

Demers, John

From: Olsen, Matthew [REDACTED]@usdoj.gov]
Sent: Friday, October 19, 2007 6:01 PM
To: [REDACTED]@ssci.senate.gov; Wainstein, Kenneth (NSD); Demers, John (NSD); Eisenberg, John; Gerry, Brett; [REDACTED]
Subject: 2.5 issue

Exemption 6

Jack - We are working on getting you information on our 2.5 practice. A quick look reveals that about one-third of the AG-approved requests this year would not have met the FISA definition of an agent of a foreign power (as required in the bill) -- the problem is FISA section 1801(b)(1)(a). We can talk more this weekend or Monday about your other questions.

NSDI

321

Demers, John

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov
Sent: Tuesday, November 27, 2007 1:09 PM
To: Demers, John (NSD)
Subject: RE: Emailing: Proposed RockefellerBond Managers Amendment 11 26

Attachments: Proposed RockefellerBond Managers Amendment 11 26(redline).wpd



Proposed
ckefellerBond Manag

What do you think of these modifications to your version?

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

From: Demers, John (NSD) [mailto:REDACTED@usdoj.gov]
Sent: Tuesday, November 27, 2007 9:31 AM
To: Livingston, J (Intelligence)
Subject: Emailing: Proposed RockefellerBond Managers Amendment 11 26

<<Proposed RockefellerBond Managers Amendment 11 26.wpd>> Jack,

Attached is a first crack at a re-draft. It is still being reviewed by folks here and outside the Department so we may have additional changes.

Let me know if you have questions.

Thanks,
John

The message is ready to be sent with the following file or link attachments:

Proposed RockefellerBond Managers Amendment 11 26

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Exemption 6

NSD

328

Demers, John

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]

Sent: Friday, November 30, 2007 12:00 PM

To: Demers, John (NSD)

Subject: RE: Here's the latest draft for our meeting in a few minutes

Exemption 6

Still waiting on Leg Counsel. I stayed late to give her all the changes. She started on them this morning. I'm hopeful that I'll have something soon. As soon as I get it, I will forward it to you (unless it comes during our afternoon meeting).

DW

NSD,

330

9/25/2008

Demers, John

From: Livingston, J (Intelligence) [redacted]@ssci.senate.gov
Sent: Friday, November 30, 2007 5:41 PM
To: Demers, John (NSD)
Subject: RE: New amendment is attached (EAS07D01.xml)

(b)(3)

No big deal. Actually, you can use the thread to make sure I made all the changes we discussed.

Exemption 6

From: Demers, John (NSD) [mailto:redacted]@usdoj.gov
Sent: Friday, November 30, 2007 5:40 PM
To: Livingston, J (Intelligence)
Subject: RE: New amendment is attached (EAS07D01.xml)

Well, I forwarded it with the thread but only in DOJ. I think Ben's taking care of the IC.

From: Livingston, J (Intelligence) [mailto:redacted]@ssci.senate.gov
Sent: Friday, November 30, 2007 5:21 PM
To: Demers, John (NSD)
Subject: RE: New amendment is attached (EAS07D01.xml)

If it's not too late, try to forward it without the message thread. Thanks.

From: Demers, John (NSD) [mailto:redacted]@usdoj.gov
Sent: Friday, November 30, 2007 3:53 PM
To: Livingston, J (Intelligence); [redacted]
Subject: RE: New amendment is attached (EAS07D01.xml)

Great. Thanks Jack. I believe this will give us something we can say we like better (though still oppose in principle).

From: Livingston, J (Intelligence) [mailto:redacted]@ssci.senate.gov
Sent: Friday, November 30, 2007 2:29 PM
To: Demers, John (NSD); [redacted]
Subject: Fw: New amendment is attached (EAS07D01.xml)

Here is the leg counsel version of fixing the 2.5 version.

Sent from my BlackBerry Wireless Device

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

From: Easley, Stephanie (Legis Counsel) <[redacted]@slc.senate.gov>
To: Livingston, J (Intelligence)
Sent: Fri Nov 30 14:19:54 2007
Subject: New amendment is attached (EAS07D01.xml)

Please let me know if you have additional edits for me.

NSD.

331

9/25/2008

Thanks.

