

Meadows, Bessie L

NOT RESPONSIVE

From: Benczkowski, Brian A (OLA)
Sent: Wednesday, February 06, 2008 11:28 AM
To: Boote, John; Haun, Kathryn (OAG); Meadows, Bessie L
Cc: Sweetin, Lindsay
Subject: RE: Approps Calls

Would prefer he do these on another day, perhaps Friday. He is doing FISA calls to the Senate and HJC calls in advance of tomorrow's hearing throughout the day today.

NOT RESPONSIVE

OAG-320

Meadows, Bessie L

From: Meadows, Bessie L
Sent: Wednesday, February 06, 2008 10:55 AM
To: Gerry, Brett ; Benczkowski, Brian A (OLA)
Subject: Congressional Call

FISA call.

Subject: Congressional Call

Start: Wed 2/6/2008 5:00 PM
End: Wed 2/6/2008 5:10 PM

Recurrence: (none)

Meeting Status: Meeting organizer

Required Attendees: Gerry, Brett ; Benczkowski, Brian A (OLA)

AG's Office

AO: Brett Gerry DOJ: Brian Benczkowski

Sen. Tom Carper will call the AG POC: Erin Walls, 224-2441

OAG-321

Meadows, Bessie L

From: Meadows, Bessie L
Sent: Wednesday, February 06, 2008 11:07 AM
To: Gerry, Brett ; Benczkowski, Brian A (OLA)
Subject: Congressional Call

FISA Call.

Subject: Congressional Call

Start: Wed 2/6/2008 4:15 PM
End: Wed 2/6/2008 4:25 PM

Recurrence: (none)

Meeting Status: Meeting organizer

Required Attendees: Gerry, Brett ; Benczkowski, Brian A (OLA)

AG's Office

AO: Brett Gerry DOJ: Brian Benczkowski

AG will call Senator Ben Nelson POC: Melanie 224-7557

February 22, 2008

The Honorable Silvestre Reyes
Chairman
House Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Reyes,

The President asked us to respond to your letter of February 14, 2008, concerning the urgent need to modernize the Foreign Intelligence Surveillance Act of 1978 (FISA). Your assertion that there is no harm in allowing the temporary authorities provided by the Protect America Act to expire without enacting the Senate's FISA reform bill is inaccurate and based on a number of misunderstandings concerning our intelligence capabilities. We address those misunderstandings below. We hope that you find this letter helpful and that you will reconsider your opposition to the bill passed last week by a strong bipartisan majority in the Senate and, when Congress returns from its recess, support immediately bringing the Senate bill to the floor, where it enjoys the support of a majority of your fellow members. It is critical to our national security that Congress acts as soon as possible to pass the Senate bill.

Intelligence Collection

Our experience since Congress allowed the Protect America Act to expire without passing the bipartisan Senate bill demonstrates why the Nation is now more vulnerable to terrorist attack and other foreign threats. In our letter to Senator Reid on February 5, 2008, we explained that: "the expiration of the authorities in the Protect America Act would plunge critical intelligence programs into a state of uncertainty which could cause us to delay the gathering of, or simply miss, critical foreign intelligence information." That is exactly what has happened since the Protect America Act expired six days ago without enactment of the bipartisan Senate bill. We have lost intelligence information this past week as a direct result of the uncertainty created by Congress' failure to act. Because of this uncertainty, some partners have reduced cooperation. In particular, they have delayed or refused compliance with our requests to initiate new surveillances of terrorist and other foreign intelligence targets under existing directives issued pursuant to the Protect America Act. Although most partners intend to cooperate for the time being, they have expressed deep misgivings about doing so in light of the uncertainty and have indicated that they may well cease to cooperate if the uncertainty persists. We are working to mitigate these problems and are hopeful that our efforts will be successful. Nevertheless, the broader uncertainty caused by the Act's expiration will persist unless and until the bipartisan Senate bill is passed. This uncertainty may well continue to cause us to miss information that we otherwise would be collecting.

Thus, although it is correct that we can continue to conduct certain activities authorized by the Protect America Act for a period of one year from the time they were first authorized, the Act's expiration has and may well continue to adversely affect such activities. Any adverse

OAG - 323A

effects will result in a weakening of critical tools necessary to protect the Nation. As we explained in our letter to Senator Reid, expiration would create uncertainty concerning:

- The ability to modify certifications and procedures issued under the Protect America Act to reflect operational needs and the implementation of procedures to ensure that agencies are fully integrated protecting the Nation;
- The continuing validity of liability protection for those who assist us according to the procedures under the Protect America Act;
- The continuing validity of the judicial mechanism for compelling the assistance of private parties needed to protect our national security;
- The ability to cover intelligence gaps created by new communication paths or technologies.

Our experience in the past few days since the expiration of the Act demonstrates that these concerns are neither speculative nor theoretical: allowing the Act to expire without passing the bipartisan Senate bill has had real and negative consequences for our national security. Indeed, this has led directly to a degraded intelligence capability.

It is imperative that our intelligence agencies retain the tools they need to collect vital intelligence information. As we have explained before, the core authorities provided by the Protect America Act have helped us to obtain exactly the type of information we need to keep America safe, and it is essential that Congress reauthorize the Act's core authorities while also extending liability protection to those companies who assisted our Nation following the attacks of September 11, 2001. Using the authorities provided in the Protect America Act, we have obtained information about efforts of an individual to become a suicide operative, efforts by terrorists to obtain guns and ammunition, and terrorists transferring money. Other information obtained using the authorities provided by the Protect America Act has led to the disruption of planned terrorist attacks. The bipartisan Senate bill would preserve these core authorities and improve on the Protect America Act in certain critical ways, including by providing liability protection to companies that assisted in defending the country after September 11.

In your letter, you assert that the Intelligence Community's ability to protect the Nation has not been weakened, because the Intelligence Community continues to have the ability to conduct surveillance abroad in accordance with Executive Order 12333. We respectfully disagree. Surveillance conducted under Executive Order 12333 in a manner that does not implicate FISA or the Protect America Act is not always as effective, efficient, or safe for our intelligence professionals as acquisitions conducted under the Protect America Act. And, in any event, surveillance under the Protect America Act served as an essential adjunct to our other intelligence tools. This is particularly true in light of the changes since 1978 in the manner in

which communications are transmitted. As a result of these changes, the Government often has been required to obtain a FISA Court order prior to surveillance of foreign terrorists and other national security threats located outside the United States. This hampered our intelligence collection targeting these individuals overseas in a way that Congress never intended, and it is what led to the dangerous intelligence gaps last summer. Congress addressed this issue temporarily by passing the Protect America Act but long-term FISA reform is critical to the national security.

We have provided Congress with examples in which difficulties with collections under the Executive Order resulted in the Intelligence Community missing crucial information. For instance, one of the September 11th hijackers communicated with a known overseas terrorist facility while he was living in the United States. Because that collection was conducted under Executive Order 12333, the Intelligence Community could not identify the domestic end of the communication prior to September 11, 2001, when it could have stopped that attack. The failure to collect such communications was one of the central criticisms of the Congressional Joint Inquiry that looked into intelligence failures associated with the attacks of September 11. The bipartisan bill passed by the Senate would address such flaws in our capabilities that existed before the enactment of the Protect America Act and that are now resurfacing. We have provided Congress with additional and detailed examples of how the Protect America Act temporarily fixed this problem and have demonstrated the operational need to provide a long-term legislative foundation for these authorities by passing the bipartisan Senate bill.

In your letter, you also posit that our intelligence capabilities have not been weakened, because the Government can employ the outdated provisions of FISA as they existed before the Protect America Act. We respectfully disagree. It was that very framework that created dangerous intelligence gaps in the past and that led Congress to pass the Protect America Act last summer.

As we have explained in letters, briefings and hearings, FISA's requirements, unlike those of the Protect America Act and the bipartisan Senate bill, impair our ability to collect information on foreign intelligence targets located overseas. Most importantly, FISA was designed to govern foreign intelligence surveillance of persons in the United States and therefore requires a showing of "probable cause" before such surveillance can begin. This standard makes sense in the context of targeting persons in the United States for surveillance, where the Fourth Amendment itself often requires probable cause and where the civil liberties of Americans are most implicated. But it makes no sense to require a showing of probable cause for surveillance of overseas foreign targets who are not entitled to the Fourth Amendment protections guaranteed by our Constitution. Put simply, imposing this requirement in the context of surveillance of foreign targets located overseas results in the loss of potentially vital intelligence by, for example, delaying intelligence collection and thereby losing some intelligence forever. In addition, the requirement to make such a showing requires us to divert our linguists and analysts covering al-Qa'ida and other foreign threats from their core role—protecting the Nation—to the task of providing detailed facts for FISA Court applications related to surveillance of such foreign targets. Our intelligence professionals need to be able to obtain foreign intelligence from

foreign targets with speed and agility. If we revert to a legal framework in which the Intelligence Community needs to make probable cause showings for foreign terrorists and other national security threats located overseas, we are certain to experience more intelligence gaps and miss collecting information.

You imply that the emergency authorization process under FISA is an adequate substitute for the legislative authorities that have lapsed. This assertion reflects a basic misunderstanding about FISA's emergency authorization provisions. Specifically, you assert that the National Security Agency (NSA) or the Federal Bureau of Investigation (FBI) "may begin surveillance immediately" in an emergency situation. FISA requires far more, and it would be illegal to proceed as you suggest. Before surveillance begins the Attorney General must determine that there is probable cause that the target of the surveillance is a foreign power or an agent of a foreign power and that FISA's other requirements are met. As explained above, the process of compiling the facts necessary for such a determination and preparing applications for emergency authorizations takes time and results in delays. Again, it makes no sense to impose this requirement in the context of foreign intelligence surveillance of targets located overseas. Because of the hurdles under FISA's emergency authorization provisions and the requirement to go to the FISA Court within 72 hours, our resource constraints limit our use of emergency authorizations to certain high-priority circumstances and cannot simply be employed for every foreign intelligence target.

