CDT Testimony

# Amending FISA: The National Security and Privacy Concerns Raised by S.2659 and S.2586

## Testimony of Jerry Berman, Executive Director, Center for Democracy and Technology[1]
## Senate Select Committee on Intelligence
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## Summary

Mr. Chairman, Mr. Vice-Chairman, members of the Committee, thank you for the opportunity to testify at this hearing in the ongoing and critical exploration of how to improve our nation's antiterrorism efforts while maintaining the free and open society that is the hallmark of our American way of life.

We have been asked to comment on both S.2659 (sponsored by Senator Michael DeWine), a bill to lower the probable cause standard for obtaining terrorism FISA orders applicable to alien residents in the United States, and S.2586 (sponsored by Senator Charles Schumer and Senator Jon Kyl) a bill to designate certain individuals as "foreign powers" under FISA.

As a representative of CDT and as someone who worked to draft FISA in 1978, I believe that S. 2659 and S. 2586, however well-intentioned, are unlikely to serve our intelligence interests enough to justify their *negative* impact on civil liberties.

Both create grounds for serious constitutional challenges by defendants in criminal cases if information collected under these warrants are used as evidence in criminal prosecutions. Given the changes made in the USA-PATRIOT, which allows information collected under FISA to be used in criminal prosecutions, we can expect more cases like this to arise. Constitutional uncertainty is not good for civil liberties, or for a coherent intelligence process.

Even if upheld by the courts, these new FISA provisions will further erode traditional civil liberties. FISA warrants are already a departure from traditional probable cause warrant requirements. FISA secret searches violate our traditional understanding that searches, except in emergencies, require prior notice and service of the warrant. FISA allows wiretaps and searches of homes and offices that may never be disclosed to the target even if based on erroneous or false information. Before we expand FISA, our reasons should be compelling and the case for expansion carefully documented.

The argument that these lower standards should apply to aliens ignores the fact that our Bill of Rights protects persons not citizens; that there are millions of "non-U.S. persons" here in the US under legal mechanisms; that it is important for law enforcement and intelligence agencies to have the trust and cooperation of the communities who will feel most targeted by these changes; that these people work in America's companies and attend American universities; and that many of the people aliens communicate with are their U.S. friends and neighbors who will inevitably be included on the tapes and in the files made under these provisions.

Mr. Chairman, making sure there are strong reasons for using intrusive techniques is essential for the preservation of our open society freedoms. In our view, the case for S. 2659 (the reasonable suspicion bill introduced by Senator DeWine) and S. 2586 (the individual as foreign power bill introduced by Senators Schumer and Kyl) has not been made and therefore they should not become law.

- **The problems these bills purport to address are problems of analysis, not problems with FISA's standards. Lowering FISA's standards will exacerbate this analysis problem.** An emerging lesson from September 11 is the huge problem faced in analyzing the vast information already collected, and changing FISA's probable cause and foreign power requirements would make that problem even worse.
- **Both bills will lead to increased surveillance without adequate judicial oversight.** S. 2586 stands FISA on its head by designating individuals themselves as foreign powers, allowing the secretive and powerful FISA procedures reserved for our nations fights against foreign governments to be turned against individuals acting alone. S. 2659 would allow FISA warrants to issue without probable cause, inevitably leading to more surveillance of both non-U.S. and related U.S. persons. And the public perception, created by the bills, that the U.S. is targeting specific communities will further diminish our intelligence gathering within those communities.
- **Both bills raise constitutional questions.** S. 2659 would allow FISA warrants to issue without probable cause, raising constitutional concerns. Even when applied to non-US persons, FISA's lack of suppression remedies or minimization procedures will lead to more information being gathered about U.S. persons as well. S. 2586, by establishing for an individual to be treated as a foreign power, turns the original purpose of FISA - the investigation of foreign nations and organizations that threaten our country - on its head. Now that FISA can be applied in criminal investigations, this would create an end-run

around Title III criminal procedures. The final combination, with individuals treated as foreign powers (as in S. 2586) and the probable cause standard lowered (S. 2659), would open future prosecutions to almost certain constitutional challenge for abridging the Fourth Amendment's protections.

