Testimony of Professor Peter P. Swire
Professor of Law
Moritz College of Law
The Ohio State University

before the

Subcommittee on Crime, Terrorism, and Homeland Security

of the

Judiciary Committee of the U.S. House of Representatives

on

Oversight Hearing on the Implementation of the USA PATRIOT Act: Sections of the Act that Address - Crime, Terrorism, and the Age of Technology

To Examine *Section 218* of the Patriot Act and the Foreign Intelligence Surveillance Act

April 28, 2005

Mr. Chairman, Mr. Ranking Member, I appreciate that the Committee has asked me back to testify this week. Your Committee is doing an exemplary job of developing a record from which everyone can become more informed about the Patriot Act. These extensive hearings will help the Committee, the Congress, and the general public have a far better basis for addressing the numerous legal issues implicated by the sunset of the Patriot Act.

The topic of today's hearing, the Foreign Intelligence Surveillance Act and the "wall," has been the focus of my single biggest research project since leaving the Government. My testimony is drawn today from my article on "The System of Foreign Intelligence Surveillance Law, 72 Geo. Wash. L. Rev. 1306, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586616. That article has been submitted into the record. In addition to the usual law review research, the article was based on my experience chairing a White House Working Group in 2000 on how to update surveillance law for the Internet age. It was also based on extensive interviews with people who have worked on FISA issues over the past several decades, in the Justice Department, the intelligence agencies, the FBI, and from outside of government. I think I can accurately describe the article as the most complete history of FISA. The article attempts to explain both the compelling national security interests at stake in FISA as well as the need to maintain civil liberties and the rule of law for surveillance conducted within the United States. The article contains a detailed list of issues for legislative oversight and for potential statutory reform.

I have one over-arching point today, as well as three specific points. The over-arching point is this. The wall has been our chief protection against a slippery slope, against permitting secret FISA surveillance from expanding deep into normal law enforcement activities. If the wall stays down, then it is the job of this Committee and the Congress to create a new set of checks and balances against abuse.

I will say it a different way to underscore the point. Since 1978 we had a way to prevent FISA from spreading into domestic law enforcement. The wall kept FISA within limits. What will prevent the secret FISA system from growing and growing in the years to come? The only reasonable answer, in my view, is to establish a set of checks and balances to make up for the absence of the wall. These hearings are the single biggest re-examination of FISA since it was enacted in 1978. I have therefore attached to this testimony a list of concrete possible reforms that can, taken together, create the checks and balances needed to replace the wall.

My three specific points concern, first, the broad definition of "agent of a foreign power," second, a legislative proposal to mend the wall somewhat, and third, a brief comment on a part of FISA that is not the focus of today's hearing, Section 215.

Turning to the first point, the definition of "agent of a foreign power" is crucial to defining the scope of FISA. For law enforcement investigations, a wiretap can be issued where there is probable cause that a crime has been, is, or is about to committed. For

FISA, the probable cause test is entirely different – there must only be probable cause that the person is an "agent of a foreign power."

Consider an individual who works in the United States for the Cali drug cartel. Is that person an "agent of a foreign power"? The Cali cartel is a highly organized group that physically controls a substantial amount of territory in Colombia. Given these facts, one might well argue that the Cali cartel is more of a "foreign power" than the amorphous Al Qaeda network. If one accepts the Cali cartel as a "foreign power," and a major smuggler as an "agent of a foreign power," would a street-level cocaine dealer also qualify as an agent of narcoterrorism? To take another example, what about the activities of the so-called "Russian mafia?" Many organized crime groups have links to overseas operations. How small can the links back home be to still qualify that group's actions as on behalf of a foreign power? These might be good oversight questions to direct to the Department of Justice.

Narcotics and organized crime cases have historically accounted for over 80 % of law enforcement wiretaps. If many of those cases shift to FISA, then law enforcement tools, including Title III wiretaps, may become the exception rather than the norm. Already in 2003, FISA orders for the first time outnumbered all state and federal law enforcement wiretap orders. As I believe other testimony will develop, there are serious constitutional issues if ordinary law enforcement cases are handled in the FISA system. Fourth Amendment protections do not get repealed for searches in the United States, for criminal investigations, just because a suspect may have a tenuous link back to someone overseas.

My second specific point concerns a proposal for partially mending the wall. My law review article explains in detail the compelling arguments on both sides of the argument. Based on my interviews with many people in DOJ and the intelligence agencies, the greatest problem with the "primary purpose" test is that investigators genuinely don't know in the early stages of an investigation whether the case will be primarily for intelligence or instead for law enforcement. The early wiretap order is a "dual use" technology – it is for *both* intelligence and law enforcement, depending on how the investigation develops.