It is also inaccurate to state that because Congress has amended FISA several times, there is no need to modernize FISA. This statement runs counter to the very basis for Congress's passage last August of the Protect America Act. It was not until the passage of this Act that Congress amended those provisions of FISA that had become outdated due to the communications revolution we have experienced since 1978. As we explained, those outdated provisions resulted in dangerous intelligence gaps by causing constitutional protections to be extended to foreign terrorists overseas. It is critical that Congress enact long-term FISA modernization to ensure that the Intelligence Community can collect effectively the foreign intelligence information it needs to protect the Nation. The bill passed by the Senate would achieve this goal, while safeguarding the privacy interests of Americans.

Liability Protection

Your assertion that the failure to provide liability protection for those private-sector firms that helped defend the Nation after the September 11 attacks does not affect our intelligence collection capability is inaccurate and contrary to the experience of intelligence professionals and to the conclusions the Senate Select Committee on Intelligence reached after careful study of the matter. It also ignores that providing liability protection to those companies sued for answering their country's call for assistance in the aftermath of September 11 is simply the right thing to do.

Through briefings and documents, we have provided the members of your committee with access to the information that shows that immunity is the fair and just result.

Private party assistance is necessary and critical to ensuring that the Intelligence Community can collect the information needed to protect our country from attack. In its report on S. 2248, the Intelligence Committee stated that "the intelligence community cannot obtain the intelligence it needs without assistance" from electronic communication service providers. The Committee also concluded that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation. The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation." Senior intelligence officials also have testified regarding the importance of providing liability protection to such companies for this very reason.

Even prior to the expiration of the Protect America Act, we experienced significant difficulties in working with the private sector because of the continued failure to provide liability protection for such companies. These difficulties have only grown since expiration of the Act without passage of the bipartisan Senate bill, which would provide fair and just liability protection. Exposing the private sector to the continued risk of billion-dollar class action suits for assisting in efforts to defend the country understandably makes the private sector much more reluctant to cooperate. Without their cooperation, our efforts to protect the country cannot succeed.

Pending Legislation

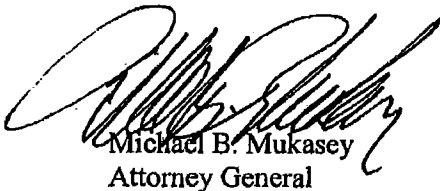
Finally, as you note, the House passed a bill in November to amend FISA, but we immediately made clear that the bill is unworkable and unacceptable. Over three months ago, the Administration issued a Statement of Administration Policy (SAP) that stated that the House bill "falls far short of providing the Intelligence Community with the tools it needs to collect effectively the foreign intelligence information vital for the security of the Nation" and that "the Director of National Intelligence and the President's other senior advisers would recommend that the President veto the bill." We adhere to that view today.

The House bill has several grave deficiencies. First, although numerous senior intelligence officials have testified regarding the importance of affording liability protection for companies that assisted the Government in the aftermath of September 11, the House bill does not address the critical issue of liability protection. Second, the House bill contains certain provisions and serious technical flaws that would fatally undermine our ability to collect effectively the intelligence needed to protect the Nation. In contrast, the Senate bill deals with the issue of liability protection in a way that is fair and that protects the national security. In addition, the Senate bill is carefully drafted and has been amended to avoid technical flaws similar to the ones in the House bill. We note that the privacy protections for Americans in the Senate bill exceed the protections contained in both the Protect America Act and the House bill.

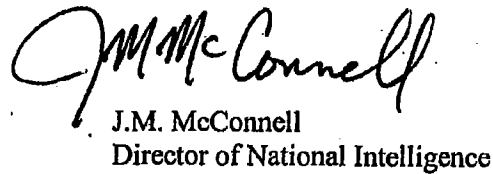
The Honorable Silvestre Reyes
Page 6 of 6

The Department of Justice and the Intelligence Community are taking the steps we can to try to keep the country safe during this current period of uncertainty. These measures are remedial at best, however, and do not provide the tools our intelligence professionals need to protect the Nation or the certainty needed by our intelligence professionals and our private partners. The Senate passed a strong and balanced bill by an overwhelming and bipartisan margin. That bill would modernize FISA, ensure the future cooperation of the private sector, and guard the civil liberties we value. We hope that you will support giving your fellow members the chance to vote on this bill.

Sincerely,



Michael B. Mukasey
Attorney General



J.M. McConnell
Director of National Intelligence

cc: The Honorable Peter Hoekstra
Ranking Member, House Permanent Select
Committee on Intelligence

The Honorable John D. Rockefeller, IV
Chairman, Senate Select Committee on Intelligence

The Honorable Christopher S. Bond
Vice Chairman, Senate Select Committee on Intelligence

Meadows, Bessie L

From: Meadows, Bessie L
Sent: Thursday, February 28, 2008 3:31 PM
To: Benczkowski, Brian A (OLA)
Subject: RE: Final answer: Cong. Peterson would like to speak with Dir. Mueller before speaking with the AG on FISA.

We have left word for all others.

From: Benczkowski, Brian A (OLA)
Sent: Thursday, February 28, 2008 3:31 PM
To: Meadows, Bessie L
Subject: RE: Final answer: Cong. Peterson would like to speak with Dir. Mueller before speaking with the AG on FISA.

OK. Move on to other calls.

From: Meadows, Bessie L
Sent: Thursday, February 28, 2008 3:24 PM
To: Benczkowski, Brian A (OLA)
Subject: Final answer: Cong. Peterson would like to speak with Dir. Mueller before speaking with the AG on FISA.
Importance: High

OAG-325

Meadows, Bessie L

From: Meadows, Bessie L
Sent: Wednesday, February 06, 2008 4:25 PM
To: Benczkowski, Brian A (OLA); Eisenberg, John; Demers, John
Cc: Gerry, Brett
Subject: RE: Fisa calls this afternoon

We are set to call Sen. Ben Nelson and Sen. Mark Pryor as soon as AG completes current call w/Cong. Scott

4:45 We are calling Sen. Ken Salazar

5:00 Sen. Tom Carper will call the AG

-----Original Message-----

From: Benczkowski, Brian A (OLA)
Sent: Wednesday, February 06, 2008 4:19 PM
To: Eisenberg, John; Demers, John
Cc: Meadows, Bessie L; Gerry, Brett
Subject: Fisa calls this afternoon

Can one or both of you AO the AGs fisa calls this afternoon? Bessie can give you details.

Meadows, Bessie L

From: Meadows, Bessie L

Sent: Friday, February 29, 2008 11:21 AM

To: 'Hobbs, Mary'

Subject: RE: Mary, per our conversation, General Mukasey would like to speak with Cong. Marshall regarding FISA. The Attorney General is available today from 1:15-2pm or 3-6pm. Thank you.

Not a problem, we'll call you at 3:30p. Thanks.



NOT RESPONSIVE

DAG - 333

NOT RESPONSIVE

Meadows, Bessie L

From: USDOJ-Office of Public Affairs
Sent: Thursday, February 07, 2008 10:53 AM
To: USDOJ-Office of Public Affairs
Subject: REMARKS PREPARED FOR DELIVERY BY ATTORNEY GENERAL MICHAEL B. MUKASEY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

Attachments: Picture (Metafile); Picture (Metafile)



Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, FEBRUARY 7, 2008
WWW.USDOJ.GOV

AG
(202) 514-2007
TDD (202) 514-1888

**REMARKS PREPARED FOR DELIVERY BY ATTORNEY GENERAL MICHAEL B. MUKASEY
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY**

WASHINGTON, D.C.

Chairman Conyers, Ranking Members Smith, and Members of the Committee. Thank you for the opportunity to testify about the important work being carried out by the men and women of the Department of Justice and for permitting me to highlight key challenges that lie ahead.

In the short time that I have been at the Department, I have confirmed what I had hoped and expected to find: men and women who are talented, committed, and dedicated to fulfilling its historic mission. That mission is to advance justice by defending the interests of the United States according to the law; to protect Americans against foreign and domestic threats; to seek just punishment for those who violate our laws; to assist our State and local partners in combating violent crime and other challenges; and to ensure the fair and impartial administration of justice by protecting the civil rights and liberties that are the birthright of all Americans.

These values are central to the mission of the Department and defining features of our democracy, and I thank the Committee for its efforts to help realize them.

During my tenure, I have sought opportunities to work with Congress to ensure that the Department is provided the statutory tools necessary to fulfill the Department's crucial mandate. I have also sought to keep Congress apprised of the Department's activities and policy positions where possible, and to respond to the Committee's oversight requests in a spirit of inter-branch comity that respects the institutional interests of the Department and Congress. I pledge to maintain this commitment throughout my tenure as Attorney General of the United States.

I would like to focus on two crucial legislative issues pending before the Congress: the impending expiration of the Protect America Act, and the impending effective date of the United States Sentencing Commission's decision to make a wide range of violent drug offenders eligible for a retroactive reduction in their sentence. I hope to work with Members of this Committee to address each of these problems.

As this Committee is aware, the Protect America Act will soon sunset, but threats to our national security will not expire with it. I urge Congress to pass long-term legislation to update the Foreign Intelligence

Surveillance Act (FISA) to ensure that this statute addresses present and emerging threats to our national security. S. 2248, the FISA Amendments Act of 2008, includes tools contained in the Protect America Act that have allowed us to close critical intelligence gaps. In addition, this legislation protects telecommunications companies now under legal assault because they are believed to have responded to the Government's call for assistance in the aftermath of September 11.

The Protect America Act is set to expire in just days, and it is vital that Congress enact long-term FISA modernization legislation, with retroactive immunity, before that Act expires.

S. 2248, which is a strong bipartisan bill reported out of the Senate Select Committee on Intelligence by a 13-2 margin, is a balanced bill that includes many sound provisions that would allow our Intelligence Community to continue obtaining the information it needs to protect the security of America, while protecting the civil liberties of Americans. Modernization of FISA is a critical part of this vital effort.

The Department would have grave concerns about any legislative proposal that ignores the continuing nature of the terrorist threat and denies the Intelligence Community and law enforcement the long-term statutory tools necessary to defend the United States. The Department respects the oversight authority of Congress, but sunset provisions create uncertainty in the Intelligence Community and stifle the development of stable partnerships necessary to detect, deter, and disrupt threats to our national security.

It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill. Contrary to the assertions of some, the legal protections contained in S. 2248 bill do not confer blanket immunity. Rather, protections apply in limited and appropriate circumstances, as reviewed by a court. We believe this approach represents the best way to provide retroactive immunity against these claims and urge Congress to pass legislation containing these protections.

