

**TESTIMONY OF KENNETH C. BASS, III
BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON
INTELLIGENCE ON PHYSICAL SEARCH AMENDMENTS TO THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT**

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Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss proposals to amend the Foreign Intelligence Surveillance Act of 1978 to provide for judicial authorization of physical searches undertaken for intelligence purposes. While enactment of this authority would, in my opinion, be in the public interest, there are certain aspects of the proposal that merit consideration for additional amendments.

My perspectives on this issue were formed during my service as the first Counsel for Intelligence Policy at the Department of Justice during the Carter Administration. I was part of the team of lawyers that represented the Administration during the enactment of FISA, and my office was established in large part to institutionalize the FISA process within the Department of Justice. We drafted the procedures to implement FISA, developed the basic forms and appellations process that are still in use today, and presented the first applications to the FISA Court.

Our Administration also decided, in effect, to extend FISA beyond its coverage of electronic surveillance and to present applications for physical searches to the FISA Court. As this Committee knows, that policy was subsequently reversed by the Regan Administration and there have not been any physical search applications presented to the FISA Court since 1981. It might be helpful to the Committee to explain briefly why we decided to use the

FISA Court for physical searches and why I continue to believe that that Court should approve physical searches for intelligence purposes.

Our decision to use FISA for physical searches was based on a combination of legal and policy considerations. We all know that decisions of the Supreme Court have established a strong preference for a judicial warrant as the authorization for physical searches and electronic surveillance. As a general rule, the only exceptions from the warrant requirement are "exigent circumstances" and "judicial unavailability," itself a form of exigent circumstances.

For a number of years before FISA the federal courts were presented with legal challenges to the long-standing Executive Branch tradition of warrantless electronic surveillance for so-called "national security" purposes. Over the years most of these surveillances had been directed at what we now call "official establishments" in FISA parlance. The courts had historically been reluctant to invalidate such searches, often expressing a belief that the judicial branch lacked adequate expertise and physical security to deal with national security issues.

This national security exception was stretched to its limits during the Vietnam War when national security became an umbrella that covered infiltration into domestic political groups and was no longer limited to activities targeted against foreign governments and their agents. It became clear that the willingness of the courts to tolerate warrantless searches might not continue in light of clear abuses of that authority. FISA was enacted, in significant part, to avoid further litigation over the legitimacy of warrantless intelligence searches.

Once the FISA Court was established, a basic rationale for not seeking judicial authorization for physical searches had disappeared. FISA created a judicial body with specialized expertise and the requisite physical security. It also created a body of judicial precedent for authorizing secret surveillances and

maintaining the secrecy of those surveillances, as long as the fruits were not used in criminal prosecutions. Within the Carter Administration, that development led some of our lawyers to question the basic legal rationale for continuing to engage in warrantless physical searches after FISA. That analytical concern was coupled with a very strong policy preference on the part of Attorney General Civiletti and other Administration officials for judicial approval, whenever possible, of intelligence searches.

We decided that the FISA judges, each of whom is also a fully-empowered district court judge, had inherent authority to issue warrants for intelligence physical searches and the security procedures of the FISA court provided the judicial mechanisms that had previously been lacking. Since it was now indeed possible to seek a judicial warrant in a manner fully consistent with the national security interests, we concluded that the constitutional preference for a warrant meant we should seek judicial approval.

Our decision was not without controversy within the Executive Branch and here in Congress. We heard at the time that some officials in the Intelligence Community were concerned that we were "going too far" in involving the judiciary in sensitive intelligence matters. We also heard that some Members of Congress were concerned that we were, in effect, amending the statute through executive action. We also heard that some of the FISA judges were troubled by the congressional reaction and began to question whether it was wise for them to continue to authorize physical searches as well as electronic surveillance.

We sought and obtain three physical search warrants. The Regan Administration came to a different conclusion. They decided, however, that the precedents we set could not simply be ignored, so they came up with a relatively unusual procedure. The first time they were faced with the necessity of a physical search for intelligence purposes, they prepared an application for a

FISA Court order, but submitted it with a memorandum explaining that they did not believe the FISA Court had any jurisdiction to issue such orders. They contended, in short, that we and the FISA Court had been wrong as a matter of law.

That application was not subjected to the normal adversarial process, but the issue was instead referred to the clerk of the FISA Court. He prepared a memorandum which agreed with the Regan Administration's position, that memo was circulated to all of the FISA trial judges, and the FISA Court issued a formal order stating that it did not have jurisdiction to issue physical search orders. That order ended the brief legal history of judicial orders for intelligence physical searches.

I continue to believe that the better view of the constitution, FISA and the inherent jurisdiction of the federal judiciary justifies issuance of physical search orders under the existing statute. But clearly it would be better to have explicit statutory authority instead of relying on debatable legal theories. Because I continue to believe that our Constitution embodies a very strong preference for judicial involvement in all searches by the government, and because the FISA Court procedures are fully compatible with national security interests, I support the concept of amending FISA to explicitly authorize physical search orders in addition to electronic surveillance orders.