Both bills are being considered before the conclusion of this Committee's own important exploration of the intelligence problems surrounding September 11 and ongoing counter-terrorism efforts. At the very least, it is premature to further curtail civil liberties without completing this factual inquiry and reporting on its findings to the American people.

Finally, we believe the Committee needs to hear from other voices before proceeding. Six witnesses have been brought before this committee to testify in support of this bill, but many others would be willing to discuss the serious impacts on privacy, security, and constitutional liberties to give the Committee a more balanced perspective.

Attorney General Ashcroft said in testimony last week before the Senate Judiciary Committee: "The Constitution provides that no warrant shall issue absent probable cause... That's been our sticking point."[2] We agree with the Attorney General. The Constitution demands probable cause for warrants, protects persons and not just citizens, and limits FISA's extraordinary authorities to national security investigations against foreign sovereigns or organizations, not individuals. Congress cannot act to change these strictures without raising significant constitutional questions and challenges.

Once again, I urge you to be deliberate and measured in your consideration of far-reaching changes to our surveillance laws. We look to working with you, your staff, and members of the Administration to improve out nation's antiterrorism efforts consistent with the Constitution and our American values.

# Expanded Analysis: Addressing Real Intelligence Problems, Consistent with the Constitution[3]

## 1. Failures of Analysis, Not Standards

A question before this committee is: Did FISA fail us in the months leading up to September 11? The answer is in doubt. The emerging record surrounding the September 11 attacks indicates that statutory limits on surveillance powers designed to balance national security and privacy may not be the main barrier to the intelligence community's ability to conduct investigations of suspected terrorists. Rather, grave problems in intra- and inter-agency communication, an overall shortage of analytic capability, and severe shortcomings in information technology, have prevented the intelligence community from "connecting the dots" in information already collected in recent cases. While we do not have access to the classified information that this Committee is now reviewing, doubts about whether FISA standards are a serious problem in intelligence investigations are based on the following information in the public record:

- FBI Agent Colleen Rowley submitted a request for a FISA warrant to examine the laptop of alleged terrorist Zacarias Moussaoui several weeks before the September 11 attacks (that laptop is now known to have contained information that *might* have helped expose the hijacking plot, but that also included substantial information on crop dusting that just as likely might have led agents on a wild goose chase.) The bureaucratic response is known by this committee: FBI headquarters denied Rowley's request, believing the application was insufficiently supported by evidence that would pass FISA court scrutiny - with no indication that any analysis or connection was made with the other evidence, indicated below, that might have met the FISA court's requirements.
- For example, prior even to Rowley's request, FBI Agent Kenneth Williams submitted a memo to the FBI's Radical Fundamentalist Unit citing concerns about the number of Islamic fundamentalists receiving training at Arizona flight schools. This memo was neither acted upon by FBI headquarters nor combined with Rowley's later request for a FISA warrant. In testimony to this committee, Williams also indicated that he had communicated his concerns to the CIA, with similar results.
- President Bush was briefed by the CIA in August about increasing reports that fundamentalist groups, including al'Qaeda, might attempt to hijack airliners in the United States. The intelligence was not connected with either the Rowley or Williams reports.
- The French intelligence community had also been in contact with American agents, informing them of Moussaoui's connections to the Islamic fundamentalist movement. This information was not combined with any of the other data already collected.
- A serious question exists about why the FBI did not try to put in an application - at least try. Some observers have assessed such timidity as stemming from the FISA court's rebuke of the Department of Justice for filing false affidavits in another case. Others have attributed it to unwillingness to make terrorism a priority. Others have attributed it to the DOJ's reluctance to risk its record of success before the FISA court - only one warrant request has ever been denied. In any case, we believe that the Justice Department could have been more aggressive within existing standards to investigate Moussaoui, rather than calling for a wholesale weakening of FISA.