While we appreciate the work of the House of Representatives in holding hearings and considering the challenges posed by the outdated provisions of FISA, the bill passed by the House, H.R. 3773, falls far short of providing the Intelligence Community with the tools it needs to collect foreign intelligence effectively from individuals located outside the United States. We cannot support this bill, which does not provide liability protection, would sunset in less than two years, requires prior court approval of acquisitions targeting persons outside the United States except in emergencies, and limits the type of foreign intelligence information that may be collected.

I would now like to focus on an issue that will have an impact on community safety nationwide: the Sentencing Commission's decision to apply retroactively, effective March 3, 2008, a new -- and lower -- guideline sentencing range for crack cocaine trafficking offenses.

Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for *immediate* release into communities nationwide.

Retroactive application of these new lower guidelines will pose significant public safety risks. Many of these offenders are among the most serious and violent offenders in the federal system and their early release, without the benefit of appropriate re-entry programs, at a time when violent crime has increased in some communities will produce tragic, but predictable results. Moreover, retroactive application of these penalties will be difficult for the legal system to administer given the large number of cases eligible for resentencing, now estimated at upwards of 20,000, and uncertainties as to certain key legal issues remain unresolved.

I understand the commitment of Members of this Committee to community safety, and would appreciate the opportunity to work with this Committee and this House to address the retroactivity issue in an expedient manner, while beginning discussions on changes to the current statutory differential between crack and powder

cocaine offenses.

Let me conclude with the following observation. While differences between this Committee and the Department are inevitable and are consistent with the institutional tension embedded in the Constitution, which is our Founding document, it is worthwhile to remember what unites us. We each swear an oath to defend the Constitution of the United States and to uphold the high ideals of public service to which we are entrusted. We must not lose sight of the common goals and common purpose that unify the Department of Justice and Members of the Committee who support its historic and ongoing mission.

I have submitted a more extensive statement for the hearing record and would be pleased to answer any questions you might have.

###

DO NOT REPLY TO THIS MESSAGE. IF YOU HAVE QUESTIONS, PLEASE USE THE CONTACTS IN THE MESSAGE OR CALL THE OFFICE OF PUBLIC AFFAIRS AT 202-514-2007.

SEP-11-2007 03:50

JUDICIARY COMMITTEE

202 225 4423 P.02

1254633
BW

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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

September 11, 2007

LAMAR S. SMITH, Texas
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STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOMBERG, Texas
JIM JORDAN, Ohio

Mr. Fred Fielding
Counsel to the President
Office of Counsel to the President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Fielding:

We are writing to follow up on the August 16, 2007 letter from the Speaker of the House and the Senate Majority Leader emphasizing the need for a prompt response to information requests by our Committee and other relevant House and Senate committees concerning Administration foreign intelligence surveillance programs, as Congress considers possible revisions to the Foreign Intelligence Surveillance Act (FISA). In particular, the Committee requests expeditious production of the documents and information on the enclosed list, which encompasses requests made to the Justice Department on January 19, February 1, May 17, and July 30, which have not produced the requested information.

To this end, we are enclosing a list of requested documents and questions. We are simultaneously submitting several additional questions to DNI Director McConnell, which relate directly to recent statements he made publicly regarding warrantless surveillance. Since the Judiciary Committee has scheduled a hearing on this issue for September 18, I would ask that you transmit as much of the information as is possible before that day. Given that many of our requests have been under review by the Administration for many months, and we were given assurances during discussion of the most recent FISA amendments that additional documentation would be forthcoming to us, this should not be burdensome or unexpected. In any event, we would ask that you set up a meeting with Judiciary Committee staff to discuss the status of any unfilled requests by no later than Thursday, September 20. This is essential given that the staff has reached out to the DNI's office, the Justice Department and to the White House over the last month to review these requests, and in each case, there has been no compliance.

We write directly to you for two reasons. First, from previous discussions with the Justice Department about our specific past requests, it is clear that it is the White House, and not the Department, that will make decisions concerning the information to be shared with Congress on this subject. Information pertinent to this request is likely to be found not just at the Justice Department, moreover, but also in offices including but not limited to the White House, Office of the Vice President, the National Security Agency, Office of the Director of National Intelligence, and the Federal Bureau of Investigation. Accordingly, we are asking the White House to facilitate responding to this document and information request across all relevant agencies.

RECEIVED
DEPT. OF JUSTICE
097 SEP 11 PM 4:36
EXECUTIVE SECRETARIAT

OLA-3

Mr. Fred F. Fielding
Page Two
September 11, 2007

In addition, as indicated in the August 16 letter to the President, this and similar requests from other Committees must receive the highest priority. At the Administration's urging, Congress recently enacted controversial changes to FISA in the Protect America Act of 2007, P.L. 110-55. This law, however, expires in less than six months. Our Committee has primary jurisdiction over FISA and has already begun the process of considering this issue. In the bipartisan spirit that helped produce the enactment of FISA in 1978, it is crucial that Congress and the Executive Branch cooperate and share critical information in this area if we are to produce a law that will truly protect America's security interests while safeguarding our constitutional rights.

Indeed, throughout the process of considering this issue, we have been clear about the need for all Members of the Judiciary Committee and a sufficient number of staff to have access to information concerning the surveillance programs, including orders of the FISA court. In July, Director of National Intelligence Mike McConnell directly assured Chairman Conyers that our Members would be given access to these materials. We specifically ask that you, Director McConnell, and other key Administration officials work with us expeditiously to fulfill this pledge and to answer our requests. Moreover, as it will likely be necessary to pursue closed hearings with current or former staff from the Department of Justice, such as Jack Goldsmith or Patrick Philbin, we look forward to your cooperation on classification issues that may arise.

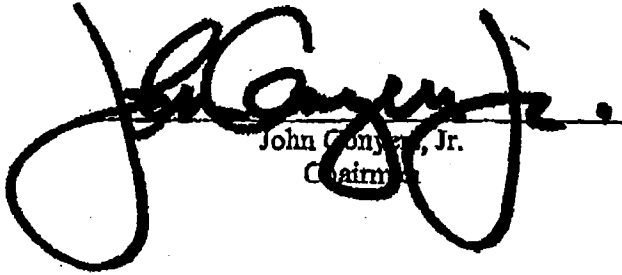
We appreciate that a number of our requests overlap with requests by or information already provided to other Committees, including subpoenas by the Senate Judiciary Committee. As the Speaker and Majority Leader noted, we assume there will be reciprocal disclosure of any materials that the Administration provides to the Senate Judiciary Committee. By the same token, to the extent that any of the information we request has already been provided to other Committees on a confidential basis, we would be pleased to expedite matters by obtaining access to the materials from them on a similar basis. We would similarly be pleased to work with you on other appropriate arrangements to obtain access to these materials. For example, to the extent that our requests include classified national security information, the House Permanent Select Committee on Intelligence has agreed to act as custodian for additional information provided.

We must emphasize, however, that important questions about FISA and the Administration's foreign intelligence surveillance programs remain unanswered, and we cannot fulfill our legislative and oversight functions without this critical information. We appreciate your personal attention to ensure a complete and expeditious response to each of our requests.


Responses and questions should be directed to the Judiciary Committee Office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680). Thank you for your cooperation in this matter.

Mr. Fred F. Fielding
Page Three
September 11, 2007


Sincerely,



John Conyers, Jr.
Chairman



Jerrold Nadler
Chairman, Subcommittee on the
Constitution, Civil Rights and Civil
Liberties



Robert C. "Bobby" Scott
Chairman, Subcommittee on Crime,
Terrorism and Homeland Security

Enclosure

- cc: Hon. Mike McConnell
Hon. Paul Clement
Hon. Lamar S. Smith
Hon. Trent Franks
Hon. J. Randy Forbes

Document and Information Request

A. Documents Requested

The Committee asks for complete and unredacted versions of the following:

1. All documents¹ from September 11, 2001 to the present constituting the President's authorization or reauthorization of any warrantless electronic surveillance² programs.

This request includes, but is not limited to, the Presidential Memoranda of March 19 and April 2, 2004, and the Presidential Authorizations dated October 4, November 2, and November 30, 2001; January 9, March 14, April 18, May 21, June 24, July 30, September 10, October 15, and November 18, 2002; January 8, February 7, March 17, April 22, June 11, July 14, September 10, October 15, and

¹For the purposes of this document and information request, the term "document" means any written, recorded or graphic matter of any nature whatsoever, regardless of how recorded, whether physical or electronic, whether or not maintained on any digital repository or electronic media, and whether original or copy, including, but not limited to, the following: memoranda, reports, manuals, instructions, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazine or newspaper articles, interoffice and intra-office communications, electronic mail (e-mail), any internet-enabled communication, contracts, cables, notations of any type of conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, transcripts, diaries, analyses, summaries, minutes, comparisons, messages, correspondence, press releases, circulars, reviews, opinions, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including without limitation, tapes, cassettes, disks, computer files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed or other graphic or recorded matter of any kind of nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

²For the purposes of this document and information request, the term "electronic surveillance program" means any classified intelligence program or programs, that include electronic surveillance involving the interception of communications in the United States or when at least one party is in the United States. This includes, but is not limited to, a program that has been termed the "Terrorist Surveillance Program" (at least some portion of which the President confirmed publicly in December 2005), programs of surveillance brought under the Foreign Intelligence Surveillance Court in January 2007, the program of surveillance under the Protect America Act of 2007, P.L. 110-55, and all related, predecessor, or subsequent versions of these programs, regardless of how titled. Except as otherwise noted, "electronic surveillance" means that term prior to the definitions in the Protect America Act. For the purposes of this document and information request, the term "warrantless" electronic surveillance programs refer to such programs and activities undertaken without a warrant or order from a court.

December 9, 2003; January 14, March 11, May 5, June 23, August 9, September 14, and November 17, 2004; January 11, March 1, April 19, June 14, July 26, September 10, October 26, and December 13, 2005; and January 27, March 21, May 16, July 6, September 6, October 24, and December 8, 2006.