There has been an interesting change in position over the years on the part of some of the strongest supporters of FISA. In 1978 the civil liberties community was one of the strongest voices heard in support of FISA. Now that voice is often heard in opposition to extending FISA to physical searches. That opposition is often based on a pragmatic foundation that there will be fewer physical searches for intelligence purposes under the present warrantless regime than there will be if FISA is amended. As a factual matter, the argument

is probably correct. There is no question that FISA provides a certain level of comfort and administrative familiarity that has led to an increase in the level of electronic surveillance for intelligence purposes. I believe a similar increase in the level of physical searches is likely to occur if FISA is amended. But unlike the opponents of this proposal, I believe it is preferable to add the protections of an independent approval from a federal judge as a further protection against a return to the excesses of the past when no official outside the Executive Branch was involved in intelligence searches. The more important principle is that of checks and balances. Our Constitution was not intended to prevent physical searches, but to regulate them through judicial oversight in all but the most exigent circumstances. Since it is now possible to have judicial review and fully protect the national security, that constitutional preference should tip the scales in favor of extending FISA to physical searches, even if that extension means an increase in the level of search activity.

The second fact that forms the basis for opposition is the history of the FISA Court in never refusing to grant an application. That record understandably causes many to question the validity of the judicial process. All of us who have worked with FISA, in the Executive, Judicial and Legislative branches, understand that the approval record of FISA applications is not significantly different than the approval record for Title III applications for law enforcement surveillances undertaken by the FBI. In both cases the applications are subjected to high-level review within the Department of Justice before they are submitted to a court. In both cases there have been a number of refusals of DOJ officials to approve an agency request for surveillance. Thus the cases that reach the courts have been pre-screened to leave only those that are more than merely arguable. When the Attorney General or her designee approves a FISA application, that approval is not the act of a mere advocate, but necessarily

contains an approval that the surveillance is necessary, as well as lawful. The certification process places on the Department of Justice a substantial responsibility to go beyond the traditional duties of counsel and to also make a decision on the balance of national and personal interests that are inherent in any search.

Based on my experience, however, the present statutory scheme does not go as far as it should in insuring that the rights of the surveillance targets, at least when U.S. persons are targeted, are protected. The FISA procedure, like the criminal warrant process, remains a completely *ex parte* process. No counsel appears in any FISA proceeding on behalf of the target. The total absence of opposing counsel is in my view a deficiency in our system. While virtually every surveillance of an official foreign establishment is, from a legal perspective, a "simple case," most surveillances of U.S. persons involve a more delicate judgmental process. There have been, on a very few occasions, applications to surveil U.S. persons which have raised difficult legal issues that are sometimes very close questions. Nothing in our present process insures that those close questions will be fully aired and subjected to scrutiny from the judiciary. While the routine use of a judicial clerk to screen applications helps flesh out any issues that may be presented in an application, that process is not an adequate substitute for the normal adversary process.

I believe it is possible, in a very small number of cases, to bring the FISA process closer to our normal adversary process without in any way compromising security or the national interest. In those few cases of surveillance targeted at U.S. persons, it is almost always possible to produce a sanitized application package that would not disclose the identity of the target or the human intelligence sources involved in the operation. Such a sanitized application could be given to an attorney in private practice who could undertake

an independent review and appear before the FISA Court to present arguments against issuance of an order. There are now enough former government attorneys who have been involved in the FISA process who could be asked to undertake such reviews on a *pro bono* basis that is feasible to appoint counsel for the targets in many, if not all, applications involving targets who are U.S. persons.

I do not advocate routinely involving counsel for the target in every U.S. person surveillance. Instead I suggest that FISA should include an explicit authorization for the appointment of such counsel, either at the request of the Attorney General, or on the FISA Court's own motion. Occasional use of such counsel would help alleviate some of the present concern over the uniform approval statistics. It would also serve as an additional buffer to any tendency to become too comfortable with the process and therefore to authorize too many physical searches.

Let me close with one other suggestion, though admittedly a very minor one. The Senate version of this legislation adds an entirely new section to FISA. That section is in large part a verbatim repetition of the electronic search provisions of FISA, with the changes necessary to fit physical searches. There are no substantial differences between the existing electronic surveillance standards and the new physical search standards. I would urge the committee to instead look at amending the existing statute by inserting references to physical searches in all appropriate places. Keeping the same statutory structure would produce a far more simply law that creating two essentially identical sections, one for electronic surveillance and one for physical search. Having two sections will not only require more lengthy applications with additional statutory citations, it increases the possibility that over the years a body of legislative changes or judicial precedents could develop in marginally

different ways that could make a relatively simple process unnecessarily complicated.

Mr. Chairman, thank you again for this opportunity to appear before you.