On their face, none of these failures implicate the FISA standards as the main constraint on our intelligence effort. As such, further review of the choices and actions taken by the intelligence community prior to September 11 is clearly necessary before changes are made to FISA's long-standing provisions. Indeed, the record indicates that obstacles within the intelligence community, not the FISA standards, were the main factor preventing detection of the September 11 plot.

The FBI lacks the ability to properly analyze the information it already collects. FBI Director Robert Mueller appeared before this committee to describe the FBI's severe lack of basic information processing technology. To date, the Bureau still does not have the computer capability to efficiently search and retrieve the thousands of reports and field documents it prepares. Such problems will only worsen over time. As long as these core shortcomings go unresolved, they will make other statutory changes, such as the proposed changes to FISA, ineffective and potentially dangerous.

### Lowering FISA's Standards Will Exacerbate Current Intelligence Problems

Will lowering the FISA standard solve the problems before us? In fact, we believe that increased collection resulting from lower FISA standards in S.2586 and S.2659 would actually aggravate our government's intelligence investigative and analytic problems. S.2586 will result in the collection of more information about individuals completely unconnected with any known terrorist organization or government. S. 2659 will result in more wiretaps and searches, even where it is not possible to show probable cause. And both will do little to address - and in fact distract from - the real systemic problems that need to be solved.

### Lower FISA Standards Would Not Have Improved Security Before 9/11

For example, in the most notable case study before this committee - the handling of Zacarias Moussaoui, the alleged “twentieth hijacker,” prior to September 11 - it appears unlikely that the provisions of either S. 2586 and S. 2659, had they been in place, would have greatly affected the FBI's ability to get a warrant. Agent Rowley's request for a FISA warrant was refused because FBI Headquarters did not believe the evidence established probable cause that Moussaoui was an agent of an international terrorist group. Had S. 2586 (designating individuals engaged in terrorism as “foreign powers”) been part of FISA at that time, presumably Moussaoui could have been designated as a foreign power, but the government would still need to show that he was a foreign power engaged in international terrorist activities. FBI Headquarters did not think the evidence supported probable cause to believe Moussaoui was involved in international terrorism as part of a group; it is hard to see how they could have been convinced that the same evidence established probable cause to believe Moussaoui was engaged in international terrorism as an individual. (If there was probable cause to believe Moussaoui was engaged in international terrorism as an individual, why didn't they pursue a criminal warrant?) Nor is it clear that under S. 2659 (lowering the standard to “reasonable suspicion”) Headquarters would have been convinced even of reasonable suspicion that Moussaoui was involved in international terrorism as an individual without better analysis and data aggregation.

Finally, had the FBI been granted a FISA warrant (on a reduced standard in conjunction with considering an individual as a foreign power) to investigate Moussaoui, any subsequent criminal prosecution would have raised serious constitutional questions. We discuss this problem in greater detail below.

## 2. Alone and in tandem, both bills raise serious constitutional questions.

One of the fundamental protections of the Constitution is the right of individuals to be free from unreasonable government intrusions. However laudable their intentions, the proposed amendments threaten the very heart of that protection, raising significant constitutional concerns.

First, changing the warrant standard from probable cause to reasonable suspicion conflicts with the plain language of the Constitution. The framers of the Constitution were clear: “no warrants shall issue, but upon probable cause.” “Reasonable suspicion” is not “probable cause.” Utilizing a less stringent standard, however well meaning its purpose may be, threatens a core right the Fourth Amendment is intended to protect.

Second, though the proposed changes affect only non-US persons, there is no recognized constitutional justification for discriminating between the rights of aliens and the rights of citizens. Indeed, the Supreme Court has recognized the constitutional rights of foreign nationals dating back over 40 years ago when it held that Fourth Amendment protections applied to Soviet spies.[4] The Constitution protects persons, not just citizens, within the United States.

