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Congress's FISA Folly: Why We Need the Protect America Act Now

The Honorable Peter Hoekstra

KIM R. HOLMES, Ph.D.: We are very pleased that Congressman Pete Hoekstra (R-MI) could join us today to talk about Congress's important role in our nation's security, specifically in enabling intelligence officers to do their job.

Intelligence is, after all, our first line of defense. Democratic leaders in Congress let Americans down by letting the Protect America Act expire and leaving town as they did. With their access to intelligence, they know better than we do the danger America faces.

Our enemies may be out of sight, but they are not "Missing in Action." They are exploiting every kind of technology there is to wage their war against America and our liberties. We only need revisit the 9/11 Report to see how vulnerable we made ourselves by making it hard for law enforcement and the intelligence community to share information.

Since September 11, 2001, President George W. Bush and Congress have worked hard to remedy that problem. We may not agree with all the recommendations in the 9/11 Report, but one of its points is key: We must be able to listen in on enemy chatter around the world to find out what they are planning to do. The Protect America Act took good steps in that area, and not reauthorizing it has put us at great risk.

Few people can talk about this as knowledgeably as our guest today. Representative Peter Hoekstra is the Ranking Member of the House Permanent Select Committee on Intelligence. Previously, he served as its Chairman. He is one of the nation's staunchest defenders of the need to give the government and the

Talking Points

- We must be able to listen in on enemy chatter around the world to find out what they are planning to do. The Protect America Act took good steps in that area, and not reauthorizing it has put us at great risk.
- We must commit to identify, contain, and ultimately defeat radical jihadists—the *real* threat America faces—and give our intelligence community the tools it needs to be effective in detecting and preventing terrorist attacks.
- Many U.S. intelligence officers working against potential terrorists are so afraid of being bankrupted by legal costs associated with lawsuits that they have been forced to take out professional liability insurance.
- The House should vote on the bipartisan Senate Foreign Intelligence Surveillance Act bill without delay. Time is of the essence and it should be spent protecting the American people—not trial lawyers.

This paper, in its entirety, can be found at:
www.heritage.org/Research/NationalSecurity/hl1062.cfm

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U.S. military the right tools to fight and win the War on Terrorism.

He has also been one of our key allies on a number of issues since coming to Congress in 1993 to represent Michigan. As Senior Member of the House Committee on Education and Labor, he has sought to correct flaws in the No Child Left Behind Act. He also is a member of the Republican Study Committee, the Immigration Reform Caucus, the Congressional Coast Guard Caucus, and the Values Action Team, and he is the founding chairman of the Education Freedom Caucus.

Today, we are fortunate that he is focusing on reforming and reauthorizing our intelligence laws. Ladies and Gentlemen, please help me welcome our good friend, Congressman Pete Hoekstra.

—*Kim R. Holmes, Ph.D., is Vice President, Foreign and Defense Policy Studies, and Director, The Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation.*

THE HONORABLE PETER HOEKSTRA: I am going to talk about three things this morning: first, the continuing threat facing our nation from radical jihadists and from terrorists; second, the urgency that we give our intelligence agencies effective tools to combat this threat; and third, how the Democrats are weakening these tools and the chilling effect their actions are having on the U.S. intelligence community.

While smoke and dust was still billowing from the ruins of the World Trade Center in the agonizing days following the 9/11 terrorist attacks, President Bush huddled with his national security team to discuss what needed to be done to protect our nation from another catastrophic attack. The President's advisors told him the tools and methods U.S. intelligence agencies needed to track and combat radical jihadist groups like al-Qaeda.

The United States continues to employ tough anti-terrorist programs because the radical jihadist threat did not end with the 9/11 attacks. One only has to listen to the statements by Osama bin Laden and his deputy, Ayman Zawahiri, to understand the seriousness of this threat, its global implications, and the determination of radical jihadists to strike the American homeland.

