

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

<hr/>)	
ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	Civil Action No. 08-1023-JSW
v.)	
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE, <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 192 employees who staff a total of ten (10) FBIHQ units and a field operational service center unit whose

collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 12958, as amended,¹ and the preparation of affidavits/declarations in support of Exemption 1 claims asserted under the FOIA.² I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 12958, as amended, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded the 15 pages of FBI-originated documents that were referred on April 4, 2008, by U.S. Department of Justice (“DOJ”), Office of Information and Privacy (“OIP”) in connection with plaintiff’s request to them.

(4) I am advised that by letter dated December 21, 2007, the Electronic Frontier

¹ 60 Fed. Reg. 19825 (1995) and 69 Fed. Reg. 15315 (2003).

² 5 U.S.C. § 552(b)(1).

foundation ("EFF") submitted a FOIA request to the Office of the Attorney General ("OAG"), U.S. Department of Justice ("DOJ") for "all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that DOJ officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA, including any discussions or immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities." (See **Exhibit A.**)

(5) I have been further advised that on April 4, 2008, the Court in the above-captioned matter granted plaintiff's request for a preliminary injunction requiring defendants to provide "an initial release of documents no later than April 17, 2008 . . . and a final release of all responsive, non-exempt documents no later than April 21, 2008." The Court also directed defendants to provide "an affidavit or declaration attesting to Defendants' compliance, and setting forth the basis for withholding any responsive documents it does not release."

(6) The FBI, although a component of defendant DOJ, is not directly involved in this case, not having received a direct FOIA request from plaintiff. However, the FBI is providing this declaration consistent with the Court's April 4, 2008 Order in order to address 15 pages of FBI-originated material which were referred to the FBI for direct response by the DOJ Office of Information and Privacy ("OIP") on behalf of the OAG. The referred documents concern statements made by FBI Director Robert S. Mueller III, before the Permanent Select Committee

on Intelligence, United States House of Representatives, regarding the Foreign Intelligence Surveillance Act (“FISA”) on September 6, 2007.³

(7) The FBI has processed and released all reasonably segregable information from the 15 pages of referred records responsive to plaintiff’s request to the ODAG. The remaining information continues to warrant classification at the “Secret “ level, and is exempt from disclosure pursuant to E.O. 12958, as amended, §§ 1.4 categories (c) intelligence activities (including special activities) or methods, and (d) foreign relations or foreign activities of the United States. This information is therefore exempt from disclosure pursuant to FOIA Exemption 1, 5 U.S.C. § 552 (b)(1). In addition, these 15 pages also contain information that implicates sensitive intelligence sources and methods protected from disclosure by the National Security Act of 1947, as amended, 50 U.S.C. § 4031(i), and this information is also exempt from disclosure pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3).

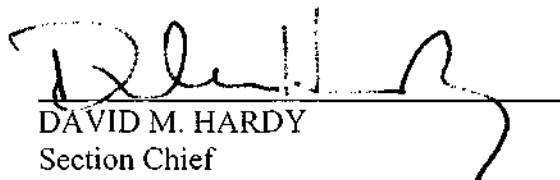
CONCLUSION

(8) In sum, the FBI is hereby releasing plaintiff 5 pages in their entirety, and 10 pages with redactions. **(See Exhibit B.)**

³ This declaration is submitted without prejudice to the FBI’s rights to provide additional information regarding the processing of the 15 referred pages and/or the reasons for any withholdings. The FBI specifically reserves the right to submit additional information, as appropriate, in the context of summary judgment or other subsequent proceedings in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A and B attached hereto are true and correct copies.

Executed this 21st day of April, 2008.

A handwritten signature in black ink, appearing to read "D. Hardy", written over a horizontal line.

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,)	
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INTELLIGENCE, <u>et al.</u> ,)	
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Defendants.)	

EXHIBIT A



December 21, 2007

VIA FACSIMILE — (202) 514-1009

Carmen L. Mallon
Chief of Staff
Office of Information and Privacy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Ms. Mallon:

This letter constitutes an expedited request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Department of Justice Office of the Attorney General on behalf of the Electronic Frontier Foundation ("EFF"). We make this request as part of EFF's FOIA Litigation for Accountable Government ("FLAG") Project, which works to obtain government documents and make them widely available to the public.

