

Demers, John

From: Demers, John (NSD)
Sent: Thursday, November 29, 2007 2:09 PM
To: (b) (6) @ssci.senate.gov; (b) (3) (NSD)
Cc: (b) (6) @ssci.senate.gov; Eisenberg, John
Subject: Re: Wyden 2.5 Fix

Tracy,

Could you get Jack and Kathleen on the list downstairs for 4pm?

Thanks,
John

----- Original Message -----

From: Livingston, J (Intelligence) [(b) (6) @ssci.senate.gov]
To: Demers, John (NSD)
Cc: Rice, K (Intelligence) [(b) (6) @ssci.senate.gov]; Eisenberg, John [(b) (6) @SMOJMD.USDOJ.gov]
Sent: Thu Nov 29 13:32:16 2007
Subject: RE: Wyden 2.5 Fix

4:00 is good for us. Can you get us on the list to get into the building. I'll try not to violate the escort policy this time.

From: Demers, John (NSD) [mailto:(b) (6) @usdoj.gov]
Sent: Wednesday, November 28, 2007 7:07 PM
To: Livingston, J (Intelligence)
Cc: Rice, K (Intelligence); Eisenberg, John
Subject: RE: Wyden 2.5 Fix

I can't do anything until 4 pm, but happy to meet then.

John

From: Livingston, J (Intelligence) [mailto:(b) (6) @ssci.senate.gov]
Sent: Wednesday, November 28, 2007 4:48 PM
To: Demers, John (NSD)
Cc: Rice, K (Intelligence)
Subject: Wyden 2.5 Fix

May Kathleen and I come over tomorrow afternoon [to hammer out language we can all live with on this issue?]

Sent from my BlackBerry Wireless Device

Demers, John

From: Demers, John (NSD)
Sent: Friday, November 30, 2007 11:18 AM
To: 'Livingston, J (Intelligence)'
Subject: RE: Here's the latest draft for our meeting in a few minutes

Jack,

Do you have an updated draft I can send around after adding the "other comms" piece?

Thanks,
John

From: Livingston, J (Intelligence) [mailto:(b) (6)@ssci.senate.gov]
Sent: Thursday, November 29, 2007 3:42 PM
To: Demers, John (NSD)
Subject: Here's the latest draft for our meeting in a few minutes

9/25/2008

Demers, John

From: Grannis, D (Intelligence) [(b) (6)] [ssci.senate.gov]
Sent: Friday, February 01, 2008 11:03 AM
To: Duck, Jennifer (Judiciary-Dem); Dubee, M (Intelligence); Davidson, M (Intelligence); Healey, C (Intelligence); Starzak, Alissa (Intelligence); Tucker, L (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Demers, John; Ben Powell [(b)(3)] Eisenberg, John
Subject: Exclusivity proposal from last night
Attachments: HEN08153_xml.pdf



HEN08153_xml.pdf
(30 KB)

Please find attached the leg counsel version of the exclusivity language we discussed last night. A quick note on the text:

Instead of repeating the phrase "physical search of stored electronic communications or stored electronic data in the custody of an electronic communications service provider," I propose that we use the phrase "acquisition of stored electronic communications" and then add a definition for "stored electronic communications" that uses all of the first term. This avoids repeating a very unwieldy phrase four times in the amendment, and it does not speak directly to the question of whether the acquisition of a stored communication is surveillance or a search, which I understand to be a plus for DOJ.

On a general note - we have tried to take the concerns of the ODNI and DOJ very seriously in drafting this language. I think this gives the Executive all the authority and flexibility that you have said would be needed, but with reasonable constraints, trigger mechanisms, and oversight that is necessary for substantive and political reasons. If there is something we have missed, let's talk, but we really hope this language will be accepted and we can finally put the exclusivity debate behind us.

Many thanks,
David

David Grannis
Professional Staff Member

(b) (6) Intelligence

Demers, John

From: Demers, John
Sent: Tuesday, February 05, 2008 1:47 PM
To: Livingston, J (Intelligence); 'Rice, K (Intelligence)'
Subject: FW: Call

From: Demers, John
Sent: Tuesday, February 05, 2008 1:47 PM
To: 'Grannis, D (Intelligence)'
Subject: RE: Call

David,

My concern with the other threat language stems from the possibility that it will lead to resistance up front and second-guessing later. There's no court order or directive mechanism for use in the relevant circumstances so we'd be relying on the voluntary cooperation of the private party. Especially in the current atmosphere, we risk push back when time is most of the essence. The possibility of resistance also arises because of the fear that the surveillance will be second-guessed later when no second attack occurs. I understand theoretically your point but I think in practice this requirement will raise difficulties and provide little protection in addition to that provided by the notification requirements.

Also, you had put in your cover email a while back that you were considering redefining electronic surveillance for the purpose of this section. I prefer spelling out "electronic surveillance or the physical search of stored electronic communications or data..." --the way you have it. The reason for that is that it strengthens the idea that acquiring stored electronic communications is a physical search, a legal question we may need to revisit for reasons best discussed in a classified setting and unrelated to FISA modernization. I would rather leave the statute as it is for now without affecting that question either way.

John

From: Grannis, D (Intelligence) [mailto:(b) (6)@ssci.senate.gov]
Sent: Tuesday, February 05, 2008 9:02 AM
To: Demers, John
Subject: Call

John -- Thanks for the call. I'm talking with Sen. Feinstein about this shortly and will raise the two issues from your voicemail: notification to the full Congress and the Presidential determination of another threat. Can you describe at any more length the concern about the latter point? We have no standard in there, and understood the need for this authority to be in cases where the President needed to act to prevent further attacks. Any suggestions on what, short of no language at all, might satisfy the concern?

Again, thanks for your call. Would be great if we could get this wrapped up.

David

David Grannis
Professional Staff Member
Senate Select Committee on Intelligence

9/25/2008

Demers, John

From: Demers, John

Sent: Tuesday, February 05, 2008 5:45 PM

To: 'Livingston, J (Intelligence)'

Subject: RE: May I see the text of the Whitehouse proposed mod to assess compliance

What are you talking about?

*

Demers, John

From: Demers, John
Sent: Saturday, February 09, 2008 4:03 PM
To: (b) (6) <(b) (6)@ssci.senate.gov>; (b) (6) <(b) (6)@ssci.senate.gov>
Subject: [Whitehouse Assessment Compliance] Modification (Revised)

Does one of you have handy the pdf of the version of the manager's amendment with the uc amendments incorporated, that is, whatever the text is that the amendments are amending? I want to give it a scrub to be sure the amendments were incorporated correctly by leg counsel, etc.

Thanks,
John

Demers, John

From: Rice, K (Intelligence) [b(6)] SSCI.senate.gov]
Sent: Saturday, February 09, 2008 4:34 PM
To: Demers, John
Cc: Livingston, J (Intelligence)
Subject: Fw: Substitute and redline
Attachments: HEN08160_xml.pdf; Redline HEN08160_xml.doc

----- Original Message -----

From: Starzak, Alissa (Intelligence)
To: Rice, K (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Davidson, M (Intelligence)
Sent: Fri Feb 01 17:57:50 2008
Subject: Substitute and redline

Attached is a draft of the bill (and a redline from the original managers' substitute) that includes the provisions that will be incorporated by unanimous consent. It therefore does not include the expedited review provisions or the WMD amendment.

9/25/2008

Demers, John

From: Demers, John
Sent: Wednesday, February 06, 2008 11:56 AM
To: 'Livingston, J (Intelligence)'
Subject: RE: How did the conference call go?

Ben said he was going to call you. [He was strongly in favor of this. I laid out your (and my own) points. On balance, he still favors it but said he wants to talk to you.]

From: Livingston, J (Intelligence) [mailto: (b)(6) @ssci.senate.gov]
Sent: Wednesday, February 06, 2008 11:54 AM
To: Demers, John
Subject: How did the conference call go?

Sent from my BlackBerry Wireless Device

Demers, John

From: Rice, K (Intelligence) [b)(6) SSCI.senate.gov]
Sent: Monday, February 11, 2008 2:20 PM
To: Demers, John
Subject: FW: FISA - Judicial Conference states opposition to provision

Attachments: ReidMcConnellFISA.pdf



ReidMcConnellFISA.
pdf (103 KB)...

[I'm shocked.]

-----Original Message-----

From: Livingston, J (Intelligence)
Sent: Monday, February 11, 2008 2:10 PM
To: Rice, K (Intelligence)
Subject: Fw: FISA - Judicial Conference states opposition to provision

Fyi.

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: [Peter_Owen@ao.uscourts.gov <Peter_Owen@ao.uscourts.gov>]
To: Davidson, M (Intelligence); Livingston, J (Intelligence)
Sent: Mon Feb 11 14:06:53 2008
Subject: FISA - Judicial Conference states opposition to provision

Mike and Jack,

Attached is a letter the Judicial Conference has sent to the House and Senate leadership opposing the time limits contained in the Bond Amendment passed last Thursday.

Please let me know how we can work with you to get these provisions adjusted.

[Peter Owen]
Attorney Advisor
Administrative Office of the US Courts
[202-502-1700]

Demers, John

From: Kim, Harold H. [Harold_H._Kim@who.eop.gov]
Sent: Monday, February 11, 2008 12:29 PM
To: (b)(6)@intelligence.senate.gov; Livingston, J (Intelligence); (b)(6)@SSCI.senate.gov
Cc: Demers, John; Eisenberg, John; (b)(3), (b)(6); Emling, John G.; Meyer, Daniel P.; Stewart, Margaret B.; Abegg, John (McConnell)
Subject: Revised Whitehouse Assessment Compliance Modification

Louis, Jack and Kathleem:

Based on the email traffic over the weekend, please find below the most recent language per comments from DOJ, DNI and you guys:

"Nothing in this Act shall be considered to reduce or contravene the inherent authority of the Foreign Intelligence Surveillance Court to determine, or enforce, compliance with its orders, rules, and court-approved procedures."

Also, in terms of placement, we suggest inserting the language in Title III as a new section 302.

