DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

August 6, 2007

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Mitch McConnell
Minority Leader
United States Senate

Dear Majority Leader Reid and Minority Leader McConnell:

I write to the United States Senate after discussions with Members indicated a letter discussing the "Protect America Act of 2007," S.1927 (Act) would be helpful. I deeply appreciate the time spent by Members understanding the need for this legislation and acting before the August recess to close critical gaps in the Intelligence Community's ability to provide warning of threats to the country.

First, I note that this was not an issue discussed only in the last few weeks. In 2006, there were extensive hearings and meetings before the Senate and the House of Representatives, including an unusual open hearing before the Senate Judiciary Committee on "FISA for the 21st Century" on July 26, 2006 where the Director of the Central Intelligence Agency and the Director of the National Security Agency (NSA) testified. In addition, there were numerous bills introduced in both the House and Senate. Indeed, in 2006, the House of Representatives passed the "Electronic Surveillance Modernization Act" (H.R. 5825), but the Senate did not pass legislation on this issue. In April 2007, responding to a congressional request, I transmitted to Congress a proposal to modernize FISA and appeared at an open hearing before the Senate Select Committee on Intelligence on May 1, 2007.

In addition, there were numerous classified briefings provided to committees of Congress, individual Member briefings, and sessions open to all Members of Congress. The legislative record of consideration of this issue has been lengthy and deep in substance.

Second, there is understandable confusion in the public discussion of what is admittedly a complex – and frequently classified – issue. But I would note that in the interest of providing an extensive legislative record and allowing for public discussion of this issue, the Intelligence Community discussed in open settings extraordinary information dealing with our operations. This will come at a price to our ability to collect vital foreign intelligence. However, to ensure there was open legislative consideration of this matter, leaders of the Intelligence Community went far further in open discussions than in any other time I can recall in my forty-year intelligence career.

As I noted in my testimony on May 1, 2007, but lost in some recent discussion of this issue, the fundamental fact is that the Act is aimed at restoring the effect of the Foreign Intelligence Surveillance Act (FISA) drafted in 1978. FISA, based on the technology of 1978,

specifically excluded from its scope certain types of international communications carried by radio and satellite. Today, many of those same communications are now transmitted by different means. This change in technology resulted in requiring, in a significant number of cases, that the Government seek court orders to monitor the communications of foreign persons physically located in foreign countries. To be clear -- the Intelligence Community was diverting scarce counterterrorism analysts who speak the languages and understand the cultures of adversaries to compiling lengthy court submissions to support probable cause findings on an individualized basis by the FISA Court in order to gather foreign intelligence from foreign terrorists located overseas. This is an unacceptable and irresponsible use of Intelligence Community resources.

Related to the discussion of exclusions contained in FISA as enacted in 1978 is the proposal of limiting the gathering of foreign intelligence from targets located overseas to discrete categories such as "international terrorism." In 1978, generally no such limitation was placed on activities excluded from the definition of electronic surveillance in FISA and directed at persons overseas -- nor is one appropriate today. The Intelligence Community must be able to gather needed intelligence information on the array of threats to our national security as it was able to in 1978.

Third, while fixing the problems created by changes in technology, the Act creates new requirements not present in FISA as enacted in 1978. In addition to requiring certain determinations from the Attorney General and the Director of National Intelligence, the Act requires the Government to submit its procedures established under the Act for determining that acquisitions are not electronic surveillance to the FISA Court for judicial review.

Fourth, FISA – both before the enactment of this Act and after – generally requires a court order to target the communications of persons in the United States for electronic surveillance as defined by FISA. Again, that was the case before this enactment and will remain the case after. This is a requirement I strongly support.

Fifth, there has also been confusing discussion about the treatment of information concerning United States persons by NSA. These procedures governing how NSA treats information concerning United States persons are frequently referred to as "minimization" procedures. During the course of normal operations, NSA will sometimes encounter information to, from or about U.S. persons. That fact does not, in itself, cause FISA to apply to NSA's activities directed at persons located overseas.

Instead, as it has for decades, NSA applies procedures approved by the U.S. Attorney General to its activities that minimize the acquisition, retention, and dissemination of information concerning U.S. persons. These procedures have worked well for decades and eliminate from intelligence reports incidentally acquired information concerning U.S. persons that does not constitute foreign intelligence.

The Act makes clear in Section 105B(a)(5) that "the minimization procedures to be used with respect to [acquisitions must] meet the definition of minimization procedures under section 101(h)" of FISA, which defines in law the requirements of such procedures. The Act does not change the definition of minimization procedures contained in FISA.

Finally, there will be intense oversight of activities conducted under the Act. There are extensive training, compliance, and other procedures in place at agencies to ensure our activities

are conducted according to law. The relevant agencies have Inspectors General staffs with the appropriate clearances, training, and technical background to ensure that activities are reviewed and audited.

I am committed to keeping the Congress fully and currently informed of how this Act has improved the ability of the Intelligence Community to protect the country and reporting – and remedying – any incidents of non-compliance.

Thank you for the time afforded to me and the consideration of proposals to fix critical gaps in our intelligence operations. I look forward to continuing our discussions and working with all Members to address any concerns about the Act. If you have any questions on this matter, please contact me.

Sincerely,

J.M. McConnell

cc: All Senate Members

Attachment: DNI Statement for the Record, May 1, 2007