2. All documents from September 11, 2001 to the present, including but not limited to any legal opinions, memoranda, audits, or evaluations, concerning any programs in which, for foreign intelligence purposes, the government obtains or obtained call or e-mail record information or other external data on phone calls or e-mails made in the United States, through the gathering of "metadata" or otherwise, regardless of how the program was titled or which agencies conducted the program, including but not limited to stored communication and including but not limited to the programs referred to in the following articles: Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006; Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. TIMES, September 9, 2007; and Scott Shane and David Johnston, *Mining of Data Prompted Fight Over U.S. Spying*, N.Y. TIMES, July 29, 2007.
3. All documents from September 11, 2001 to the present containing analysis or opinions from the Department of Justice, the National Security Agency, the Department of Defense, the White House, or any other entity within the Executive Branch on the legality of, or legal basis for, any warrantless electronic surveillance program, including but not limited to documents that describe why the surveillance at issue should not or could not take place consistent with the requirements and procedures of the Foreign Intelligence Surveillance Act (FISA) as they existed at the time of the document.

This request includes, but is not limited to, any memoranda or legal opinions from the Department of Justice Office of Legal Counsel or Office of Intelligence Policy and Review, including any memoranda or opinions authored or co-authored by former Department of Justice officials Jack Goldsmith, Patrick Philbin, or John Yoo concerning legal issues related to any warrantless electronic surveillance program, and memoranda issued by the Department of Justice dated October 4 and November 2, 2001; January 9, May 17, and October 11, 2002; February 25, 2003; March 15, May 6, and July 16, 2004; and February 4, 2005.

4. All documents from September 11, 2001 to the present, including orders, memoranda decisions, or opinions of the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Court of Review (FISR), and pleadings submitted to the FISC and FISR, that reflect communications with the FISC or FISR or any FISC or FISR judges about warrantless or other electronic surveillance program(s), containing legal analysis, arguments, or decisions concerning the interpretation of FISA; the Fourth Amendment to the Constitution, the Authorization for the Use of Military Force enacted on September 18, 2001, or the President's authority under Article II of the Constitution.

This request includes, but is not limited to: the January 10, 2007 Orders of the FISC referenced in the January 17, 2007 letter from Attorney General Gonzales to Senator Patrick Leahy and others, bringing the warrantless electronic surveillance program "into" FISA; any Orders of the FISC that require foreign-to-foreign communications to be subject to a warrant; and any Orders of the FISC narrowing or expanding the government's ability to intercept foreign communications that may pass through equipment in the United States.

5. All documents from September 11, 2001 to the present that reflect, discuss, or describe agreements or understandings between the White House, the Department of Justice, the National Security Agency, or any other entity of the Executive Branch and

telecommunications companies, internet service providers, equipment manufacturers, or data processors regarding criminal or civil liability for assisting with or participating in warrantless electronic surveillance program(s).

This request includes, but is not limited to, any certifications by the Attorney General or other Executive Branch official pursuant to 18 U.S.C. 2511(2)(a)(ii) provided to any telecommunications company, internet service provider, equipment manufacturer, or data processor in connection with requests for assistance with warrantless electronic surveillance program(s).

6. All documents from September 11, 2001 to the present related to the classified intelligence program that was the subject of discussion during the March 2004 hospital visit to former Attorney General John Ashcroft and other events that former Deputy Attorney General James Comey described in his May 15, 2007 testimony before the Senate Judiciary Committee

This request includes, but is not limited to:

- a) all documents from January 1, 2004 to the present related to the transfer of the powers of the Attorney General from then-Attorney General John Ashcroft to then-Deputy Attorney General James Comey in or around March, 2004 that reflect, discuss, or describe a) the date, time, or manner of that transfer of power; b) communication with or notice to White House personnel, including the President or the Vice President, about that transfer of power; c) knowledge of White House personnel about that transfer of power;
 - b) any memoranda authored or co-authored by former Deputy Attorney General James Comey or any other DOJ official on or around March 10, 2004 concerning legal issues related to any warrantless electronic surveillance program;
 - c) any memoranda or other documents from then-Counsel to the President Alberto Gonzales or any other White House official provided to Former Deputy Attorney General James Comey or any other DOJ official in March, 2004, concerning legal issues related to any warrantless electronic surveillance program or any proposed or actual revisions thereto; and
 - d) an unredacted copy of the notes or program log of FBI Director Mueller provided to the House Judiciary Committee on August 14, 2007.
7. All documents from December 1, 2005 to the present related to the investigation by the Department of Justice's Office of Professional Responsibility (OPR) into the role of Department of Justice attorneys in the authorization and oversight of the warrantless electronic surveillance program, which was opened on January 11, 2006 and closed approximately three months later after OPR investigators were denied the necessary security clearances ("OPR Investigation") that reflect, discuss, or describe the following:
 - a) consideration of the request for security clearances;
 - b) communications between White House personnel, including the President or the Vice President, and Department of Justice personnel about the OPR investigation or consideration of the request for security clearances; and
 - c) the reasons for ending that investigation.

8. Since September 11, 2001, all audits, reports, or evaluations of or concerning any warrantless surveillance program(s), whether conducted by government employees or private companies, including any reports as to the effectiveness of minimization standards or procedures to protect U.S. persons' communications.

B. Questions

1. Since September 11, 2001, has the Administration conducted any warrantless surveillance in the United States, other than through the warrantless electronic surveillance program the President acknowledged in late 2005 (known now as the Terrorist Surveillance Program), or as explicitly authorized by FISA at the time, or any other warrantless surveillance techniques such as physical searches of home or offices or opening of mail? Are such activities continuing? Is the Administration currently conducting any foreign intelligence surveillance in the United States, other than that explicitly authorized by the Foreign Intelligence Surveillance Act (FISA)?
2. How many actionable leads have been referred to operational entities as a result of acquisitions of US persons' conversations or communications?
 - a) Please break down the response as follows: 1) between September 11, 2001 and October 25, 2001; 2) between October 25, 2001 and January 10, 2007; 3) between January 10, 2007 and August 5, 2007; and 4) since August 5, 2007.
 - b) Of the actionable leads referred to operational entities, what have been the results? Please differentiate between counter-terrorism, criminal investigations and prosecutions, counter-espionage, and in-theater combat operations. Please indicate with specificity whether any attacks have been averted.
3. How many conversations or communications (both incoming or outgoing) monitored under the programs have revealed a contact between a US person and someone for whom there was probable cause to believe they were in or supporting al Qaeda? How many people in the US have had email communications with someone considered to be in al Qaeda? How many of these conversations or communications have actually involved terrorist activity, as opposed to other topics of conversation? How many people have been charged with any wrongdoing as a result of such interceptions? How many terrorist activities have been disrupted as a result of such interceptions? How many people have been subjected to surveillance but not charged with any crime or otherwise detained?
4. How many persons whose conversations or communications were monitored under the programs have been subjected to any other surveillance techniques or searches, such as physical searches of home or offices, opening of mail, etc, whether subject to a warrant or not?
5. Have any US persons whose conversations or communications were monitored under the programs been detained within the United States? Have any US or foreign persons been interrogated or detained outside of the United States, whether by the United States or any other government, in significant part as a result of such monitoring?
6. Have journalists, lawyers, lawmakers (whether federal, state, or local), or aides had their conversations or communications monitored under the programs? If so, how many?

7. How many persons in the US had conversations (voice or email content) or communications (call or email data) acquired through electronic surveillance programs? In how many of these acquisitions was the person in the US the target of the acquisition? In how many of these acquisitions was the acquisition incidental, and in how many of those incidental acquisitions did the individuals subsequently become the target of acquisitions? How many warrants for continued surveillance were sought after identification of someone as a person in the US? How many such applications were denied? Please break down the response between warrantless and other electronic surveillance programs as to the following periods: a) between September 11, 2001 and October 25, 2001; b) between October 25, 2001 and January 10, 2007; c) between January 10, 2007 and August 5, 2007; and d) since August 5, 2007.
8. How many individuals have been targeted for surveillance under the Protect America Act that has involved foreign intelligence generally, as opposed to terrorism or nuclear proliferation?
9. Please identify all telecommunications companies or internet service providers that allowed the government to access communication streams in the US without warrants between September 2001 and January 10, 2007. Please identify all telecommunications companies or ISPs that have allowed access since January 10, 2007. Please break down by programs that obtained external and internal data.
10. During the time period in March 2004 in which the warrantless surveillance program did not have Attorney General certification, please identify all telecommunications companies that continued to allow surveillance without such certification. Please break down by programs that obtained external and internal data.
11. Please identify any telecommunication companies or internet service providers that refused to allow access to communication streams without court order or warrant. Please provide all letters or communications from telecommunications companies or internet service providers in which they refused to allow access to communications streams without court order or warrant. Please break down by programs that obtained external and internal data.
12. Please identify the precise legal authority that was asserted in any and all documents provided to telephone or internet service providers to obtain their cooperation between September 2001 and January 2007. Please break down by programs that obtained external and internal data. Please provide any certifications, letters, and any legal memoranda or opinions setting forth such authority.

JOHN CONYERS, JR., Michigan
CHAIRMAN

LAMAR S. SMITH, Texas
RANKING MEMBER

HOWARD L. BEAMAN, California
NICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
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SHERA JACKSON LEE, Texas
MADONE WAYNE, California
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LINDA T. SANCHEZ, California
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HENRY C. "HANK" JOHNSON, JR., Georgia
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BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
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ARTUR DAVIS, Alabama
DEBBIE WASSERMAN SCHULTZ, Florida
KEITH ELLISON, Minnesota

F. JAMES SCHENK
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATY, Virginia
STEVE CHABOT, Ohio
DANIEL S. LUNGREN, California
CHRIS CANNON, Utah
AIC KELLER, Florida
DANIEL E. ISSA, California
MIKE FENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arkansas
LOUIE GOMMERT, Texas
JIM JORDAN, Ohio

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

FAX COVER SHEET

DATE: 9/11/07

TO: Hon. Paul Clement

FAX NO.: 202-2514-~~0700~~ 9769

FROM: John Conyers, Jr., Chairman Fax No.: (202) 225-7680

NUMBER OF PAGES IN THIS TRANSMISSION: 9 (including cover)

COMMENTS: Please contact Renata Strouse at
202-225-3951 if fax does not transmit completely.