9/25/2008

Demers, John

From: [Peter_Owen@ao.uscourts.gov]
Sent: Thursday, February 14, 2008 4:01 PM
To: (b)(6)@ssci.senate.gov; (b)(6)@ssci.senate.gov;
(b)(6)@mail.house.gov; (b)(6)@mail.house.gov; (b)(6)@mail.house.gov;
(b)(6)@mail.house.gov; (b)(6)@judiciary-dem.senate.gov;
(b)(6)@judiciary-rep.senate.gov
Cc: Demers, John; (b)(6)@ao.uscourts.gov
Subject: possible FISA bill language
Attachments: ReidMcConnellFISA.pdf, HoyerBoehnerFISA.pdf

Colleagues,

You have received a letter expressing the Judicial Conference's strong opposition to any statutory time limits for judicial decision-making. The Conference continues to urge that any and all such time limits be stricken from the FISA statute.

Because we are not involved in the moment-to-moment negotiations on this legislation, we are not in the best position to track and identify all instances in which time limits might be inserted into the bill (and then ask for their removal in each instance). For example, the Bond Amendment would seem to provide an exception to its 30-day requirement, but the exception is merely a partial list of constitutional constraints the FISC would need to adhere to anyway – in other words a tautology.

Thus considering the manner in which the bill is being negotiated, you might consider adoption of the following statutory provision as part of any bill final bill. This language would ameliorate much of the detriment the various time limits might cause.

50 USC Section 1803(c), is amended by adding after the sentence "Proceedings under this chapter shall be conducted as expeditiously as possible." the following new sentence: "A time limit for a judicial decision in this chapter shall apply unless the judge, by order for reasons stated, extends that time for good cause."

Finally, we are to continuing reach out to the Department of Justice. Their support for us in this request would of course make this easier to solve. We hope that with enough time to think about it, they will re-consider their position. However, if there is not time for that, we request Congress to address our reasonable concerns.

Please don't hesitate to contact me if I can be of further assistance in this matter.

[Peter Owen]
Attorney Advisor
Administrative Office of the US Courts
Office of Legislative Affairs
[202-502-1700]

9/25/2008



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

February 11, 2008

Honorable Steny H. Hoyer
Majority Leader
United States House of Representatives
Washington, DC 20515

Dear Mr. Leader:

I am writing to express the Judicial Conference's strong opposition to a provision in S.2248 ("The FISA Amendments Act of 2008") that would impose statutory time limits on the Foreign Intelligence Surveillance Court (FISC) when adjudicating the lawfulness of directives to assist in the acquisition of foreign intelligence information.

The Judicial Conference has traditionally strongly opposed time limits in legislation for judicial actions/rulings for a variety of reasons, including the fact that they limit the ability of the judge to give needed consideration to the complexity of the issues presented, which can be done on an expedited basis where warranted.

Another reason that the Conference has had a longstanding opposition to statutorily-mandated expedited review is that as the categories of cases required to be expedited proliferate, the ability of a court to expedite any of those cases is restricted. The national security significance of the cases before the FISC means there is a chance this provision could force the FISC by statute to forego consideration of another matter of paramount importance.

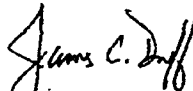
Indeed, Congress has also recognized that time limits are inappropriate in the analogous context of petitions challenging requests for business records sought by the government in the statute for review of non-frivolous petitions (see 50 U.S.C. 1861(f)(2)(A)(ii), providing for non-frivolous petitions only that "...the assigned Judge

Honorable Steny H. Hoyer
Page 2

shall promptly consider the petition in accordance with the procedures established under section 1803(e)(2) of this title.").

Finally, as you know, the FISC judges have a well-established reputation for diligence and a willingness to adjust their personal and courtroom schedules as the work of the FISC requires. There is no demonstrated need to impose statutory deadlines in this particular area. To the contrary, the FISC judges have demonstrated an ability to prioritize their docket based on the exigencies of the national interest.

Sincerely,


James C. Duff
Secretary

cc: Honorable Silvestre Reyes
Honorable John Conyers

Identical letter sent to: Honorable Harry Reid
Honorable Mitch McConnell
Honorable John Boehner

Demers, John

From: Demers, John
Sent: Tuesday, February 12, 2008 11:36 AM
To: Rice, K (Intelligence); (b)(6) [REDACTED]@ssci.senate.gov; Livingston, J (Intelligence)
Cc: (b)(6) (b)(3) [REDACTED]
Subject: Managers nit amendment

Tracking: Recipient

Read

Rice, K (Intelligence)

(b)(6) [REDACTED]@ssci.senate.gov

Livingston, J (Intelligence)

(b)(6) (b)(3) [REDACTED]

Read: 2/12/2008 11:37 AM

Mike, Jack and Kathleen,

We've reviewed the nit amendment and had just a couple of comments:

1. The amendment on page 2, lines 1-4, changes the language about retention of directives to make it apply only to the Government. This seems inconsistent with FISA. Section 1805(h) of FISA provides: "Certifications made by the Attorney General . . . and applications made and orders granted under this subchapter shall be retained for a period of at least 10 years from the date of the certification or application."
2. On page 5, line 5, the page number should be 67, not 61.

Also, we spotted on other nit:

page 54, lines 22-23. I think some language got dropped at some point. It reads: "shall remain in effect with respect to any directive issued pursuant to . . . during the period such directive was in effect." The language should read, as it does on page 83 (lines 10-13): "shall remain in effect with respect to any directive issued pursuant to . . . for information, facilities, or assistance provided during the period such directive was or is in effect."

Thanks,
John

9/25/2008

Demers, John

From: Davidson, M (Intelligence) (b)(6) [REDACTED]@ssci.senate.gov]
Sent: Tuesday, February 12, 2008 11:55 AM
To: Demers, John; Rice, K (Intelligence); Livingston, J (Intelligence)
Cc: (b)(6) (b)(3) [REDACTED] Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: RE: Managers nit amendment

Jack,

If you're reading this over on the floor –

[We'll take out the amendment described in (1) below and insert an amendment to incorporate the page 54, lines 22-23 suggestion.]

And bring it over to the floor as soon as we get it back, as there is only one more amendment to be voted on.

Mike

Demers, John

From: Livingston, J (Intelligence) (b)(6) [redacted]@ssci.senate.gov]
Sent: Thursday, February 14, 2008 1:37 PM
To: Demers, John; Ben Powell
Subject: FW: ARTICLES: FISA and Democrat Campaign Contributions

[Interesting.]

ARTICLE 1 --

Obama, Hillary, Dems Take FISA Trial Lawyer Cash

By Amanda Carpenter
Wednesday, February 13, 2008
Townhall.com

As Congress debates giving immunity to phone companies that assisted the government in tracking terrorist communications, trial lawyers prosecuting those phone companies have poured money into the coffers of Democratic senators, representatives and causes.

Court records and campaign contribution data reveal that 66 trial lawyers representing plaintiffs in lawsuits against these phone companies donated at least \$1.5 million to 44 different current Democratic senators and Democratic causes.

All of the trial lawyers combined only contributed \$4,250 to Republicans in comparison. Those contributions were made to: Sen. John Cornyn (Tex.), Rep. Tom Davis (Va.), Sen. Lindsay Graham (S.C.), Sen. Mel Martinez, and Sen. Arlen Specter (Pa.).

One maxed-out lawyer donor, Matthew Bergman of Vashon, Washington, has given more than \$400,000 in his name to Democrats. In the 2008 cycle alone he has donated \$78,300 to various campaigns.

Bergman's law firm's website says that he also specializes in "identifying viable asbestos defendants, locating evidence and developing legal theories to hold offending companies accountable." In 2004, his firm split a \$4.3 billion payout from Halliburton with seven other law firms. \$30 million of that was delivered to their firm's asbestos victim clients.

Another lawyer prosecuting the phone companies is Mikal Watts of Corpus Christi, Texas, who has given more than \$200,000 to Democrats. Watts has prosecuted Ford Motors over defective tires and attempted to run against Republican Sen. John Cornyn (Tex.) for the Senate.

Since the New York Times broke a story in late 2005 that found the Bush administration had engaged in surveillance activities with cooperation from phone companies like Verizon, AT&T, and MCI, a debate has erupted, largely on party lines, over whether or not to protect those companies from prosecution under the Foreign Intelligence Surveillance Activities Act.

President Bush has aggressively called on Congress to do so, and Homeland Security Secretary Michael Chertoff has testified that FISA "is the radar we have for the 21st century to detect attacks before they happen."

On Wednesday, the Senate held a critical vote on an amendment to the FISA reauthorization that would grant this immunity. It passed, but 29 Democratic senators voted against it. 24 of them have accepted campaign contributions from trial lawyers who are suing the government over those activities.

Two of them are running for President.

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Sen. Barack Obama (D.-Ill.), who is in the running for the Democratic nomination, was given \$28,650 from trial lawyers listed as counsel for plaintiffs who are suing Verizon, AT&T, and MCI because those companies turned over phone records as a part of President Bush's covert phone surveillance program. \$19,150 of that was donated in the last year.

Sen. Hillary Clinton (D.-N.Y.), the other main contender for the Democratic presidential bid, also accepted money from trial lawyers on the case. Records show those lawyers have poured \$34,800 to her and her husband's campaigns over the years. \$12,150 of those donations were made to her within the last year.

The other 22 senators who opposed the amendment and have taken similar donations are: Joe Biden (Del.), Barbara Boxer (Calif.), Maria Cantwell (Wash.), Ben Cardin (M.D.), Chris Dodd (Conn.), Byron Dorgan (N.D.), Dick Durbin (Ill.), Russ Feingold (Wisc.), Teddy Kennedy (Mass.), John Kerry (Mass.), Amy Klobuchar (Minn.), Frank Lautenberg (N.J.), Patrick Leahy (Vt.), Carl Levin (Mich.) Robert Menendez (N.J.), Patty Murray (Wash.), Jack Reed (R.I.), Harry Reid (Nev.) Charles Schumer (N.Y.), Debbie Stabenow (Mich.), Jon Tester (Mont.) and Ron Wyden (Ore.).

Clinton did not vote Tuesday because she was campaigning. She has, however, voted against granting telephone companies immunity and other FISA reforms in the past.

