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by email and regular mail
Chairman Pat Roberts
Vice Chairman John D. Rockefeller, IV
United States Senate
Select Committee on Intelligence
211 Hart Senate Office Building
Washington, D.C. 20510-6475

Re: **Draft Committee Bill to Reauthorize the USA PATRIOT Act**

Dear Chairman Roberts and Vice Chairman Rockefeller:

I write to support a provision in the draft Committee bill to reauthorize the Patriot Act. The provision, currently designated Section 203, would amend the definition of "foreign intelligence information" in the Foreign Intelligence Surveillance Act of 1978 ("FISA"). I support this amendment because it will correct the erroneous interpretation of FISA by the Foreign Intelligence Surveillance Court of Review in *In re Sealed Case*, 310 F.3d 717 (2002). The Court of Review interpreted FISA, as amended by the Patriot Act, to bar the government from using FISA surveillance to get evidence to arrest and prosecute foreign agents, even when such arrests and prosecutions are necessary to prevent acts of international terrorism and other foreign threats. That erroneous interpretation prevents the Patriot Act from achieving its purpose of bringing down the dysfunctional, statutory "wall" between foreign intelligence and criminal law enforcement activities. By correcting the Court of Review's error, Section 203 of the draft Committee bill will implement Congress's original intent in the FISA and the Patriot Act and, in the process, remove a potentially serious restriction on the government's power to fight international terrorism and other foreign threats.

To briefly describe my qualifications to address the issue, I served as an Assistant to the Solicitor General of the United States from 1990-1996. In that position, I became familiar with FISA and other statutory, as well as constitutional, provisions governing federal government surveillance of persons in the United States. Since 1996, I have been a law professor who has taught and done legal research and writing on issues of criminal procedure. 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 the publication of an article, co-written with William Dylan Gardner, entitled *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 Harvard Journal of Law & Public Policy 319 (2005), available at http://www.law.uidaho.edu/richard [hereafter cited as "Seamon & Gardner"].

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In the paragraphs below, I briefly explain (1) how the Court of Review erred in interpreting FISA; (2) how that error harms the domestic fight against international terrorism; and (3) how the error would be appropriately corrected by Section 203 of the draft Committee bill.

1. The Court of Review misinterpreted FISA.

As amended by Section 218 of the Patriot Act, FISA authorizes the government to seek a FISA warrant and conduct FISA surveillance if "a significant purpose" of the proposed surveillance is "to obtain foreign intelligence information."[1] "Foreign intelligence information," in turn, is defined in relevant part to mean information that is "necessary to" the ability of the United States to protect against "international terrorism" and certain other foreign threats.[2] Under the plain language 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."[3] 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.[4]

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.[5] Congress decided, instead, to allow surveillance of U.S. persons based on conduct

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[1] 50 U.S.C. 1804(a)(7)(b).

[2] *Id.* § 1801(e)(1).

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

[4] *See id.* at 735-36.

[5] *See* Seamon & Gardner at 427-435.

that is not invariably a crime.[6] And, Congress required that the purpose of such surveillance be obtaining "foreign intelligence information," which does not invariably constitute evidence of crime.[7] 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*.[8] 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 FISA. The Department may have good (perhaps strategic) reasons for not seeking correction of what the Department itself (at least in 2002) believed was an error. That should not prevent Congress from considering an amendment of FISA to implement its original intent.[9]

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[6]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. *Id.* § 1801(b)(2).

[7]*See In re Sealed Case*, 310 F.3d at 723 n.10.

[8]*See id.* at 735-36.

[9]In addition to imposing the "ordinary crimes" restriction discussed in the text, the Court of Review held that FISA, as amended by 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." *Id.* 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

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 restriction 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 now.

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 suspected members of the mob: It has promised to arrest and prosecute suspected terrorists for any and all offenses, including ones as minor as "spitting on the sidewalk."[10] 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.[11] Title III will not always work, for two reasons. First, Title III authorizes surveillance for evidence of only certain crimes.[12] 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

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

[10]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 22, 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).

[11]18 U.S.C. 2510-2522.

[12]*See* 18 U.S.C. 2516(1).

hindsight – 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 could 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.[13] The government understood this when it prosecuted Al Capone for not paying taxes and, later, when it undertook to arrest mob figures even for offenses as minor as "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.[14] The government's ability to use that approach, however, has been hampered by *In re Sealed Case*'s interpretation of FISA.

3. The Court of Review's misinterpretation of FISA would be appropriately corrected – and a potentially serious restriction on the government's power to international terrorism would be removed – by the amendment to the Definition of "Foreign Intelligence Information" proposed in Section 203 the draft Committee bill.

As discussed in Points 1 and 2, FISA authorizes the government to use FISA surveillance to take law enforcement measures 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." Although FISA now, and always has, permitted this use of FISA surveillance, courts have not recognized its permissibility. Section 203 of the draft Committee bill would clarify the matter, and thereby effectuate Congress's original intent. In the process, Section 203 would remove a potentially serious restriction on the government's power to fight international terrorism.

