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TRANSCRIPT OF CONFERENCE CALL ON THE CONSEQUENCES OF PROTECT AMERICA ACT EXPIRATION

WASHINGTON, D.C.

2:05 P.M. EST

MR. ROEHRKASSE: I thank you very much. This is Brian Roehrkasse. Thanks for joining us. I know there's a lot of information that's coming at you in a number of different ways, but the purpose of this call is to talk about the consequences that would come as a result of Congress letting the Protect America Act expire.

So we do need to end promptly at 2:30 because of engagements for our two officials. This call will be on-the-record, and without further ado, I would like to turn it over to Ben Powell, General Counsel for the Director of National Intelligence.

MR. POWELL: Well, thanks. This is Ben Powell. I'd like to make a few points before turning it over to Ken Wainstein at the Department of Justice.

First, from the intelligence community perspective, the Protect America Act has been very valuable since the enactment of the Protect America Act. We have obtained critical information. Some examples of that information include insight and understanding leading to disruption of planned terrorist attacks, efforts by terrorist to obtain guns and ammunition, efforts of an individual to become a suicide operative, terrorist facilitator plans to travel to Europe, information on terrorists, money transfers, identifying information regarding foreign terrorist operatives, and plans for future terrorist attacks.

We have provided Congress with even more examples and we can provide you with the letters to Congress pointing out these examples. So, the Act itself has been very valuable. Coming to the question of expiration of the Protect America Act or extension of the Protect America Act, without addressing the liability issue, to us has been a bit of confusing debate out in the public.

What seems to be lost in the debate is for almost two years senior leaders of the intelligence community have been discussing with Congress the critical need to provide retroactive liability protection and the need to address that. The reason that they have been doing that is the private sector is absolutely critical to our operations and right now because of the

concerns over these issues, we do not have all the capabilities that we would want, because of these private sector concerns about liability.

So right now we don't have the capabilities that we need. So merely extending the PAA without addressing liability protection doesn't give us the capability that we need. And that's kind of a critical point, and the DNI has made this in numerous forums and statements. In the beginning of August he talked about it in a statement you can find on our website. When the Protect America Act was passed, he understood that this issue would be addressed in September of 2007 by the congressional leadership because of the critical need to obtain the cooperation of the private sector.

So the bottom line on this is we need the issue of liability protection to be addressed or we're not going to have one of the critical, enabling factors of our operations, which is the willing cooperation of the private sector.

Finally, some of the other debate has been, well, if the Protect America Act expires, that's okay, because we can go back to FISA and use FISA. What that overlooks is that in some of the examples I just provided to you, we would not have been able to obtain FISA court orders, because FISA sets a probable cause standard or warrant requirement type of standard applicable to America's operations against Americans here in the United States, and would then apply that to a terrorist overseas, in Pakistan or another country.

The intelligence community may not have all that information to be able to go to court to fill out an application to go through the whole, entire FISA process to carry out surveillance of that person abroad. So if you put the probable cause standard back into effect, we are not going to be able to obtain the same coverage that we have right now. And with that, I'll turn it over to Ken Wainstein, the Assistant Attorney General for National Security of the Department of Justice.

MR. WAINSTEIN: Okay, thanks, Ben.

Good afternoon, everybody. I'm just going to sort of expand a little bit on some of the points that Ben made. A couple of the issues that have arisen relate to whether even if the Protect America Act expires on Saturday, I guess it is, whether the directives that were filed and served under the Protect America Act over the last six months, whether those would continue in effect. And it is true; they do continue in effect. They last for up to a year.

I think that we have been on record saying that within -- I can't remember exactly -- days of the passage of the Protect America Act back in the beginning of August, we filled the intelligence gaps that were so troubling and were the reason we had pushed so hard for the Protect America Act. So that will give you some sense of the timing and how much time we have left on at least some of these directives.

The problem is that those directives do not cover the whole waterfront of every type of surveillance we could conceivably need to undertake, starting after midnight on Saturday. There are situations where we would need to get the assistance of a provider who is not

covered by one of the directives, and if the PAA has expired, we would not have the authorization to do that. And, as Ben said, we would then have to go through old FISA, which is cumbersome and requires Fourth Amendment probable cause showing, which is something we think we just should not have to do for a non-U.S. person overseas.