Since 1997, Senate Majority Leader Sen. Harry Reid (D.-Nev.) accepted donations from three lawyers working the FISA case that amount to \$10,000. The No.2 Democrat in the Senate, Dick Durbin, who is charged with whipping votes, has accepted \$18,350 from 1996 through 2007 from lawyers listed as counsel against phone companies.

Now that FISA has been reauthorized in the Senate, the bill was sent over to the House where an effort to strip the immunity provision is expected. House Republicans are pressuring House Democrats to pass the Senate version of the bill quickly, as it is scheduled to expire on Saturday.

Records show that House Speaker Nancy Pelosi (D.-Calif.) accepted \$3,750 in donations to her campaigns and PACs from these lawyers from 1996-2001.

Amanda Carpenter is National Political Reporter for Townhall.com.

ARTICLE 2 (Editorial) --

EDITORIAL: Retroactive immunity
February 14, 2008
Copyright © Las Vegas Review-Journal

If you're an AT&T executive confronted with armed federal agents demanding access to customer records as part of the government's warrantless wiretapping program put in place after 9/11, what do you do?

Standing up for the Fourth Amendment may be wonderful in principle, but in practice, the pressure to cooperate would be immense.

In the wake of Sept. 11, many telecommunications companies did just that. Today, there are some four dozen lawsuits accusing those companies of improperly acceding to government demands.

On Tuesday, the Senate made permanent an anti-terror measure passed in August allowing intelligence agencies to intercept -- often without a warrant -- phone calls and e-mails of U.S. citizens communicating with those overseas.

As part of the bill, the Senate approved by a 67-31 vote a provision granting retroactive immunity to the telecommunications companies now facing lawsuits for cooperating with the government after 9/11.

Many Democrats were livid over the amendment.

9/25/2008

"It is inconceivable that any telephone companies that allegedly cooperated with the administration's warrantless wiretapping program did not know what their obligations were," said Sen. Russell Feingold, D-Wis. "And it is just as implausible that those companies believed they were entitled to simply assume the lawfulness of a government request for assistance."

Really? The burden is on a private company to ensure that a request from the federal government is constitutional when it involves a secret court and national intelligence?

In fact, Sen. Feingold and other Democrats, including Barack Obama – Hillary Clinton didn't show for the vote – were carrying water for their friends at the trial bar, who are already seeking millions of dollars through lawsuits against various telecommunication companies. Is it really fair that the trial lawyers are free to shake down companies that thought they were acting in good faith by helping the government fight the terror war?

The bill now goes to the House, which passed a previous version without the immunity provision. And while debates over the constitutional ramifications of allowing this type of surveillance are important and appropriate – How far down this road can we go if the Bill of Rights is to survive? – setting up major corporations as fodder for the trial bar is counterproductive.

If it's going to approve this bill, the House should agree to the immunity provision.

Find this article at:

<http://www.lvrj.com/opinion/15626377.html>

Christopher M. Jaarda
Senate Republican Policy Committee
347 Russell Building
Washington, D.C. 20510
(b)(6)

Demers, John

From: Rice, K (Intelligence) [REDACTED] SSCI.senate.gov]
Sent: Thursday, February 14, 2008 3:01 PM
To: [REDACTED] Demers, John
Subject: Fw: FISA, next week

----- Original Message -----

From: Rice, K (Intelligence)
To: Livingston, J (Intelligence); Tucker, L (Intelligence)
Sent: Thu Feb 14 14:59:53 2008
Subject: Re: FISA, next week

[Please just shoot me now]

----- Original Message -----

From: Livingston, J (Intelligence)
To: Tucker, L (Intelligence); Rice, K (Intelligence)
Sent: Thu Feb 14 14:56:01 2008
Subject: Fw: FISA, next week

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Davidson, M (Intelligence)
To: DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep)
Cc: Livingston, J (Intelligence); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Sent: Thu Feb 14 14:28:56 2008
Subject: FISA, next week

Mary and Nick,

[In case higher powers have not resolved all this before then, there is an interest in convening a bipartisan, bicameral (Intelligence and Judiciary each House) process, with ODNI/DOJ/NSA next week.]

I'll be away Tuesday and Wednesday. What are your plans next week?

Thursday afternoon is a possibility.

Mike

9/25/2008

Demers, John

From: Davidson, M (Intelligence); (b)(6) @ssci.senate.gov
Sent: Thursday, February 21, 2008 4:54 PM
To: Benjamin Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); (b)(3) Chris; Gerry, Brett; Potenza, Vito; (b)(3), (b)(6)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); (b)(6) @mail.house.gov; (b)(6) @mail.house.gov; Johnson, A (Intelligence); Tucker, L (Intelligence); Weich, Ron (Reid); Lettre, Marcel (Reid); Hoy, Serena (Reid)
Subject: FISA, meeting tomorrow (Friday), 10, at HPSCI.

Ben, et al.

This is just to confirm the FISA meeting tomorrow, at HPSCI (H405), at 10, and that we are looking forward to ODNI/DOJ/NSA participation.

As you undoubtedly know, our Republican colleagues decided not to attend this afternoon's bicameral meeting (House and Senate Intelligence and Judiciary Committee staff), which just concluded.

Working on the belief that every new day is a new opportunity, I hope that tomorrow's meeting will be bipartisan as well as bicameral. However that may develop, it is important that the DNI, DIRNSA, and AG allow for your participation, which has always been helpful, in responding to questions, providing information, and considering suggestions that the staff of these four committees may have in preparing members for important decisions in the days ahead.

None of us now knows whether the House will be asking for a conference or considering whether to send the bill back to the Senate with an amendment. At the very least, there may be a need for an amendment to the transition provisions that takes into account that the Protect America Act has expired, and perhaps provides for its extension retroactive to February 17 -- as well as its repeal upon enactment of the FISA Amendments -- to make sure there has not even been an arguable gap in liability protection.

But whether there is a conference or an amendment from the House back to the Senate, members will have questions, and I know that you'll be able to help in answering them.

I've added Wyndee Parker and Perry Apfelbaum to the cc list, so that they might keep their House Democratic and Republican colleagues up to date, and also Ron Weich, Marcel Lettre, and Serena Hoy, so that they can do the same for their counterparts in Senator McConnell's office.

Looking forward to seeing everyone tomorrow.

Demers, John

From: Livingston, J (Intelligence) [(b)(6)]@ssci.senate.gov]
Sent: Thursday, February 21, 2008 5:07 PM
To: Demers, John; Ben Powell
Subject: FW: FISA, meeting tomorrow (Friday), 10, at HPSCI.
Follow Up Flag: Follow up
Flag Status: Red

Have you guys figured out what you're going to do with respect to this meeting. [We won't be attending for the same reasons that we did not attend the meeting this afternoon. We are past the point of staff negotiations and down to member level issues. The Senate has spoken very clearly on where it is with respect to many of those member level issues, e.g., immunity, sunset, bulk collection, use of information limitations, prior court approval, etc.]

Demers, John

From: Livingston, J (Intelligence) [(b)(6)]@ssci.senate.gov
Sent: Monday, March 03, 2008 2:28 PM
To: Demers, John
Subject: FW: FISA Meeting Tuesday at 1 in Room H-326

John,

Sorry to bother you when you're out of the office [] but are you guys going to this? [] On a different matter, it looks like SJC may mark up Sen. Kennedy's state secrets privilege bill this week. Have you guys provided any input on this? [] Thanks. Scope

Jack

From: Parker, Wyndee [mailto:(b)(6)]@mail.house.gov
Sent: Monday, March 03, 2008 1:26 PM
To: Donesa, Chris; Lewis, James; Roland, Sarah; Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Healey, C (Intelligence); Starzak, Alissa (Intelligence); DeRosa, Mary (Judiciary-Dem); Espinel, Zulima (Judiciary-Dem); Apelbaum, Perry; Kalo, Ted; DeBaca, Lou; Dubester, Mark; Delaney, Mike; Bash, Jeremy; Sheehy, Mike; Onek, Joe; Sixkiller, Mariah; Cantrell, Margaret; Weich, Ron (Reid); Lettre, Marcel (Reid); Hoy, Serena (Reid)
Subject: FISA Meeting Tuesday at 1 in Room H-326

As a follow-up to last week's bicameral, bipartisan leadership discussions, we plan to convene a staff meeting Tuesday at 1 pm in H 326, the Majority Whip's office.

At the meeting we hope to discuss issues related to HR 3773/S 2248. Administration representatives have also been invited.

Please pass this message along as appropriate.

Thanks,

Wyndee Parker

Deputy Staff Director and General Counsel

House Permanent Select Committee on Intelligence

The Capitol, Room H-405

Washington, DC 20515

(b)(6)

9/25/2008

Demers, John

From: Demers, John
Sent: Monday, March 03, 2008 3:46 PM
To: (b)(6) @ssci.senate.gov
Subject: Re: FISA Meeting Tuesday at 1 in Room H-326

This is the first I've heard of this. [The usual rule of thumb is we don't go if it's not bipartisan. Are you going?]

Demers, John

From: Davidson, M (Intelligence) [(b)(6)]@ssci.senate.gov]
Sent: Monday, March 03, 2008 4:39 PM
To: Ben Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); [(b)(3)] Potenza, Vito; [(b)(3), (b)(6)] Chris
Cc: Livingston, J (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Parker, Wyndee; [(b)(6)]@mail.house.gov; Apfelbaum, Perry; Weich, Ron (Reid)
Subject: FISA, meeting tomorrow (Tuesday), 1 pm,

Ben, et al.:

This follows up on a message that Wyndee Parker has left for Ben.

Invitations have been sent to House and Senate Democratic and Republican staff (Leaders' offices and Intelligence and Judiciary Committees) for a bipartisan, bicameral FISA meeting tomorrow (Tuesday), at 1 pm, in H 326, the Majority Whip's Office.

The purpose is to build on the bicameral, bipartisan Members meeting of last week with Ben, and to discuss specific matters that may be presented to the House this week.

Wyndee or I can describe further.

