Oral Statement of Kenneth L. Wainstein

on

The Foreign Intelligence Surveillance Act

before the

House Permanent Select Committee on Intelligence

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ORAL STATEMENT OF
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CONCERNING

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

BEFORE THE

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Chairman Reyes, Ranking Member Hoekstra, and Members of the Committee, thank you for this opportunity to testify concerning FISA modernization. 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 moments to explain why I think we need to permanently modernize the FISA statute. To do that, I will briefly discuss first what Congress intended to accomplish when it drafted FISA in 1978, and second how sweeping changes in telecommunications technology since then resulted in the requirements of FISA being extended to surveillance activities that Congress sought to exclude from the scope of FISA when it was enacted. I will then explain how this process impaired our intelligence capabilities and points up the need to modernize FISA on a permanent basis. Finally, I will briefly describe the efforts we are making to ensure that the temporary fix you adopted last month in the Protect America Act is implemented in a responsible and transparent manner.

The FISA Congress Intended: The Scope of FISA in 1978

In enacting FISA, the Congress of 1978 established a regime of judicial review for foreign intelligence surveillance activities -- but not for all such activities; only for those that most substantially implicated the privacy interests of people in the United States. Striking a careful balance between the protection of privacy and the need for the effective collection of foreign intelligence, Congress designed a judicial review process that would apply 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.

Congress gave effect to this careful balancing through its definition of the statutory term "electronic surveillance," the term that identifies those Government activities that fall within the scope of the statute and, by implication, those that fall outside it. Congress established this dichotomy by defining "electronic surveillance" by reference to the *manner* of the communication under surveillance -- by distinguishing between "wire" communications -- which included most of the local and domestic traffic in 1978 -- and "radio" communications -- which included most of the transoceanic traffic in that era. Based on the communications reality of that time, that dichotomy more or less accomplished the Congressional purpose of distinguishing between domestic communications that generally fell within FISA and foreign international communications that generally did not.

The Unintended Consequences of Technological Change

The revolution in communications technology since 1978 radically altered that reality and upset the careful balance in the statute. As a result, certain surveillance activities directed at persons overseas -- which were not intended to fall within FISA -- became subject to FISA, which required us to seek court authorization and effectively conferred quasi-constitutional

protections on terrorist suspects and other national security targets overseas. This process impaired our surveillance efforts and diverted resources that would have been better spent protecting the privacy interests of persons within the United States.

The Protect America Act of 2007

In April of this year, the Administration submitted to Congress a comprehensive proposal that would remedy this problem and provide a number of other important refinements to the FISA statute. While Congress has yet to act on the complete package we submitted, your passage of the temporary legislation in August was a significant step in the right direction. That legislation updated the definition of "electronic surveillance" to exclude surveillance directed at persons reasonably believed to be outside the United States, thereby restoring FISA to its original focus on domestic surveillance and allowing us the critical latitude to surveil overseas terrorists and other national security threats without going through a lengthy court approval process.

[The authority provided by the Act is an essential one and allowed us effectively to close an intelligence gap identified by the DNI that was caused by FISA's outdated provisions.]

The legislation only lasts for six months, and the new authority is scheduled to expire on February 5, 2008, absent reauthorization. I see this interim period as an opportunity to do two things. First and foremost, it gives us the opportunity to demonstrate that we can use this authority responsibly, conscientiously and effectively. That is an opportunity that we have already started to seize. As we explained in a letter we sent the Committee this Tuesday, we have already established a strong regime of oversight for this authority, which includes regular internal agency audits as well as on-site compliance reviews by a team from the Office of the Director of National Intelligence (ODNI) and the National Security Division of the Department of Justice. This DNI/NSD team has already completed its first audit, and it will complete further

audits every 30 days during this interim period to ensure full compliance with the implementation procedures.

In that same letter, we also committed to providing Congress with comprehensive reports about how we are implementing this authority. We will make ourselves available to brief you and your staffs on the results of our regular compliance reviews; we will provide you copies of the written reports of those audits; and we will give you update briefings every month on compliance matters and on implementation of this authority in general. In fact, we are prepared to brief you on the first compliance review whenever it is convenient for you.

We are confident that this regime of oversight and congressional reporting will establish a solid track record for our use of this authority, and that it will demonstrate that you made the absolutely right decision when you passed the Protect America Act last month.

This interim period also gives us one other opportunity -- the opportunity to engage in a serious debate and dialogue on this important issue. I feel strongly that American liberty and security were advanced by the Act, and that they will be further advanced by adoption of our comprehensive FISA Modernization proposal. However, I recognize that this is a matter of significant and legitimate concern to many throughout our country. For that reason, this Committee is wise to hold this hearing and to explore the various legislative options and their implications for national security and civil liberties. I am confident that, when those options and implications are subject to objective scrutiny and to honest debate, Congress and the American people will see both the wisdom and the imperative of modernizing the FISA statute on a permanent basis.

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