

III. Changes to current law concerning sharing of information on Americans with the intelligence community.

Several provisions of both bills would significantly change current statutory authorities and responsibilities for conducting terrorism investigations involving Americans or other U.S. persons inside the United States. The problem of effective coordination between such investigations and overseas intelligence activities is certainly one of the most important ones before this Committee. It is also one of the most difficult, both in terms of actually insuring effective investigations and making sure that the unintended consequences are not to repeal crucial protections for individual rights.

Since the creation of the CIA in the 1947 National Security Act, there has been an attempt to distinguish between law enforcement, the collection of information on Americans and others to be used in criminal prosecutions of individuals , and foreign intelligence, the collection of information about the plans, intentions and capabilities of foreign governments and organizations. When the CIA was created, its charter specifically prohibited the agency from any "law enforcement or internal security functions" 50 U.S.C. 403-3(d)(1). As was documented in the Church committee report, it was the blurring of the distinction between law enforcement and foreign intelligence national security investigations that led to the abuses by the intelligence agencies outlined in that report. Many of the reforms intended to prevent such abuses from happening again, were explicitly predicated upon recognizing the differences between law enforcement and intelligence, they have different objectives and require different means and different rules should apply in order to protect individual liberties. The most obvious examples are the different rules for criminal wiretaps set out in Title III and for foreign intelligence wiretaps in the Foreign Intelligence Surveillance Act, as well as the two sets of Attorney General guidelines governing FBI investigations, one for General

Crimes, including domestic terrorism, and a different set for Foreign Counter-Intelligence investigations.

At the same time, it has always been recognized that some matters, most particularly internationally-sponsored terrorism and espionage on behalf of foreign powers implicate both law enforcement and foreign intelligence concerns. In the past few years, there has been an increasing number of situations where intelligence and law enforcement interests coincide and there are a substantial number of executive branch regulations, directives, working groups and practices that have been developed to address the myriad specific issues that are involved; for example reconciling the need for intelligence agencies to keep the identities of their human sources a secret with due process requirements that a criminal defendant be informed of the evidence against him and allowed to cross-examine his accusers.

The threat of terrorism obviously requires effective and close coordination between the intelligence community and law enforcement. We welcome these proposals as the first step towards examining whether statutory changes are now needed. However, we urge the Committee to take the time to examine the issue in depth beginning with an analysis of existing rules and practices. Nothing is more central to the protection of the liberties of Americans from the abuses of the past than the distinction between law enforcement and intelligence. The current proposals would be a sea change in laws that have been on the books for 30 years. Before that is done, we urge the Committee to act slowly and deliberately. We would welcome the opportunity to sit down with you and the Judiciary Committee together to work on solutions that will ensure an effective anti-terrorism effort without sacrificing individual liberties.

The specific provisions at issue include the following sections in the Department of Justice draft:

Section 103, repealing the present prohibition on disclosing Title III intercepts of Americans' conversations to the intelligence community, other than the FBI.

Sections 154 and 354 , repealing the present prohibitions on sharing grand jury information and other criminal investigation information with the intelligence community, other than the FBI.

The provisions in the Graham -Feinstein bill on this subject, are much narrower. However, they would also effect an important shift in current responsibilities that needs much more extensive discussion and analysis, before being acted upon. Specifically, Section 101 would shift from the Attorney General to the Director of Central Intelligence the responsibility for determining which Americans should be targeted for FISA surveillance.

Section 102 of the Graham-Feinstein bill would also change the foreign intelligence definitions in the National Security Act of 1947.

This provision would change the definitions in the National Security Act of 1947 so that "international terrorism" is included in the definition of "foreign intelligence" rather than "counterintelligence." While, this may be a wise idea, it requires an extensive reading of the many and various laws and regulations which incorporate the current definitions in the Act to determine what the effect of the change would be, which we have not had an opportunity to do.

Miscellaneous. Sec. 104 Temporary authority to defer reports to Congress.

This seems like a good way to insure that adequate resources may be directed to the September 11 attack while also insuring that the Congress continue to receive the information required by the Intelligence Oversight Act on all intelligence activities. In this connection, we note that paragraph (c) entitled "Exception for Certain Reports" should refer to section 501 of the National Security Act (50 U.S.C.413) as well as to sections 502 and 503(50 U.S.C. secs 413a and 413b).