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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 27, 2007

Fred Fielding, Esq.
Counsel to the President, Office of Counsel to the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W., Rm 154
Washington, DC 20501

Dear Mr. Fielding:

For more than five years, the Bush Administration intercepted conversations of Americans in the United States without warrants and without following the procedures of the Foreign Intelligence Surveillance Act (FISA). The President confirmed this fact soon after it became public in December 2005. Since that time, the Senate Judiciary Committee has conducted an inquiry into this warrantless electronic surveillance. Over the past 18 months, this Committee has made no fewer than nine formal requests to the Department of Justice and to the White House, seeking information and documents about the authorization of and legal justification for this program. All requests have been rebuffed. Our attempts to obtain information through testimony of Administration witnesses have been met with a consistent pattern of evasion and misdirection.

Therefore, attached is a subpoena for documents related to the Committee's inquiry into the program or programs of warrantless electronic surveillance. The subpoena seeks, among other things, documents related to authorization and reauthorization of that surveillance; legal analysis or opinions about the surveillance; orders, decisions, or opinions of the Foreign Intelligence Surveillance Court (FISC) concerning the surveillance; agreements between the Executive Branch and telecommunications or other companies regarding liability for assisting with or participating in the surveillance; and documents concerning the shutting down of an investigation of the Department of Justice's Office of Professional Responsibility (OPR) concerning the surveillance.

This Committee's inquiry into this warrantless electronic surveillance is essential to the performance of its constitutional legislative and oversight responsibilities. The Administration has asked Congress to make sweeping changes to FISA – a crucial national security authority over which the Judiciary Committee has jurisdiction. It is impossible to make informed legislative decisions without understanding fully the Administration's interpretation of FISA and the perceived flaws in that legislation that led the Administration to operate a program outside of its provisions for more than five years. It is not enough to know the Administration's current legal justification for the surveillance.

All indications are that the legal analysis supporting this program of warrantless surveillance, and perhaps the program itself, has changed more than once since its inception; it could very well change again. For the Congress to legislate effectively in this area it must have full information about the Executive Branch's interpretations of FISA and how those interpretations have affected its enforcement of the Act.

The Administration's FISA proposal also contains provisions that would bring to an end lawsuits concerning participation of telecommunications carriers and other companies in this program of warrantless surveillance. This Committee cannot responsibly consider those provisions without knowing what government officials and the companies understood to be the legal basis for that participation at the time it occurred. The Supreme Court has said that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *McGrain v. Dougherty*, 273 U.S. 135, 175 (1927). The documents this Committee seeks are just that sort of information and we cannot do our job without them.

In addition, the Judiciary Committee is charged with oversight of the Executive Branch in the areas of constitutional protections and the civil liberties of Americans. The warrantless electronic surveillance program directly impacts those responsibilities. We cannot conduct this oversight without knowing the legal arguments the Administration has used to justify interception of the communications of Americans without a warrant. This Committee would be abdicating its responsibility if it failed to examine Executive Branch actions simply because we are told they have stopped. We have been given no assurance that these activities, or similar ones, will not resume based on the same or similar legal arguments. This Committee must conduct oversight to consider whether it wishes to act, through legislation or otherwise, to prevent such recurrence.

Oversight is also necessary to determine whether the Administration has conducted itself appropriately in carrying out and defending this warrantless surveillance. The testimony of former Deputy Attorney General James Comey before this Committee raises serious questions about the Administration's commitment to the rule of law. He testified that only the prospect of a mass resignation of virtually every senior officer in the Department of Justice caused the President to address serious Justice Department concerns about legality of the program. This came after the program had already been operating for more than two years. Later, when Attorney General Alberto Gonzales was asked during testimony before this Committee whether senior Justice Department officials expressed reservations about the warrantless surveillance program, the Attorney General responded "I do not believe that these DOJ officials . . . had concerns about this program." That response, at the very least, calls into question the Attorney General's candor with this Committee.

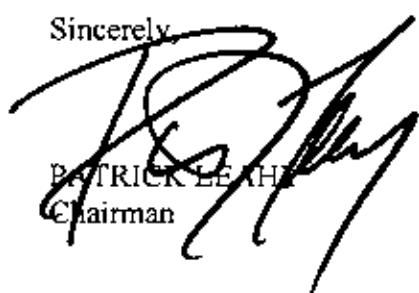
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Finally, when the Department of Justice's own Office of Professional Responsibility (OPR) began an internal investigation into the role of Department of Justice attorneys in the authorization and oversight of the warrantless surveillance program, the Department of Justice and the White House denied the investigators the clearances they needed, thereby shutting the investigation down. The head of OPR has noted that in its 31-year history OPR has never before been prevented from pursuing an investigation. This action, too, raises questions about the Administration's motives and behavior.

There is no legitimate argument for withholding the requested materials from this Committee. The Administration cannot thwart the Congress's conduct of its constitutional duties with sweeping assertions of secrecy and privilege. The Committee seeks no intimate operational facts and we are willing to accommodate legitimate redactions of the documents we seek to eliminate reference to these details. We ask that you segregate any documents containing classified national security information and deliver those separately to the Office of Senate Security in Room S-407 of the Capitol, where they will be maintained in compliance with all security laws and regulations. Only Committee members and appropriately cleared staff will be permitted to review them.

I continue to hope that the Administration will cooperate with the Committee's investigation; this Committee remains willing to work to with you and accommodate legitimate concerns in connection with your compliance with this subpoena. I look forward to your compliance with the Judiciary Committee's subpoena by the return date of July 18, 2007.

Sincerely,



PATRICK LEAHY
Chairman