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]

Sent: Friday, November 30, 2007 12:25 PM

To: Easley, Stephanie (Legis Counsel)

Subject: RE: New amendment is attached (EAS07C97.xml)

Stephanie,

Any chance this might be ready before 1:00? We have a FISA meeting with SJC, SSCI, DOJ, and the IC then, and it would be nice to share text.

Thanks.

Jack

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

From: Easley, Stephanie (Legis Counsel)

[mailto: [REDACTED]@slc.senate.gov]

Sent: Friday, November 30, 2007 9:00 AM

To: Livingston, J (Intelligence)

Subject: RE: New amendment is attached (EAS07C97.xml)

Ok. I'll work on these this morning.

Thanks.

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]

Sent: Thursday, November 29, 2007 9:41 PM

To: Easley, Stephanie (Legis Counsel)

Cc: Rice, K (Intelligence); Tucker, L (Intelligence)

Subject: RE: New amendment is attached (EAS07C97.xml)

Okay. I just got back from DOJ, and it appears that we have a larger than expected number of edits. Working off of EAS07C99, here they are:

Page 3, line 1, strike "surveillance" and insert "acquisition"

Page 3, line 5, strike "have returned to" and insert "be in"

Page 3, line 7, strike "surveillance" and insert "acquisition"

Page 3, line 8, strike "an order under Title I of this Act is obtained" and insert "authority is obtained pursuant to this Act"

Page 3, line 15, strike "subsection (a)" and insert "this subsection"

Page 3, line 19, strike "electronic surveillance" and insert "acquisition"

Page 3, line 20, strike "declaration containing a"

Page 3, line 23, strike "electronic surveillance" and insert "acquisition"

Page 4, line 8, strike "electronic surveillance" and insert "acquisition"

Page 4, line 10, strike "surveillance" and insert "acquisition"

Page 4, line 13, strike "[and, if applicable section 301(4)]" and insert "or section 301(4)"

Page 4, line 17, strike "surveillance" and insert "acquisition"

Page 4, line 20, strike "electronic surveillance" and insert "acquisition"

Page 5, line 5, strike "electronic surveillance" and insert

9/25/2008

"acquisition"

Page 5, line 13, strike "electronic surveillance" and insert "acquisition"

Page 5, line 18, strike "electronic surveillance" and insert "acquisition"

Page 6, line 3, strike "and, if applicable," and insert "or"

Page 7, line 5, strike "and, if applicable," and insert "or"

Page 7, line 9, remove brackets

Page 7, line 12, strike "Directives" and insert "Directions"

Page 7, line 13, strike "electronic surveillance" and insert "acquisition"

Page 7, line 17, strike "communication" and insert "communications"

Page 7, line 21, strike "electronic surveillance" and insert "acquisition authorized under this subsection,"

Page 7, line 22, strike "surveillance" and insert "acquisition"

Page 8, line 1, strike "munication" and insert "munications"

Page 8, line 4, strike "providers" and insert "provider"

Page 8, line 6, strike "elec-tronic surveillance" and insert "acquisition"

Page 8, line 8, strike "communication" and insert "communications"

Page 8, line 16, strike "paragraph (3)" and insert "this paragraph"

Hmmm. The closer this provision tracks to the current FISA emergency request language, the easier it will be for me to sell.

Page 8, strike line 25 through Page 9, line 14 and insert "reasonably determines that--(A) an emergency situation exists with respect to the acquisition of foreign intelligence information, to include the acquisition of stored electronic communications, within the United States to target a United States person reasonably believed to be located outside the United States before an order authorizing such acquisition can with due diligence be obtained; and (B) the factual basis for issuance of an order under this subsection to approve such acquisition exists; he may authorize the emergency acquisition if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to conduct such acquisition and if an application in accordance with this subsection is made to that judge as soon as practicable, but not more than 168 hours after the Attorney General authorizes such acquisition."

Page 9, line 17, strike "employment of electronic surveillance" and insert "acquisition"

Page 9, line 23, strike "electronic surveillance" and insert "acquisition"

Page 9, line 24, strike "surveillance" and insert "acquisition"

Page 10, line 6, strike "electronic surveil-lance" and insert "acquisition"

Page 10, line 8, strike "surveillance" and insert "acquisition"

Page 10, line 9, strike "surveil-lance" and insert "acquisition"

Page 10, line 17, strike "sur-veillance" and insert "acquisition"

Page 10, strike lines 24 through Page 11, line 13.

