Testimony before the Permanent Select Committee on Intelligence
United States House of Representatives

Hearing on Information Sharing under the Patriot Act
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Mr. Chairman, thank you for the honor and opportunity to testify before the House Permanent Select Committee on Intelligence about information sharing between foreign intelligence and law enforcement officials under the Patriot Act. I am currently an Associate Professor of Law at the University of Idaho. From 1990-1996, I served as an Assistant to the Solicitor General of the United States. In that position, I became familiar with the Foreign Intelligence Surveillance Act of 1978 ("FISA") and other statutory, as well as constitutional, provisions governing federal government surveillance of persons in the United States. Since 1996, I have taught and done legal research and writing on issues of criminal procedure including domestic government surveillance. Most relevantly, I have done extensive research on the history of FISA and the Patriot Act, focusing on those statutes' information sharing provisions. My research resulted in an article, co-written with William Dylan Gardner, entitled "The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement." It is published in 28 Harvard J.L. & Pub. Pol'y 319 (2005), and I have submitted it for the record. The views I present here are mine alone.

I would like to address one aspect of information sharing under the Patriot Act. I am referring to the myth that the Act tore down the wall between foreign intelligence and law enforcement. That is a myth because of the decision in *In re Sealed Case*, 310 F.3d 717 (Foreign Intell. Surv. Ct. 2002). As the Committee knows, *In re Sealed Case* was a decision by the Foreign Intelligence Court of Review. The Court of Review construed Section 218 of the Patriot Act as creating, for the first time, a statutory basis for a foreign intelligence/criminal law enforcement "wall." The court reached this conclusion by interpreting Section 218 to codify the foreign intelligence/criminal law distinction underlying the "primary purpose" test adopted in some circuits as a gloss on the original FISA.[1]

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[1]Under the "primary purpose" test, government surveillance under FISA had to be for the "primary purpose" of gathering foreign intelligence information, rather than gathering evidence for a criminal prosecution. *See* Richard H. Seamon & William D. Gardner, "The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement," 28 Harv. J.L. & Pub. Pol'y 319, 358-367 (2005).

The Court of Review's interpretation of Section 218 is not only erroneous; it also unjustifiably restricts the domestic fight against international terrorism. For those reasons, I would urge Congress to amend Section 218 to correct the court's error and remove the restrictions.

In the rest of my testimony, I explain (1) how the Court of Review misinterpreted Section 218; (2) how that misinterpretation harms the domestic fight against international terrorism; and (3) how the court's error can be corrected.

1. Section 218 of the Patriot Act has been misinterpreted.

Section 218 of the Patriot Act in relevant part authorizes the government to seek a FISA warrant if "a significant purpose" of the proposed surveillance is "to obtain foreign intelligence information."[2] "Foreign intelligence information," in turn, is defined in relevant part to mean information that is "necessary to" protect this country from specified foreign threats, including "international terrorism."[3] Under the plain language

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[2]50 U.S.C. 1804(a)(7)(b). Although my testimony follows common usage in referring to "FISA warrants," FISA itself does not actually use the term "warrant"; instead, FISA refers to "orders approving electronic surveillance." *E.g.*, 50 U.S.C. 1803(a). FISA's avoidance of the term "warrant" reflects that the drafters of FISA used Title III as a model, and Title III did not use the term "warrants." *See* Seamon & Gardner, *supra* note 1, at 437 & n.584.

[3]50 U.S.C. 1801(e) defines "[f]oreign intelligence information" to mean:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

Thus, FISA defines "foreign intelligence information," when it concerns a U.S. person, by reference to its necessity to achieving one or more of five foreign intelligence purposes. The first three purposes – identified in section 1801(e)(1)(A), (B), and (C) – are protective, and information that serves any of these three protective purposes is "protective" (or "counter") intelligence. The remaining two purposes –

of the statute, the government should be able to seek a FISA warrant and conduct FISA surveillance for the purpose of getting the evidence needed to arrest and prosecute a foreign agent – for any type of crime – as long as the government reasonably considers the agent's arrest and prosecution necessary to prevent an act of international terrorism or one of the other foreign threats identified in FISA's definition of "foreign intelligence information."

The Foreign Intelligence Surveillance Court of Review accepted this analysis in *In re Sealed Case*, but only up to a point. The court found persuasive the government's argument that "arresting and prosecuting terrorist agents of, or spies for, a foreign power may well be the best technique to prevent them from successfully continuing their terrorist or espionage activity."[4] Nonetheless, the court concluded, contrary to the government's argument, that the government cannot use FISA surveillance to get evidence of "ordinary crimes" by a suspected terrorist, even if the government reasonably believes that the arrest and prosecution of the terrorist for those crimes is necessary to protect against a planned terrorist attack.[5]

The Court of Review's "ordinary crimes" restriction misinterprets FISA. FISA does not base the government's surveillance authority on the likelihood of crime, ordinary or otherwise. To the contrary, Congress deliberately decided against a purely criminal standard for FISA surveillance.[6] Congress decided, instead, to allow surveillance of U.S. persons based on conduct that is not invariably a crime.[7] And,

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identified in section 1801(e)(2)(A) and (B) – involve "positive" intelligence.