On August 5, 2007, President Bush signed into law the Protect America Act, legislation which amended the Foreign Intelligence Surveillance Act ("FISA") to expand the government's power to intercept communications without warrants, as well as shield telecommunications companies from future liability for their role in such activity.

Since the passage of this law, the Administration has tried to convince Congress to amend FISA to make it impossible for courts to impose liability on telecommunications companies for participating in a massive and illegal warrantless spying operation conducted by the National Security Agency. *See* Signing Statement, *President Bush Commends Congress on Passage of Intelligence Legislation*, Aug. 6, 2007; James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, *NY Times*, Aug. 6, 2007; Mark Hosenball and Michael Isikoff, *Case Dismissed?: The Secret Lobbying Campaign Your Phone Company Doesn't Want You to Know About*, *Newsweek*, updated Sept. 26, 2007, available at <http://www.newsweek.com/id/41142>; Eric Lichtblau, James Risen and Scott Shane, *Wider Spying Fuels Aid Plan for Telecom Industry*, *NY Times*, Dec. 16, 2007.

We are seeking all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that Justice Department officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications

Freedom of Information Act Request and Request for Expedited Processing
December 21, 2007
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companies¹ concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. This request includes, but is not limited to, all e-mail, appointment calendars, telephone message slips, or other records indicating that such briefings, discussions, or other exchanges took place.

Request for Expedited Processing

This request warrants expedited processing because it pertains to information about which there is “[a]n urgency to inform the public about an actual or alleged federal government activity,” and it is “made by a person primarily engaged in disseminating information.” 28 C.F.R. § 16.5(d)(1)(ii). The information we request easily satisfies this standard.

As an initial matter, it is worth noting that the DOJ and Office of the Director of National Intelligence recently granted expedited processing for FOIA requests nearly identical to this one (see DOJ and ODNI letters granting expedited processing attached hereto).

The federal government activity at issue here — DOJ efforts to secure immunity for telecoms engaged in illegal surveillance — raises serious questions about the DOJ’s interests in revision of the FISA. Moreover, the Protect America Act includes a sunset provision requiring Congress to decide within weeks whether to reauthorize the legislation. This decisionmaking process has involved, and will continue to involve, congressional debate about whether to expand the law further, and if so, how much. Because Congress will imminently consider modifying FISA again, there is an urgency to inform the public about the lobbying forces pushing for reform of the law. The information we have requested will help the public and Congress fully participate in the current and ongoing debate over whether the government’s authority to conduct electronic surveillance should be further expanded and facilitated by telecommunications companies.

The purpose of this request is to obtain information directly relevant to the DOJ’s communications with members of Congress and telecommunications carriers about updating FISA to grant the companies retroactive immunity for illegal activities. There is an urgency to inform the public about the information we seek. Therefore, this request clearly meets the

¹ The phrase “representatives or agents of telecommunications companies” is intended to include lobbyists and lawyers acting on behalf of such companies. According to Newsweek, these individuals may include, but are not limited to, “powerhouse Republican lobbyists Charlie Black and Wayne Berman (who represent AT&T and Verizon, respectively), former GOP senator and U.S. ambassador to Germany Dan Coats (a lawyer at King & Spaulding who is representing Sprint), former Democratic Party strategist and one-time assistant secretary of State Tom Donilon (who represents Verizon), former deputy attorney general Jamie Gorelick (whose law firm also represents Verizon) and Brad Berenson, a former assistant White House counsel under President George W. Bush who now represents AT&T.” Mark Hosenball and Michael Isikoff, Case Dismissed?, *Newsweek*, updated Sept. 26, 2007.

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standard for expedited processing set forth in DOJ regulations.

Further, as I explain below in support of our request for "news media" treatment, EFF is "primarily engaged in disseminating information."

