U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 10, 2008

The Honorable John Conyers, Jr.
Chairman
The Honorable Jerrold Nadler
Chairman
Subcommittee on Constitution, Civil Rights,
and Civil Liberties
The Honorable Robert "Bobby" Scott
Chairman
Subcommittee on Crime, Terrorism, and
Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Conyers, Nadler, and Scott:

This responds to your letter of April 3, 2008, in which you discuss press reports regarding a question and answer session following a speech on public corruption where the Attorney General, in response to a question, discussed the Administration's effort to work with Congress to modernize the Foreign Intelligence Surveillance Act of 1978 (FISA).

In his remarks, the Attorney General discussed a pre-September 11, 2001, intelligence collection under Executive Order 12333 of communications between a terrorist facility abroad and one of the 9/11 hijackers. The Attorney General and the Director of National Intelligence have discussed this particular intelligence collection before, in a joint letter they sent to Chairman Reyes on February 22, 2008. In that letter, which is enclosed for your convenience, the Attorney General and the Director of National Intelligence (DNI) explained that because of the nature of the collection, the Intelligence Community missed the opportunity to identify the domestic end of the communication prior to September 11, 2001.

This episode is also referenced in the report of the Joint Inquiry by the Senate and House Intelligence Committees into the 9/11 attacks. Some of the confusion regarding the Attorney General's remarks may have arisen from the details provided by the Attorney General of the nature and location of the terrorist facility. We note that while the Attorney General referenced a communication between a 9/11 hijacker and a location in Afghanistan, he was, in fact, referring to communication between a 9/11 hijacker and a terrorist facility located in a different country.

Apart from your questions concerning the particulars of the response the Attorney General provided at the Commonwealth Club, your letter appears to question the very premise for the joint congressional and executive branch effort over the past year to modernize FISA. We believe there is a broad bipartisan agreement among Members of Congress that FISA has become outdated in large part because of changes in communications technology and the nature of national security threats facing the country in the past thirty years. This mutual understanding led to the passage of the Protect America Act last year and underlies the continued bipartisan effort to place FISA modernization on a long-term footing.

Your letter, for instance, asks whether a FISA order could have been required in 2001, to intercept a communication with a terrorist suspect overseas. Prior to the passage of the Protect America Act, our intelligence officials were frequently required to seek a court order based upon probable cause to target the communications of terrorists located overseas; indeed, this requirement, which was discussed extensively both in public hearings and in closed session, was the primary impetus for the Executive Branch's efforts to modernize FISA. As the Attorney General and the Director of National Intelligence explained in their letter of February 22:

> . . . 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.

We are also enclosing public testimony from a senior Justice Department official explaining why FISA, prior to the passage of the Protect America Act, often required a court order to surveil overseas intelligence targets.

Your letter also inquires why FISA's emergency provisions were not an adequate substitute for the authorities the Government has obtained under the Protect America Act. This issue has also been repeatedly addressed by the Executive Branch, most recently in the February 22 letter:

> 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.

The fact is that not every threat meets the emergency exception because many do not appear to be emergencies until it is too late. Indeed, the job of the Intelligence Community is to obtain intelligence information that permits us to act before an emergency arises, and our intelligence professionals should be authorized to obtain intelligence information in an expeditious and efficient manner. Given the catastrophic nature of the threats we face from foreign terrorists abroad, the Government should not be forced to wait for an emergency before it can take steps to gather information needed to prevent these terrorists from creating such an emergency.

It is quite easy to say, after the fact, that the Government could have or should have used FISA to conduct surveillance of a particular overseas intelligence target. If the Government had the requisite probable cause before the fact and could have met the remaining legal requirements of FISA (and known that this particular target among numerous others would turn out to be so important), that might have been possible. But doing so comes at the price of diverting analysts from their primary purpose of tracking terrorist and other foreign threats to drafting probable cause determinations every time they become aware of a new target or that target acquires a new

method of communication. Considering the sheer volume of foreign intelligence targets abroad and the speed and agility with which the Intelligence Community must react, this process—as we have learned from experience—is simply not sustainable.

This, of course, begs the policy question currently before the Congress: namely, why would we willingly impose these requirements, which impede and at times can prevent effective intelligence collection, on the government when it targets foreigners overseas? As discussed in the letter to Chairman Reyes quoted above, although the probable cause findings required by FISA make a great deal of sense when we target people in the United States, they do not with respect to foreigners in foreign lands.

We hope that this letter and the enclosures are responsive to your recent letter and help you understand the critical need for FISA modernization. The passage of legislation to modernize FISA—like the bipartisan bill passed overwhelmingly by the Senate—will help ensure that the Intelligence Community has the tools it needs to protect the Nation.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Lamar S. Smith
Ranking Minority Member
Committee on the Judiciary

The Honorable Trent Franks
Ranking Minority Member
Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary

The Honorable J. Randy Forbes
Ranking Minority Member
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The Honorable Patrick J. Leahy
Chairman
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The Honorable Arlen Specter
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