A Declaration of War

Osama bin Laden declared war against the United States with little fanfare in 1996 when he issued a "fatwa" titled "Declaration of War Against the Americans Occupying the Land of the Two Holy Places." He acted on this so-called declaration of war with al-Qaeda attacks against the U.S. embassies in Tanzania and Kenya in 1998 and the USS *Cole* in 2000.

Bin Laden claims parallels between the American presence in Iraq and the Soviet presence in Afghanistan. For example, according to a strategy document posted on a jihadist Web site in 2003, "With guerilla warfare the Americans were defeated in Vietnam and the Soviets were defeated in Afghanistan. This is the method that expelled the direct Crusader colonialism from most of the Muslim lands."

The purpose of al-Qaeda's terrorist campaign is supposedly to establish Osama bin Laden's brand of radical Islam over what he claims is "the Caliphate," a region that in bin Laden's mind constitutes historical "Muslim lands" extending from Morocco to Indonesia. He said in 1998 that "the pious caliphate will start from Afghanistan." Zawahiri made a similar statement in an October 2005 letter when he wrote "[T]he goal in this age is the establishment of a caliphate in the manner of the Prophet." In 2006, Zawahiri said, "The reinstatement of Islamic rule... is the individual duty of every Muslim... with every land occupied by infidels."

The Left has asserted the radical jihadist threat in Iraq is very limited or unreal, and that the U.S. should withdraw to focus on the "real" War on Terrorism, which some of them claim is confined to Afghanistan. Nothing could be further from the truth.

In 2004, Osama bin Laden said, "Baghdad is 'the capital of the Caliphate.'" In July 2005, Ayman Zawahiri gave this detailed four-stage plan for Iraq in a letter to Abu Musab al-Zarqawi, the now-deceased head of al-Qaeda in Iraq:

The first stage: Expel the Americans from Iraq.

The second stage: Establish an Islamic authority or emirate, then develop it and support it until it achieves the level of a caliphate—over

as much territory as you can to spread its power in Iraq....

The third stage: Extend the jihad wave to the secular countries neighboring Iraq.

The fourth stage: It may coincide with what came before: the clash with Israel, because Israel was established only to challenge any new Islamic entity.

We have seen the world over that the threat from radical jihadists is a global threat. It also is a sophisticated threat that has spread its message, recruited followers, and planned terrorist attacks using the Internet, satellite television, and even computer games. Al-Qaeda activity has been reported in dozens of countries, including China, Canada, Sweden, India, the Philippines, Thailand, Yemen, and Serbia.

Radical jihadists are affecting Europe's rapidly growing Muslim population and have led to "home grown" Islamist terrorists. Europe is also threatened by a more subtle threat from radical Islamists who hope to conquer European states from the inside by setting up parallel Islamic legal systems and cultures in the belief that they will be in the majority in many European countries in the next 25–50 years. The Dutch intelligence service has published some excellent papers in English on how this phenomenon is occurring in the Netherlands.

An Ongoing War

The threat of homegrown and radical jihadist terrorism is why we need to update the Foreign Intelligence Surveillance Act (FISA) and continue aggressive anti-terrorism programs. Radical jihadist suicide bombers killed 202 people and injured 209 in the Indonesian resort city of Bali on October 12, 2002. The Madrid train bombings killed 191 people and left more than 2,000 injured on March 11, 2004. The London subway and bus bombing killed 56 people and injured 700 on July 7, 2005.

Although America has not been subjected to an attack by radical jihadists since 2001, this has not been for a lack of trying. The Heritage Foundation's James Carafano wrote an excellent paper last November that lists 19 attempted terrorist attacks against the United States and U.S. citizens since 2001. These include:

- An attempt by Richard Reid to detonate a shoe bomb on board an American Airlines flight flying from Paris to Miami in December 2001. A grand jury indictment of Reid found he had trained in al-Qaeda camps in Afghanistan.
- The May 2002 arrest of Jose Padilla for planning to detonate a "dirty bomb" in the United States.
- A plot to place a bomb in the New York subway system during the 2004 Republican National Convention.
- An August 2006 plot by "home grown" U.K. jihadists to blow up 10 civilian airliners flying from London to the United States.
- A June 2006 plot to blow up a jet fuel artery that runs through residential neighborhoods near New York's JFK Airport.