Request for News Media Fee Status

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a "representative of the news media" pursuant to the FOIA and 28 C.F.R. § 16.11(b)(6). In requesting this classification, we note that the Department of Homeland Security and Department of State have recognized that EFF qualifies as a "news media" requester based upon the publication activities set forth below (see DHS stipulation and State Department letter attached hereto). In addition, the National Security Agency has previously determined that EFF is not only a "news media requester," but also "primarily engaged in disseminating information" for purposes of expedited processing (see attached EFF FOIA request and NSA response, in which EFF requested expedited processing because it sought information "urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity," and NSA granted the request). We further note that the U.S. Court of Appeals for the D.C. Circuit has stressed that "different agencies [must not] adopt inconsistent interpretations of the FOIA." *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001), quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

EFF is a non-profit public interest organization that works "to protect and enhance our core civil liberties in the digital age."² One of EFF's primary objectives is "to educate the press, policymakers and the general public about online civil liberties."³ To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

First, EFF maintains a frequently visited web site, <http://www.eff.org>, which received 46,682,194 hits in July 2007 — an average of 62,744 per hour. The web site reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.

EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 77,000 subscribers. A complete archive of past EFFectors is available at <http://www.eff.org/effector/>.

Furthermore, EFF publishes a blog that highlights the latest news from around the Internet. DeepLinks (<http://www.eff.org/deeplinks/>) reports and analyzes newsworthy developments in

² Guidestar Basic Report, Electronic Frontier Foundation, <http://www.guidestar.org/pqShowGsReport.do?npoid=561625> (last visited Dec. 18, 2007).

³ *Id.*

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technology. It also provides miniLinks, which direct readers to other news articles and commentary on these issues. DeepLinks had 510,633 hits in July 2007.⁴

In addition to reporting hi-tech developments, EFF staff members have presented research and in-depth analysis on technology issues in no fewer than eighteen white papers published since 2002. These papers, available at <http://www.eff.org/wp/>, provide information and commentary on such diverse issues as electronic voting, free speech, privacy and intellectual property.

EFF has also published several books to educate the public about technology and civil liberties issues. *Everybody's Guide to the Internet* (MIT Press 1994), first published electronically as *The Big Dummy's Guide to the Internet* in 1993, was translated into several languages, and is still sold by Powell's Books (<http://www.powells.com>). EFF also produced *Protecting Yourself Online: The Definitive Resource on Safety, Freedom & Privacy in Cyberspace* (HarperEdge 1998), a "comprehensive guide to self-protection in the electronic frontier," which can be purchased via Amazon.com (<http://www.amazon.com>). Finally, *Cracking DES: Secrets of Encryption Research, Wiretap Politics & Chip Design* (O'Reilly 1998) revealed technical details on encryption security to the public. The book is available online at <http://cryptome.org/cracking-des.htm> and for sale at Amazon.com.

Most recently, EFF has begun broadcasting podcasts of interviews with EFF staff and outside experts. *Line Noise* is a five-minute audio broadcast on EFF's current work, pending legislation, and technology-related issues. A listing of *Line Noise* podcasts is available at <feed://www.eff.org/rss/linenoisemp3.xml> and <feed://www.eff.org/rss/linenoiseogg.xml>. These podcasts were downloaded more than 2,600 times from EFF's in July 2007.

Due to these extensive publication activities, EFF is a "representative of the news media" under the FOIA and agency regulations.

Request for a Public Interest Fee Waiver

EFF is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and 28 C.F.R. § 16.11(k). To determine whether a request meets this standard, Department of Justice components determine whether "[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government," and whether such disclosure "is not primarily in the commercial interest of the requester." 28 C.F.R. §§ 16.11(k)(i), (ii). This request clearly satisfies these criteria.

First, the DOJ's relationship with telecommunications companies concerns "the operations or activities of the government." 28 C.F.R. § 16.11(k)(2)(i). Furthermore, the DOJ's push to amend

⁴ These figures include hits from RSS feeds through which subscribers can easily track updates to DeepLinks and miniLinks.

Freedom of Information Act Request and Request for Expedited Processing
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FISA unquestionably constitutes government operations or activities.

Second, disclosure of the requested information will "contribute to an understanding of government operations or activities." 28 C.F.R. § 16.11(k)(2)(ii) (internal quotation marks omitted). EFF has requested information that will shed light on how and why the DOJ is lobbying to immunize telecommunications companies from liability for their role in conducting illegal surveillance.