Mike

9/25/2008

Demers, John

From: Tucker, L (Intelligence) [(b)(6)] SSCI.Senate.Gov]
Sent: Wednesday, March 12, 2008 11:36 AM
To: Kim, Harold H.; [(b)(6)] mail.house.gov; Hawkins, Tom (McConnell); Abegg, John (McConnell); Soderstrom, Sharon (McConnell); [(b)(6)] mail.house.gov; Rossi, Nick (Judiciary-Rep); Emling, John G.; [(b)(3), (b)(6)] Demers, John; Stewart, Margaret B.; [(b)(6)] mail.house.mail
Cc: Livingston, J (Intelligence); Rice, K (Intelligence); Russell, J (Intelligence)
Subject: FISA
Attachments: Side by Side with Revised House Version 3-12-08.doc



Side by Side with
Revised Hous...

Folks,
We digested the Revised House version and attached is the side-by-side the minority staff on the SSCI put together (correcting the inaccuracies on the one we received yesterday) on the Restore Act - Senate Bill - Revised House Bill.
Louis

Louis Tucker
Republican Staff Director
[(b)(6)] Committee on Intelligence

Demers, John

From: Davidson, M (Intelligence); (b)(6) @ssci.senate.gov
Sent: Friday, March 28, 2008 4:54 PM
To: Ben Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito (b)(3); (b)(3), (b)(6) Chris; Livingston, J (Intelligence); Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: RE: On the return of H.R. 3773 to the Senate

After consulting with Ben about a date and time, let's plan to meet on Monday, April 7, at 2, for a full afternoon, bipartisan Senate-side discussion (Intelligence and Judiciary) with ODNI/DOJ/NSA to help set us on a path that enables the branches to reach agreement on a good law.

I've reserved both our hearing room, SH-219, and a conference room in SH-211, depending on the number of participants. Let's assume for now that we'll meet in 219.

Looking forward to seeing all.

Mike

Demers, John

From: Demers, John
Sent: Monday, March 31, 2008 3:42 PM
To: 'Livingston, J (Intelligence)'
Subject: FISA immunity language

Attachments: FISA immunity alternative.doc

Jack,

[For your eyes only, attached is an idea on court review of immunity. The redline shows changes from the Senate bill.] Let me know if you'd like to meet on this to walk through it. [As we discussed, please don't forward to anyone. This is just an idea and has not been vetted.]

John



FISA immunity
alternative.doc ...

Demers, John

From: Demers, John
Sent: Friday, April 04, 2008 1:42 PM
To: 'Livingston, J (Intelligence)'; Davidson, M (Intelligence); Ben Powell; Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; (b)(3) (b)(6) [REDACTED] Chris Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: RE: On the return of H.R. 3773 to the Senate

Tracking: Recipient Message Status

'Livingston, J (Intelligence)'
Davidson, M (Intelligence)
Ben Powell
Eisenberg, John
Nichols, Carl (CIV)
Potenza, Vito
(b)(3) (b)(6) [REDACTED]
Rice, K (Intelligence)
DeRosa, Mary (Judiciary-Dem)
Rossi, Nick (Judiciary-Rep)
Espinel, Zulima (Judiciary-Dem)
Solomon, Matthew (Judiciary-Dem)
Healey, C (Intelligence)
Starzak, Alissa (Intelligence)

Mike,

We are available Friday [and would strongly prefer for this meeting to involve all of the key players on the Senate side.]

Thanks,
John

Demers, John

From: Livingston, J (Intelligence); (b)(6) @ssci.senate.gov
Sent: Tuesday, April 15, 2008 6:10 PM
To: Davidson, M (Intelligence); Ben Powell; Demers, John; (b)(3) Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; (b)(3) (b)(6) Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence); (b)(6) @mail.house.gov; Tucker, L (Intelligence)
Subject: RE: FISA, Monday, April 21, 1 pm

Wyndee,

We understand that you would like to meet to see if we can reach a bicameral solution on the FISA legislation. I think the most productive use of our time on Monday will be to figure out what modest changes can be made to the Senate bill, since it appears to have the most support in Congress (a supermajority in the Senate and apparent near-majority in the House). We look forward to your thoughts. Thanks.

Jack

Demers, John

From: Demers, John
Sent: Friday, May 09, 2008 9:59 AM
To: Tucker, L (Intelligence); Livingston, J (Intelligence)
Subject: FISA Mod Final (5 9 08).doc

Attachments: FISA Mod Final (5 9 08).doc

Louis and Jack,

Attached is a proposed counterproposal reflected as a redline to the relevant pages from the Senate-passed bill. I will send you an email shortly explaining any changes that may not be immediately apparent.

Thanks,
John



FISA Mod Final (5 9
08).doc (...)

Demers, John

From: Demers, John
Sent: Wednesday, May 21, 2008 4:47 PM
To: 'Livingston, J (Intelligence)'
Subject: Technical Changes

Attachments: FISA Bill Technical Changes.doc

Jack,



FISA Bill Technical
Changes.do...

Title I nits in the attached draft. Some may not apply depending on exact what you've done. Title II nits below:

section 202(d)(1): "... finds that such certification is not supported by a preponderance of the evidence provided TO THE COURT pursuant to subsection (a), paragraph (2) OF THIS SUBSECTION, and subsection (h).

section 202(d)(2): "... or series of such requests or directives, described in subparagraph (a)(1)(B), or submitted...

section 202(e)(1) "... for review of any final determination of a court in such action pursuant to this section WITHIN 30 DAYS OF SUCH DETERMINATION."

section 202(e)(2) "The United States or any party in A covered civil action ... issued in such action under paragraph (1) WITHIN 30 DAYS IF SUCH DECISION."

section 202(g)(1): "review such certification and supplemental materials in CAMERA AND EX PARTE" Drop the procedures bit.

Call if you have questions,
John

From: Livingston, J (Intelligence) [mailto:(b)(6)@ssci.senate.gov]
Sent: Wednesday, May 21, 2008 10:42 AM
To: Demers, John
Subject: RE: Meeting

John,

Do you have them in electronic copy? If so, could you just send them over. Louis has me working on a project and I'm not going to have time for a phone call this morning. Thanks.

Jack

From: Demers, John [mailto:(b)(6)@usdoj.gov]
Sent: Wednesday, May 21, 2008 9:46 AM
To: Livingston, J (Intelligence)
Cc: (b)(6)
Subject: RE: Meeting

Do you want to do call this am about technicals?

From: Livingston, J (Intelligence) [mailto:(b)(6)@ssci.senate.gov]
Sent: Tuesday, May 20, 2008 6:34 PM
To: (b)(3), (b)(6) Demers, John; Gerry, Brett
Subject: Meeting

Can we meet tomorrow morning to discuss the technical edits we can live with. Hoyer and Bond would like us to get together with Bash tomorrow. I'd like to invite Doneso to the pre-meeting if that's okay. I'm not sure he'd participate.

Sent from my BlackBerry Wireless Device

9/25/2008

Demers, John

From: Livingston, J (Intelligence) [(b)(6)]@ssci.senate.gov]
Sent: Thursday, June 12, 2008 11:19 AM
To: Demers, John; [(b)(3), (b)(6)]
Subject: FW: FISA Response

I just sent this response to Jeremy. Call me if you have any substantive disagreements with the points we've made or the solutions we've proposed. Thanks.

Jack

From: Livingston, J (Intelligence)
Sent: Thursday, June 12, 2008 11:17 AM
To: 'Bash, Jeremy'
Cc: Tucker, L (Intelligence); Sixkiller, Mariah
Subject: FISA Response

Jeremy,

Thanks for the response. Just to clarify, we don't consider these to be "underbrush" items, because many of them will likely be member issues for our side if you and I can't reach resolution. I wanted to see if you and I could achieve options to clear away some of these issues if possible to demonstrate that there were fewer member issues than the number our caucus see in your counter-proposal. I called them secondary originally, because, in our opinion, many of them appear to be staff-driven items (from the Senate side) that keep getting inserted into Democratic counterproposals.

Of the eleven items discussed, it appears so far that we have consensus on items 7 (accounting of the number), 8 (only with respect to the "Savings" provision) and 9.a. (WMD lone wolf and for or on behalf of a foreign power). Here is my response to the remaining issues (page and line cites are to the PDF version of your latest counterproposal, unless otherwise noted):

1. **Section 702(c)(1)(A) – Certification Required for Acquisition.** Our concern was that the insertion of the phrase "until such time as certification is submitted pursuant to subsection (g)" [at page 6, lines 3-5] could have the unintended consequence of not allowing collection in exigent circumstances until a certification is actually submitted. It was my impression that neither you nor Eric intended for that result to occur. However, your most recent "fix" appears to have the same unintended consequence. Your fix would cause the first paragraph of the "Conduct of Acquisition" subsection to read as follows: "(1) In general.—An acquisition authorized under subsection (a) *may be conducted only in accordance with—*(A) *the certification made by the Attorney General and the Director of National Intelligence pursuant to subsection (g);* and (B) the targeting and minimization procedures required by subsections (d) and (e)." The problem with this formulation is that it deletes "a *determination under paragraph (1) (B) of such subsection.*" That means that you can only conduct an acquisition *when a certification is made pursuant to subsection (g).* Under subsection (g) there are two ways of making a certification: (1) in routine cases by submitting it to the FISA court; and (2) in exigent cases, by submitting it to the FISA court no later than 7 days after the AG and DNI make a determination to authorize the acquisition. So, even though subsection (g)(1)(B) would authorize the AG and DNI to authorize an acquisition and seek immediate collection, Section 702(c)(1)(A) would require that the acquisition be delayed until the certification is actually filed with the FISA court (sometime within 7 days after the determination). We don't want to create the possibility for such an operational gap. We can solve this problem in one of two ways: (1) we can go with a paragraph that reads as follows: "(1) In general.—An acquisition authorized under subsection (a) may be conducted only in accordance with—(A) the certification made by the Attorney General and the Director of National intelligence pursuant to subsection (g) or a determination

9/25/2008

under paragraph (1)(B) of such subsection; and (B) the targeting and minimization procedures required by subsections (d) and (e)."; or (2) we can go with a paragraph that reads as follows: ""(1) In general.—An acquisition authorized under subsection (a) may be conducted only in accordance with—(A) the certification or determination made by the Attorney General and the Director of National Intelligence pursuant to subsection (g); and (B) the targeting and minimization procedures required by subsections (d) and (e)."" Of these two, I prefer the second because, in my opinion, it reads more cleanly. Our members see your last language as walking away from our agreement on pre-post court; I don't think that is what you are trying to do though. If not, I trust you would view the above options as agreeable 'fix' options. This is definitely a big issue for our members.