My article argues that the missing legislative piece is a requirement within FISA that the surveillance be: (1) important enough and (2) justifiable on foreign intelligence grounds alone. The proposal is to amend FISA to include a new certification in a FISA application. The certification would be that "the information sought is expected to be sufficiently important for foreign intelligence purposes to justify" the initial (and any subsequent) FISA order.

This certification would underscore the idea that FISA should be used where foreign intelligence goals justify use of the special system. True foreign intelligence investigations would deserve a FISA order. If orders are sought with little link to foreign intelligence, then the Justice Department should not make the certification. If such cases

go forward, FISA judges should ask the tough questions to ensure that there is an important foreign intelligence justification for the order.

In concluding, I note that my article goes piece by piece through FISA, suggesting ways to update a number of its provisions in the light of our experience since 1978 and 2001. A special focus of the article is the so-called "gag rule" that applies to Section 215 orders and National Security Letters. The Senate version of the SAFE Act has adopted one of my recommendations, to put a six-month limit on the gag. The limit would be extendable by order of the FISA court. I hope very much this Committee will include the same limit in its bill this year.

To return to my over-arching point, the wall probably deserves to be lowered somewhat in our globalized world, where information sharing is vital to fast-moving investigations. The wall, however, was our chief bulwark against the creep of the FISA system into ordinary law enforcement. If the wall comes down, this Committee should erect new safeguards against the abuses that come from secret surveillance.

Contact information:
Professor Peter P. Swire
John Glenn Scholar of Public Policy Research
Moritz College of Law
The Ohio State University
Telephone: (240) 994-4142
E-mail: peter@peterswire.net
Web: www.peterswire.net

Issues List for Possible Reform of the Foreign Intelligence Surveillance Act

The issues list here comes directly from Peter Swire, "The System of Foreign Intelligence Surveillance Law, 72 Geo. Wash. L. Rev. 1306, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586616. The reform proposals are discussed in greater detail in that paper.

A. The Practical Expansion of FISA since 1978

1. Expand reporting on FISA surveillance
   Ex., look at Title III and pen/trap reporting

2. Redefine "agent of a foreign power"
   Ex., define activities that come within domestic law enforcement.

B. Section 215 and National Security Letters to Get Records

1. Limit the use of NSLs because there is no judicial oversight

2. Limit the use of Section 215 orders

   a. For both, consider return to pre-2001 standard for "specific and articulable facts"

   b. For both, consider minimization or other ways to prevent search of entire, large databases

   c. For both, clarify that the record producer can consult an attorney and also seek to narrow the order as unduly burdensome or overbroad; the challenge might be either in district court or the FISC

3. Modify the "gag rule"

   a. Adopt the 6-month limit for the gag rule, subject to 6-month extensions by the FISC

C. What to Do About the Wall

1. Require certification that the "the information sought is expected to be sufficiently important for foreign intelligence purposes to justify" the initial (and any subsequent) FISA order.

D. Improved Procedures for the Foreign Intelligence Surveillance Court System

1. Create more of an adversarial system with the FISC
   Ex., create a "devil's advocate" within the system, or at least permit the FISC to ask for counsel in appropriate cases

2. Adversary council on FISC appeals

3. Certification of issues to the FISC in criminal cases, at discretion of district judges

4. Create a statutory basis for minimization and other procedures by the FISC

E. Additional Oversight Mechanisms

1. Greater reporting to the public and Congress on the use of FISA for criminal prosecution

2. Disclosure of legal theories used in the FISC

3. Greater House and Senate Judiciary Committee oversight

4. Consider greater use of Inspector General oversight after the fact

5. Consider providing notice of FISA surveillance considerably after the fact

Potential Oversight Questions

The following potential questions for oversight accompany the April 28 testimony of Peter Swire on Section 218 and the Foreign Intelligence Surveillance Act. They were compiled with the assistance of other persons who are expert in FISA, especially Kevin Bankston of the Electronic Frontier Foundation and Beryl Howell of Stroz Friedberg, LLC.

1. What steps has the Department of Justice taken to ensure that the more than 70 errors and misrepresentations regarding information sharing and unauthorized dissemination of information, which are described in the Foreign Intelligence Surveillance Court's 2002 Opinion and Order, have not been repeated?