Third, the requested material will "contribute to public understanding" of the DOJ's efforts to modify FISA. 28 C.F.R. § 16.11(k)(2)(iii) (internal quotation marks omitted). This information will contribute not only to EFF's understanding of the reasons why and manner in which the DOJ is lobbying for legal reform, but to the understanding of a reasonably broad audience of persons interested in the subject. EFF will make the information it obtains under the FOIA available to the public and the media through its web site and newsletter, which highlight developments concerning privacy and civil liberties issues, and/or other channels discussed more fully above.

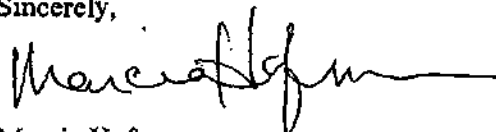
Fourth, the disclosure will "contribute significantly" to the public's knowledge and understanding of the DOJ's push to amend FISA to protect telecommunications companies. 28 C.F.R. § 16.11(k)(2)(iv) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the Justice Department's efforts to reform the law and the interests behind them, as well as contribute to the public debate about whether FISA should be further modified.

Furthermore, a fee waiver is appropriate here because EFF has no commercial interest in the disclosure of the requested records. 28 C.F.R. § 16.11(k)(3). EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information at issue here.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge.

Thank you for your consideration of this request. As applicable Department regulations provide, we will anticipate your determination within ten (10) calendar days. 28 C.F.R. § 16.5(d)(1). Please be advised that, given the urgency of this matter, EFF intends to seek immediate judicial relief if a response to this request for expedition is not issued in a timely manner.

Sincerely,



Marcia Hofmann
Staff Attorney

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,)	
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Plaintiff,)	
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v.)	Civil Action No. 08-1023-JSW
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE, <u>et al.</u> ,)	
)	
Defendants.)	

EXHIBIT B

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ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

**Statement of
Robert S. Mueller III
Director
Federal Bureau of Investigation
Before the
Permanent Select Committee on Intelligence
United States House of Representatives
Concerning
The Foreign Intelligence Surveillance Act
September 6, 2007**

(U) Good morning Chairman Reyes, Representative Hoesktra, and members of the Committee.

I am pleased to be here today to discuss modernization of the Foreign Intelligence Surveillance Act (FISA), particularly the impact of the recently passed Protect America Act of 2007 on FBI operations. I would also like to thank you for your continued oversight of the Bureau and your efforts to ensure our success as we pursue the shared goals of making America safer.

(U) In your invitation to testify, the Committee asked that I address "the legal authorities provided to the National Security Agency after September 11, 2001 and how the FBI worked with the NSA in connection with those authorities; how the FBI worked with the NSA after the Terrorist Surveillance Program was brought under the authority of the FISA Court; how the FBI will work with NSA under the Protect America Act; the impact that law will have on FBI operations; and any permanent changes the Congress should consider making to FISA."

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(U) NSA Post-9/11 Program Activities

~~(S//NF)~~ I will defer to the NSA to explain the legal authorities that were given to it by the President following the 9/11 attacks but will describe how those authorities intersected with the FBI's authorities. Following the President's grant of expanded authority to the NSA, the Attorney General directed the FBI to cooperate with the NSA. Operationally, FBI's involvement has largely been comprised of receiving information from NSA for transmittal as leads to the appropriate FBI field office. Our agents and analysts who are assigned to work at NSA take the leads that are developed from the program, supplement those leads with information already known to the FBI, and communicate those leads to the appropriate field office for further investigation. Over the years, NSA and FBI have worked together to determine the characteristics of leads that are most likely to be of value to the FBI. Our operational relationship vis-a-vis the NSA's program did not change when the January 10, 2007, order was issued by the FISA Court.