2. **Section 702(c)(2)—Rule of Construction.** I concur that this is likely a member issue. Let me just highlight why we feel the "clarification" or "carve out" of the electronic surveillance definition is preferable to the "rule of construction" approach. To date, I have heard two main objections to the "clarification/carve out" approach: (1) the clarification approach has a limiting effect on the exclusive means section; and (2) the clarification approach could have unspecified unintended consequences. In my opinion, these objections have no merit. First, the "clarification" approach has absolutely no effect on the exclusive means section, because our language explicitly spells out that the "clarification" does not apply to the use of "electronic surveillance" in the exclusive means section ["... electronic surveillance (as defined in section 101(f), *regardless of the limitation of section 701*)"]. Second, while it is hard to respond to unspecified "unintended consequences," I'm assuming that such concerns would apply to electronic surveillance or acquisition activities related to U.S. persons in the United States. The "carve out" is a very narrow clarification that electronic surveillance does not include the targeting of persons reasonably believed to be located outside the United States. Given the numerous limitations and procedures in the underlying bill, this clarification only applies to non-U.S. persons located overseas. There are other reasons to favor the "clarification" approach over the "construction" approach. Placing this "carve out" language in various "construction" provisions throughout Title VII has the effect of creating an artificial dichotomy (or at least an internal inconsistency) in the FISA statute. It sets up a situation in which the acquisition activities of the government will trigger both the current definition of electronic surveillance and the Title VII foreign targeting procedures. The "clarification" approach draws a clear line between electronic surveillance and acquisition activities. Under the "construction" approach, the same activity can be both electronic surveillance and an acquisition activity. The "construction" approach might encourage lawsuits from plaintiffs alleging that the government is violating the definition of electronic surveillance and relying upon an unconstitutional acquisition authority in Title VII. The "construction" approach causes these sections of FISA to pull against each other, while the "clarification" approach strengthens the procedures contained in Title VII by making clear that such activity is not electronic surveillance under the meaning of FISA. It is also important to note that the "clarification" approach has already been approved by the Foreign Intelligence Surveillance Court in the context of the Protect America Act. We should not be abandoning a proven approach accepted by the FISA court, because of unspecified hypotheticals. Our members have not yet seen a solid rationale for your approach and would need to see that articulated as better than the FISA Court approved approach.

3. **Section 702(f) – Reverse Targeting Guidelines.** We proposed folding *all* of the subsection (b) limitations, including reverse targeting, into guidelines within the targeting procedures. Our suggested approach has the advantage of obviating the need for any redundant guidelines. We don't have any problem with the FISC reviewing the revised targeting procedures (that will include the guidelines for all of the subsection (b) limitations). In fact, the Senate bill has always contained that requirement. The FISC needs to ensure that the procedures ensure compliance with the subsection (b) limitations. We don't believe that the training or submission requirements are necessary in the context of the targeting procedures. Our oversight of NSA in the context of this collection has revealed that they already have an impressive training program for their employees. Also, we don't feel that a statutory requirement to get copies of these targeting procedures will be necessary. I'm interested in what your leg counsel has drafted. It sounds like we may be able to reach an accommodation on this issue.

4. **Section 702(i)(5) – Schedule for Renewals/Reauthorization.** This "Schedule" section has always been problematic for us. It was originally drafted as a possible solution to the "Prior-Court Review" issue. Even though we have agreed to compromise text on the Prior-Court Review issue, this "Schedule" provision keeps popping up in both of our drafts. It's a bad idea because it imposes a submission requirement of "at least 30 days before the expiration of such authorization." This is a deviation from standard FISA and the criminal wiretap statutes which contain no such requirement. The problem with this unnecessary requirement is that if the Intelligence Community submits a certification or procedures 29 days prior to expiration, there is a technical violation of this statutory provision. Historically, statutory violations of any kind are always reported to the Intelligence Oversight Board. Given that this statutory requirement has no real consequence anyway given the changes made in the context of Prior-Court Review, we would recommend dropping it in its entirety. Our members have not seen a clear argument for its inclusion. With respect to the deletion of the "construction" provision, it is my recollection that it was a formulation that was always linked in our drafts to this "Schedule" provision [page 27, after line 2; see also our latest draft, page 10, lines 20-23]. It was intended to provide the AG and DNI with a certain degree of flexibility in submitting certifications and procedures for additional and existing authorizations. If we're not going to drop this "Schedule" provision, we recommend that the subparagraph on page 21, lines 6-22 be amended as follows: "(C) Amendments.—The Attorney General and the Director of National Intelligence may amend a certification submitted in accordance with subsection (f) or the targeting and minimization procedures submitted in accordance with subsection (d) and (e) as necessary at any time, even if the Court is conducting or has completed its review or approval of the original or prior certification or procedures. Such amended certification or amended procedures shall be submitted to the Court not later than 7 days after amending such certification or procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures." We offer that these minor modifications to your version of the "Amendments" subparagraph provide sufficient flexibility to allow the deletion of the "construction" provision.
5. **Section 702(j)(2) – "Good Cause" Exception for FISC Time Limits.** I appreciate your proposal to improve the "good cause" standard to "extends that time as necessary for good cause, in a manner consistent with national security." We have members who are wedded to the due process standard, which requires that this issue be elevated to the Member level.
6. **Section 702(l) – Providing Reports to the Judiciary Committee.** I understand your position. We have some members that have problems with this approach; it is a member level issue.
7. **Section 702(l)(3) – "Accounting" of Disseminated Information (in Reports/Reviews).** I appreciate your willingness to accept the original compromise language contained in the Senate bill.
8. **Section 703(a)/704(a)/708 – Jurisdiction of the FISC on 2.5 Authority (from E.O. 12333).** I appreciate your willingness to modify the Savings provision to permit the government to use statutory means (in addition to FISA) and we can accept your following modification of page 61, line 6-7: "or otherwise engage in any activity that is authorized under any other title of this Act or Chapters 119, 121, or 206 of Title 18, United States Code." Consistent with the intent of the Senate version of HR 3773, we still believe that from a practitioner's standpoint, the ability to use methods other than Title VII of FISA should be explicit in each "2.5" Section. Our latest proposal contained the following language to address this issue: "Nothing in this paragraph shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity that is authorized under, any other title of this Act or other statutory authority." This text could be revised, consistent with the text used in the Savings provision modification, to read: "Nothing in this paragraph shall be construed to limit the authority of the Government to seek an order or authorization under, or otherwise engage in any activity

that is authorized under, any other title of this Act or Chapters 119, 121, or 206 of Title 18, United States Code." The argument for taking this provision out is that it is unnecessary. The argument for leaving the provision in is that it provides clear guidance to practitioners and the Court.

9. **Section 110 – WMD Definitions.** Page 80, line 4. There were two issues.

- a. **Agent of a Foreign Power.** I appreciate your willingness to accept the Senate language that includes the distinctions between a lone wolf WMD proliferator and a WMD proliferator acting for or on behalf of a foreign power. We don't believe this distinction is redundant. The current FISA definitions make a distinction between a lone wolf international terrorist and a person who knowingly engages in international terrorism for or on behalf of a foreign power.
- b. **WMD Definition.** We may have had a miscommunication on this issue. I have no language to offer beyond the Senate version of the WMD definition, which was accepted by voice vote. The Senate bill did not "broaden" the definition of WMD. In fact, that Senate text narrowed the meaning of "destructive device" within the definition of WMD to address Democrat concerns. Other than that change, the Senate bill text is almost identical to the Title 18 criminal definition of WMD [18 USC 2332a(c)(2)] and our members see no reason to further deviate from that definition. Our members need to see a clear argument for deviating from the Title 18 definition.

10. **Title II (Section 802(a)(2)) – Certification Requirement.** Page 86. I don't think it's clear that (a)(2) is simply a subset of (a)(1). If that were the case, we wouldn't need the restatement of "Notwithstanding any other provision of law . . ." in (a)(2) and "the person/electronic communication service provider did not provide the alleged assistance" would come *after* the additional limitations in paragraph (2). Paragraph (1) is the prospective liability provision that was contained in Section 203 of the Senate bill. Paragraph (2) is the retroactive liability provision contained in Section 202 of the Senate bill. These liability provisions have always had different triggering criteria. Also, these provisions were designed to protect sources and methods by including a "did not provide the alleged assistance" certification option in each section. It is possible that new lawsuits may be brought that only allege past participation in the program. If such a case were to be dismissed, then that lawsuit will confirm that the carrier participated in the TSP. The inclusion of a parallel "did not provide the alleged assistance" would prevent this disclosure of sensitive sources and methods. We have the ability to eliminate any risk by the simple inclusion of the parallel structure. If this is primarily a leg counsel concern, you know our reasons for overruling that advice. If we can't agree on this issue, Members may insist on returning to the separate structures contained in the Senate bill and the latest Republican proposal. As this touches on a key issue in our agreement to date, this will clearly be a member issue if we are unable to clarify the language.

11. **Title II (Section 802(b)(2)) – Supplemental Materials.** Page 87-88. We had proposed striking the "any other materials submitted by the Attorney General" to limit the scope of materials reviewed by the FISC and to prevent a wholesale examination of the TSP (legal opinions, etc.). To address the concern of private sector entities about the basis for a certification that a carrier did not provide assistance, we could amend the text as follows: "(2) Supplemental Materials.—In its review of a certification made pursuant to subsection (a), the court may examine the court order, certification, or directive described in subsection (a), any relevant court order, certification, written request or directive submitted pursuant to subsection (d), and any other document submitted by the Attorney General, in his discretion, to show that the electronic communication service provider did not provide the alleged assistance."

Thanks and I look forward to your thoughts. Speak to you soon,

Jack

9/25/2008

Demers, John

From: Livingston, J (Intelligence) (b)(6) [ssci.senate.gov]
Sent: Thursday, June 12, 2008 11:21 AM
To: Demers, John; (b)(3), (b)(6)
Subject: FW: FISA underbrush

In case you haven't seen this, here's Jeremy's underlying response to issues I raised with him last week.

