

MR. WILLIAM STAFFORD: Mr. Chairman and members of the committee, you have done me the honor of soliciting my comments on the draft legislation entitled the National Security Surveillance Act of 2006.

It is my judgment that these proposed amendments to the FISA statute strike a reasonable balance between the president's power to conduct foreign affairs, including electronic surveillance, and the Congress' power of oversight over the same.

By positing the power to review and/or authorize this surveillance in the FISA Court of the 3rd branch, this legislation accommodates the power of the president to fulfill his duty to protect the nation against terrorism from without, while the civil liberties of Americans are being watched over by judges whose lifetime appointments put them above the current political clamor.

For those of us who came of age during the Cold War, the world political scene and the communications universe have changed dramatically. It is well then that the FISA statute, created nearly 30 years ago, be looked at and revised in the light of the world as it really is in the year 2006.

When FISA was first enacted in 1978, the Congress codified the president's power to conduct foreign intelligence surveillance and the method by which that could be done. In 1984, Congress amended the FISA statute to permit physical searches under the same foreign intelligence surveillance umbrella.

The Berlin Wall has since come down and other artificial borders have disappeared, while wireless computers, cellular telephones and other electronic creations have reduced the communications distances to nanoseconds. The events of September 11, 2001 and their aftermath demonstrate that while it is indeed a different world in which we now live, constitutional principles still apply and your proposed legislation accommodates both of these verities.

Your amendments create an electronic surveillance program in which the Congress recognizes that it is, quote, "not feasible to name every person or address every location," and requires, again quoting, "an extended period of electronic surveillance." This is another recognition not only of the change in the world scene and in communications abilities, but also of the difference between traditional criminal prosecution and foreign intelligence gathering. By requiring a justification for continuing the surveillance and by establishing enhanced minimization procedures these amendments offer a reasonable approach to meeting both the need for national security and for protecting American's civil liberties.

Foreign intelligence surveillance has been mentioned, is a different form of executive function than is law enforcement, and your proposed legislation recognizes that. In my considered opinion, it is well that a different threshold is set for the initiation and/or the continuation of foreign intelligence surveillance, as contrasted to the traditional fourth amendment probable cause that is required in criminal search and seizure warrant applications.

This is because the purposes of the intrusion and collection of information in each case is different. In a typical fourth amendment search and seizure context the individual and/or the place, and/or the type of evidence, are generally spelled out in the warrant application and criminal prosecution is the end game.

Under FISA the governmental function is the gathering of foreign intelligence information, and while the intelligence gatherers are not required to turn a blind eye to violations of the criminal laws, prosecution is not the purpose for the initiation or continuation of the foreign intelligence surveillance.

Spelling out in your legislation a different level for the initiation and/or continuation of foreign intelligence surveillance has the additional benefit, Mr. Chairman, of providing guidance for those courts that may be called upon to review the product of any such foreign intelligence surveillance.

Should evidence incidentally gathered as a result of a FISA warrant be offered in a criminal case, and there be challenged as a product of an unreasonable search and seizure, it would be comforting for the trial judge and for the court of appeal's judges who may have the same issue on appeal to know that Congress made a deliberate choice to set a different threshold for foreign intelligence purposes.

Illinois v. Gates has been mentioned. It's my recollection that arose in a criminal case context, and while the language of that opinion may well allow for different levels of consideration, depending upon the purpose for the warrant application, having the legislative intent clearly stated here removes any doubt as to what the Congress would authorize or sanction in the FISA context.

Choice of language to accomplish this is for you as drafters, but I respectfully suggest that if it is the will of Congress to set a different standard for foreign intelligence surveillance gathering that you do so for the benefit of the other two branches of government and for the American people.

As I approach my 75th birthday it remains my belief that our nation is really held together by a couple of pieces of paper, the declaration of independence and the constitution, and the belief of the American people that our system of government works.

FISA was created by Congress to clarify that the president had the authority to conduct foreign intelligence surveillance, but that the president would do so through a court composed of judges who had been nominated for life time appointments by a president and confirmed by the Senate, as provided in Article III of the constitution.

This arrangement seems to have worked well for everyone, and these amendments will, in my judgment, continue that arrangement into the real world of the 21st century.

Thank you, sir.

SEN. SPECTER: Thank you very much, Judge Stafford. Very profound, two pieces of paper so long as we follow them and with great tradition for a balance of power and for separation of power which we're going to the heart of today.

We'll now begin the five minute rounds of questioning by members of the Senate, and I will begin with Judge Baker, asking you about your testimony on minimization and establishing probable cause. And you were testifying that you think that the foreign intelligence surveillance court would be in a position to analyze the administration's program, whatever it turns out to be, to see to it that those two constitutional requirements are followed if my bill was enacted, correct?

MR. STAFFORD: Yes. I would urge you not to abandon the language of the fourth amendment of probable cause. Probable cause is the test, but there's a different probable cause that applies in a foreign intelligence case. And going back to how I feel the effectiveness of FISA Court was limited by the In re: Sealed Case decision, saying that we shouldn't look behind the minimization procedures. We had no right of review. I think that that is an oversight function that Congress intended, and also that we shouldn't look behind the determination of probable cause. Probable cause has always been a judicial determination --

SEN. SPECTER: And that could be accomplished with the legislation which I have proposed?

MR. STAFFORD: Absolutely. Yes, sir.

SEN. SPECTER: Judge Stafford, you testified about the necessity for balance and cited the advances in electronics and wireless, and you're looking for a balance for national security and protecting civil liberties, and do you think that the legislation which I have proposed will take into account the modern technological advances with the FISA Court review provide that kind of balance?

MR. STAFFORD: Yes, sir, I do. I think the -- you recognize that, as I indicated, that it's not possible to name every one, and therefore -- and as previously noted, the electronics just flies around this world so quickly, and the prospect of running to the court every time it seemed to me is not possible. So I think your legislation is broad enough to permit the gathering of the foreign intelligence information and the minimization procedures to strike from that anyone who's -- particularly U.S. persons who may not have any foreign intelligence purpose whatsoever, so their names could be eliminated, so I think the legislation will accomplish that, senator.