(U) Protect America Act of 2007

(S) ~~(S//NF)~~

(S)

(S) b1
b3

(S)

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~~SECRET//NOFORN~~

(S)

[Redacted]

[Redacted]

That collection is vitally important to the safety

and security of the United States and it should occur. Requiring FISA Court orders for such

collection never made sense. The FISA Court should be focused on ensuring there is adequate

information to meet the legal standard for collection of foreign intelligence from persons inside the

United States, not non-U.S. persons outside the United States.

b1
b3

~~(S//NF)~~ The Protect America Act of 2007 achieved the goal of amending FISA to take such

foreign and international communications outside the requirements to obtain a FISA Court order,

and it did so in a way that did no damage to the fundamental structure and protections U.S. citizens

(S)

enjoy from FISA.

[Redacted]

[Redacted]

b1
b3

~~(S//NF)~~ For the FBI, this change of law will have substantial benefits.

[Redacted]

[Redacted]

(S)

b1
b3

~~SECRET//NOFORN~~

(S)

~~SECRET//NOFORN~~

(S)

[redacted] Separate from the January 10, 2007 order issued by the FISA Court, the FBI currently has approximately [redacted] FISA Court orders authorizing collection of [redacted]

b1
b3

(S)

[redacted]

(S)

[redacted] Each one of those orders required substantial time and effort of the employees of our Intelligence Community partners, of FBI agents, analysts and attorneys, of Department of Justice attorneys, and of the judges and legal advisors of the FISA Court. Because we all have limited resources, every person hour spent obtaining a court order to collect from [redacted]

(S)

[redacted] is an hour that cannot be spent seeking and obtaining FISA orders for individuals inside the United States who, though posing a national security threat, are not as high a priority as the terrorist operatives on whom CIA or NSA were seeking coverage.

b1
b3

Put differently, by giving the Intelligence Community the ability to compel cooperation by

[redacted] so that the Intelligence Community can collect foreign intelligence collection

(S)

[redacted] without a court order, Congress has freed up hundreds of person hours that had been spent previously obtaining court orders to surveil non-U.S. persons outside the United States. We anticipate that once the new FISA provision is fully operational, the total number of FISA orders signed each year should be substantially reduced - perhaps by as much as 50%.

(S)

~~(S//NF)~~ Moving the collection of [redacted] outside the strictures of the FISA Court approval process should benefit the FBI in several respects. First, once we are no longer

b1
b3

(S)

processing [redacted] on behalf of our Intelligence Community partners, many agents at

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FBI Headquarters who are assigned to those duties will be free to return to their primary duties in direct support of the FBI mission. Moreover, currently there are approximately [redacted] attorneys at DOJ's Office of Intelligence Policy and Review (OIPR) who work almost exclusively on preparing FISA packages for [redacted]. Once all such accounts have been transitioned to the new section 105B directives available under the Protect America Act, those attorneys can return to national security legal work that is more directly associated with the protection of privacy and civil liberties of Americans. Those attorneys have performed a great service to the country, but their talents can be better directed at preparing FISA packages that directly affect persons inside the United States. We anticipate that with those resources, DoJ will reduce further the average length of time it takes to prepare FISA packages on FBI investigative targets and will prepare renewal packages more quickly. Further, those additional resources can be used for increased oversight of the FBI's national security program.

(S)

b1
b3

(S)

(U) In addition to the benefits to the FBI, the new law will also benefit the FISA Court. Once we have fully transitioned to the new law, the FISA Court will be able to focus its very limited resources to evaluating requests for FISA orders that affect the privacy rights of persons inside the United States.

(S)

~~(S//NF)~~ Although moving the collection of [redacted] traffic outside of the strictures of the FISA Court approval process will certainly relieve the FBI of many burdens associated with this important collection, the FBI is expected to have continuing involvement in the collection.

b1
b3~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

Although the exact logistics have not been finalized, we anticipate that the FBI will be the interface
(S) between the [redacted] for this collection.

