Department of Justice

STATEMENT OF

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BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

WARRANTLESS PHYSICAL SEARCHES CONDUCTED IN THE

U. S. FOR FOREIGN INTELLIGENCE

PRESENTED ON

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Mr. Chairman and Members of the Committee:

You have asked for my views on the provision of the Senate Select Committee on Intelligence's counterintelligence bill that establishes a procedure for court orders approving physical searches conducted in the United States for foreign intelligence purposes.

At the outset, let me emphasize two very important points. First, the Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes and that the President may, as has been done, delegate this authority to the Attorney General.

Second, the Administration and the Attorney General support, in principle, legislation establishing judicial warrant procedures under the Foreign Intelligence Surveillance Act for physical searches undertaken for intelligence purposes. However, whether specific legislation on this subject is desirable for the practical benefits it might add to intelligence collection, or undesirable as too much of a restriction on the President's authority to collect intelligence necessary for the national security, depends on how the legislation is crafted.

The language currently found in the Senate Intelligence Committee bill raises a number of significant concerns and is not acceptable to the Administration without some additions and modifications. We are working with that Committee to address these concerns, and there do not appear to be any major areas of

disagreement. I am hopeful that an agreement will be reached.

That being said, the Department of Justice believes that Congress can legislate in the area of physical searches as it has done with respect to electronic surveillances, and we are prepared to support appropriate legislation. A bill that strikes the proper balance between adequate intelligence to guarantee our nation's security, on one hand, and the preservation of basic civil rights on the other will be an important addition to our commitment to democratic control of intelligence functions. Such a bill would also provide additional assurances to the dedicated men and women who serve this country in intelligence positions that their activities are proper and necessary.

In considering legislation of this type, however, it is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities.

Rule 41 of the Rules of Criminal Procedure requires a judicial warrant to search and seize (1) property that constitutes evidence of a crime; (2) contraband, that is the fruits of a crime or things otherwise illegally possessed; or (3) property designed or intended for use as the means of committing a crime. Normally, the federal officer conducting the search is required to serve a copy of the warrant on the person whose property is being searched and to provide a written inventory of the property seized.

These rules would defeat the purposes and objectives of foreign intelligence searches, which are very different from searches to gather evidence of a crime. Physical searches to gather foreign intelligence depend on secrecy. If the existence of these searches were known to the foreign power targets, they would alter their activities to render the information useless. Accordingly, a notice requirement, such as exists in the criminal law, would be fatal.

Likewise, only in extremely rare cases could a good faith representation be made that the purpose of the search was to gather evidence of a crime. In addition, because of the nature of clandestine intelligence activities by foreign powers, it is usually impossible to describe the object of the search in advance with sufficient detail to satisfy the requirements of the criminal law.

Intelligence is often long range, its exact targets are more difficult to identify, and its focus is less precise. Information gathering for policy maker and prevention, rather than prosecution, are its primary focus. Prosecution is but one of many possible options that may be pursued at a later date. The Rule 41 requirements for the purpose of the search and ultimate notice to the person searched simply cannot be squared with the clandestine nature of searches directed at foreign powers or their agents.

This fundamental difference was recognized by Congress when the Foreign Intelligence Surveillance Act was enacted. In FISA,

the privacy interests of individuals are protected not by mandatory notice but through in-depth oversight of foreign intelligence electronic surveillance by all three branches of government and by expanded minimization procedures.

The Department of Justice has consistently taken the position that the Fourth Amendment requires all searches to be reasonable, including those conducted for foreign intelligence purposes in the United States or against U.S. persons abroad. For the reasons I just mentioned, however, we believe that the warrant clause of the Fourth Amendment is inapplicable to such searches. We are satisfied, therefore, that Attorney General approval of foreign intelligence searches pursuant to the President's delegation of authority in Executive Order 12333 meets the requirements of the Constitution.

Pre-FISA case law relating to electronic surveillance in the Fifth, Ninth, Third, and Fourth Circuits have confirmed this view. Additionally, when the Supreme Court determined that warrant requirements applied to electronic surveillance for domestic intelligence purposes in the Keith case, it specifically declined to apply this holding to foreign powers or their agents.

There are fewer cases dealing with physical, as distinguished from electronic, searches, but it is important to recognize that, for Fourth Amendment analysis purposes, courts have made no distinction between electronic surveillances and physical searches.

There were foreign intelligence physical searches involved in the Truong case that were upheld by the Fourth Circuit in 1980. And, in 1986, the United States District Court for the Eastern District of Virginia, in an unpublished opinion in the Chin case, upheld an Attorney General authorized physical search based on the Truong case.

In a 1976 case, United States v. Ehrlichman, the D.C. Circuit went to some lengths to point out that whatever search authority the President has can be exercised by the Attorney General, but not by other officials. The court, however, did not squarely define the extent to which the President had authority to authorize foreign intelligence searches.

In 1984, during hearings on the FISA, the Senate Intelligence Committee requested a legal opinion from the Department of Justice on the constitutionality of Attorney General approved intelligence searches. The unclassified version of this opinion was subsequently published in volume 35 of the Catholic University Law Review and concluded that the President has this inherent authority and may delegate it to the Attorney General.

As I stated earlier, we believe that existing directives that regulate the basis for seeking foreign intelligence search authority and the procedures to be followed satisfy all Constitutional requirements. Nevertheless, I reiterate the Administration's willingness to support appropriate legislation that does not restrict the President's ability to collect foreign

intelligence necessary for the national security. We need to strike a balance that sacrifices neither our security nor our civil liberties.

If we can achieve such a balance -- and I believe we can if we use the basic provisions of the Foreign Intelligence Surveillance Act -- we can accomplish a number of things. First, we will reaffirm our commitment to democratic control of intelligence functions. Second, by mirroring the FISA process including the involvement a neutral judicial official, we will remove any doubt from the minds of reasonable persons concerning the legality of these searches. And finally, we will also provide additional assurances to the patriotic individuals who serve this country in intelligence positions that their activities are proper and necessary.

I appreciate the opportunity to appear before you and would be happy to answer any questions the Committee may have.