Democrats refuse to see or hear the continuing threat from radical jihadists. Even more troubling, Democrats refuse to recognize that tough anti-terrorist tools employed since 2001 *have* protected this country from terrorist attacks. Instead, Democrats have distorted anti-terrorist programs as threats to the American people rather than tools that our intelligence agencies are using to protect us from threats of radical jihadist terrorism. Instead of helping to strengthen anti-terrorism tools, Democrats have established a clear pattern of trying to undermine and erode them.

Democratic Distortions About Terrorism

Let me discuss the tools we are using to fight radical jihadists and other terrorists and the status of these tools.

Aggressive electronic surveillance of foreign terrorist suspects has played a critical role in tracking al-Qaeda terrorist activities and preventing terrorist attacks. Democrats have undermined this effort by refusing to fix the FISA problem and by demagoguing electronic surveillance of foreign terrorist suspects as "domestic spying" and "warrantless wiretaps" in an effort to rally the American people against the Bush Administration.

It didn't matter that Democrats and the news media could not produce evidence that even one American citizen's rights had been violated by this

effort. It also didn't matter that senior Democrats in the House and Senate had been regularly briefed on—and never objected to—aggressive electronic surveillance of terrorist suspects since this effort began in October 2001.

The Terrorist Finance Tracking Program is a program U.S. intelligence agencies have effectively used to track terrorist activities by “following the money.” When this program was leaked to the media in mid-2006, Democrats—without evidence—asserted the Bush Administration had abused power to spy on Americans' personal finances. Most Democrats voted against a June 2006 House Resolution condemning this leak. While the *New York Times* ombudsman later admitted this story shouldn't have been published in the first place, Democrats never took back these outrageous and untrue assertions.

Democrats have also taken steps to interfere with the interrogation, investigation, and prosecution of terrorist suspects.

- Democrats have tried to weaken U.S. efforts to obtain information on terrorist plots by foreign terrorist suspects by trying to accord them U.S. constitutional protections such as habeas corpus—protections radical jihadists want to do away with and replace with medieval Sharia law.
- Democrats have pressed to “legitimize” al-Qaeda terrorists by giving them the same rights as “lawful combatants” under the Geneva Convention—even though terrorist suspects do not meet the criteria laid out by the Convention and certainly do not obey the law of war themselves.
- For the last several months, House and Senate Democrats have been pushing for a criminal investigation of the 2005 destruction of CIA videotapes of interrogations of radical jihadist terrorists. The House Intelligence Committee investigation of this issue has consumed enormous amounts of staff time with little apparent result and has been so poorly run that it may interfere with a separate Justice Department investigation. However, the main consequence of the Democratic investigation will be to scare intelligence officers from taking difficult jobs in the fight against al-Qaeda, and avoid taking risks that could result in meritless congressional investigations.

As President Bush has been trying to focus the country on the threat from radical jihadists, Senate and House Democrats demonstrated they had a different focus when they mandated in the 2008 Intelligence Authorization that U.S. intelligence agencies craft an intelligence assessment of climate change. Before the President's Day recess, the House Intelligence Committee sent staff to the CIA to see how it is analyzing the environment. Given the Democratic leadership's lack of focus on the threat from radical jihadists, is it really a surprise they are pressing the CIA to study *global warming*?