The FBI has strong, well-established relationships with all of the largest [redacted]

(S) [redacted] We anticipate that the FBI will play an intermediary role, and the FBI will rely on DoJ
(S) and ODNI to provide the appropriate oversight of our partners to ensure that they are, in fact, only
(S) designating for coverage accounts that are reasonably believed [redacted] and are
applying their minimization procedures to reasonably ensure the privacy of U.S. persons.

b1
b3

(U) Commentators and others have raised two concerns with the new law. Some have expressed concern that the phrase "foreign intelligence information concerning persons reasonably believed to be outside the United States" that appears in Section 105B(a) is so broad that it could mean that the DNI and the AG could authorize - without a FISA Court order - collection of stored email of an American if the email "concerns" someone outside the United States. The FBI has never understood the word "concerning" as used in 105B(a) to relate to the contents of a communication. Our understanding has consistently been that in this context the phrase "foreign intelligence information concerning persons reasonably believed to be outside the United States" means foreign intelligence information collected from the communications of persons reasonably believed to be outside the United States. The FBI would have very grave concerns if that phrase were interpreted to allow, without consent and without a FISA Court order, the Intelligence Community to search the stored email accounts of individuals believed to be in the United States.

~~SECRET//NOFORN~~

~~SECRET//NOFORN~~

(U) The second issue that has been raised involves the collection of foreign intelligence from U.S. persons who are outside the United States. Because 105B by its terms is not limited to non- U.S. persons who are reasonably believed to be outside the United States, some have questioned whether this law would permit the government to target for collection U.S. persons who are outside the United States. The issue of collection of foreign intelligence from U.S. persons outside the United States has never been addressed by FISA; it has, however, long been addressed by Executive Order. Section 2.5 of E.O. 12,333 authorizes the Attorney General to approve surveillance and physical searches of U.S. persons outside of the United States. The Executive Order requires the Attorney General to make an individualized determination that there is probable cause to believe that the person being searched or surveilled is an agent of a foreign power. Thus, although the statute is silent as to the issue of U.S. persons outside the United States, by long-standing Executive Branch policy, such surveillance requires an individualized determination by the Attorney General. We fully anticipate that policy will continue.

(U) Conclusion

(U) In conclusion, from the FBI's perspective, the Protect America Act will provide huge benefits for the FBI and the rest of the Intelligence Community and will do so without compromising the protections FISA had traditionally provided for persons inside the United States. Having said that, we recognize that the law was passed with a sunset provision. We look forward to working with Congress to renew and improve the law.

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~~SECRET~~//NOFORN

(U) Mr. Chairman, I appreciate the opportunity to appear before this Committee and look forward to answering your questions. Thank you.

~~SECRET~~//NOFORN

~~SECRET~~ / NOFORN



ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

**Statement of
Robert S. Mueller III
Director
Federal Bureau of Investigation
Before the
Permanent Select Committee on Intelligence
United States House of Representatives
Concerning
The Foreign Intelligence Surveillance Act
September 6, 2007**

Good morning Chairman Reyes, Representative Hoesktra, and members of the Committee. I am pleased to be here today to discuss modernization of the Foreign Intelligence Surveillance Act (FISA), particularly the impact of the recently passed Protect America Act of 2007 on FBI operations. I would also like to thank you for your continued oversight of the Bureau and your efforts to ensure our success as we pursue the shared goals of making America safer.

In your invitation to testify, the Committee asked that I address "the legal authorities provided to the National Security Agency after September 11, 2001 and how the FBI worked with the NSA in connection with those authorities; how the FBI worked with the NSA after the Terrorist Surveillance Program was brought under the authority of the FISA Court; how the FBI will work with NSA under the Protect America Act; the impact that law will have on FBI operations; and any

