Good afternoon. One week ago, my colleague, Senator Dianne Feinstein, spoke on the Senate floor to lay out a series of alarming allegations that put the country on the cusp of a possible constitutional crisis.

In a cogent and powerful speech, Senator Feinstein described her belief that the CIA has circumvented the Senate Intelligence Committee's oversight efforts in a number of ways: stonewalling the Committee's attempts to obtain certain documents, searching Committee computers to monitor staff activity, surreptitiously seizing material and most disturbingly, accusing Committee staff of criminal misconduct in an effort to intimidate them.

The history behind these events is complicated, and although I know Senator Feinstein would not make these allegations lightly, what has been stated in the public record does not allow for definitive factual or legal conclusions. I share the concern expressed by my colleagues that any investigation must provide both the reality and the appearance of fairness and impartiality. And regardless of what is eventually revealed, these events highlight the broader question of whether the intelligence community, which has been afforded so much deference over the past decade, can operate within the apparatus of accountability that apportions power between the branches of government.

In the context of this situation and others that have come to light over the past year, we must ask how much unchecked and unmonitored intelligence activity can be consistent with the rule of law – the respect for legal constraints that is safeguarded in this country by our robust system of judicial review. These questions cannot be long delayed, because of their urgency and immediacy in involving critical civil rights and liberties, and because key statutes must be reauthorized by June 1, 2015.

The rule of law is our bedrock principle, the lodestar of American democracy. Living under the rule of law means that there are lines that cannot be crossed, even when circumstances makes crossing them seem necessary or appealing. As much as a guarantee of safety might seem attractive, we are not willing to pursue it – indeed, the Fourth Amendment prohibits us from pursuing it – through wholesale sacrifice of our liberty, our dignity, or our privacy. Police cannot search houses on a hunch, even though doing so might reveal some criminal activity. Government agents cannot listen to our phone conversations whenever they wish, just in case they happen to hear something threatening. Arbitrary, unconstrained governmental invasion of privacy was a major reason for the rebellion against English rule and for the Declaration of Independence.

The drafters of the Constitution attempted to prevent such invasions of individual freedom and privacy with the Bill of Rights. The tension between these liberties and government authority has nonetheless recurred throughout our history, particularly when our national security is threatened. Great leaders, men remembered as Constitutional giants, were not immune to pushing the boundaries. President Lincoln suspended habeas corpus during the Civil War.

President Roosevelt interned Japanese-American citizens during World War II. Bobby Kennedy presided over the Justice Department that spied on Martin Luther King, Jr.

Our current system of congressional oversight of intelligence was informed by the findings of the Church Committee. In 1975, Church Committee hearings revealed that the CIA had secretly opened Americans' mail, engaged in campaigns of surveillance and harassment designed to discredit Vietnam War opponents and journalists, and even bugged Martin Luther King's hotel rooms.

In response to these findings, Congress passed the Foreign Intelligence Surveillance Act, which we know as FISA, in 1978. FISA allows for domestic electronic surveillance when the government can show probable cause that an individual or organization was a "foreign power" or an "agent of a foreign power." FISA also creates a two-tiered court system, comprised of what we know as the FISA Court and the appellate-level FISA Court of Review. These courts are where the government has to make the showing that surveillance is authorized.

The very powerful role established by FISA for judges in the intelligence process is no accident. This role has been assigned to judges since the Republic's founding, though it might seem counterintuitive considering that the judiciary is really our most antidemocratic institution. Men and women are appointed for life to wear black robes, interpret the law and tell the rest of us what searches and seizures are warranted, and issue countless other rulings that shape our lives. They can almost never be removed, and they guard their prerogatives so jealously that Congress has a very difficult time in trying to make rules for them.

But we not only tolerate this system, we value it. As someone who has spent most of my professional life in one court or another, I believe wholeheartedly in the importance of the judiciary to our democracy. We maintain it, and we protect it, because we believe that the rule of law is so precious that it has to be, in some ways, safeguarded from democracy. The vagaries of popular will and executive overreach can threaten to overwhelm our bedrock principles, individual rights chief among them.