So, that's just one of those issues that has come up in the press as to whether all the surveillance we need can continue as long as those directives remain in place from the year and date they survive in place. And the answer is no. There is a risk that there are surveillances we would not be able to do.

In terms of the burdensomeness of FISA, you know, we've argued this out and discussed it at length. I have testified. Ben has testified. But let's not forget when people say we can just go back to old FISA that there is a price to that. One: we'd have to show probable cause when we really shouldn't have to. We should be able to go up on foreign persons overseas when we have a legitimate interest in doing so without having to establish probable cause.

It means that we have to go back to the old system of drawing up and submitting lengthy, 50-, 60-page applications to a FISA court, which is very busy with the resources the analysts, investigators, and attorneys being focused on, developing those packages as opposed to going out and doing more productive work. And the bottom line is we just would not have the early warning system that we now have in place -- the nimble and agile early warning system we now have in place thanks to PAA.

So people should not be under any illusion that FISA is something we can just sink back to and remain in the same posture of readiness we are today. Just to make it a little bit tangible, it is quite possible that at some point we will encounter or hear about a terrorist who is overseas. We're tracking that person. He is changing phones as terrorists often do for the very purpose of avoiding surveillance. And we then want to go up on this terrorist, and lo and behold! That terrorist is maybe using a phone or e-mail provided that we don't have subject to an existing directive.

That means we'd have to go to FISA. Yes, we can get emergency authorization on that person, but only if we have probable cause. And then we have to follow that up with a lengthy package pursuant to the regular FISA core proceeding. So that's the kind of scenario we are talking about and it's certainly not unlikely at all.

And then the last thing I wanted to mention is the PAA expires, there is aside from the tangible effect of the expiration and ability to issue new directives, you have maybe less tangible, but I think very real concern that that injects a level of uncertainty into the practice.

And what do I mean by that? I mean that there are providers out there who are watching this, and if they see that the PAA expires on Saturday, their general counsels will be looking to that issue and saying, okay. I understand there is an immunity provision at PAA that immunizes the providers from any assistance rendered pursuant to the PAA.

I believe there is a good legal argument that it does, and I think that is the answer, but it

injects some uncertainty there. Same thing with compulsion mechanisms in place with the PAA. Do those remain enforced, so that we can compel assistance? Once again, I believe we can, but that will raise legal issues that could then produce litigation, which could then produce delays in our ability to conduct surveillance, all of which could be very problematic for our efforts. And I have said, as I have always said, in this area, we need to be able to act quickly. And for those reasons we are concerned that the expiration of the PAA might undermine that ability.

MR. ROEHRKASSE: Okay, with that we will take your questions.

QUESTION: Yeah, I just have two points for Ben, just to follow up on points that he made. You talked about the concerns of carriers, about what would happen if reliability protection is not implemented, and concerns you will not have the will and cooperation of the private sector. Just to be clear, are you saying that there are carriers that have told you that they would no longer cooperate, unless liability is included in the legislation?

MR. POWELL: Yeah, the -- I don't want to get that specific, on the verge of getting into classified material. But the answer is, the answer is that beyond just this program, for two years we have been saying that we are having problems getting cooperation from the private sector, not just on this program, because of this issue. Within this program, and General Hayden talked about that before the Senate, either the Senate, or the House in the threat testimony, and gave some specific, some fairly specific examples about it. Within this program itself, under the Protect America Act, I will just say that private sector parties are very concerned, and have raised the types of questions that Ken outlined, in terms of can you compel me after the Protect America Act expires? And can you protect me from liability after the Protect America Act expires? They have raised those questions. So, certainly private sector parties have said that unless we address this issue in the retroactive liability protection, it raises substantial questions about their cooperation with our operations. And they have also said that there is an increasing reluctance, or an outright refusal to willingly cooperate with us in some critical areas.

QUESTION: So, what do you expect to happen come February 16, if AT&T, or one of the other carriers did not have liability protection? Do you expect them to simply opt out, and say, "okay, come after me?"