[4] *In re Sealed Case*, 310 F.3d 717, 724 (Foreign Intell. Surv. Ct. Rev. 2002) (per curiam).

[5] *See In re Sealed Case*, 310 F.3d at 735-36. The Court of Review believed that the use of FISA to get evidence of "ordinary crimes" would "transgress" the original FISA and also reflected an "anomalous reading" of Section 218 of the Patriot Act. *Id.* at 736.

[6] *See* Seamon & Gardner, *supra* note 1, at 427-435.

[7] To get a FISA warrant, the government must, among other requirements, establish probable cause that the target of the proposed surveillance "is a foreign power or an agent of a foreign power." 50 U.S.C. 1804(a)(4)(A). FISA classifies a U.S. person as an "agent of a foreign power" based on the person's "knowing" involvement, "for or on behalf of a foreign power," in various activities that are often – but not always – a crime, including (1) "'clandestine intelligence gathering activities' [that] involve or may involve violations of Federal criminal law"; (2) "other clandestine intelligence activities," "pursuant to the direction of an intelligence service or network of a foreign power," "which * * * involve or are about to involve a violation of the criminal statutes of the United States"; (3) "sabotage or international terrorism [as defined elsewhere in the FISA, 50 U.S.C. 1801(c)] * * * or activities that are in preparation therefor"; (4) entering or remaining in the United States "under a false or fraudulent identity"; or (5) aiding or abetting, or conspiring to engage in, any of the first three categories of activities listed in this sentence. 50 U.S.C. 1801(b)(2).

Congress required that the purpose of such surveillance be obtaining "foreign intelligence information," which does not invariably constitute evidence of crime.[8] Because of these decisions, the government does not need probable cause of crime to get a FISA warrant and it does not seek a FISA warrant merely to get more evidence of crime. Rather, the government's ultimate aim must be "to obtain foreign intelligence information," and "foreign intelligence information" is defined instrumentally – by reference to its necessity for achieving certain foreign intelligence purposes, including the protection of this country from specified foreign threats. Thus, evidence of crime – even "ordinary" crime – constitutes "foreign intelligence information" as long as it is needed for law enforcement measures that the government reasonably considers necessary to protect against the foreign threats specified in FISA's definition of "foreign intelligence information."

It bears emphasis that the interpretation of FISA that I am advancing is substantially the same that the Department of Justice advanced, and the court rejected, in *In re Sealed Case*.[9] As far as I know, the Department continues to believe, as I do, that the Court misinterpreted FISA by adopting the "ordinary crimes" restriction. Unlike me, the Department has not urged Congress (as far as I know) to correct the misinterpretation by amending Section 218 of the Patriot Act. The Department may have good reasons for not seeking correction of what the Department itself (at least in 2002) believed was an error. Those reasons, however, should not prevent Congress from considering an amendment of Section 218 to implement its original intent.[10]

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[8] *See supra* note 2; *see also In re Sealed Case*, 310 F.3d at 723 n.10.

[9] *See In re Sealed Case*, 310 F.3d at 735-36.

[10] In addition to imposing the "ordinary crimes" restriction discussed in the text, the Court of Review held that Section 218 of the Patriot Act bars the government from using FISA surveillance for the sole purpose of prosecuting even "foreign intelligence crimes." *In re Sealed Case*, 310 F.3d at 735. The court based this "foreign intelligence crimes" restriction upon its view that Section 218 "imposed a requirement that the government have a measurable foreign intelligence purpose, *other than* just criminal prosecution of even foreign intelligence crimes." *In re Sealed Case*, 310 F.3d at 735 (emphasis added). As discussed in the text, however, the plain language of FISA reflects that criminal prosecution of any type of crime can serve protective foreign intelligence purposes. Thus, the Court of Review's "foreign intelligence crimes" restriction, like its "ordinary crimes" restriction, misinterprets FISA. The Court of Review thought that its "foreign intelligence crimes" restriction would not "make much practical difference," because, "when [the government] commences an electronic surveillance of a foreign agent, typically it will not have decided whether to prosecute the agent." *In re Sealed Case*, 310 F.3d at 735. The "foreign intelligence crimes" restriction, however, might be construed to operate not just at the commencement of electronic surveillance but throughout the surveillance. So construed, the restriction could require the government to cease surveillance under a FISA warrant if and when the sole objective of the surveillance becomes the gathering of evidence for a prosecution of a foreign intelligence crime. That result not only rests on a misreading of the Patriot Act; it also could significantly restrict the government's domestic fight against