Page 11, line 18, strike "a directive" and insert "an order or request for emergency assistance"

Page 11, line 23, remove brackets

Page 12, line 1, strike "(4) not later than 7 days after the issuance of such decision." and insert "(4)."

Page 12, line 15, strike "Acquisition Outside the United States" and insert "Other Acquisition"

Page 12, line 20, strike all after "In General.--" through Page 13, line 4 and insert "Acquisition by electronic, mechanical, or other"

9/25/2008

surveillance device may not intentionally target a United States person reasonably believed to be located outside the United States to acquire the contents of a wire or radio communication sent by or intended to be received by that United States person under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes if the technique were used inside the United States, unless the Foreign Intelligence Surveillance Court has entered an ex parte order pursuant to paragraph (3). The Foreign Intelligence Surveillance Court shall have jurisdiction to enter such order pursuant to paragraph (3)."

Page 13, strike line 6 and all that follows through line 25 and insert "(j) Moving or Misidentified Targets.--In the event"

Page 14, line 2, strike "have returned to" and insert "be in"

Page 14, line 5, strike "an order under title I of this Act is obtained" and insert "authority is obtained pursuant to this Act"

Page 14, after line 10, insert new clause (ii) Applicability.--If the acquisition constitutes electronic surveillance targeting a United States person reasonably believed to be located outside the United States to acquire foreign intelligence information, to include the acquisition of stored electronic communications, when acquisition is conducted within the United States, the procedures in subsection (a) shall apply.

Page 14, line 13, strike "sub-section (a)" and insert "this subsection"

Page 15, line 6, strike [and, if applicable section 301(4)] and insert "or section 301(4)"

Hmmm. I think we have to go back to the language similar to the original formulation here for the order. Your formulation has the court authorizing the acquisition. We can't have the Court actually authorizing acquisitions in this context, because the means of surveillance might violate the laws of some foreign country. Thus, the Court can only issue an order stating that the required elements have been met.

Page 15, line 19, strike "Upon an application" and all that follows through line 24 and insert "If, upon an application made pursuant to paragraph (2), the Foreign Intelligence Surveillance Court finds that--"

Page 16, line 13, strike "with" and insert "with respect to their dissemination provisions,"

Page 16, strike line 15 and insert "or section 301(4); it shall issue an ex parte order so stating."

Page 17, line 13, strike "proposed minimization procedures required under subparagraph (A)(ii)" and insert "minimization procedures applicable to dissemination of information obtained through an acquisition under this subsection"

Page 17, line 16, strike "and, if applicable," and insert "or"

Page 17, line 20, remove brackets

Page 17, line 23, strike all through page 18, line 1 and insert "(D) Duration.--An order under this"

Page 18, strike line 11 through line 23 and insert "reasonably determines that--(A) an emergency situation exists with respect to the acquisition of foreign intelligence information, to include the acquisition of stored electronic communications, to target a United States person reasonably believed to be located outside the United States before an order authorizing such acquisition can with due diligence be obtained; and (B) the factual basis for issuance of an

order under this subsection to approve such acquisition exists; he may authorize the emergency acquisition if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to conduct such acquisition and if an application in accordance with this subsection is made to that judge as soon as practicable, but not more than 168 hours after the Attorney General authorizes such acquisition."

Page 20, strike lines 7 through line 20.

Page 20, line 23, remove brackets

Page 21, line 1, strike "(4) not later than 7 days after the issuance of such decision." and insert "(4)."

I think that's all of them. (Kathleen, feel free to chime in if I've missed anything.)

I imagine that there will be some modifications to this text after we negotiate with Mike, but it's my hope that this will largely be acceptable to them. If you have time once you've finished with this, it might be good to have this text cut and pasted into EAS07C96 (substitute Managers' Amendment) starting on page 25 and going through page 39. Thanks.

Jack

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

From: Easley, Stephanie (Legis Counsel)

[mailto: [REDACTED]@slc.senate.gov]

Sent: Thursday, November 29, 2007 4:23 PM

To: Livingston, J (Intelligence)

Subject: RE: New amendment is attached (EAS07C97.xml)

A new version is attached for your review (EAS07C99.xml).