From: Bash, Jeremy [mailto:(b)(6)@mail.house.gov]
Sent: Wednesday, June 11, 2008 3:27 PM
To: Livingston, J (Intelligence)
Cc: Sixkiller, Mariah
Subject: FISA underbrush

Jack,

Here is our response to some of the "underbrush" items you raised. Page and line cites will be to the PDF, June 5, 2008, 5:32 pm version.

1. Section 702(c)(1)(A) – Certification Required for Acquisition. Page 6, lines 3-6. You said that the words "until such time as a certification is submitted pursuant to subsection (g)" were unnecessary and confusing. We will agree to delete the words (starting on line 3): "or until such time as a certification is submitted pursuant to subsection (g), a determination under paragraph (1)(B) of such subsection." If leg counsel has heartburn, we can take it up with them.
2. Section 702(c)(2) – Rule of Construction. Page 6, lines 9-14. You objected to our rule of construction and preferred your "carve-out"/redefinition. This is a Member issue, as we continue to strongly disagree with your carveout.
3. Section 702(f) – Reverse Targeting Guidelines. Page 7, line 17. You proposed folding the Reverse Targeting guidelines into the targeting guidelines themselves. This may be a workable proposal and we have some leg counsel language to share. I presume you are not agreeing to have the Reverse Targeting guidelines submitted to judicial review. In any event, I think we can agree to physically move the Reverse Targeting guidelines into the targeting guidelines, if you can agree that (a) the targeting guidelines/minimization procedures would be given to intel and judiciary committees; and (b) the training requirement will be left in.
4. Section 702(i)(5) – Schedule for Renewals/Reauthorization. No page. You wanted to know why we deleted a construction paragraph. The reason is that it applied to provisions that had been deleted in a previous proposal and was unnecessary.
5. Section 702(j)(2) – "Good Cause" Exception for FISC Time Limits. Page 27, line 7-12. You asked us to consider some middle ground between "good cause" (AOC-preferred language) and your Fifth-Amendment-due-process language. We propose: "extends that time as necessary for good cause, in a manner consistent with national security."
6. Section 702(l) – Providing Reports to the Judiciary Committee. Page 28, 30, 32. You wanted to

9/25/2008

include language requiring that any sharing of info with the judiciary committees was "consistent with the rules of each chamber" or something of that sort. We don't think there is a need to clarify in the statute the restrictions that the rules of the House and Senate impose. There are several examples in FISA where reports must go to both judiciary and intel and there are no additional restrictions imposed.

7. Section 702(1)(3) – "Accounting" of Disseminated Information (in Reports/Reviews). Page 30, line 22; page 31, line 1. You expressed concern over the language "accounting." We agree to recede to the Senate bill: "accounting of the number."

8. Section 703(a)/704(a)/708 – Jurisdiction of the FISC on 2.5 Authority (from E.O. 12333). You wanted us to include language to make sure that our limitation provision did not prevent the government from engaging in surveillance allowed by other statutes, such as Title 18. We don't believe any change is necessary in 703 and 704, but we will agree to modify the language in 708 to say (page 61, line 6-7): "otherwise engage in any activity that is authorized under any other title of this Act or Chapters 119, 121, or 206 of Title 18, United States Code."

9. Section 110 – WMD Definitions. Page 80, line 4. There were two issues.

a. First, you thought the agent-of-a-foreign-power definition ought to include not only the lone-wolf definition but also anyone acting "for or on behalf of a foreign power." We can agree to this – but are you sure this is what you want? Are you sure that this isn't redundant?

b. Second, you wanted to broaden the WMD definition. Perhaps you would like to propose language; this may end up being a Member issue.

10. Title II (Section 802(a)(2)) – Certification Requirement. Page 86. You wanted to repeat in 802(a)(2) the language from 802(a)(1)(D) (allowing dismissal if the electronic service provider did not provide the alleged assistance). This language is not necessary because (a)(2) is simply a subset ("additional limitation") of (a)(1) and therefore we think it is clear that if the electronic service provider did not provide the assistance, we don't even need to get to (a)(2).

11. Title II (Section 802(b)(2)) – Supplemental Materials. Page 87-88. The specific language you proposed to modify ("and any other materials submitted by the attorney general") was language that was specifically asked for by private sector entities. It may be of particular significance if the AG is establishing the basis for a certification that a carrier did not provide the assistance (a fact which might not be on the face of one of the specified documents, such as a written request to a carrier). We are reluctant to change it.

Under separate cover, I will send [REDACTED] a note responding to some of the drafting issues he flagged. I will copy you.

Speak to you soon,

Jeremy

Jeremy Bash | Chief Counsel

House Permanent Select Committee on Intelligence

9/25/2008

Demers, John

From: Starzak, Alissa (Intelligence) [(b)(6)]@ssci.senate.gov]
Sent: Friday, June 13, 2008 5:54 PM
To: Bash, Jeremy; Sixkiller, Mariah; Tucker, L (Intelligence); Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Donesa, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Greenwald, Eric; Delaney, Mike
Cc: Erach, Christopher W.; Daniel_P_Meyer@who.eop.gov; Demers, John; [(b)(3), (b)(6)]
[(b)(3), (b)(6)] Potenza, Vito; Joel_D_Kaplan@who.eop.gov; [(b)(3), (b)(6)]
Subject: RE: Follow up
Attachments: FISAreline.doc

Attached is a track changes version of the draft. It is compared to the 6/5/08 offer.

From: Bash, Jeremy [(mailto: (b)(6)]@mail.house.gov]
Sent: Friday, June 13, 2008 5:42 PM
To: Bash, Jeremy; Sixkiller, Mariah; Tucker, L (Intelligence); Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Donesa, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Starzak, Alissa (Intelligence); Greenwald, Eric; Delaney, Mike
Cc: Erach, Christopher W.; Daniel_P_Meyer@who.eop.gov; John.Demers@usdoj.gov; [(b)(3), (b)(6)]
[(b)(3), (b)(6)] Potenza, Vito; Joel_D_Kaplan@who.eop.gov; [(b)(3), (b)(6)]
Subject: RE: Follow up

Gang,

On behalf of Mariah, I'm circulating a further draft (5:24 pm version) based on today's meeting. Please review this draft.

A couple of quick notes:

- 1) We have proposed a construct for 702(c) (item #4 on the list, dealing with certification and the exigent circumstances). Please review this carefully and we can discuss Monday morning.
- 2) We will be incorporating the WMD cross-references in the next draft (item #7 on the list).
- 3) Track changes/Word version to come, once we locate Senate leg counsel.
- 4) I know we are waiting to hear from some folks (Ben, John, et al) on some items, per our discussion.

Have a nice weekend.

- Jeremy

9/25/2008

Demers, John

From: Bash, Jeremy [REDACTED] (b)(6) [REDACTED]@mail.house.gov]
Sent: Friday, June 13, 2008 2:27 PM
To: Sixkiller, Mariah; Tucker, L (Intelligence); Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Dones, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Starzak, Alissa (Intelligence); Greenwald, Eric
Cc: [REDACTED] (b)(3), (b)(6) [REDACTED] W.; Daniel_P._Meyer@who.eop.gov; Demers, John; [REDACTED] (b)(3), (b)(6) [REDACTED] Potenza, Vito
Subject: Follow up

One follow up item from our meeting. [Item #1 on our list (language on the Title II certification requirement), I have talked to the carrier in question and they are fine with "the" (vice "an") on p. 87 line 7 and 23.

So, barring any other objection from DOJ folks, we will keep that language as is in the draft.]

9/25/2008

Demers, John

From: Demers, John
Sent: Sunday, June 15, 2008 10:06 PM
To: (b)(6) <(b)(6)@ssci.senate.gov>
Subject: Re: FISA Construction

Happy to take a look but I think it works with my construction paragraph.

----- Original Message -----

From: Livingston, J (Intelligence) <(b)(6)@ssci.senate.gov>
To: Demers, John
Sent: Sun Jun 15 21:35:49 2008
Subject: Re: FISA Construction

We're trying to build a custom front-wheel drive motorcycle (which probably doesn't even exist) with a rear-wheel drive frame. It just doesn't work. All the other parts are essentially the same as we've got now.

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Demers, John <(b)(6)@usdoj.gov>
To: Livingston, J (Intelligence)
Sent: Sun Jun 15 21:30:32 2008
Subject: Re: FISA Construction

Thanks.

Take a look at our draft and see if it works. I worry about doing any significant re-ordering at this stage.

----- Original Message -----

From: Livingston, J (Intelligence) <(b)(6)@ssci.senate.gov>
To: Demers, John
Sent: Sun Jun 15 18:01:21 2008
Subject: Re: FISA Construction

I've started looking at this thing again, and it seems to me one of the reasons we're having trouble with the conduct of acquisitions language is because it was designed for post court review. Converting it to prior court review is kind of like trying to fit a square peg into a round hole. Maybe we need to reorder the subsections to reflect this unfortunate reality. Once we reorder, then maybe we can just speak plainly about how it's supposed to work. I imagine that most of the current text will then fall into place.

As for the construction language, I'll defer to you.

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Demers, John <(b)(6)@usdoj.gov>
To: Livingston, J (Intelligence)
Cc: (b)(3), (b)(6)
Sent: Sun Jun 15 17:52:30 2008
Subject: FISA Construction

Jack,

Jeremy emailed about the proposed constructions and the only one he reported they had problems with was the one in sec 703(g). (P. 46 in 8:38 am draft) He would like to drop (mostly for optics) "electronic surveillance and the acquisition of stored ... an order under this Act." That's fine with us. As long as they keep "Nothing in this Act" at the beginning, the sentence works. In fact the less we have to repeat that formulation, the better for the reasons mentioned at the meeting.

Because we had all discussed the constructions together, I wanted to run this by you before responding.

Let me know,
John

Demers, John

From: Livingston, J (Intelligence) (b)(6) @ssci.senate.gov
Sent: Monday, June 16, 2008 10:16 AM
To: Demers, John (b)(3), (b)(6)
Subject: Section 702
Attachments: Restructure.doc

Below is an e-mail that I sent to Mike last night. I recently forwarded it to the House Democrats for their consideration and wanted to get your input as well. I've looked at the latest DNI draft on this issue and it still appears to be unclear in its application.