Recent Terrorist Plots

While the Democrats press for intelligence studies of “bugs and bunnies,” radical jihadist activity continues around the globe. Just over the last few weeks the press has reported on these new radical jihadist threats:

- Last week, Moroccan officials arrested 32 members of an al-Qaeda-linked group who allegedly planned to assassinate Moroccan government officials.
- Hezbollah may retaliate against Israel, according to press reports, over a massive car bomb on February 12 that killed Imad Mughniyeh, a Hezbollah terrorist who was reportedly behind radical jihadist terrorism since the 1970s, including the 1983 bombings of the U.S. embassy and Marine barracks in Beirut.
- Hezbollah chief Hassan Nasrallah earlier this month raised the prospect of war with Israel declaring, “Zionists, if you want this kind of open war, let the whole world listen: Let this war be open.”
- The reputed leader of al-Qaeda in Iraq posted on a jihadi Web site a call for war with Israel and for jihadists to use Iraq as a launching pad to seize Jerusalem.
- In Denmark, three jihadists were arrested in a plot to murder a cartoonist for drawing editorial cartoons years ago that they found objectionable.
- In the Philippines, jihadist groups linked to al-Qaeda are said to be plotting the assassination of the Philippine president and bombing Western embassies.

Despite these recent developments, House Democrat leaders decided to go on vacation this month instead of updating the FISA to close a loophole that is inhibiting U.S. intelligence agencies from conducting electronic surveillance of foreign terrorists.

Lawsuits and Lies

FISA requires court orders for monitoring electronic communications that pass through the United States, even if the surveillance targets foreign persons in foreign countries. That made sense when the law was enacted in 1978 because it was clear where phone calls started and ended.

Today, due to technological advances and the Internet, it is possible that a cell phone call between two terrorists in Pakistan could pass through the United States and require a time-consuming FISA court order for U.S. intelligence agencies to monitor that call. The press has reported at least one case where the lives of U.S. soldiers in Iraq may have been placed at risk due to the paperwork and lawyering required to ensure that all of the legally required elements were met before obtaining a FISA order to monitor foreign terrorist communications.

Democrats have never understood the necessity, the complexity, or the urgency of these critical issues. They have responded by again putting politics ahead of national security. They have accused the Bush Administration of spying on Americans, “fearmongering,” and “hying” the threat from radical jihadist terrorism.

In addition, allegations that some American companies, for patriotic reasons, may have helped U.S. intelligence agencies monitor terrorist communications have led to the reward of an estimated \$40 billion in lawsuits.

Yesterday, four senior congressional Democrats published an op-ed in the *Washington Post* raising the fearmongering charge and asserting that there was no hurry to update FISA since authorities provided under the now-expired Protect America Act will allow the U.S. government to continue to monitor known foreign terrorists without court orders or other bureaucratic obstacles for up to a year.

This op-ed does not comport with the facts of this serious issue for two reasons:

- First, it is extremely misleading to assert U.S. intelligence agencies can rely on the authorities of the now-expired Protect America Act because those authorities will not cover many potential threats, especially new ones.
- Second, the expiration of the Protect America Act has returned us to a broken and outdated system in which targeting foreigners in foreign countries to detect and prevent potential attacks requires burdensome paperwork, government lawyers, and court orders. This bureaucracy costs precious time—time that could mean stopping a terrorist plot or saving the life of an American soldier. FISA must be modernized, permanently and immediately.

I have to admit I was puzzled by yesterday’s *Washington Post* op-ed since one of its authors, Democratic Senator Jay Rockefeller (D-WV), the Chairman of the Senate Intelligence Committee, was the sponsor of the bipartisan Senate FISA bill that overwhelmingly passed the Senate Intelligence Committee by a vote of 13-2 and the Senate by a vote of 68-29. Senator Rockefeller agreed with me as late as February 14 of this year that a consequence of Congress not acting before the Protect America Act expired would be “degraded” intelligence collection capability.

