

STATEMENT OF

**KENNETH L. WAINSTEIN
PARTNER, CADWALADER, WICKERSHAM & TAFT LLP**

BEFORE THE

**SUBCOMMITTEE ON CRIME, TERRORISM
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

CONCERNING

**THE REAUTHORIZATION OF
THE FISA AMENDMENTS ACT**

PRESENTED ON

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Chairman Sensenbrenner, Ranking Member Scott and Members of the Subcommittee, thank you for the invitation to appear before you today. My name is Ken Wainstein, and I'm a partner at the law firm of Cadwalader, Wickersham & Taft. I spent many hours testifying before you and other committees during Congress' deliberations leading to the passage of the FISA Amendments Act in 2008, and it is a particular honor to be back here supporting the Act's reauthorization and discussing the issues it raises with my distinguished fellow panelists.

I. Introduction

Before going into the intricacies of the FISA Amendments Act and its reauthorization, it's important to remind ourselves about the national security threats – and particularly, the threat from international terrorism – that this legislation addresses. Since the attacks of September 11, 2001, we have been at war with Al Qaeda and its terrorist affiliates around the globe, and we're making great progress against them. We have significantly degraded their operational effectiveness with our strike against their leadership, and we have succeeded in preventing a number of recent attack attempts – the best example being the Yemeni bomb plot that was foiled just recently.

While many institutional and operational improvements have contributed to that progress over the past decade, none has been more instrumental than the overall enhancement in our intelligence capabilities. We can see the fruits of that effort regularly in the newspaper. Every successful strike against Al Qaeda leaders happens because we have sound intelligence telling us where and when we can find the targets. And, every plot prevention happens because we now have a developed network of surveillance capabilities, human assets and international partnerships that provides us an insight into our adversaries' planning and operations that we simply did not have before 9/11.

A critical component of our counterterrorism effort – and, for that matter, any investigative effort – is the capability to intercept our adversaries’ communications. From my earliest days as a prosecutor investigating narcotics networks here in the District of Columbia, I learned that electronic surveillance can be a tremendous source of intelligence about the inner workings of a conspiracy. That is particularly true in relation to foreign terrorist groups, where leaders and foot soldiers in different parts of the world have to rely on electronic communication for operational coordination.

In recognition of this fact, much of our intelligence effort since 9/11 has focused on tapping into the communications streams of our terrorist adversaries. The government has taken a number of steps to enhance our electronic surveillance capacity over the past decade – refining our collection technologies and devoting more resources and manpower to the effort. But, the one development that has contributed most to that effort was Congress’ decision to modernize our national security surveillance efforts with the passage of the FISA Amendments Act of 2008.

II. Background of the FISA Amendments Act

In considering reauthorization of the FAA, it is important to remind ourselves why it was necessary to modernize the Foreign Intelligence Surveillance Act in the first place.¹ As you know, FISA was passed in 1978 in the aftermath of the Church Committee hearings which disclosed the flagrant misuse of national security surveillances against dissidents, civil rights groups and other domestic organizations. These revelations persuaded Congress that the Executive should no longer have unilateral authority to conduct domestic national security surveillance and that its use of those surveillance powers should be subject to a process of judicial review and approval.

To effectuate this objective, Congress passed FISA, which established the Foreign Intelligence Surveillance Court – or “FISA Court” – and required by its terms that any “electronic surveillance” of foreign powers or their agents must first be approved by the FISA Court. In crafting this law, however, Congress recognized that it had to balance the need for a judicial review process for domestic surveillance against the government’s need to freely conduct surveillance overseas. It accomplished that objective by clearly distinguishing between surveillances directed against persons located within the United States – where constitutional protections apply – and those directed against persons outside the United States, where the fourth amendment does not apply. It then imposed the court approval requirement on surveillances

¹ For a more comprehensive discussion of the FAA’s background and the operational problems it was designed to address, see my testimony at the following hearings: May 1, 2007 Hearing before the Senate Select Committee on Intelligence Concerning The Need To Bring The Foreign Surveillance Act Into The Modern Era; September 6, 2007 Hearing before the House of Representatives Permanent Select Committee on Intelligence Concerning The Foreign Intelligence Surveillance Act; September 18, 2007 Hearing Before the House of Representatives Committee on the Judiciary Concerning The Foreign Intelligence Surveillance Act; and October 31, 2007 Hearing Before the Senate Committee on the Judiciary Concerning The Foreign Surveillance Intelligence Act.