I've been looking at Section 702 a lot this weekend, trying to figure out how to make it work like we intend. I believe the problem stems from the fact that this section was originally designed as a "post-court review" approach. Our attempts to make a "prior-court review" approach fit into the existing structure just doesn't make sense. I'm attaching a draft of Section 702 that I believe solves the problem. Essentially it contains the following improvements:

1. It dumps the "Conduct of Acquisition" subsection (that was designed for post-court approval) in favor of a clarified subsection (a). Under this draft, subsection (a) sets the flow for the rest of the section.
2. It clarifies that the authorization in subsection (a) is for the AG and DNI to issue directives as limited by the requirement for prior court review and the exigent circumstances standard.
3. It solves the "filing certification" problem by: (1) specifying that exigent directives only last until the FISC reviews and issues an order; and (2) requiring the cert and procedures to be filed not later than 7 days after the exigent determination.
4. It moved the limitations guidelines up next to the limitation, since they seem to belong there.
5. It created an exigent circumstances subsection
6. It moves the judicial review subsection before the directives subsection since that would occur before the issuance of any directive in a routine situation.
7. It otherwise keeps all the same text in the current draft.

I think if you were to compare a table of contents of the current draft with a table of contents from the attached draft, it would seem to have a more logical pre-court flow. I also think that this approach is much less confusing and will be easier for practitioners to teach and learn.

I wanted to run this by you first for your thoughts given how late we are in the game. Given that this doesn't really conflict with any of the Member deals reached, I think we should consider this concept. I figured it would be better received if we both supported the approach, given that I'm obnoxious and disliked. Let me know what you think after you've had a chance to review it in the morning. Thanks.

Jack

9/25/2008

Demers, John

From: Greenwald, Eric (b)(6) @mail.house.gov
Sent: Monday, June 16, 2008 3:38 PM
To: (b)(3), (b)(6) Bash, Jeremy; Christopher W. Frech; Daniel P Meyer; Demers, John; Vito Potenza; Joel D Kaplan; (b)(3), (b)(6) Bash, Jeremy; Sixkiller, Mariah; L Tucker (Intelligence); J Livingston (Intelligence); W Davidson (Intelligence); A Johnson (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Dones, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Alissa Starzak (Intelligence); Delaney, Mike; (b)(6) @ssci.senate.gov; Lettre, Marcel (Reid)
Subject: technical edits
Attachments: Technical edits to 13Jun08 draft.doc

As promised, here are the technical edits (appended below and attached as a Word document). There are several of them, but most are very simple changes to make language consistent.

Important note: these changes track to the June 13, 2008 5:24 PM draft. Because the track-changes document from this morning is paginated differently depending on how it is printed, we went with the last common draft available.

So that we can move forward quickly on this process, we ask that you provide any feedback on these edits by 4:30 PM today.

Please let me know if you have any questions concerning the edits, and please provide an explanation for any objections.

Thanks.

Eric

Eric Greenwald | Counsel

Staff Director, Subcommittee on Oversight & Investigations

Permanent Select Committee on Intelligence

Main: (b)(6)

Direct: (b)(6)

(b)(6) @mail.house.gov

<<Technical edits to 13Jun08 draft.doc>>

Technical Edits to 6/13/08 5:24pm Draft

101(a)(2) (Page 2, line 8) – strike “by adding after title VI” and replace with “by adding at the end”

701(b)(2) & (3) (Page 3, line 8 & 12) – strike “established by section 103” and replace with “established under section 103”

9/25/2008

702(c)(2) (Page 6, line 12) – strike “paragraph (1)” and replace with “paragraph (2)”

702(c)(2) (Page 6, lines 19-20) – strike “paragraph (3)” and replace with “paragraph (2)”

702(d)(2) & (e)(2) (Page 7, line 23-24 and page 8, line 10) – strike “required by paragraph (1)” and replace with “adopted in accordance with paragraph (1)”.

702(f)(2) (Page 8, line 22-23) – strike “adopted pursuant to paragraph (1)” and replace with “adopted in accordance with paragraph (1)”.

702(g)(1)(A) (Page 9, lines 10-11) – strike “initiation on an acquisition authorized” and replace with “implementation of an authorization”

702(g)(1) (Page 9, lines 14-15) – on line 14 strike “under oath” and on line 15 strike “under seal” and replace with “under oath and under seal”

702(g)(2)(A)(i) (Page 10, line 12) – strike “the acquisition” and replace with “an acquisition”

702(g)(2)(C)(i) (Page 12, line 11) – strike “consent” and replace with “advice and consent”

702(g)(6) (Page 13, lines 22-24) – strike “The certification required by” and replace with “A certification submitted in accordance with”

702(h)(4)(B) (Page 15, line 19) – strike “established by” and replace with “established under”

702(h)(4)(D) (Page 16, line 17) – strike “such a determination” and replace with “a determination under this subparagraph”.

Page 16, lines 19-20 – strike “a determination under this subparagraph” and replace with “such determination”

702(h)(5)(B) (Page 18, line 6) – strike “established by” and replace with “established under”

702(h)(5)(C) (Page 18, line 16) – strike comma after “section”

702(i)(1)(B) (Page 20, line 14) – strike “the certification” and replace with “a certification”

702(i)(2)(C) (Page 22, line 12) – strike “submitted in accordance with” and replace with “adopted in accordance with”

702(i)(3)(C) (Page 24, line 2) – strike “orders” and replace with “order”

Page 24, line 4 – strike “the orders” and replace with “the order”

Page 24, line 5 – strike “its reasons” and replace with “the reasons for the order”

702(i)(4)(A) (Page 24, line 9) – strike “under this section” and replace with “under this subsection”

Page 24, lines 8-11 – strike “The Government may appeal” through “review such order.” and replace with “The Government may file a petition with the Foreign Intelligence Surveillance Court of Review for review of an order under this section. The Court of Review shall have jurisdiction to consider such a petition.”

Page 24, line 15 – strike “its reasons” and replace with “the reasons for the order”

702(i)(5)(A) (Pages 25 line 21 through page 26, line 10) – strike this entire subparagraph and move it to the transition procedures (Title IV). This provision relates to the PAA and will cease to have effect once all PAA orders have expired. For that reason, it should not be executed as an amendment to FISA but as a provision of this bill only.

702(i)(5)(A) & (B) (Page 26, lines 6-7 & 18-19) – strike “prepared in accordance with” and replace with “in accordance with”

On page 26, line 21, strike “prior to” and insert “before” to be consistent with subparagraph (A).

702(k)(1) (Page 27, line 25 through page 28, line 1) – strike “reasons for decision” and replace with “reasons for a decision”

702(l)(2) (Page 29, lines 15-16) – strike “Inspectors General” and replace with “Inspector General”

Page 29, lines 16-17 – strike “each element” and replace with “the Inspector General of each element”

Page 29, line 21 – strike “are” and replace with “is”

Page 29, line 19 – insert comma between “(a)” and “with”

702(l)(2)(C) (Page 30, line 14) – strike “their communications” and replace with “communications of such targets”

702(l)(3)(A)(iii) (Page 32, line 6) – strike “their communications” and replace with “communications of such targets”

703(b)(1) (Page 35, lines 7-9) – strike “Each application for an order under this section shall be made by a Federal officer” and replace “A Federal officer may make an application,”

Page 25, line 10 – strike “a judge having jurisdiction under subsection (a)(1)” and replace with “the Foreign Intelligence Surveillance Court”

703(b)(1)(H) (Page 37, line 19) – Strike “, however,”.

703(e) (Page 46, line 19) – strike “subsections” and replace with “subsection”

703(f) (Page 46, line 24) – strike “an appeal” and replace with “a petition”

704(a)(3)(B) (Page 49, line 7) – strike “by section 703” and replace with “under section 703”

704(b) (Page 49, lines 16-18) – strike “Each application for an order under this section shall be made by a Federal officer” and replace “A Federal officer may make an application,”

Page 49, lines 18-19 – strike “a judge having jurisdiction under subsection (a)(1)” and replace with “the Foreign Intelligence Surveillance Court”

704(c)(2) (Page 52, line 21) – strike “an order under”

704(c)(3)(B) (Page 53, line 21) – strike “this clause” and replace with “this subparagraph”

704(c)(3)(C) (Page 54, line 7) – strike “this clause” and replace with “this subparagraph”.

704(e)(1) (Page 57, line 20) – strike “an appeal” and replace with “a petition”

707(b) (Page 60, line 17) – strike “required by” and replace with “adopted in accordance with”.

Page 60, line 18 – strike “such acquisition” and replace with “an acquisition under such section”

Page 60, line 24 – strike “paragraphs” and insert “paragraph”.

Page 62, line 1

Page 62, line 13 – strike “or” and replace with “and”

102(b) (Page 65, line 6) – strike “in such section”

Page 67, line 24 & Page 68, line 3-4 – strike “established by section” and replace with “established under section”.

107(b) (Page 76, line 12) – strike “(A)”

Page 77, line 3 – strike “(B)” and replace with “(6)”

Page 77, line 4 – strike “(A)” and replace with “(5)”

Title II

802(a)(3) (Page 88, line 11) – strike “sections” and replace with “section”.

802(a)(4)(B) (Page 89, line 4) – strike “such requests or directives” and replace with “written requests or directives”

Page 89, line 7 – strike “such person” and replace with “such head of an element”

802(c)(1) & (2) (Page 90, line 9 and line 12) – strike “the supplemental materials” and replace with “such supplemental materials”.

802(f) (Page 91, lines 13-16) – strike this entire subsection (it recites an inherent appellate power of the courts) [Note: keep pending resolution of FISC vs. District Court in Title II]

802(h) (Page 91, line 24) – strike “may be construed” and replace with “shall be construed”.

803(a) (Page 92, line 7) – strike “shall have authority to” and replace with “may”.

Title III

301(a)(2) (Page 95, line 3) – strike “established by section” and replace with “established under section”.

301(b)(2)(B) (Page 97, line 16) – strike “its review” and replace with “the review of the Inspector General”.