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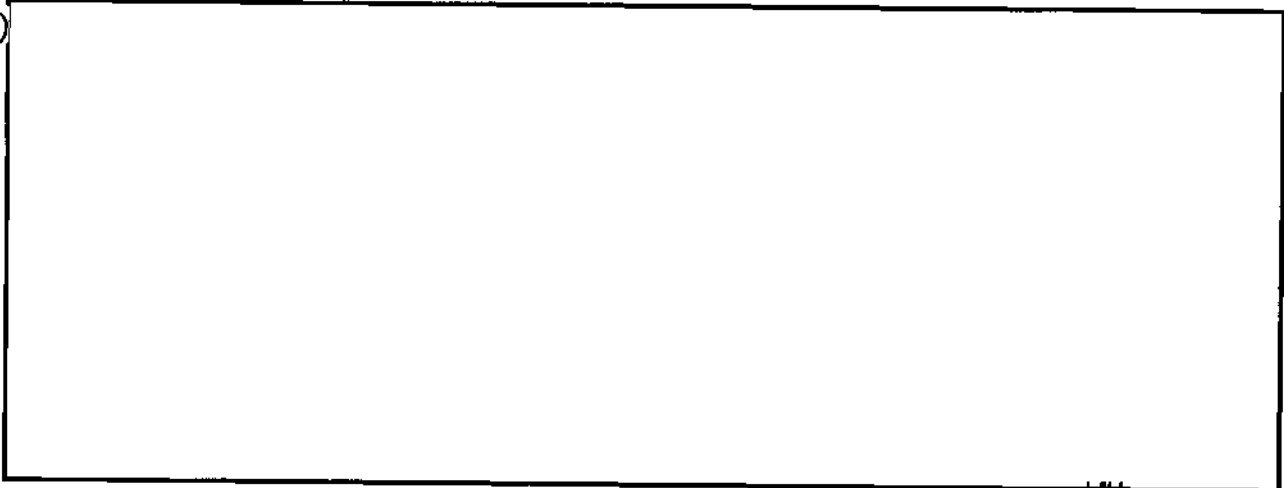
permanent changes the Congress should consider making to FISA.”

NSA Post-9/11 Program Activities

I will defer to the NSA to explain the legal authorities that were given to it by the President following the 9/11 attacks but will describe how those authorities intersected with the FBI's authorities. Following the President's grant of expanded authority to the NSA, the Attorney General directed the FBI to cooperate with the NSA. Operationally, FBI's involvement has largely been comprised of receiving information from NSA for transmittal as leads to the appropriate FBI field office. Our agents and analysts who are assigned to work at NSA take the leads that are developed from the program, supplement those leads with information already known to the FBI, and communicate those leads to the appropriate field office for further investigation. Over the years, NSA and FBI have worked together to determine the characteristics of leads that are most likely to be of value to the FBI. Our operational relationship vis-a-vis the NSA's program did not change when the January 10, 2007 order was issued by the FISA Court.

Protect America Act of 2007

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[Redacted]

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[Redacted] That collection is vitally important to the safety and security of the United States and it should occur. Requiring FISA Court orders for such collection never made sense. The FISA Court should be focused on ensuring there is adequate information to meet the legal standard for collection of foreign intelligence from persons inside the United States, not non-U.S. persons outside the United States.

The Protect America Act of 2007 achieved the goal of amending FISA to take such foreign and international communications outside the requirements to obtain a FISA court order, and it did so in a way that did no damage to the fundamental structure and protections U.S. citizens enjoy from FISA. [Redacted]

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[Redacted]

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For the FBI, this change of law will have substantial benefits [Redacted]

[Redacted]

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[Redacted] Separate from the January 10, 2007 order issued by the FISA Court, the FBI currently has

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approximately [redacted] FISC orders authorizing collection of [redacted]

[redacted]

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Each one of those orders required substantial time and effort of the employees of our intelligence community partners, of FBI agents, analysts and attorneys, of Department of Justice attorneys, and of the judges and legal assistants of the FISA Court. Because we all have limited resources, every

(S) person hour spent obtaining a court order to collect from [redacted]

[redacted] is an hour that cannot be spent seeking and obtaining FISA orders for individuals inside the United States who, though posing a national security threat, are not as high a priority as the terrorist operatives on whom CIA or NSA were seeking coverage. Put

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(S) differently, by giving the intelligence community the ability to compel cooperation by [redacted]

[redacted] so that the Intelligence Community can collect foreign intelligence collection [redacted]

(S) [redacted] without a court order, Congress has freed up hundreds of persons hours that had been spend previously obtaining court orders to surveil non-U.S. persons outside the United States. We anticipate that once the new FISA provision is fully operational, the total number of FISA orders signed each year should be substantially reduced – perhaps by as much as 50%.