PLEASE CALL IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION
(202) 225-3951

HONORABLE PETER D. KEISLER
 ACTING ATTORNEY GENERAL
 UNITED STATES DEPARTMENT OF JUSTICE
 950 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20530-0001

U.S. House of Representatives
 Committee on Energy and Commerce
 Washington, DC 20515-6115

JOHN D. DINGELL, MICHIGAN
 CHAIRMAN

November 1, 2007

HONORABLE PETER D. KEISLER
 ACTING ATTORNEY GENERAL
 UNITED STATES DEPARTMENT OF JUSTICE
 950 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20530-0001

RECEIVED
 NOV 1 2007
 EXECUTIVE SECRETARIAT

The Honorable Peter D. Keisler
 Acting Attorney General
 United States Department of Justice
 950 Pennsylvania Avenue, N.W.
 Washington, D.C. 20530-0001

Dear Mr. Keisler:

Congress is considering legislation regarding the Foreign Intelligence Surveillance Act. As part of that legislation, Congress is considering proposals concerning retroactive immunity to telecommunications companies widely reported to have been involved in the Administration's warrantless surveillance program.

As the House Committee with jurisdiction over telecommunications, we recently wrote to these companies requesting answers to a series of questions about the nature and extent of their participation in the program. The companies informed the Committee that they are unable to respond to our inquiries because any such information is within the control of the Administration; that if such information exists, it is classified and therefore the companies are unable to produce it; and that the United States has invoked the state secrets privilege as it relates to any such information, thereby preventing the companies from producing any such information.

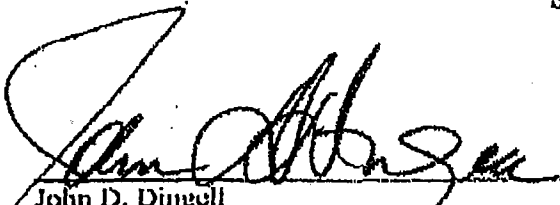
In order for this Committee to consider any legislation involving immunity for telecommunications companies, we will need more information about the nature and extent of this program. Because the Administration is the only entity able to provide this information, we are formally requesting a briefing from the appropriate Administration personnel.

OLA-5

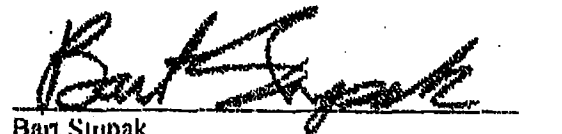
The Honorable Peter D. Keisler
Page 2

Please contact Amy Levine, Colin Crowell, or John Sopko with Committee staff at (202) 226-2424, within one week of the date of this letter, to arrange the requested briefing.

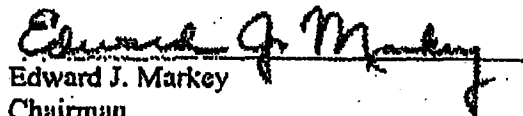
Sincerely,



John D. Dingell
Chairman



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations



Edward J. Markey
Chairman
Subcommittee on Telecommunications and
the Internet

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

Rob T
~~Stanley~~

**CONGRESS of the UNITED STATES
U.S. HOUSE OF REPRESENTATIVES**

**COMMITTEE ON ENERGY AND COMMERCE
2125 Rayburn House Office Building, Washington, D.C. 20515**

FAX COVER SHEET

DATE: November 1, 2007

TO: The Honorable Peter D. Keisler
Acting Attorney General
United States Department of Justice

FAX NUMBER: (202) 514-4482

FROM: Committee on Energy and Commerce
U.S. House of Representatives

NUMBER OF PAGES:
(Including Cover) 3 pages

COMMENTS:



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 16, 2008

The Honorable John D. Rockefeller IV
Chairman
The Honorable Christopher S. Bond
Vice-Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Messrs. Chairman and Vice-Chairman:

This responds to your letter, dated October 10, 2007, in which you requested access to certain National Security Division documents. As you know, documents responsive to the first bullet in your letter have already been provided to the Committee. In addition, as we have informally advised Committee staff, documents responsive to the second and third bullets of your request are available for review by appropriately cleared staff at the Department, and a number of staff members reviewed these documents last week.

Regarding your request for a list of significant constructions or interpretations of law issued by the Foreign Intelligence Surveillance Court (FISC) during the past five years that have not previously been included in the Department's Semi-Annual Reports under the Foreign Intelligence Surveillance Act, we are not aware of any such decisions, orders, or opinions of the FISC. Generally, such documents have been summarized in our Semi-Annual Reports in the sections titled "Judicial Assessment" and "Summary of Significant Legal Interpretations." Please notify us if you have information indicating that FISC decisions of this nature have not been summarized in reports provided to the Committee, and we will review the matter further. Similarly, we remain available to confer with staff about how to accommodate the Committee's information needs regarding any significant constructions and interpretations of law by the FISC identified in our Semi-Annual Reports that have not previously been made available to the Committee for review.

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

OLA-6



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have provided for your review redacted copies of documents relating to the implementation of the Protect America Act of 2007 (Act), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA). The Act moves FISA toward its original focus and provides critical new authority to conduct surveillance on foreign intelligence targets located overseas with more of the speed and agility necessary to safeguard the American people. We are grateful to Congress for identifying and remedying the vulnerability caused by the outdated FISA statute, and we are committed to ensuring that the use of the new authority is consistent with the Act and with the protection of the civil liberties and privacy of Americans.

Where necessary, we have made redactions to the documents to protect critical intelligence sources and methods. The highest classification level of these documents is Top Secret/Sensitive Compartmented Information (TS/SCI). As such, we have delivered the documents to the care of the Permanent Select Committee on Intelligence in H-405 of the Capitol.

We look forward to continuing to work with you on this critical issue. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benzckowski", is written over a faint, larger signature.

Brian A. Benzckowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Lamar Smith
Ranking Minority Member

OLA-7



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 14, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We have provided for your review redacted copies of documents relating to the implementation of the Protect America Act of 2007 (Act), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA). The Act moves FISA toward its original focus and provides critical new authority to conduct surveillance on foreign intelligence targets located overseas with more of the speed and agility necessary to safeguard the American people. We are grateful to Congress for identifying and remedying the vulnerability caused by the outdated FISA statute, and we are committed to ensuring that the use of the new authority is consistent with the Act and with the protection of the civil liberties and privacy of Americans.

Where necessary, we have made redactions to the documents to protect critical intelligence sources and methods. The highest classification level of these documents is Top Secret/Sensitive Compartmented Information (TS/SCI). As such, we have delivered the documents to the care of the Senate Security in S-407 of the Capitol.

We look forward to continuing to work with you on this critical issue. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Arlen Specter
Ranking Minority Member

OLA-7A



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 31 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have provided for your review redacted copies of additional documents relating to the implementation of the Protect America Act of 2007 (Act), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA). The Act moves FISA toward its original focus and provides critical new authority to conduct surveillance on foreign intelligence targets located overseas with more of the speed and agility necessary to safeguard the American people. We are grateful to Congress for identifying and remedying the vulnerability caused by the outdated FISA statute, and we are committed to ensuring that the use of the new authority is consistent with the Act and with the protection of the civil liberties and privacy of Americans.

Where necessary, we have made redactions to the documents to protect critical intelligence sources and methods. The highest classification level of these documents is Top Secret/Sensitive Compartmented Information (TS/SCI). As such, we have delivered the documents to the care of the Permanent Select Committee on Intelligence in H-405 of the Capitol.

We look forward to continuing to work with you on this critical issue. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

Brian A. Benzowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Lamar Smith
Ranking Minority Member

OLA-7B



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 3 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We have provided for your review redacted copies of additional documents relating to the implementation of the Protect America Act of 2007 (Act), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA). The Act moves FISA toward its original focus and provides critical new authority to conduct surveillance on foreign intelligence targets located overseas with more of the speed and agility necessary to safeguard the American people. We are grateful to Congress for identifying and remedying the vulnerability caused by the outdated FISA statute, and we are committed to ensuring that the use of the new authority is consistent with the Act and with the protection of the civil liberties and privacy of Americans.

Where necessary, we have made redactions to the documents to protect critical intelligence sources and methods. The highest classification level of these documents is Top Secret/Sensitive Compartmented Information (TS/SCI). As such, we have delivered the documents to the care of the Senate Security in S-407 of the Capitol.

We look forward to continuing to work with you on this critical issue. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

Brian A. Benzckowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Arlen Specter
Ranking Minority Member

OLA-7C



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

January 24, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable John D. Rockefeller, IV
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Chairmen:

In accordance with our letter dated September 5, 2007, concerning the Protect America Act of 2007 (PAA), we are providing the Committees with several documents relating to the implementation of this Act.

First, on January 15, 2008, the Foreign Intelligence Surveillance Court issued an opinion and order upholding the procedures the government has adopted for determining that the acquisition of foreign intelligence information under the PAA concerns persons reasonably believed to be located outside the United States. Copies of the Court's decision and related documents involving the PAA are currently available for appropriately cleared Committee staff to review at the Department and will be made available to Committee Members upon request.

Second, we are providing the Committees with the National Security Division's reports detailing the monthly compliance reviews we have conducted. Because these reports are highly classified, they are being provided to the Intelligence Committees for appropriate storage, but are intended to be made available to Members and appropriately cleared staff from the four Committees. These reports reflect our efforts to conduct rigorous oversight of the implementation of the PAA and to ensure that the use of this authority is consistent with the PAA and with the protection of the privacy and civil liberties of Americans.

DLA-8

The Honorable Patrick J. Leahy
The Honorable John Conyers, Jr.
The Honorable John D. Rockefeller, IV
The Honorable Silvestre Reyes
Page 2

We hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
The Honorable Christopher S. Bond
The Honorable Lamar S. Smith
The Honorable Peter Hoekstra



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 5, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John D. Rockefeller IV
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

Dear Messrs. Chairmen:

On August 5, 2007, the President signed the Protect America Act of 2007 ("Act"), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA). The Act moves FISA toward its original focus and provides critical new authority to conduct surveillance on foreign intelligence targets located overseas with more of the speed and agility necessary to safeguard the American people. We are grateful to Congress for identifying and remedying the vulnerability caused by the outdated FISA statute.

The Department of Justice is committed to ensuring that any use of the new authority is consistent with the Act and with the protection of the privacy and civil liberties of Americans. Use of this authority will be subject to rigorous oversight by any intelligence agency that uses it, by the Department, and by the Office of the Director of National Intelligence (ODNI). In addition, the Department will inform Congress of acquisitions authorized by the Attorney General and the Director of National Intelligence and of the reviews it conducts to assess compliance by the implementing agencies.