Section 203 would amend FISA's definition of "foreign intelligence information" in 50 U.S.C. 1801(e) to add the language that is underlined and in bold-face type below:

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[13]*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").

[14]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 at 461 & n.682 (citing relevant portions of Report).

"(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 to protect **(including protection by use of law enforcement methods such as criminal prosecution)** 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 * * *."

The amendment clarifies the definition by making it explicit that information can constitute "foreign intelligence information" – and therefore can be sought and collected under a FISA warrant – when it is intended to be used for law enforcement measures that will protect the United States from an act of international terrorism or one of the other foreign threats specified in the definition of "foreign intelligence information."[15]

It may be useful to describe a situation in which the amendment would clarify the government's power to use FISA surveillance.

- An alien innocently enters the United States on a student visa but, while here, joins a U.S. cell of al Qaeda. With the support of that organization and other members of the cell, he begins plotting to poison a large U.S. city's water supply. Based on his status as a foreign agent, the FBI obtains a FISA warrant for surveillance of his activities. While conducting surveillance under the FISA warrant, the FBI discovers not only evidence of the plot but also evidence that he has overstayed his student visa. The government determines that the best way to disrupt the plot, without revealing its knowledge of the plot, is to get evidence to arrest, prosecute, and deport the foreign agent for overstaying his visa. The government may use FISA surveillance to get the evidence needed for the agent's arrest, prosecution, and deportation.

This example shows that sometimes the best way to protect against a foreign threat is by law enforcement measures involving an "ordinary" offense. Other examples can be envisioned involving U.S. persons, rather than aliens, who are acting as foreign agents and who have

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[15]My co-author and I have proposed a similar amendment to the definition of "foreign intelligence information." *See* Seamon & Gardner at 458-462.

committed other, seemingly "ordinary" offenses. Section 203 of the draft Committee bill clarifies that, when the arrest and prosecution of such agents protect against international terrorism or one of the foreign threats identified in FISA's definition of "foreign intelligence information," the evidence needed to take those law enforcement measures is "foreign intelligence information" that the government can use FISA surveillance to obtain.

When the government conducts surveillance in order to get information that is meant to be used to protect against foreign threats, that surveillance is foreign intelligence surveillance, rather than surveillance for ordinary criminal law enforcement purposes. In other words, foreign intelligence surveillance is identified by its objective of protecting the United States from foreign threats, rather than by the methods used to achieve that objective. Indeed, Congress recognized when enacting the original FISA that "use of foreign intelligence information as evidence in a criminal trial is one way the Government can lawfully protect against * * * international terrorism" and other foreign threats.[16] In this context, arrest, prosecution, and other law-enforcement measures function as counterintelligence activities, rather than as ends in themselves. Accordingly, FISA surveillance to obtain evidence for taking such law enforcement measures is governed by the constitutional requirements for foreign intelligence surveillance, rather than the constitutional requirements for criminal law enforcement surveillance.

The constitutional requirements for foreign intelligence surveillance differ from those for criminal law enforcement surveillance.[17] The different standards reflect, among other things, their different purposes. Criminal law enforcement surveillance has the programmatic purpose "to advance the general interest in crime control"[18] or one of the broader "social" purposes that invariably underlie "the general interest in crime control."[19] In contrast, foreign intelligence surveillance, as discussed above, serves the quite different, paramount purpose of preserving the nation. Congress carefully considered, and acted within, constitutional requirements for foreign intelligence surveillance both in 1978, when it enacted the original FISA, and in 2001, when it amended FISA in the Patriot Act. Because Section 203 of the draft Committee bill merely

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[16]H.R. Rep. No. 95-1283, pt. 1, at 49 (1978).

[17]*See generally* United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (commonly known as "the *Keith* case").

[18]*Compare* City of Indianapolis v. Edmond, 531 U.S. 32, 44 & 46 (2000) (striking down on Fourth Amendment grounds a city's drug checkpoint program of stopping cars without a warrant and without individualized suspicion of drivers because the primary purpose of the program, judged at a "programmatic level," was "to advance the general interest in crime control").

[19]*Compare* Ferguson v. City of Charleston, 532 U.S. 67, 81 & 84 (2001) (striking down on Fourth Amendment grounds a city's program of drug testing pregnant women in situations indicating drug use because, judged at a "programmatic level," the "immediate" purpose of program was to gather evidence for prosecutions and the "ultimate" purposes of protecting unborn children and getting women off drugs did not distinguish the program from other law enforcement searches, since "law enforcement involvement always serves some broader social purpose or objective").

clarifies Congress's intent in those prior statutes, Section 203 itself satisfies constitutional requirements for foreign intelligence surveillance.

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The USA PATRIOT Act was supposed to bring down the dysfunctional statutory "wall" between foreign intelligence and criminal law enforcement. The Act has not completely achieved that result, however, because of the Foreign Intelligence Surveillance Court of Review's decision in *In re Sealed Case*. Section 203 of the draft Committee bill corrects the Court of Review's error and, in the process, removes a potentially serious restriction on the government's power to fight international terrorism.

Thank you for considering my views. I would gladly answer any questions about my views that the Committee may have.

Respectfully submitted,

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