directed against persons within the United States and left the Intelligence Community free to surveil overseas targets without the undue burden of court process.²

The drafters of FISA built that distinction into the statute through its definition of “electronic surveillance,” which is the statutory term designating the range of surveillance activities that are subject to the court approval requirement. The statute required the examination of a number of factors – such as location of target, location of interception and nationality of target – in determining whether a particular surveillance falls within that definition and the coverage of the statute. Among those factors was the type of communications technology being used by the target – i.e. whether he was communicating by “wire” or by “radio.” Given that “radio” (or satellite) technology was commonly used for international calls at the time and “wire” technology was the norm for domestic calls, it arguably made sense that FISA distinguished between “radio” and “wire” communications in designating which surveillances were sufficiently domestic in character that they would be subject to the court approval requirement and which would be excluded because they targeted foreign communications that did not enjoy fourth amendment protection. The result was a technology-based carve-out for surveillances targeting foreign-based communications.

With the change in technology over the intervening years, however, that carve-out started to break down. In particular, the development of the world-wide network of fiber optic wire communications resulted in an increasing number of phone calls and emails passing through the United States, whose interception in the United States required court review under the definition of “electronic surveillance.” As a result, the government found itself expending significant manpower generating FISA Court applications for surveillances against persons outside the United States – the very category of surveillances that Congress specifically intended to exclude when it imposed the FISA Court approval process in 1978.

With the dramatic increase in counterterrorism surveillance efforts after 9/11, the requirement to obtain a court order for foreign surveillances started to severely strain the Intelligence Community. As a result – and as reported by Intelligence Community professionals at the time – the government expended significant resources with the approval process for these surveillances and was increasingly forced to make tough choices regarding surveillance of worthy counterterrorism targets.

To its enduring credit, Congress recognized that this situation was unacceptable in a post-9/11 world, and in the spring of 2007 it undertook to study how FISA could be revised to bring it more in line with the threats and realities of today’s world. Over the next 15 months, the Intelligence and Judiciary Committees held dozens of hearings and briefings – many of which I attended – in which Members sought input and debated how to revise FISA in a way that

² The report of the House Permanent Select Committee on Intelligence clearly acknowledged the infeasibility of imposing a court approval process for NSA’s overseas collection and expressed its desire to exclude surveillances of persons overseas from FISA’s scope. As it explained, “[t]he committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillances.” H.R. Rep. No. 95-1283 at 27 (1978).

relieved the Intelligence Community from having to seek individualized FISA orders for overseas surveillances yet retained the court review requirement for those domestic surveillances that directly implicated the fourth amendment concerns underlying FISA.

III. The FISA Amendments Act

After considering a number of options and passing stopgap legislation – the Protect America Act – to provide temporary relief for the Intelligence Community, Congress ultimately passed the FISA Amendments Act in July 2008. The statute amends FISA in the following three ways:

1. Approval Process for Surveillances of Foreign Persons Located Overseas

The most significant amendment in the FISA Amendments Act is Section 702, which authorizes the FISA Court to approve surveillance of categories of terrorist suspects and other foreign intelligence targets overseas without requiring the government to provide an individualized application as to each particular target. The statute prescribes a new, streamlined process by which categories of overseas targets are approved for surveillance. Under this process, the Attorney General and the Director of National Intelligence (DNI) provide the FISA Court annual certifications identifying the categories of foreign intelligence targets to be subject to this surveillance and certifying that all statutory requirements for that surveillance have been met. The Intelligence Community designs “targeting procedures” for the surveillance categories which are the operational steps it takes to determine whether each individual surveillance target is outside the United States and therefore subject to this non-individualized collection process. It also draws up “minimization procedures” that lay out the limitations on the handling and dissemination of any information from that surveillance that may identify or relate to U.S. persons. The government then submits the Attorney General and DNI certifications as well as the targeting and minimization procedures for review by the FISA Court. The FISA Court then decides whether to approve the surveillances, based on its assessment whether all statutorily-required steps have been taken in compliance with FISA and the fourth amendment.