301(c)(3) (Page 98, line 24) – strike “report submitted” and replace with “report”

Title IV

404(a)(2) (Page 104, line 8) – insert comma after “made by this Act”.

404(b)(3)(A) (Page 109, line 21) – strike “section 113” and replace with “section 403(a)(1)(B)(ii)”

Two additional edits:

703(d)(1) (Page 44, line 7 through page 45, line 4) – Restructure into 4 subparagraphs (to parallel the structure of the amendments being made to Section 105(e) of FISA in our Section 105(6) – see page 70, line 17 through page 71, line 13) to read as follows:

“(d) Emergency authorization.—

“(1) Authority for emergency authorization.—Notwithstanding any other provision of this Act, the Attorney General may authorize an acquisition of foreign intelligence information for which an order may be obtained under subsection (c) before such order is obtained if—

“(A) the Attorney General reasonably determines that—

“(i) an emergency situation exists with respect to such acquisition before an order under subsection (c) authorizing such acquisition can with due diligence be obtained; and

“(ii) the factual basis for issuance of an order under such subsection to approve such acquisition exists;

“(B) a judge having jurisdiction under subsection (a)(1) is informed by the Attorney General, or a designee of the Attorney General, at the time of such authorization that the decision has been made to conduct such acquisition; and

“(C) an application in accordance with this section is made to a judge of the Foreign Intelligence Surveillance Court as soon as practicable, but not more than 7 days after the Attorney General authorizes such acquisition.”

This makes no changes in language other than relabeling the subparagraphs and the following:

Page 44, line 11-12 – strike “the Attorney General may authorize such acquisition if”

Page 44, line 9 – immediately following “Act,” insert “the Attorney General may authorize an acquisition of foreign intelligence information for which an order may be obtained under subsection (c) before such order is obtained if—

704(d)(1) (Page 55, line 12 through page 56, line 8) – same as 703(d)(1)

Demers, John

From: Demers, John
Sent: Monday, June 16, 2008 3:42 PM
To: (b)(3) [redacted] Jeremy Bash; Christopher W. Frech; Daniel P Meyer; (b)(3), (b)(6) [redacted]
(b)(3), (b)(6) [redacted] Vito Potenza; Joel D Kaplan; (b)(3), (b)(6) [redacted] Jeremy Bash; Mariah Sixkiller; L Tucker (Intelligence); J Livingston (Intelligence); M Davidson (Intelligence); A Johnson (Intelligence); Mike Sheehy; Joe Onek; Lou DeBaca; Chris Dones; Jen Stewart; Caroline Lynch; Brian Diffell; Wyndee Parker; Alissa Starzak (Intelligence); Eric Greenwald; Mike Delaney
Subject: RE: Comments on June 13 (5:24pm) draft

We have reviewed the question [about the order of the district court in the immunity provision and are fine with deleting the words, "following an appeal, if any."] [redacted]

Demers, John

From: Bash, Jeremy [(b)(6)]@mail.house.gov]
Sent: Monday, June 16, 2008 6:39 PM
To: Demers, John; Livingston, J (Intelligence); Greenwald, Eric; [(b)(3)] Christopher W. Frech; Daniel P Meyer; [(b)(3), (b)(6)] Vito Potenza; Joel D Kaplan; [(b)(3), (b)(6)] Sixkiller, Mariah; Tucker, L (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Dones, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Starzak, Alissa (Intelligence); Delaney, Mike; Healey, C (Intelligence); Lettre, Marcel (Reid); Rice, K (Intelligence)
Subject: RE: technical edits

We've now got tech edits from (I think) all corners. Thanks to everyone for flyspecking this so carefully.

We anticipate integrating all of this into the next draft and re-circulating tonight.

Jeremy Bash, HPSCI
[(b)(6)]

From: Demers, John [mailto:[(b)(6)]@usdoj.gov]
Sent: Monday, June 16, 2008 6:36 PM
To: Livingston, J (Intelligence); Greenwald, Eric; [(b)(3)] Bash, Jeremy; Christopher W. Frech; Daniel P Meyer; [(b)(3), (b)(6)] Vito Potenza; Joel D Kaplan; [(b)(3), (b)(6)] Bash, Jeremy; Sixkiller, Mariah; Tucker, L (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onek, Joe; DeBaca, Lou; Dones, Chris; Stewart, Jen; Lynch, Caroline; Diffell, Brian; Parker, Wyndee; Starzak, Alissa (Intelligence); Delaney, Mike; Healey, C (Intelligence); Lettre, Marcel (Reid); Rice, K (Intelligence)
Subject: RE: technical edits

Here are DNI/DOJ comments on the proposed technical edits.

Title I

702(c)(2), not to pile on but should be "subsection (a)"

703(b)(1) and change that follows on p. 25, l 10. Prefer to keep the current formulation as it is consistent with other FISA titles.

704(b) and change that follows on p. 49, ll 18-19. Prefer to keep the current formulation as it is consistent with other FISA titles.

Title II

802(a)(4)(B) and change that follows on page 89, l.7. Prefer not to touch existing text. This is the key part of the immunity provision and has been carefully drafted. We don't think that leg counsel's changes alter the meaning but we are loathe to take risks on that score when there's no compelling reason to do so.

802(f), as noted by Jack and Alissa, we should keep this section on interlocutory review.

803(a). Keep "shall have the authority" rather than "may"

On the two additional edits suggested on p. 5 of the leg counsel list concerning the emergency authorization provisions. We strongly prefer to keep these provisions as they are because the language tracks that of existing

9/25/2008

FISA. We don't see any need to create questions about why different provisions purporting to do the same thing in the same Act read differently.

We agree with Alissa's additional nits. Agree to with Jack re: p. 24, ll. 8-11 ("order under this subsection")

Demers, John

From: Demers, John
Sent: Wednesday, June 18, 2008 8:56 AM
To: (b)(6) @mail.house.gov; (b)(6) @ssci.senate.gov; (b)(6) @mail.house.gov;
(b)(6) @mail.house.gov; (b)(6) ; (b)(3), (b)(6)
(b)(3), (b)(6) (b)(6) @ssci.senate.gov; (b)(6) @mail.house.gov;
(b)(6) @mail.house.gov; (b)(6) @ssci.senate.gov
Cc: (b)(6) @mail.house.gov; (b)(6) @mail.house.gov
Subject: Re: the three remaining issues

[With apologies for the delay, we're fine (obviously) with Acting AG, adding the pending language re: the district court and changing "to the extent practicable" to "in a manner consistent with national security."]

We will take a look at the rest of today's draft.

Thanks.

Demers, John

From: Sixkiller, Mariah (b)(6) [REDACTED]@mail.house.gov
Sent: Thursday, June 19, 2008 11:04 AM
To: Sixkiller, Mariah; Greenwald, Eric; Starzak, Alissa (Intelligence); Lynch, Caroline; Dones, Chris; (b)(3) [REDACTED]; Bash, Jeremy; Christopher W. Frech; Daniel P Meyer; Demers, John; (b)(3), (b)(6) [REDACTED]; Vito Potenza; Joel D Kaplan; (b)(3), (b)(6) [REDACTED]; Bash, Jeremy; Tucker, L (Intelligence); Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onok, Joe; DeBaca, Lou; Stewart, Jen; Diffell, Brian; Parker, Wyndee; Delaney, Mike; Healey, C (Intelligence); Lettre, Marcel (Reid); Cantrell, Margaret; DeRosa, Mary (Judiciary-Dem); Bernards, Stacey; Romick, Brian; Weich, Ron (Reid); Hoy, Serena (Reid)
Subject: FISA BILL HAS BEEN FILED -- H.R.6304
Attachments: FISAINTRO_001_xml.pdf

The bill has been filed in the House as H.R.6304 -- the FISA Amendments Act of 2008. Text attached.
<<FISAINTRO_001_xml.pdf>>

From: Sixkiller, Mariah
Sent: Thursday, June 19, 2008 10:17 AM
To: Greenwald, Eric; Starzak, Alissa (Intelligence); Lynch, Caroline; Dones, Chris; (b)(6) [REDACTED]; Bash, Jeremy; Christopher W. Frech; Daniel P Meyer; John Demers; (b)(3), (b)(6) [REDACTED]; (b)(3), (b)(6) [REDACTED]; Vito Potenza; Joel D Kaplan; (b)(3), (b)(6) [REDACTED]; Bash, Jeremy; Tucker, L (Intelligence); Livingston, J (Intelligence); Davidson, M (Intelligence); Johnson, A (Intelligence); Sheehy, Mike; Onok, Joe; DeBaca, Lou; Stewart, Jen; Diffell, Brian; Parker, Wyndee; Delaney, Mike; Healey, C (Intelligence); Lettre, Marcel (Reid); Cantrell, Margaret; DeRosa, Mary (Judiciary-Dem); Bernards, Stacey; Romick, Brian; Weich, Ron (Reid); Hoy, Serena (Reid); Sixkiller, Mariah
Subject: FISA Floor process/timing
Importance: High

It appears that the House will take up the FISA bill first, most likely tomorrow. Now that we have this clarity on floor timing/process, feel free to pull the trigger on your roll-out.

Thanks to all of you for your hard work and patience.

MS

Demers, John

From: Diffell, Brian [(b)(6)]@mail.house.gov]
Sent: Friday, June 20, 2008 3:24 PM
To: Tucker, L (Intelligence); Livingston, J (Intelligence); Lynch, Caroline; Donesa, Chris; Stewart, Jen; Hawkins, Tom (McConnell); Abegg, John (McConnell); Rice, K (Intelligence); Frech, Christopher; (b)(3), (b)(6); (b)(3) Demers, John; Kathleen Turner, Roland, Sarah
Subject: FISA

All - In light of House passage today, I just wanted to say thanks to everyone for their work the past few weeks.

None of this has been easy and there was nothing perfect about our approach. But I'm hopeful that, on balance, people see what we did as the best way to move forward in a way that got us as close as we could get to the bill we wanted without sacrificing really big principles or operational needs.

To the Senate folks, I wish you guys luck next week. Please pass this bill, if for no other reason than to save us from ever having to meet and discuss this in Steny Hoyer's conference room again.

Best,

Brian C. Diffell
Senior Policy Advisor
Office of the Republican Whip
(b)(6)

9/25/2008