The implementation and use of this new authority will be subject to the following oversight measures:

- Regular reviews by the internal compliance office of any agency that exercises authority given it under section 105B of FISA;

OLA-9

- An audit/review by the Department and ODNI, within fourteen days of the initiation of collection under this new authority, of an agency's use of the authority to assess compliance with the Act, including with the procedures by which the agency determines that the acquisition of foreign intelligence information concerns persons reasonably believed to be located outside the United States and with the applicable minimization procedures;
- Subsequent audit/reviews by the Department and ODNI at least once every thirty days;
- An agency using this authority will be under an ongoing obligation to report promptly to the Department and to ODNI incidents of noncompliance by its personnel.

The Department's compliance audits/reviews will be conducted by attorneys of the Department's National Security Division with experience in undertaking reviews of the use of FISA and other national security authorities, in consultation with the Department's Privacy and Civil Liberties Office, as appropriate, and ODNI's Civil Liberties Protection Officer.

The Department also appreciates the need for regular and meaningful reporting to Congress, so that Congress can fully understand our use of this surveillance authority as it considers its reauthorization. Accordingly, the Department will make itself available to brief and report to the committees listed below and their staff in the following ways:

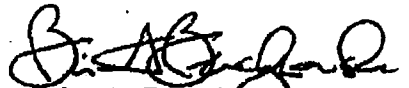
- The Act requires the Attorney General to report on acquisitions under section 105B on a semiannual basis to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary of the Senate and of the House of Representatives. This report must include incidents of noncompliance with the procedures used to determine whether a person is reasonably believed to be located outside the United States, noncompliance by a recipient of a directive, and the number of certifications issued during the reporting period.
- In addition to fulfilling these statutory requirements, Department representatives will be available to brief these committees after completing the first compliance review and after each subsequent review. At these briefings, Department representatives will report on the results of the compliance review, as well as incidents of noncompliance reported to it by an implementing agency. Such briefings will also include a discussion of what remedial efforts have been or will be undertaken in light of the findings of these reviews. The Department will make available to the committees any written reports of these reviews.

The Honorable Patrick J. Leahy, John D. Rockefeller IV, John Conyers, Jr., and Silvestre Reyes
Page Three

- Department representatives will be available to brief the committees on a monthly basis to update them on the results of further compliance reviews and generally on our use of the authority under section 105B.
- Because of the exceptional importance of making the new authority permanent and of enacting the remainder of the Administration's proposal to modernize FISA, the Department will make appropriately redacted documents (accommodating the Intelligence Community's need to protect critical intelligence sources and methods) concerning implementation of this new authority available, not only to the Intelligence committees, but also to members of the Judiciary committees and to their staff with the necessary clearances.

The Department is committed to working with the Congress to ensure that the authority granted by the Act is used to safeguard the nation's security in a manner consistent with the privacy and civil liberty interests of Americans. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,



Brian A. Benczkowski

Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
The Honorable Christopher S. Bond
The Honorable Lamar S. Smith
The Honorable Peter Hoekstra



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 12, 2007

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the corrected transcript of the testimony of Mr. Kenneth Wainstein, Assistant Attorney General, National Security Division, for the hearing held before the Committee on September 20, 2007, concerning the Foreign Intelligence Surveillance Act.

If we may be of further assistance, please feel free to contact this office.

Sincerely,

Brian A. Benczkowski

Principal Deputy Assistant Attorney General

Enclosure

OLA-11



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 12, 2007

The Honorable Silvestre Reyes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the corrected transcript of the testimony of Mr. Kenneth Wainstein, Assistant Attorney General, National Security Division, for the hearing held before the Committee on September 20, 2007, concerning the Foreign Intelligence Surveillance Act.

If we may be of further assistance, please feel free to contact this office.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosure

OLA-11A

SILVESTRE REYES, TEXAS, CHAIRMAN

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NANCY PELOSI, SPEAKER
JOHN A. BOEHNER, REPUBLICAN LEADER

U.S. HOUSE OF REPRESENTATIVES
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

H-405, THE CAPITOL
WASHINGTON, DC 20515
(202) 225-7690

MICHAEL J. DELANEY
STAFF DIRECTOR

MICHAEL MEERMANS
MINORITY STAFF DIRECTOR

September 24, 2007

Assistant Attorney General Kenneth Wainstein
U.S. Department of Justice
National Security Division
950 Pennsylvania Avenue
Room 2200C
Washington DC, 20530

Dear Mr. Wainstein:


Enclosed are transcript pages containing your remarks at the Permanent Select Committee on Intelligence hearing on Thursday, September 20, 2007, on FISA. These transcript pages have not been revised or edited and are not for quotation or duplication.

In order to ensure the accuracy of your transcribed statements prior to publication of the hearing record, please review your statements and make only technical, grammatical, and typographical corrections. Please initial each correction in the margin, and fax the corrected transcript pages to the Committee, attention of Ms. Courtney Littig, Chief Clerk, at (202) 226-5068, by Friday, October 5, 2007.

Once you have faxed your corrections to the Committee, or if you have chosen not to make changes, please return the hard copy originals by mail to H-405, the Capitol. If the Committee does not receive your corrections by October 5th, the Committee will publish your statements as they appear in the enclosed transcript pages. If you have any questions, please contact the Chief Clerk at (202) 225-7690.

Thank you in advance for your attention to this matter.

Sincerely,


Silvestre Reyes
Chairman

OLA-11B



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 20, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the corrected transcript of the testimony of Mr. Kenneth Wainstein, Assistant Attorney General, National Security Division, for the hearing held before the Committee on October 31, 2007, entitled, "FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability."

If we may be of further assistance, please feel free to contact this office.

Sincerely,

For Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosure

OLA-12

SILVESTRE REYES, TEXAS, CHAIRMAN
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U.S. HOUSE OF REPRESENTATIVES
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

H-405, THE CAPITOL
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NANCY PELOSI, SPEAKER
 JOHN A. BOEHNER, REPUBLICAN LEADER

September 11, 2007

Mr. Kenneth Wainstein
 Assistant Attorney General, National Security Division
 United States Department of Justice
 950 Pennsylvania Avenue NW
 Washington, DC 20530

Dear Mr. Wainstein:

On Thursday, September 20, 2007, the House Permanent Select Committee on Intelligence will hold a hearing on the Foreign Intelligence Surveillance Act (FISA) and authorities for the National Security Agency (NSA) surveillance activities. The hearing will take place from 10:00 am until 1:00 pm. We will notify you as to the location once a hearing room has been designated. We cordially invite you to testify in this hearing that will begin as an open session and then move to a closed session.

On August 4, 2007, Congress passed legislation to adopt a temporary revision of FISA. The Committee seeks to understand the impact of these changes on the civil liberties of American citizens and the need for permanent modification to FISA. This hearing is one in a series of hearings the Committee will convene in the coming weeks to assess the future of FISA.

In preparing your testimony, please consider the following issues: (1) the legal authorities given to the NSA after September 11, 2001, to include the way in which the NSA operated under those authorities; (2) the legal authorities NSA operated under beginning in January 2007, after the President brought the publicly described "Terrorist Surveillance Program" to the Foreign Intelligence Surveillance Court, to include the way in which those authorities have evolved; (3) how NSA will operate under the legal authorities passed by Congress on August 4, 2007; (4) the impact the temporary changes have had on intelligence collection; (5) the question of retrospective liability for private sector entities that may have assisted the U.S. government in conducting surveillance after September 11, 2001; and (6) any permanent changes Congress should consider making to FISA when the temporary authorities expire.


16-39

OLA-14

Please provide your statement for the record by close of business on September 17, 2007 along with the names of any supporting attendees. Please limit your oral testimony to five minutes.

Questions regarding this hearing may be directed to Ms. Wyndee Parker, Deputy Staff Director and General Counsel, at 202-225-7690.

Sincerely,


Silvestre Reyes
Chairman


Peter Hockstra
Ranking Member



U.S. House of Representatives

Permanent Select Committee
on Intelligence
H-405, U.S. Capitol
Washington, DC 20515-6415

Office No: (202) 225-7690
Fax No: (202) 226-5068

DATE:	NUMBER OF PAGES: <i>(Including cover sheet)</i>
TO: <i>AA-6 Wainstein</i> PHONE: FAX: <i>267-353-9836</i>	FROM:
COMMENTS:	

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT US AT: (202) 225-7690 OR 4121

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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SAM BROWNBACK, KANSAS
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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

November 1, 2007

Bryan A. Benczkowski
Principle Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 1601
Washington, DC 20530

Dear Mr. Benczkowski:

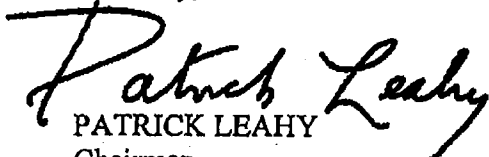
Thank you for facilitating the testimony of Assistant Attorney General Kenneth L. Wainstein's at the United States Senate Judiciary Committee hearing entitled "FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability" on October 31, 2007.

I have enclosed a copy of the unedited hearing transcript for Mr. Wainstein to review and make grammatical changes to his testimony, if needed. This is not the official hearing transcript and should not be copied or distributed under any circumstance.

Please mark any changes directly on the transcript and return it to my office, to the attention of Jennifer Price, Hearing Clerk, Senate Judiciary Committee, 224 Dirksen Senate Office Building, Washington, D.C., 20510. In order to complete the hearing record, please return this transcript with your changes as soon as possible and in no event later than Thursday, November 15, 2007.

Again, thank you for your participation. If you have any questions, please contact Jennifer Price of my staff at (202) 224-7703.

Sincerely,


PATRICK LEAHY
Chairman

OLA-15A

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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JOHN CORNYN, TEXAS
SAM BROWNBACK, KANSAS
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BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

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WASHINGTON, DC 20510-6275

November 13, 2007

Bryan A. Benczkowski
Principle Deputy Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 1601
Washington, DC 20530

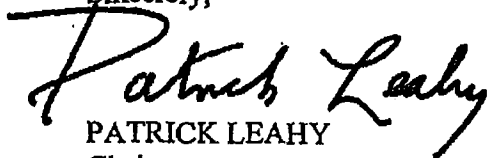
Dear Mr. Benczkowski:

Thank you for facilitating the testimony of Assistant Attorney General Kenneth L. Wainstein at the United States Senate Judiciary Committee hearing regarding "FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability" on October 31, 2007.