This process succeeds in bringing the operation of FISA back in line with its original intent. It allows the government to conduct overseas surveillance without individualized court approval while at the same time giving the FISA Court an important role in ensuring that this authority is used only against those non-U.S. persons who are “reasonably believed to be located outside the United States.”

2. Oversight of the Implementation of this Surveillance Authority

In addition to requiring FISA Court approval of the certifications and procedures, the FAA tasks various levels of government with conducting oversight over this authority. For example, it directs the Attorney General to adopt guidelines that ensure Section 702 is not used against targets who do not qualify for this surveillance. It tasks the Attorney General and the DNI with conducting and submitting to the FISA Court and Congress a semi-annual assessment of compliance with the statutory requirements. It specifically authorizes the relevant Inspectors General to review compliance with the procedures and guidelines. And, it directs the head of each participating Intelligence Community agency to conduct an annual review of the

surveillance effort, and to provide that review to the FISA Court and the Intelligence and Judiciary Committees of Congress.

3. Requirement of an Individualized Court Order to Surveil U.S. Persons Overseas

The FAA also added to the protections for U.S. persons in a very significant way. The FAA imposed the requirement, for the very first time, that the government seek and obtain an individualized order from the FISA Court whenever it seeks to conduct overseas intelligence collection on a U.S. person while that person is outside the United States. While the Attorney General previously approved such collection against any U.S. person overseas pursuant to Executive Order 12333, the FAA now obligates the government to seek court approval and demonstrate to the satisfaction of the FISA Court that there is probable cause to believe that that U.S. person target is acting as a foreign power or as an agent, officer or employee of a foreign power.

In sum, the FISA Amendments Act was a well-calibrated piece of legislation. It provided the Intelligence Community relief from the expanding scope of FISA requirements and spared the government from filing applications for overseas surveillances that do not implicate the fourth amendment. At the same time, it adhered to the original purposes of FISA, maintaining the individualized court review requirement for surveillances directed within the United States and even expanding it to surveillances of U.S. persons outside the country. Moreover, it directed all three branches of government to provide robust oversight to ensure that this authority is implemented in full compliance with FISA and the Constitution.

IV. Reauthorization of the FISA Amendments Act

With the FAA set to expire at the end of this year, the Administration has strongly urged Congress to reauthorize the legislation. In a recent letter to Congress the Attorney General and the DNI explain that the FAA “has proven to be an extremely valuable authority in protecting our nation from terrorism and other national security threats.” They represent that the oversight of its implementation has been comprehensive, citing the findings of their semi-annual assessments that agencies have “continued to implement the procedures and follow the guidelines in a manner that reflects a focused and concerted effort by agency personnel to comply with the [FAA] requirements” and that agency personnel “are appropriately focused on directing their efforts at non-United States persons reasonably believed to be located outside the United States.” And importantly, they conclude that the reauthorization of the FAA “is the top legislative priority of the Intelligence Community.”

V. Conclusion

In supporting the Administration’s call for reauthorization, I ask Congress to focus on the three considerations that have been the focus of my remarks: (1) the vital importance of the FAA surveillance authority to our counterterrorism efforts; (2) the extreme care with which Members of Congress considered, crafted and limited that authority when they passed the FAA four years ago; and (3) the representations of the Executive Branch that that authority has been implemented to great effect and with full compliance with the law and the Constitution.

In addition to these considerations, we must also focus on one other important consideration – which is the severity of the terrorist threat we still face today. While we have certainly weakened them in many ways, our terrorist adversaries still pose a serious danger to our national security. Whether it is the continued attack planning by Al Qaeda and its associates or the recent threats emanating from within Iran, we are constantly reminded that our terrorist adversaries are still intent on inflicting damage and death on the United States and its people.

Given that reality, now is not the time to rest on our accomplishments, to weaken our defenses or to scale back on a critical intelligence authority. To the contrary, now is the time to redouble our efforts, to press the advantage that we've gained, and to reauthorize a statute that has done so much to protect our people and their liberties over the past four years.

Thank you for giving me the opportunity to speak about this important matter, and I look forward to answering any questions you may have for me.