2. Does the Department have knowledge of any misrepresentations made to the Foreign Intelligence Surveillance Court since the passage of Section 218?

3. Are criminal prosecutors directing and controlling the initiation and operation, continuation and expansion of FISA searches and surveillances of US persons?

4. In what types of criminal cases have prosecutors directed and controlled FISA investigations? For example, have they directed and controlled the initiation of FISA searches and surveillances of US persons in narcotics cases? RICO cases? Domestic terrorism cases?

5. Which attorneys in the Criminal Division and the U.S. Attorneys' Offices are receiving training in the use of FISA? Only those in the terrorism and espionage sections or in all sections?

6. Is the Department of Justice's Office of Intelligence Policy and Review (OIPR) attending all meetings and discussions between the FBI's intelligence agents and the Criminal Division regarding FISA cases? If not, does OIPR receive briefings or written information on all such meetings and discussions?

7. Does OIPR inform the Foreign Intelligence Surveillance Court when a FISA target is also the subject of a criminal investigation?

8. A small number of applications have been rejected by the FISC since the FISCR's decision, according to public reporting. How many, if any, of these denials resulted from a lack of a significant foreign intelligence purpose? Were any orders submitted to the FISC and then modified and eventually approved in response to FISC concerns about the lack of a significant foreign intelligence purpose?

9. Please share with this committee any written opinion or order issued by the FISC after the FISCR decision construing the significant purpose requirement, redacted as necessary to prevent disclosure of sources and methods.

10. Since the FISCR held that agents and lawyers of the Criminal Division may direct and control FISA surveillance, approximately what percentage of FISA applications or surveillances would the DOJ characterize as being so directed or controlled?

11. In light of the expanded use of FISA authorities for law enforcement investigations and prosecutions, in what ways, if any, should the House and Senate Judiciary Committees receive less oversight information on FISA issues than the House and Senate Intelligence Committees?

12. The Fourth Circuit in United States v. Truong Dinh Hung, 629 F.2d 908, 916 (4th Cir. 1980), found that the constitutional exception to the Fourth Amendment warrant requirement applies only to "foreign powers, their agents, and collaborators." The Court stated that "even these actors receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution." Id. Does the Department consider this statement to be an accurate description of the law in the Fourth Circuit? Has the Department conducted surveillance under a FISA order in the Fourth Circuit where the government was "primarily attempting to put together a criminal prosecution"? Since the adoption of Section 218, has the Department conducted such surveillance in any circuit?

13. Does selling illegal narcotics, in and of itself, constitute "international terrorism" as defined in 50 U.S.C. § 1801? Is your answer different if the individual selling the narcotics knows that they come from an international organization that systematically brings illegal narcotics into the United States? Is your answer different if the individual knows that that activities of the international organization appear to "intimidate or coerce" a civilian population? Is it relevant to your answer if the international organization bribes or otherwise coerces public officials? Does such bribery or influence over public officials constitute activities that appear to be intended "to influence the policy of government by intimidation or coercion"? For these questions, in what ways do your answers differ if the person selling the narcotics is a U.S. person or not?

14. Does participation in organized crime activity, in and of itself, constitute "international terrorism" as defined in 50 U.S.C. § 1801? Is your answer different if the individual engaged in RICO or other organized crime activity knows that the organization systematically operates both inside and outside of the United States? Is it relevant to your answer if the international organization bribes or otherwise coerces public officials? Does such bribery or influence over public officials constitute activities that appear to be intended "to influence the policy of government by intimidation or coercion"? For these questions, in what ways do your answers differ if the person engaged in organized crime activity is a U.S. person or not?

15. One possible legal change would be to permit criminal defendants – or their cleared counsel – an opportunity to review the initial application for the FISA wiretap or search when contesting the admissibility of evidence obtained through a FISA search. What are the chief advantages and disadvantages of this possible change?

16. One possible legal change would be to require the Department to certify in applications for a FISA order that the "the information sought is expected to be sufficiently important for foreign intelligence purposes to justify" the initial (and any subsequent) FISA order. What are the chief advantages and disadvantages of this possible change?

17. One possible legal change would be to authorize expressly the FISCR and Supreme Court to permit parties from outside of the government to write briefs and participate in oral argument on appeals from the FISC. What are the chief advantages and disadvantages of this possible change?

18. One possible legal change is to authorize expressly the FISC to establish minimization or other procedural rules that would apply to applications for FISA orders. In light of the usual authority of Article III courts to establish procedural rules for their proceedings, what are the chief advantages and disadvantages of this possible change?