As new technologies develop, the question as to what the government can access and what is off limits is reframed. In the age of the internet, millions of people, every second, in every part of the world, communicate with each other in every conceivable medium – some through the letters and phone conversations that the Church Committee would have recognized, but many more through the text messages, social media postings, and video chats that were unimagined in 1978. Keeping pace with the explosion in electronic communication has been a growth in the government's ability to monitor what we do: to engage in staggeringly speedy and comprehensive searches of our associational activity, beyond the scope of anything the drafters of FISA, let alone the drafters of the Constitution, would have imagined.

The Bill of Rights was adopted when all searches were physical, at least in some sense, and had at least the potential to be witnessed. By contrast, when the NSA dives into the cloud to see what

websites you've visited, what political postings you've "liked," or what phone numbers your phone number has contacted, you will almost never be aware that a search has taken place. Because the FISA Court's job is to consider whether these sorts of searches are authorized, we should appropriately step back and look at whether the court is structured in a way that lets it give these questions the analysis they deserve.

I know it doesn't come as a surprise that I don't think the court is sufficiently equipped for this job as it stands right now. In my position as a member of the Judiciary Committee, I have proposed several changes to address this.

As I'm sure many of you know, the FISA Court right now only hears arguments from the government. The central change I have proposed is the introduction of a truly adversarial process – as President Obama called for last summer, an advocate for privacy and civil liberties who will participate in the FISA Court structure. I have been working to craft legislation to establish this "Special Advocate's Office" for almost a year.

A court where only one party gets to argue too often looks like a rubber stamp, rather than a place of genuine debate. I know that the judges of the FISA Court work extremely hard to get their legal decisions right. But American jurisprudence has long recognized the importance of opposing arguments. I recently asked Judge Patricia Wald – formerly Chief Judge of the D.C. Circuit, and a member of the Privacy and Civil Liberties Oversight Board – whether judges, acting in good faith and working as hard as they can, nonetheless miss important issues. She said yes – not only do judges miss issues on their own, they sometimes miss them even with the benefit of briefing by both sides.

The adversarial principle is so central to our legal system that in the criminal defense context, the Supreme Court has held that the right to representation is a constitutional guarantee. In the landmark case of *Gideon v. Wainwright*, the Supreme Court held that a criminal defendant's access to a lawyer doesn't depend on the judge thinking one is necessary. The judge who initially convicted Mr. Gideon—Judge McCrary—was sympathetic to his case, showing every sign of trying to help Gideon present his arguments. However, Judge McCrary simply did not believe Gideon needed an attorney. In McCrary's opinion, Gideon's problem was not that he had not adequately presented his case, but simply that there was no colorable argument for his innocence. After a one-day trial, the court found Gideon guilty as charged.

Yet when Gideon was retried and given access to a lawyer, not only did that lawyer find colorable arguments on behalf of his client, he exposed a host of issues that the court had never considered. At the end of the trial, the same judge who had originally presided over a trial he thought was open-and-shut instructed the jury for a second time. One hour later, the verdict came in: Clarence Earl Gideon was not guilty.

The lessons of Gideon apply with even more force to the FISA context. Although many FISA Court cases are essentially warrant proceedings, which in the ordinary criminal process are not

adversarial, criminal defendants eventually have the opportunity to challenge the validity of warrants that lead to their arrest. By contrast, most people who are subject to surveillance under FISA never even learn about it, let alone have the opportunity to challenge it.

Last summer, in one of his first public comments on the metadata program revealed by Edward Snowden, President Obama said he believed that the FISA Court would benefit from the addition of a civil liberties advocate. Equally important is assurance that the office we establish is in a position to make a real difference. The new law must enact real reform, rather than just a cosmetic tweak to the current process. As I see it, the Special Advocate must, for example, be able to proactively request participation in FISA Court proceedings, and to engage the FISA Court of Review appellate process for significant legal decisions.