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Moving the collection of [redacted] outside the strictures of the FISA Court

approval process should benefit the FBI in several respects. First, once we are no longer

(S) processing [redacted] on behalf of our Intelligence Community partners, many agents at

FBI Headquarters who are assigned to those duties will be free to return to their primary duties in direct support of the FBI mission. Moreover, currently there are approximately [redacted] attorneys

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at DOJ's Office of Intelligence Policy and Review (OIPR) who work almost exclusively on preparing FISA packages for [redacted] (S) Once all such accounts have been transitioned to the new section 105B directives available under the Protect America Act, those attorneys can return to national security legal work that is more directly associated with the protection of privacy and civil liberties of Americans. Those attorneys have performed a great service to the country, but their talents can be better directed at preparing FISA packages that directly affect persons inside the United States. We anticipate that with those resources, DoJ will reduce further the average length of time it takes to prepare FISA packages on FBI investigative targets and will prepare renewal packages more quickly. Further, those additional resources can be used for increased oversight of the FBI's national security program.

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In addition to the benefits to the FBI, the new law will also benefit the FISA Court. Once we have fully transitioned to the new law, the FISA Court will be able to focus its very limited resources to evaluating requests for FISA orders that affect the privacy rights of persons inside the United States.

Although moving the collection of [redacted] traffic outside of the strictures of the FISA Court approval process will certainly relieve the FBI of many burdens associated with this important collection, the FBI is expected to have continuing involvement in the collection.

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Although the exact logistics have not been finalized, we anticipate that the FBI will be the interface

(S) between the [redacted] for this collection.

The FBI has strong, well-established relationships with all of the largest [redacted]

(S) [redacted] We anticipate that the FBI will play an intermediary role, and the FBI will rely on DoJ

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and DNI to provide the appropriate oversight of our partners to ensure that they are, in fact, only
(S) designating for coverage accounts that are reasonably believed and are
applying their minimization procedures to reasonably ensure the privacy of U.S. persons.

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Commentators and others have raised two concerns with the new law. Some have expressed concern that the phrase "foreign intelligence information concerning persons reasonably believed to be outside the United States" that appears in Section 105B(a) is so broad that it could mean that the DNI and the AG could authorize – without a FISA Court order – collection of stored email of an American if the email "concerns" someone outside the United States. The FBI has never understood the word "concerning" as used in 105B(a) to relate to the contents of a communication. Our understanding has consistently been that in this context the phrase "foreign intelligence information concerning persons reasonably believed to be outside the United States" means foreign intelligence information collected from the communications of persons reasonably believed to be outside the United States. The FBI would have very grave concerns if that phrase were interpreted to allow, without consent and without a FISA Court order, the intelligence community to search the stored email accounts of individuals believed to be in the United States. To the extent Congress sees this as a statutory ambiguity, we look forward to working with this Committee to draft language to resolve any unintended ambiguity.

The second issue that has been raised involves the collection of foreign intelligence from U.S. persons who are outside the United States. Because 105B by its terms is not limited to non-U.S. persons who are reasonably believed to be outside the United States, some have questioned whether this law would permit the government to target for collection U.S. persons who are outside

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the United States. The issue of collection of foreign intelligence from U.S. persons outside the United States has never been addressed by FISA; it has, however, long been addressed by Executive Order. Section 2.5 of E.O. 12,333 authorizes the Attorney General to approve surveillance and physical searches of U.S. persons outside of the United States. The Executive Order requires the Attorney General to make an individualized determination that there is probable cause to believe that the person being searched or surveilled is an agent of a foreign power. Thus, although the statute is silent as to the issue of U.S. persons outside the United States, by long-standing Executive Branch policy, such surveillance requires an individualized determination by the Attorney General. We fully anticipate that policy will continue.

In conclusion, from the FBI's perspective, the Protect America Act will provide huge benefits for the FBI and the rest of the Intelligence Community and will do so without compromising the protections FISA had traditionally provided for persons inside the United States. Having said that, we recognize that the law was passed with a sunset provision and that some members of Congress have expressed a desire to alter some of the language in the Act. We believe that any alterations should continue to ensure that the intelligence community can collect foreign intelligence contained in electronic communications and telephone traffic of persons who are located outside the United States without obtaining a FISA order. We are, however, fully prepared to work with Congress to make improvements in the bill that appropriately balance national security with privacy concerns.

Mr. Chairman, I appreciate the opportunity to appear before this Committee and look forward to answering your questions. Thank you.

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