MR. POWELL: Okay, I am not going to talk about any specific company, or speculate about any specific company. I will say that there is significant concern across the private sector about what is happening here, and our ability to get their cooperation with the intelligence community overall, not just in this program. Certainly on February 16, we have the problems that Ken outlined. If we have a new method of communication that requires the assistance of a private party, and we need to compel that person, it is very unclear to us that we can actually issue a new directive to a new communication provider method to cover them, and compel their assistance. So, that is very unclear. Frankly, the six-month nature of the act itself has caused substantial uncertainty among some in the private sector, and caused us problems in getting their cooperation. So, we expect that -- I can tell you, if you look at the AG, and DNI, the letter that they sent to Senator Reed, probably most people didn't get

to page 10, and 11, that addresses this specific issue. And the way that the AG, and DNI's characterize February 16, was that "expiration of the Protect America Act would plunge critical intelligence programs into a state of uncertainty, which would cause us to delay the gathering of, or simply miss critical foreign intelligence information." So, we can get that out to everyone, or anyone who would like it. But that is what we expect to happen on February 16.

QUESTION: And just to follow up on a second point that you made. You said that if you put the probable cause standard back into effect, you are not going to be able to have the same coverage as you have right now. Now, that might suggest to a lot of listeners, and readers that some of the communications are near intercepting, particularly those that implicate Americans, perhaps you should not be going after in the first place.

MR. POWELL: But yeah, I mean it's not --

QUESTION: I mean, there are a lot of people who hold the probable cause standard --

MR. POWELL: Okay, right.

QUESTION: -- under the fourth amendment as a pretty sacred one.

MR. POWELL: Right, excellent question. And let me, let me, let me make sure that everyone has this clear, because I see it confused out there all the time. FISA passed in 1978, no probable cause standard, no court order for operations carried out outside the United States intercepting communications. Okay, that was very clear in the 1978 law. So, that has never been the case that intercepting terrorists overseas required a -- nobody ever thought that the fourth amendment applied to that. And what we are trying to do here is do the same thing, and we should not be under a probable cause standard. Under that approach that you outlined, that would say we need a warrant for every single operation we do around the world to surveil a foreigner, which of course, is largely going to be, in not completely in many cases, foreign to foreign communication.

QUESTION: But what about the ones where there is an American into it.

MR. POWELL: That's right, okay. In all of our testimony over the past two years, we have said the intelligence community, for many decades, has encountered information about, to, or from a U.S. person. It's unavoidable in the world. That is the whole process of minimization that the court has approved. And in case, anyone on this call doesn't know it, the FISA court, under the PAA, has approved our targeting procedures. They reviewed them, and they have approved those, as of about a month ago. And the minimization process has been in place to deal with that for many, many decades. And that has always been the accepted practice for how we deal with U.S. person information. That is not something new for the Protect America Act, that is something we have done for over 30 years.

QUESTION: Thank you.

MR. WAINSTEIN: If I could, this is Ken Wainstein, and I would like to follow up, just to reiterate one thing. I alluded to this earlier. But when we talked about uncertainty, and the fact that maybe companies might have more uncertainty about the continuation of the compulsion mechanisms, the immunity provisions, those kinds of things, and that might give rise to litigation. Just so that you understand the practical impact of that, that if there is more uncertainty, there is going to be more inclination to litigate these issues just to protect the companies. And litigating the issues means that we would then have to move to compel their assistance, after we seek their assistance in a particular surveillance. They could, if they refuse to do that, they then key this issue, and the issue is generated by the expiration of the Protect America Act, tee it up in litigation before the FISA court. That means that we then go through a process of litigation, and during that whole time of litigating that matter, we are not getting the surveillance that we asked them to do. And so that is the sort of real life concern, and the real life implication of this uncertainty.

QUESTION: Thank you, Ken. You talked about the fact that these directives, I think the way you put it is “don’t cover the whole waterfront.” And I am wondering, setting aside the uncertainty question, which I know is very important to you, what part of the waterfront, legally, do you lose when the current authority expires? You said at one point, “certain providers are not subject to the existing directive.” Is it a matter of who, which providers are subject to the directive, or is it a matter of the coverage that any provider can supply?