Enclosed are written questions from Committee members. In order to complete the hearing record, please send Mr. Wainstein's written responses as soon as possible and in no event later than Tuesday, November 27, 2007 to my office, attention Jennifer Price, Hearing Clerk, Senate Judiciary Committee, 224 Dirksen Senate Office Building, Washington, D.C., 20510. Please also send an electronic version of your responses to Jennifer_Price@judiciary-dem.senate.gov.

Again, thank you for your participation. If you have any questions, please contact Jennifer Price of my staff at (202) 224-7703.

Sincerely,


PATRICK LEAHY
Chairman

OLA-17C

**Questions of Senator Patrick J. Leahy
To Kenneth L. Wainstein**

Definition of “Electronic Surveillance”

1. Both the Protect America Act and the Senate Intelligence Committee bill would change the definition in FISA of “electronic surveillance” to say that it does not include surveillance of a target overseas, even if that target is communicating with someone in the United States.

First, this is nonsensical – this clearly is electronic surveillance and to have a statute say that black is white is a bad practice. This change would also have consequences for other parts of the statute that use that definition. For example, there is a question about whether it renders inapplicable the civil and criminal liability provisions contained in FISA because those provisions are triggered by unauthorized “electronic surveillance.”

Most importantly – it seems entirely unnecessary. The next part of the legislation would set up a new procedure for conducting the surveillance the government wants. There is no need to except it from the definition.

Q: Do you agree that if the statute sets up an alternative procedure to conduct the surveillance in the legislation, there is nothing in changing the definition that would add to the government’s authority? If not, please explain in as much detail as possible what the definitional change accomplishes.

Immunity – Takings Issue

2. Retroactive immunity would strip away the rights of plaintiffs in those lawsuits to pursue on-going litigation that alleges violations of constitutional rights.

Q: Are there constitutional problems with doing this? Is it a “Taking” that violates the 5th amendment?

If there are no constitutional problems, can you point us to precedent where Congress has stepped in to quash on-going constitutional litigation?

If there are constitutional problems, do the retroactive immunity provisions contained in the Senate Intelligence bill address them?

Role of the FISA Court

The Senate Intelligence Committee bill would require the Government to submit targeting and minimization procedures to the FISA Court for the court’s review, but it would not require an up-front order from the FISA Court. The companies assisting with the surveillance would get their direction from the Attorney General and the DNI, not the Court.

Q: With the Senate Intelligence Committee bill, please describe your understanding of what power the FISA Court would have to stop the

Government from acquiring communications if it determines that the targeting or minimization procedures are flawed?

Immunity – Approval by Counsel to the President

4. The Report accompanying the Senate Intelligence Committee's legislation notes with respect to the "Terrorist Surveillance Program" that the Executive Branch provided the service providers with letters at regular intervals stating that the activities they were being asked to assist the government with had been deemed lawful by the Attorney General. The Report says this is true for all the letters except one. One letter stated that the Counsel to the President, not the Attorney General, had deemed the activities to be lawful.

Q: Even if you argue that the companies acted legally in compliance with FISA through most of this time, you cannot make that argument with respect to the period of time when Mr. Gonzales – then White House Counsel – approved the letters, can you?

Q: Given that the service providers provided assistance without regard for the statutory requirements for certification laid out in FISA and Title III, if we give them immunity now, how can we assure ourselves that they will follow the statutory requirements of FISA in the future and not just accept any written certification that the Administration gives them?

5. You stated more than once in your testimony that if any litigation should occur, it should be directed against the government, not the communications carriers who assisted the government. However, when I asked you how this would be done in light of the government's blanket assertions of state secrets, you responded, "there are many investigations going on right now about the propriety of what was done or not done under the Terrorist Surveillance Program. So in terms of accountability, if there is wrongdoing, that wrongdoing is being ferreted out in ways, very traditional ways, other than litigation."

Q: Please specify what particular avenues, other than litigation, you are suggesting we use to hold any wrongdoers involved in this matter accountable?

**Senate Judiciary Committee Hearing on "FISA Amendments: How to Protect
Americans' Security and Privacy and Preserve the Rule of Law and Government
Accountability"**

Wednesday, October 31, 2007

**Questions Submitted by U.S. Senator Russell D. Feingold to Kenneth L. Wainstein
Assistant Attorney General**

1. The Senate Intelligence Committee bill provides new authority for targeting individuals 'reasonably' believed to be located overseas. That determination of the target's physical location prevents warrantless wiretapping of Americans inside the United States, so it is critical that the government establish effective procedures to make sure it only uses this authority to target people overseas. Under the bill, the government starts using its targeting procedures before submitting them to the court for approval. If the court ultimately rejects those procedures, and determines that they are not reasonably designed to ensure that only overseas targets are wiretapped using these new authorities, what does the bill say would happen to all the communications involving U.S. persons that were acquired using the unlawful procedures before the court rejected them?
2. Does the Justice Department believe that private sector liability for unlawful surveillance plays any role in the enforcement of U.S. privacy laws and in providing disincentives to engage in unlawful behavior?
3. The Intelligence Committee Report on the FISA bill declassified for the first time the fact that after September 11, 2001, the administration provided letters to communications service providers seeking their assistance with communications intelligence activities authorized by the President. What is the Justice Department's position as to whether those letters comply with the statutory immunity provision in existing law, which is in Section 2511(2)(a) of Title 18?
4. Five weeks ago, I asked DNI McConnell whether the administration could provide this Committee with information about how much U.S. person information is looked at and how much is disseminated, under the new authorities provided in the Protect America Act. He told me that the information was already being compiled and should be ready in a matter of weeks. As far as I am aware, that information has not yet been provided. When will the Judiciary Committee get that information?
5. The Senate Intelligence Committee bill, like the Protect America Act, amends FISA's definition of "electronic surveillance." The consequences of that change are unclear. Does the Administration believe that it is necessary to amend that key definition? Would the legislation have the same effect if it added new authorities

but allowed the new definition of electronic surveillance in the Protect America Act to expire?

6. The Intelligence Committee bill permits the executive branch to begin surveillance based on its own procedures, and requires that they be submitted to the court only after the fact. What would be the harm in having the court review and approve the procedures prior to using them, with a provision for going forward without prior judicial review in an emergency?
7. Do you agree that there is a greater potential for intrusions on Americans' privacy rights, mistaken or otherwise, if the government is intercepting international communications in the United States, as opposed to when the interception occurs overseas?
8. Do the new authorities provided in the Intelligence Committee-passed FISA bill authorize the acquisition, from inside the United States, of any foreign-to-foreign communications in which a target is not a communicant? Do they authorize such acquisition of any foreign-to-domestic communications in which a target is not a communicant? Do they authorize such acquisition of any domestic-to-domestic communications in which a target is not a communicant?
9. As defined in Section 2510(15) of Title 18, the term "electronic communication service" is quite broad, and covers "any service which provides to users thereof the ability to send or receive wire or electronic communications." Does the Department of Justice believe that Title I of the FISA bill reported by the Senate Select Committee on Intelligence, S. 2248, which applies to providers of electronic communication services as defined in Section 2510 of Title 18, covers libraries that provide Internet access to their patrons or places of business that provide their staff with Internet access?
10. The Protect America Act contains a provision that permits communications service providers directed to conduct surveillance under that law to file a petition with the FISA Court challenging the legality of the directive.
 - a. Will you commit to notifying the Judiciary and Intelligence Committees if any such petitions are filed with the FISA Court challenging the Protect America Act, and will you share with those committees any court action, as well as the pleadings in those proceedings, redacted as necessary?
 - b. Will you commit to announcing, publicly, the fact that such a petition has been filed?

Senator Edward M. Kennedy
Questions for the Record
Senate Judiciary Committee hearing on "FISA Amendments: How to Protect Americans'
Security and Privacy and Preserve the Rule of Law and Government Accountability"
Held on October 31, 2007

*To Kenneth L. Wainstein, Acting Attorney General, National Security Division, U.S.
Department of Justice*

1. Thank you, Mr. Wainstein, for sharing your views on FISA with the members of this Committee. I regret that I was unable to attend the hearing in person. As the history of our surveillance laws teaches us, it's essential that we have a very careful and—to the fullest extent possible—public consideration of FISA legislation.

I was present at the creation of the FISA law, and I worked closely with a Republican Attorney General to draft its provisions. Together, we found a way to provide our intelligence agencies with the authority they needed, and also build in checks and balances to prevent abuse of that authority. FISA proved that we do not have to choose between civil liberties and national security.

Unfortunately, the Protect America Act was enacted this summer in a much less thoughtful process. It was negotiated in secret and at the last minute. The Administration issued dire threats that failure to enact the law before the August recess could lead to disaster. We need to correct that failure by engaging in a thorough, deliberative process before we enact more legislation.

It is encouraging that the Administration has finally agreed to share documents with members of this Committee and the Senate Intelligence Committee on its warrantless surveillance program. We had requested these documents for many months, because they are clearly relevant to the Administration's arguments on FISA.

But the Administration has not yet shared any documents with members of the House Judiciary or Intelligence Committees, whose new FISA bill it has criticized. This selective information-sharing is troubling because it suggests that the Administration will only work with those lawmakers who already agree with it.

Questions:

1. Why won't the Administration share the documents on its warrantless surveillance program with the House Intelligence and Judiciary Committees? Aren't these committees equally important players in this legislative debate?
2. White House press secretary Dana Perino was recently asked why the Administration was willing to share documents with the Senate Intelligence Committee but not with any others. She said it was because the Intelligence Committee's leaders "showed a willingness" to grant amnesty to the telecommunications companies. "Because they were

willing to do that," Ms. Perino said, "we were willing to show them some of the documents that they asked to see." Asked to clarify these disturbing comments several days later, a White House spokesman said that what the Administration did was "not exactly" a quid pro quo.

- a. Do you stand by these descriptions of the Administration's behavior?
- b. These documents contain information that is clearly relevant to our responsibilities as lawmakers. How can you defend a policy of sharing them only with the committees that agree with the White House's preferences?

