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ONE HUNDRED TENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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April 14, 2008

The Honorable Michael B. Mukasey  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Attorney General:

We are writing about the April 10, 2008, letter from Brian Benczkowski in response to our letter of April 3, 2008, concerning disturbing recent revelations about apparent pre-9/11 failures and subsequent abuses of civil liberties by the Administration. While we appreciate the promptness of the April 10 letter, we are extremely concerned about its failure to address several of our specific inquiries. In addition, the April 10 letter indicates that, far from supporting the Administration's position on reform of the Foreign Intelligence Surveillance Act (FISA), the incident referred to in your March 27 speech leads to precisely the opposite conclusion. We ask that the Department respond equally promptly to this letter, both by providing answers to our specific questions and by agreeing to undertake meaningful discussions to help bring about effective FISA modernization.

Based on the April 10 letter and other information from the Department, it now appears that the incident mentioned in your March 27 remarks concerned phone communication between a future 9/11 hijacker while in the U.S. and a known terrorist facility in the Middle East, which was in fact discussed by the Congressional intelligence committees in their report on 9/11. As the committees explained, however, the failure to utilize the information in this call had nothing to do with limitations in FISA, contrary to what your March 27 speech appeared to suggest. Instead, the problem was NSA's narrow interpretation of its authority to collect and disseminate data on U.S. persons following its acquisition under Executive Order 12333. Your letter to Chairman Reyes recognizes this. As the Congressional intelligence committees' joint inquiry pointed out, "NSA adopted this policy even though the collection of such communications is within its mission and it would have been possible for NSA to obtain FISA Court authorization for such collection.... NSA did not, however, develop a plan with the FBI to collect and to ensure

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the dissemination of any relevant foreign intelligence to appropriate domestic agencies.”<sup>1</sup> In the wake of the 9/11 attacks, the NSA changed this policy. Although a number of changes to FISA have been enacted since the attacks of September 11, this change in NSA policy did not require Congressional action, and FISA had nothing to do with the failure to intercept and utilize effectively the intelligence at issue. We hope that you will clarify your remarks accordingly.

In addition, however, the April 10 letter does not respond to several of our requests. Our letter did not, as you characterize it, generally inquire “why FISA's emergency provisions were not an adequate substitute for the authorities the Government has obtained under the Protect America Act.” Rather, our inquiry concerned the specific phone call about which you spoke. We asked whether the then-existing emergency provisions would have allowed interception of the specific call at issue, if indeed the foreign portion of the call was a known terrorist location. To the extent that your response set forth an argument for the PAA or the Administration’s preferred version of FISA reform, it was non-responsive to our request for information. Based on the clarifications in the April 10 letter, we understand that the answer to our actual question was that, in fact, then-existing FISA provisions would have allowed the interception and dissemination of the phone call, but that it was NSA’s then-existing narrow interpretation of Executive Order 12333 that was the problem. Please explain promptly if that is not the case.

Our April 3 letter also asked for a copy of the secret Office of Legal Counsel Memorandum of October 23, 2001, concerning the purported authority to conduct certain military or other activities within the United States. Quite recently, you testified to a Senate Committee that the portion of that memorandum that has been publicly revealed – the claim that “the Fourth Amendment had no application to domestic military operations” – may no longer be operative, though you did not state whether this or other conclusions in the memo have been withdrawn.<sup>2</sup> This testimony underlines further the need for release of this memorandum, and we ask that you promptly reply to our request that you do so.

Finally, our letter did not, as the April 10 letter suggests, “question the very premise for the joint congressional and executive branch effort over the past year to modernize FISA.” To the contrary, we have been deeply involved in that effort, conducting numerous hearings and passing two separate bills in the past six months. In those bills, developed in close collaboration with our colleagues on the Permanent Select Committee on Intelligence and adopted by the

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<sup>1</sup> House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence, REPORT OF THE JOINT INQUIRY INTO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, H. Rept. No. 107-792 (2002) 36 (hereinafter, “Joint Inquiry Report”).

<sup>2</sup> P. Shenon, *Mukasey Distances Himself From a Memo on Searches*, New York Times, April 11, 2008.

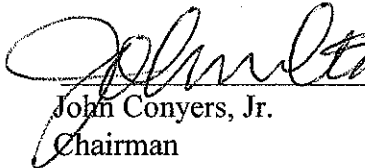
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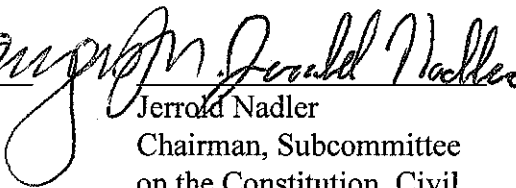
House, we have responded to concerns of the intelligence community. The House versions of FISA reform provide flexible means of collection that are not limited to individualized probable cause determinations. Given our track record of action on this issue in the last year, for the Department to suggest that we do not understand FISA or the need for flexibility is disingenuous at best.


The Administration's refusal to engage in meaningful discussions with House Democrats on FISA reform has become untenable. The time has come for meaningful negotiations on this important subject. We remain willing and able to have such discussions, and we urge that you and others in the Administration agree to do so promptly.

Please provide your responses and direct any questions to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel.: 202-225-3951; fax: 202-225-7680). Thank you for your attention to this matter, and we look forward to hearing from you promptly.

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

cc: Hon. Lamar S. Smith  
Hon. Trent Franks  
Hon. Louie Gohmert  
Hon. Brian Benczkowski