

It is important that we continue to refine and improve the FISA statute, and consequently, I believe that Congress should adopt the proposed Kyl/Schumer amendment to FISA and the proposed DeWine amendment to FISA.

The Kyl/Schumer amendment would remove the requirement that the subject suspected of international terrorism be affiliated with a “group engaged in international terrorism or activities in preparation therefore.” This change would allow the surveillance of individuals who are not affiliated with any terrorist group and would give the government another weapon to terrorists, who act alone.

The DeWine amendment would lessen the burden on the government by changing the standard for showing that a proposed FISA target is “a foreign power or agent of a foreign power.” Rather than the current “probable cause” standard, the amendment applies a “reasonable suspicion” standard. Both standards require the court to apply a “totality of the circumstances” test and examine all the various factors to determine if the government has met its burden. But the reasonable suspicion standard is slightly easier to satisfy, and that is appropriate, because these cases involve national security interests. Under such dangerous circumstances, it is appropriate to balance the competing interests in a slightly different way than usual, and make it a little bit easier for the law enforcement interest to prevail. Such a change would make it a little more likely that FISA surveillance is permitted and would make it more likely that FISA can effectively be used in the war on terrorism. For example, in the case of the Moussaoui investigation, there was some uncertainty about whether the facts were sufficient to find probable cause, and so the Justice Department did not apply for a FISA warrant (However, under any legitimate reading of the facts in Moussaoui, the government could have met a reasonable suspicion standard and most likely would have asked for and received surveillance authority.).

FISA -- Congressional Oversight

In addition to these and other enhancements to FISA, it is important that Congress improve the quality and quantity of oversight with regard to FISA. There are two separate and distinct reasons for this. First, as the recent Court of Review opinion made clear, in recent years, the