2. The misinterpretation of Section 218 impairs the domestic fight against international terrorism.

The Department of Justice presumably believes that no great harm will come of *In re Sealed Case*'s erroneous restrictions on FISA surveillance. The Department has been wrong about this sort of thing before (having participated in building the wall). I urge the Committee to consider whether the Department is wrong in this instance. I have not worked in foreign intelligence and do not have access to the operational reality. In my view, however, *In re Sealed Case*'s restrictions on FISA surveillance could seriously impair the domestic fight against international terrorism.

The Department has promised, since 9/11, that it will take the same approach to suspected terrorists that Robert Kennedy's Justice Department took toward mobsters: It has promised to arrest and prosecute suspected terrorists for any and all offenses, including ones as minor as "spitting on the sidewalk."[11] The problem is that the Department cannot use FISA surveillance to get evidence of such "ordinary crimes" under the erroneous interpretation discussed in Point 1.

Perhaps the Justice Department plans to fulfill its promise by relying on a different statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[12] Title III will not always work, for two reasons. First, Title III authorizes surveillance for evidence of only certain crimes.[13] Thus, federal officials cannot use Title III to obtain evidence of minor state or federal offenses (such as overstaying a visa) even when, for example, the arrest of a suspected terrorist for such an offense would incapacitate the terrorist and thereby disrupt an ongoing terrorist plot. Second, officials conducting a FISA surveillance operation are not always able, in the midst of that operation, to determine when the purpose of the operation will be deemed – by a court in hindsight –

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international terrorism, for essentially the same reasons as could the court's "ordinary crimes" restriction. *See infra* Point 2; *see also* Seamon & Gardner, *supra* note 1, at 461-462.

[11]Attorney General John Ashcroft, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001) ("Robert Kennedy's Justice Department, it is said, would arrest mobsters for 'spitting on the sidewalk' if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror."), available at http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm (visited May 8, 2005); Viet Dinh, "Life After 9/11: Issues Affecting the Courts and the Nation," 51 U. Kan. L. Rev. 219, 224 (2003) (remarks to the same effect by then-Assistant Attorney General Viet Dinh at the 2002 Tenth Circuit Judicial Conference, Conference Proceedings).

[12]18 U.S.C. 2510-2522.

[13]*See id.* § 2516(1).

to have become that of obtaining evidence of ordinary crime. Unless the officials guess correctly – and cease surveillance until they have secured a Title III warrant – the evidence collected under the FISA warrant will be considered illegally obtained under *In re Sealed Case*. The illegal nature of the evidence, in turn, could invalidate any arrest and prosecution, even if they are necessary to prevent a terrorist attack or other foreign threat from occurring.

The arrest and prosecution of dangerous persons for "ordinary crimes" is an important and well-established way to neutralize the danger that such persons pose.[14] The government understood this when it prosecuted Al Capone for not paying taxes and, later, when it undertook to prosecute mobsters even for minor, "ordinary" offenses like "spitting on the sidewalk." The government must be able to use this same approach to suspected terrorists, especially when prosecuting them for "ordinary" crimes provides a way to avoid disclosing intelligence sources and methods.[15] The government's ability to use the "Al Capone" approach toward terrorists, however, has been hampered by *In re Sealed Case*'s interpretation of Section 218 of the Patriot Act. Congress should correct that erroneous interpretation not only because it is erroneous but also because the error is a potentially quite grave one.

3. Congress should amend Section 218 of the Patriot Act to authorize the prosecutorial use of FISA surveillance when necessary to protect against the foreign threats specified in FISA.

As discussed in Points 1 and 2, FISA authorizes the government to use FISA surveillance for prosecutorial purposes in certain circumstances. Specifically, the government can use FISA surveillance to get evidence for arrest, prosecution, and other law-enforcement measures as long as the government reasonably considers those measures necessary to protect against international terrorism or one of the other foreign threats identified in FISA's definition of "foreign intelligence information" (see *supra* note 3). Although FISA now, and always has, permitted this use of FISA

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[14] *See, e.g.*, Harry Litman, "Pretextual Prosecution," 92 Geo. L.J. 1135, 1169-1170 (2004) (stating author's inclination "to defend in principle a policy of using the Al Capone approach to bring immigration charges (or other relatively trivial federal charges) when there is reason to believe that the defendants have material information about terrorism"); Daniel C. Richman & William J. Stuntz, "Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution," 105 Colum. L. Rev. 583, 623 (2005) ("there may be no realistic alternative" to the Justice Department's use of "the Al Capone approach to counterterrorism prosecutions").