MR. WAINSTEIN: Yeah, I can’t get into the specifics of the directives, they are on file. But that, to sort of build on the point I made, the clearest example of where we would have trouble in the future is if we are seeking to go up on a new provider. And a provider to has not been subject to existing directive, because we just couldn’t -- the only way you can do that is by issuing a new directive to that provider, and we no longer have the authority to do that. So, I just sort of use that as kind of a very stark example of where expiration of the PAA would just cut us off at the pass, and keep us from getting that surveillance. Does that answer your questions?

QUESTION: Well, back to the first part though. Is setting -- which providers are involved aside, for any given provider, do you lose some coverage when this expires? Certain things that the provider is no longer, that you no longer are legally entitled to ask the provider to provide.

MR. POWELL: Well, this is Ben. If I could try it from a different angle Pete, I would say it is both the ‘who’, and the ‘what’. The ‘who’ may be a electronic communication service provider that is not currently being used, covered by one of these, one of these directives. The ‘what’ is the fact that they are very good, and agile, the terrorists. I mean, they want to blend in, and they are very good at using our commercial technology, and the ‘what’ is a new method of communication, a new process by which we are not currently covering.

QUESTION: So there's both a who aspect to this and a what. Thank you.

MR. POWELL: But Pete, just to make sure there's no misunderstanding, we will not, for

the directives that are in place, the expiration of the PAA will not then shave back on the surveillance authorities under those exact directives. So that's where one part of your question.

QUESTION: Hi. Thanks for doing the call. I have two questions. The first is if there are all these concerns about the expiration date, can you explain a little bit more your opposition to extending this for 21 days, because I don't really understand why? I mean basically what it would mean is perhaps lack of the retroactive immunity for 21 more days, and I don't really understand the urgent particular piece of it, if it's been already going on for the last six months.

MR. POWELL: Yeah. This has been -- I'll take that -- first it's addressed page 11 of the DNI, the joint letter sent to the Senate by the Attorney General and the Director of National Intelligence. And we can get that out to everyone. But they make it very clear that expiration or continued short-term extensions of the Protect America Act means that this issue will not be addressed --

QUESTION: So what's the harm in not addressing it for 21 days?

MR. POWELL: Oh, I guess it's the same harm that we're suffering under now for the fact we haven't addressed it for almost 2 years, which is right now we don't have the capability we need because the private sector is not giving us their willing cooperation because of concern about this issue, and the failure to address it. And we've said this over and over again, this is not a new fact that's happened in the last 72 hours, and we can give you lots of sites for the past 2 years where this is said, and it's in the letter, and also the DNI addressed that, I believe, on CNN this morning, that we have a problem currently with things that we need to do to move forward. So right now, I mean they have time to address this, and you know, everyone hopes that the Congress will go ahead and act to address this. But continued short-term extensions of 14-day after 14-day after 14-day does not address the current problem we have in gaining cooperation with the intelligence community.

QUESTION: But if --

MR. POWELL: And that's what the Director is concerned about.

QUESTION: If you have this ability to compel under the Protect America Act, what's the issue? I mean what are you not getting from the telecoms right now, because it's a lack of retroactive immunity if you have that power to compel in the current law?

MR. POWELL: Okay, well, first you're only focused on the Protect America Act. I would say also reluctant cooperation, even under compulsion scenario, is a very difficult situation to operate in, but again, as we've talked about for over two years, they're critical to our operations, not just in the area of the Protect America Act. So to the extent we have a completely lawful activity, a completely lawful request, but we have continually failed to address this issue, then if you're with that company with a fiduciary duty, you may not have a willingness to cooperate with us and to help us in critical operations. And that's the same

thing that we have said for about 2 years now, over and over again.

QUESTION: But can you give us an example of what you're not getting right now from the private sector because of the lack of retroactive immunity? It's been sort of alluded to, but you've given some other examples of other things. Are there examples of the cooperation you're not receiving now that's making your job much more difficult?

MR. POWELL: Yes, there are examples, and the Director would not be happy with me, I think, if alerted folks to what we are not getting.

QUESTION: Thank you.

OPERATOR: Next question is from Ken Strickland. Please go ahead.

QUESTION: This is a question about the certification. The law doesn't seem to make it explicitly clear, but the intel folks on both sides of the aisle seem to suggest that certifications can be recertified. Now you said that some certificates were done when the law was passed in August. Have any of -- number one, can those certifications be recertified? And how often are certifications done, if you can just give a sense of that? Or was that time in August just when you did a bunch of them?