Fear the Fearmongers

“Fearmongering” is when someone invents or exaggerates a threat. Based on ongoing radical jihadist threats worldwide and pleas from Director of National Intelligence Michael McConnell, an intelligence professional who headed the National Security Agency for President Clinton, this charge hardly fits the Bush Administration or congressional Republicans—or the significant number of House and Senate Democrats who support the bipartisan Senate bill to fix FISA.

I submit the fearmongering charge fits those politicians who are falsely telling the American people that U.S. intelligence agencies are spying on their phone calls. It is fearmongering that portrays our intelligence professionals as a greater threat than al-Qaeda. America’s intelligence professionals are tired of the unending harsh criticism from congressional Democrats for doing the best they can to protect our homeland. Shame on the Democrats for fearmon-

gering at the expense of the reputation of these good men and women, our friends and neighbors!

Because of Democrat fearmongering, our soldiers may have to go to a court for permission to exploit battlefield intelligence. Can you imagine General Eisenhower having to go to court for permission to spy on the Germans in advance of D-Day on the off-chance an American may be on the shores of Normandy? Yet Democrats want to force Admiral McConnell to go to court for permission to spy on al-Qaeda. We shouldn't need a court order to spy on al-Qaeda, and we shouldn't need one to save our soldiers.

I should add that since the Senate passed its bipartisan legislation to fix FISA on February 12, 2008, over 200 people have been killed in radical jihadist terrorist attacks.

- More than 100 people were killed by a suicide bomber in Afghanistan at a dog fighting match on February 18. Thirty-eight more died the next day when a suicide bomber attacked a Canadian military convoy;
- In Pakistan, a suicide car bombing killed 40 on February 17 at an election rally. Suicide bombers killed 52 Shiite pilgrims in Iraq on February 24 and four on February 25.

The effectiveness of our anti-terrorism tools is eroding. We have already lost the Terrorist Surveillance Program. Telecommunications companies are fearful of helping the U.S. government monitor terrorists when they are facing meritless, crippling lawsuits and unending attacks and investigations by congressional Democrats—even though these companies have done nothing other than agree to help their country in programs ratified by the same Democrat leadership that is now harassing them.

Many U.S. intelligence officers working against potential terrorists are so afraid of being bankrupted by legal costs associated with lawsuits or unwarranted congressional investigations that they have been forced to take out professional liability insurance. You can be sure that the Democrat assault on anti-terrorist programs has contributed to the already serious problem of risk aversion

by U.S intelligence agencies. This is the last thing we need when facing such a serious threat to our national security.

The Legislation We Need

Congress is now back from its 12-day recess and must get to work by putting partisan politics aside and promoting legislation that protects our nation. We must pass national security legislation that helps do the following:

- Commit to identify, contain, and ultimately defeat radical jihadists—the real threat America faces;
- Give our intelligence community the tools it needs to be effective in detecting and preventing terrorist attacks; and
- Stop attacking and prosecuting intelligence professionals and U.S. companies for trying to prevent these attacks. Our goal needs to be preventing attacks, not prosecuting those trying to keep us safe.

Obviously, the first thing that needs to be done this week is for the House to pass the bipartisan Senate FISA bill without delay. With 21 House Democrats pledging to support this bill, there is no excuse to not bring this legislation to the floor as soon as possible. Time is of the essence and it should be spent protecting the American people—not trial lawyers. Congress needs to vote on the Senate bill *today*.

We need a more fundamental change in Congress toward national security. The threats to our nation from radical jihadists are real and continuing. When elected officials try to exploit anti-terrorist programs for political gain, they are weakening the safety net that is, and has kept, our nation safe. It is time to stop demonizing congressional Republicans and the U.S. intelligence community for trying to protect our nation from a clear and present danger. It is time to stop demagoguing anti-terrorist programs to appease the American Civil Liberties Union, liberal bloggers, and trial lawyers.

It is time for House Democrats to see and hear the threats facing our nation and to start honoring their most important responsibility as elected officials—to protect the American people from harm.