[15] The 9/11 Commission's Report describes instances in which actual or suspected international terrorists committed crimes with no immediately obvious connection to their terrorist activities. *See* Seamon & Gardner, *supra* note 1, at 461 & n.682 (citing relevant portions of Report).

surveillance, courts have not recognized its permissibility. To clarify the matter, Congress should amend FISA.

I propose that FISA's definition of "foreign intelligence information" in 50 U.S.C. 1801(e) be amended to add the language underlined below:

"(e) 'Foreign intelligence information' means--,

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States, by law-enforcement or other lawful means, to protect against--,

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power

* * *."

This amendment would clarify that the government can use investigation, arrest, prosecution, and other law-enforcement means to achieve any of the three protective foreign intelligence purposes – relating to (1) actual or potential attacks or other grave acts; (2) sabotage or international terrorism; and (3) clandestine intelligence activities – that are identified in the above definition of "foreign intelligence information." This, in turn, would allow the government to use FISA surveillance for law enforcement purposes when necessary to achieve any of those three protective foreign intelligence purposes.[16] In particular, the government could use FISA surveillance to get evidence of any crime, including "ordinary crimes," when needed for protect against international terrorism. Thus, the amendment I propose would remove the restrictions on prosecutorial use of FISA surveillance that exist under *In re Sealed Case*.

I am aware of one other proposed revision of FISA that would address the

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[16] *See* Seamon & Gardner, *supra* note 1, at 458-462; *see also* Written Testimony of David S. Kris before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, at 32 n.91 (Apr. 28, 2005) (proposing similar amendment in the event that Congress wants to remove restrictions on prosecutorial uses of FISA surveillance imposed under Court of Review's decision in *In re Sealed Case*); *but cf. id.* at 31 n.80 and 31-32 n.84 (arguing that court's "foreign intelligence crimes" restriction and its "ordinary crimes" restriction are unlikely to inhibit necessary coordination between intelligence and law enforcement officials).

prosecutorial use of FISA surveillance. Professor Peter Swire has proposed amending FISA to require the government to certify that "the information sought is expected to be sufficiently important for foreign intelligence purposes to justify" the issuance of a FISA surveillance order.[17] Under Professor Swire's proposal, "the usefulness for foreign intelligence purposes would be measured regardless of the usefulness for law enforcement purposes."[18]

I do not favor Professor Swire's proposal for three reasons. First, by distinguishing "foreign intelligence purposes" from "law enforcement purposes," his proposal ignores that the government can use law enforcement means to achieve foreign intelligence purposes. Indeed, as Congress recognized in the legislative history of FISA, the arrest and prosecution of a foreign agent can be the best way to protect against a foreign threat.[19] Second, the proposal, as applied to FISA surveillance targeting U.S. persons, could unduly broaden the government's power to conduct FISA surveillance. Today, the FISA defines "foreign intelligence information" as information that, if it concerns U.S. persons, is "necessary to" one or more of five foreign intelligence purposes specified in the definition of "foreign intelligence information." A standard allowing the government to conduct FISA surveillance to obtain information that is "*sufficiently important* for foreign intelligence purposes" (without identifying those purposes) seems more lenient than a standard that allows the government to conduct FISA surveillance to obtain only that information which is "*necessary*" to achieving one or more of five statutorily specified foreign intelligence purposes. Finally, Professor Swire's proposal invites federal judges to measure the intelligence value of information sought under a FISA warrant. In my view, such judicial second guessing of executive branch determinations is neither practicable nor appropriate.

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In sum, although it is commonly believed that Section 218 of the Patriot Act brought down the wall between foreign intelligence and criminal law enforcement, *In re Sealed Case* interpreted Section 218 as creating, for the first time, a statutory basis for the wall.

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[17]Peter Swire, "The System of Foreign Intelligence Surveillance Law," 72 Geo. Wash. L. Rev. 1306, 1364 (2004); Testimony of Professor Peter P. Swire before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, Oversight Hearing on the "Implementation of the USA PATRIOT Act: Section 218, Foreign Intelligence Information ('The Wall')," at 3 (Apr. 28, 2005).

[18]Swire, *supra* note 17, 72 Geo. Wash. L. Rev. at 1364.

[19]*See* Seamon & Gardner, *supra* note 1, at 430 (citing legislative history).

Most importantly, this post-9/11 wall prevents the government from using FISA surveillance for evidence to arrest and prosecute suspected terrorists for "ordinary" crime, even when doing so is necessary to prevent an act of international terrorism. Congress should amend FISA to remove this erroneous and potentially quite serious restriction.

I hope these comments are helpful to the Committee. I look forward to answering any questions the Committee may have. Thank you.