MR. WAINSTEIN: I'm sorry. This is Ken Wainstein. I'm trying to clarify your question. You're asking whether the certifications could be recertified sort of on the eve of the expiration, the expiration of the PAA, to then extend the directives for a full year, or 364 days from the expiration? Is that the idea?

QUESTION: Right. And furthermore, had there been additional certifications for additional procedures, without getting into the specifics, since August?

MR. POWELL: Yeah. As the second piece, we can't go into that. As I said. And that's what I went back to what was hopefully on the record about filling the intelligence gaps.

QUESTION: Mm-hmm.

MR. WAINSTEIN: In the days after the passage of the PAA. So that's as far as we can go there in terms of the number directives, the nature of the directives, and that kind of thing. In terms of recertifying, I guess, you know, that -- I've heard that notion. I guess that procedure is conceivable, but that does not address all the concerns that we've laid out here in any shape or form. It merely extends the directives by some period of months.

MR. POWELL: And this has been -- I will say -- and again the Attorney General and the DNI address this on page 10 of this that was sent to the Congress on February 5th. But a substantial problem we would have is the ability to modify certifications and procedures after the expiration. And we have for operational reasons had to go back and modify the documents to reflect current operational needs. After the Protect America Act expires, even though some of those may continued in force, if we need to modify them again to reflect

something, substantial question, to say the least, about whether you could modify something after the expiration of the Act.

MR. ROEHRKASSE: I'm sorry. We're only going to have time now for one more question. One more question.

QUESTION: Hi. Quickly. Ken, can you just, one thing, go right back and just address the time line on the one-year, just so it's really clear? And the 2nd thing is following up on Eric's question about what circumstances right now can you monitor a phone call or e-mail in the United States without a court order?

MR. WAINSTEIN: The one-year chronology, it's just that the directives are in force for a year, and with the expiration of the PAA, the directives that are in force remain in force until the end of that year. So, take today, for example, if we were to get a certification that directives issued today on February 14th, it would expire 365 days from now, I guess. So, that's my point, is that for those directives that are in place, we'll be able to continue doing surveillance based on those directives.

Your other question as to whether we can collect e-mails or telephone calls in the United States -- what was it again?

QUESTION: Without a court order.

MR. WAINSTEIN: Um --

QUESTION: In other words, you don't want to go through the FISA procedure, you know, on an expedited basis.

MR. WAINSTEIN: Well I think what you're getting to, then, just is basically what FISA provides for right now with the PAA. And you know, the original FISA still is in place that requires us to go to the FISA court if we want to target somebody in the United States, requires us to go to FISA court if it's a purely domestic communication. The PAA only carves out of the original FISA and makes explicit that we don't have to go to the FISA court or target somebody outside the United States, and puts in place these procedures by which we have to go to the FISA court, and show the procedures by which we determine that a target is outside the United States, et cetera. So --

QUESTION: I mean if there's an international call that originates in the United States, which way does that go?

MR. WAINSTEIN: Well, if we're targeting the person outside the United States, we can do that under the PAA. We can collect that. And then any communications with the U.S. person would then go through the minimization procedures that Ben described earlier, which is exactly what we've done historically for surveillance that's conducted outside the United States -- the executive order.

MR. POWELL: Yeah. This is Ben. I would just follow up, as I mentioned, those targeting procedures were approved by the FISA court. I believe that's also contained in a letter that we've sent to the Congress that those targeting procedures were provided.

I would also note that one thing that's kind of lost in this debate is that the Senate bill that is pending before the House, to the extent there are concerns in this area, increases the roll of the FISA court significantly. It for the first time extends court order requirements to targeting an American anywhere in the world. That has not been the case since 1978. It also requires the FISA court to approve the minimization procedures. It requires the FISA court has a role in approving the certifications and directives. So there's substantial -- for those who are concerned about those issues, the Senate bill has greater increased the roll for the FISA court, compared to the Protect America Act.

MR. ROEHRKASSE: All right. Well, thank you very much today for joining us today.

END 2:37 P.M. EST