Giving this power to the Advocate herself, rather than leaving it entirely in the hands of the Court, is important. We have heard from the Privacy and Civil Liberties Oversight Board that at least some judges of the FISA Court believe they already have the power to call upon third parties for alternative views. But, they have never exercised that power. Rather than relying on judges to seek out other arguments, the structure must require those arguments be heard.

This is why I believe the Special Advocate should be a permanent position, with an established office and a staff – not an occasional, on-call observer that the Court hears only when it chooses. My proposal would grant the Advocate many of the powers of any counsel – assert factual and legal arguments, present them to the court, and take cases through the appellate process.

My proposal would bar the Advocate from delaying or undercutting the FISA process. It requires the Advocate and her staff to obtain appropriate security clearances and maintain confidentiality. It allows the FISA Court to grant a warrant first – and hear from the Advocate later -- denying the Advocate the ability to unilaterally prolong processing a warrant. If the Advocate believes that the legal interpretation involved is incorrect, she has the power to assure confidential review of that interpretation, but not to force a judge to wait before surveillance takes place. The goal of my legislation is to ensure that FISA doctrine evolves with the benefit of an adversarial process, not to prevent any particular warrant from going into effect.

In addition to adversarial argument, accountability comes from transparency. Another aspect of my Special Advocate proposal would require the FISA Court to disclose and release decisions that constitute a "significant construction or interpretation of law." These releases could be redacted or summarized to protect classified details. Even so, they would bolster public trust by allowing the American public to have a better sense of how legal interpretations that affect us all – like the one that allowed for the bulk metadata collection program we have heard so much about – are developing.

Public trust also comes from the appearance and perception – as well as reality -- of a balanced and unbiased institution. Unlike other courts, the judges of the FISA Court are all appointed by the Chief Justice of the Supreme Court, without oversight or confirmation. All current members

of the FISA Court and the FISA Court of Review were placed there by John Roberts. Without a scintilla of disrespect to the Chief Justice, Americans may hesitate to trust a court whose members were picked entirely by one man – especially a court that operates in secret, requiring a particularly high standard of credibility and impartiality. A court picked by one man will inevitably be more homogenous ideologically than one assembled by multiple sources. And extensive research has shown that judicial decision-making is negatively affected by homogeneity – of whatever ideological perspective.

This is why my other proposal to reform the court focuses on its composition. The FISA Judge Selection Reform Act authorizes the chief judge of each judicial circuit nominate FISA Court judges, subject to approval by the Chief Justice. And additionally, it makes any selections of judges for the FISA Court of Review by the Chief Justice subject to the approval of five associate justices. This reform would ensure that the judges on the FISA courts represent the broad mainstream of judicial opinion. It is designed to achieve greater diversity on the FISA courts without undermining their independence from political pressures or from the President.

As vast as our challenges in this area remain, I am confident that our ability to adjust our course will continue to serve us well. The attacks of September 11th shook our nation to its core: while they cannot change our values, they awoke us to threats that we must address.

Many of our decisions in the aftermath were made on an emergency basis, and one of our most important and most difficult tasks is translating the programs these decisions put in place into institutions that both reflect our democratic principles and respond to a changing world. As a member of the Armed Services Committee as well as the Judiciary Committee, I know that although the threat of massive, coordinated attacks from Al Qaeda may seem reduced, the threat of attack remains real and relentless. Non-state actors with a global reach will always be a threat to any open society, and we must confront that fact.

Our intelligence community has enormously able, expert, dedicated men and women – patriots who protect our nation. Our intelligence legal framework must be, like them, the best it can be – both in reflecting our national values and in effectively gathering and using information. From my forty years of courtroom experience, including twenty years as Attorney General of Connecticut, I know that judges do best when they hear competing arguments, when they are open about their reasoning, and when they are free from perceptions of bias.

Our values and ideals do not disappear just because enemies like Al Qaeda have found new ways to fight. Although we must of course adapt to a changing world, the central principles of the American rule of law – ensuring that government power is balanced by checks among the branches, by respect for individual liberty, and by accountability for secret activity – will remain the same.