2. This Administration has asserted a view of executive power that is breathtaking in its scope. It has claimed the authority to wiretap Americans without warrants, despite the clear statement in FISA that it provides the "exclusive" means for conducting foreign intelligence surveillance. As we know from Justice Jackson's opinion in the Steel Seizure Cases, the President's authority is at its weakest when he acts contrary to a congressional enactment. Yet here, the President defied clear statutory language.

Questions:

1. If Congress enacts a FISA bill, will the President accept that he is bound by it? In particular, if we pass a bill that gives the President less power to conduct surveillance than he is now exercising, will he comply with it?
 2. If we do not extend the Protect America Act and do not pass any other new laws, will the Administration comply with FISA?
 3. Are any electronic surveillance programs currently being conducted outside the authority of FISA as amended by the Protect America Act?
 4. Do you agree that new legislation should reaffirm that FISA is the sole means by which the Executive branch can conduct electronic surveillance outside of the criminal context?
3. As you know, the Administration is asking Congress to grant broad immunity for any past violations of the law by telecommunications companies that provided surveillance information. The Senate Intelligence Committee's bill grants this amnesty; the House Intelligence and Judiciary Committees' bill does not.

I have yet to hear a single good argument in favor of amnesty for the telecoms, but there are many reasons to be against it. Under FISA, communications carriers already have immunity from liability if they act pursuant to a court warrant or a certification from the Attorney General. In this way, FISA protects carriers who follow the law, while enlisting their help in protecting Americans' rights and the integrity of our electronic surveillance laws.

The Administration's proposal for immunity will help shield illegal activities from public scrutiny, but it will do nothing to protect our security or liberty. Instead, it will deprive plaintiffs of their rightful day in court, send the message that violations of FISA can be ignored, and undermine an important structural safeguard of our surveillance laws.

It's especially disturbing that the Administration apparently encouraged communications companies to break the law, and that those companies apparently went along. It's wrong to allow the Executive Branch to pick and choose which laws it obeys, and to ask others to help it break the law.

Questions:

1. Isn't it true that under FISA, companies that acted pursuant to a court order or an Attorney General certification already have immunity from liability?
 - a. Is it fair to say, then, that none of the telecoms being sued had one of these two documents, because if they did, they would already be off the hook?
2. In your testimony, you suggested that it would be "unfair" to the telecommunications companies to let the lawsuits proceed. I found this argument most unconvincing. Telecommunications companies have clear duties under FISA, and they have highly sophisticated lawyers who deal with these issues all the time. It is precisely because fairness and justice are so important to the American system of government that we ask an independent branch—the judiciary—to resolve such legal disputes. There is nothing fair about Congress stepping into ongoing lawsuits to decree victory for one side.
 - a. If a company violated its clear duties and conducted illegal spying, doesn't fairness demand that it face the consequences?
3. If Congress bails out any companies that may have broken the law, won't that set a bad precedent? What incentive will companies have in the future to follow the law and protect Americans' sensitive information?
4. If your concern is that carriers not be bankrupted, would you support something more specific than complete amnesty—for example, a cap on damages?
 - a. If not, why not? Are you worried that courts will rule that the President's warrantless surveillance programs were illegal?
5. As you know, the President has said he will veto any FISA bill that does not grant retroactive immunity. At the same time, he and the Director of National Intelligence have said that if Congress does not make major changes to FISA, American lives will be sacrificed. If we take him at his word, then, the President is willing to let Americans die on behalf of the phone companies

- a. That's hard to believe. So why does the President insist on amnesty for the phone companies as a precondition for any FISA reform?

4. As you know, the Senate Select Committee on Intelligence recently reported a FISA bill, the "FISA Amendments Act of 2007," which has now come to this Committee on sequential referral. This bill would make major revisions to our surveillance laws in a variety of areas.

Although I appreciate the work of my colleagues on the Intelligence Committee in drafting this legislation, I have some concerns about their bill. For example:

- As I have said, the bill provides amnesty to telecommunications companies that may have broken the law in cooperating with the Administration on illegal surveillance, even though they already have broad immunity under current FISA law.
- The Intelligence Committee's bill redefines "electronic surveillance" in a way that is unnecessary and may have unintended consequences.
- The bill does not fully close the loophole left open by the Protect America Act, allowing warrantless interception of purely domestic communications.
- The bill does not require an independent review and report on the Administration's warrantless eavesdropping.
- The bill purports to eliminate the "reverse targeting" of Americans, but does not actually contain language to do so. There is nothing analogous to the House bill on reverse targeting, which prohibits such surveillance if "a significant purpose" is targeting someone in the United States.
- Court review occurs only after-the-fact, with no consequences if the court rejects the government's targeting or minimization procedures.

These are just a few of my concerns. But if I understand you correctly, you are generally supportive of the Intelligence Committee bill. Certainly, you seem to like it a lot more than the bill being considered by the House, which contains significantly greater protections for civil liberties.

Questions:

1. My understanding is that you are in favor of the way the Intelligence Committee bill redefines "electronic surveillance." In his written testimony, Mort Halperin described this change as "Alice in Wonderland": "It says that the language in FISA, which defines 'electronic surveillance,' means not what it clearly says, but what the current bill says it says."

- a. Why should we change the definition of "electronic surveillance"? It's a central term in FISA, and I see no good reason to replace it and open the door to many unintended consequences.
 - b. Mort Halperin has recommended that we strike out the part of the Intelligence Committee bill that redefines "electronic surveillance," and then change the requirements for the certification to be given to the FISA court to read "the surveillance is targeted at persons reasonably believed to be located outside the United States." How would this change affect your understanding of the legislation?
2. Unlike the House bill, the Intelligence Committee bill does not require prior judicial authorization before surveillance begins. This is a major departure from how FISA has always worked. It raises serious civil-liberties concerns, and makes it very difficult for courts to cut off surveillance that is illegal under the law. As Mort Halperin has stated: "By definition, if there is no emergency, there is time to go to the court and there is no reason to allow the executive branch to begin a surveillance without first having court approval. Requiring as a matter of routine that court approval must come first will assure that the executive branch gives the matter the full consideration that it deserves before starting a surveillance which will lead to the acquisition of many communications of persons in the United States and Americans abroad. . . . I cannot imagine any public policy argument to the contrary once one concedes that the court needs to play a role and there is an exception for emergencies with ample time limits."
- a. How do you respond to Mr. Halperin's arguments?
 - b. Doesn't the abandonment of *before-the-fact* court review go against the basic promise of FISA that Americans will not have their communications acquired without a judge confirming that there is a legitimate reason to do so?
3. If you agree that purely domestic-to-domestic communications should never be acquired without a court order, would you support changes to the bill that would make this point 100% clear? As I read the bill, this is not as clearly prohibited as it could be.
4. If you agree that warrantless "reverse targeting" of Americans should never be allowed, would you support language in the bill to prohibit its use if "a significant purpose" is targeting someone in the United States?
- a. If not, why not? The House bill contains this provision, and it's a sensible way to address the very serious "reverse targeting" concerns that will make Americans afraid for their rights.

**U.S. SENATE COMMITTEE ON THE JUDICIARY
FISA HEARING — OCTOBER 31, 2007
QUESTIONS FOR THE RECORD FOR MR. WAINSTEIN
SUBMITTED BY SENATOR KYL**

An amendment that was added to this bill in the Intelligence Committee by Senator Wyden adds a section to FISA that requires U.S. agents to obtain a warrant to conduct *overseas* surveillance of national-security threats if that surveillance targets a U.S. person.

1. Some advocates of this provision have described it as protecting the rights of U.S. citizens. The bill text, however, appears to cover "U.S. persons" — a category that FISA defines to even include U.S. green card holders. As I read the Wyden amendment, if a Pakistani national came to the United States as an adult for a few years, acquired a green card, and then returned to Pakistan and joined up with Al Qaeda, then under the Wyden amendment, this Pakistani national would be granted privacy rights under FISA that would bar the United States from monitoring his communications with the rest of Al Qaeda without first obtaining a warrant. Is that description accurate?

2. Would Middle Eastern governments be barred from monitoring the communications of this Pakistani green-card holder by any U.S. law if he were inside one of those Middle Eastern countries? In other words, under the Wyden amendment, would it be the case that the law would permit every government in the world — other than our own — to monitor the communications of this Pakistani Al Qaeda member when he is in the Middle East?

3A. Again, considering the hypothetical example of a Pakistani national who resides in Pakistan but has acquired a green card: under the Wyden amendment, the United States would be required to get court pre-approval and a warrant if it wanted to monitor this Pakistani in Pakistan in the course of a foreign intelligence investigation. Now suppose that the U.S. thought that this Pakistani green card holder were participating in drug smuggling in Pakistan and the FBI opened a criminal investigation. Would the U.S. be required to obtain a warrant in order to monitor his activities in Pakistan in the course of a drug-smuggling criminal investigation?

B. What if this Pakistani national were believed to be involved in bribery of a public official while residing in Pakistan and the U.S. opened a criminal investigation of his activities. Would the U.S. be required to obtain a warrant to monitor such activities in Pakistan?

C. What if the U.S. thought that this green card holder were fencing stolen goods in Pakistan? Would the U.S. be required to obtain a warrant in order to monitor his activities in Pakistan?

4. As I understand it, the Wyden amendment would apply not just when Pakistan-to-Afghanistan communications are routed through the U.S. Rather, it would apply whenever the activities of a U.S. green card holder are monitored overseas as part of a terrorism investigation. As a result, even if the U.S. were participating with the Pakistani government in an investigation inside Pakistan that targeted a Pakistani national who was a U.S. green-card holder, the U.S. would be required to report the investigation to the FISA court and seek a warrant.

I also understand that while many Middle Eastern governments cooperate with the United States in the war with Al Qaeda, many of these governments do not want other countries or radicalized elements of their own populations to know that they are helping the United States. As a result, many of these governments require that the fact of their cooperation with the United States or the details of joint counterterrorism operations not be disclosed outside of the U.S. intelligence community.

A. Would the Wyden amendment's requirement that the existence of intelligence investigations conducted entirely inside a foreign country be disclosed in U.S. court proceedings violate any of our information-sharing agreements with foreign intelligence services?

B. Should we expect that foreign intelligence services will refuse to share information or otherwise cooperate with the United States in the future if the Wyden amendment requires U.S. intelligence agencies to disseminate intelligence information outside of the intelligence community?