Third, FISA investigations must meet constitutional requirements. Admittedly, the Supreme Court has asserted that standards for intelligence gathering need not be as restrictive as those in the criminal context.[5] But they have made that clear that those lower standards apply to intelligence investigations, not criminal investigation. FISA is no longer just an intelligence gathering statute since it can be used for criminal investigations against individuals. Since the adoption of the Patriot Act, it contains a non-negligible criminal investigation purpose. To the extent it is utilized for this purpose, the FISA must provide adequate Fourth Amendment protections. The current FISA definition of probable cause already lowers the standard from that used in criminal investigations. Lowering the standard further would insufficiently protect those targeted under FISA. Moreover, the fact that FISA investigations occur entirely in secret and lack suppression remedies suggests that maintaining the current standard is essential to ensuring adequate protections.

Fourth, the redefinition of foreign power to include individuals essentially recasts the very purpose of FISA from intelligence gathering to criminal investigation. FISA was originally intended to counter foreign government or entity efforts to threaten the US through the use of intelligence gathering. But an individual acting alone and engaging in terrorist activity is a criminal, not intelligence, concern. As such, the Constitution demands those individuals be accorded the full protection of the criminal law. *This*

*does not mean that suspects should not be investigated **vigorously*** **- but that they should be afforded the minimization, notice, and other protections that are part of the criminal process.** Modifying the definition of foreign power to include individuals would deny such protections.

Clouded by constitutional uncertainty, these changes will likely be the subject of future litigation for years to come. This uncertainty serves neither law enforcement and national security interests, nor the interests of individuals in safeguarding personal liberty.

## 3. Conclusion

Attorney General Ashcroft said in testimony last week before the Senate Judiciary Committee: "The Constitution provides that no warrant shall issue absent probable cause... That's been our sticking point."**[6]** We agree with the Attorney General. The Constitution demands probable cause for warrants, protects persons and not just citizens, and limits FISA's extraordinary authorities to national security investigations against foreign sovereigns or organizations. Congress cannot act to change these protections without raising constitutional problems.

It is clear that improvements need to be made in America's counter-intelligence procedures, and it appears there are many things that can be done without harming civil liberties. Because of the concerns raised by what we know of the current investigations, and the problems of analysis, we think it would be wise at the very least to wait until the Congress completes its investigations of what went wrong and what we can do better, including refined versions of these bills.

At this point, I strongly urge the members of this committee to perform the review and oversight they did not have the luxury of performing in September and October. Additional hearings should be held before any further changes are made to these statutes, with appearances by others who have much to contribute to our efforts. If hearings cannot be scheduled before the end of the session, I hope we will continue this discussion next year.

We look to working with you, your staff, and members of the Administration to improve out nation's antiterrorism efforts consistent with the Constitution and our American values.

## Notes

1 The Center for Democracy and Technology is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values for the new digital communications media. Our core goals include enhancing privacy protections and preserving the open architecture of the Internet. Among other activities, CDT coordinates the Digital Privacy and Security Working Group (DPSWG), a forum for more than 50 computer, communications, and public interest organizations, companies and associations working on information privacy and security issues.

2 Attorney General John Ashcroft, Senate Judiciary Committee Hearing on "Oversight of the Justice Department" (July 25, 2002).

3 CDT Associate Director Alan Davidson, Policy Analyst Rob Courtney, and Summer Law Clerk Paul Petrick assisted in the preparation of this testimony.

4 *See, e.g., Abel v. U.S.*, 362 U.S. 217 (1959).

5 *See, e.g., U.S. v. U.S. District Court for the Eastern District of Maryland*, 407 U.S. 297 (1972).

6 Attorney General John Ashcroft, Senate Judiciary Committee Hearing on "Oversight of the Justice Department" (July 25, 2002).