Thanks.

Stephanie

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]

Sent: Thursday, November 29, 2007 3:14 PM

To: Easley, Stephanie (Legis Counsel)

Subject: RE: New amendment is attached (EAS07C97.xml)

Here is another redline/strike out with edits for EAS07C97. This is the version I'm taking to DoJ for comment. Hopefully, there won't be many edits after that. I apologize for submitting it in this format. If I had more time, I'd give you the standard page/line references. Thanks.

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

From: Easley, Stephanie (Legis Counsel)

[mailto: [REDACTED]@slc.senate.gov]

Sent: Thursday, November 29, 2007 1:34 PM

To: Livingston, J (Intelligence)

Subject: New amendment is attached (EAS07C97.xml)

Here it is. Let me know if you have questions or edits.

Thanks.

9/25/2008

Stephanie

9/25/2008

NSD
1/2/07

Demers, John

From: Livingston, J (Intelligence) [redacted]@ssci.senate.gov]
Sent: Monday, December 03, 2007 11:51 AM
To: Demers, John (NSD)
Subject: RE: New amendment is attached (EAS07D01.xml)

I've found a few problems with our version (e.g., on page 19, line 7, I need to strike the words "for approval" and change the "surveillance" on line 11 to "acquisition"). There are some others, but we can talk about them this afternoon.

Exemption 6

From: Demers, John (NSD) [mailto:redacted@usdoj.gov]
Sent: Monday, December 03, 2007 11:47 AM
To: Livingston, J (Intelligence)
Subject: RE: New amendment is attached (EAS07D01.xml)

Nope. Just curious for when I talk to him.

From: Livingston, J (Intelligence) [mailto:redacted@ssci.senate.gov]
Sent: Monday, December 03, 2007 9:21 AM
To: Demers, John (NSD)
Subject: Re: New amendment is attached (EAS07D01.xml)

Yes, but I haven't talked with him yet. I also shared it with Mike and other SSCI lawyers. Is there a problem?

Sent from my BlackBerry Wireless Device

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

From: Demers, John (NSD) <redacted@usdoj.gov>
To: Livingston, J (Intelligence)
Sent: Sun Dec 02 20:30:28 2007
Subject: Re: New amendment is attached (EAS07D01.xml)

Have you shared this with Pelovsky?

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

From: Livingston, J (Intelligence) <redacted@ssci.senate.gov>
To: Demers, John (NSD)
Sent: Fri Nov 30 17:41:00 2007
Subject: RE: New amendment is attached (EAS07D01.xml)

No big deal. Actually, you can use the thread to make sure I made all the changes we discussed.

DJP

NSD

334

9/25/2008

DUP
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-----Original Message-----

From: Livingston, J (Intelligence) [mailto:██████████@ssci.senate.gov]

9/25/2008

Sent: Friday, November 30, 2007 12:25 PM
To: Easley, Stephanie (Legis Counsel)
Subject: RE: New amendment is attached (EAS07C97.xml)

Stephanie,

Any chance this might be ready before 1:00? We have a FISA meeting with SJC, SSCI, DOJ, and the IC then, and it would be nice to share text.
Thanks.

Jack

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

From: Easley, Stephanie (Legis Counsel)
[mailto: [REDACTED]@slc.senate.gov]
Sent: Friday, November 30, 2007 9:00 AM
To: Livingston, J (Intelligence)
Subject: RE: New amendment is attached (EAS07C97.xml)

Ok. I'll work on these this morning.

Thanks.

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]
Sent: Thursday, November 29, 2007 9:41 PM
To: Easley, Stephanie (Legis Counsel)
Cc: Rice, K (Intelligence); Tucker, L (Intelligence)
Subject: RE: New amendment is attached (EAS07C97.xml)

Okay. I just got back from DOJ, and it appears that we have a larger than expected number of edits. Working off of EAS07C99, here they are:

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Page 3, line 5, strike "have returned to" and insert "be in"
Page 3, line 7, strike "surveillance" and insert "acquisition"
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Page 5, line 13, strike "electronic surveillance" and insert "acquisition"
Page 5, line 18, strike "electronic surveillance" and insert "acquisition"

Page 6, line 3, strike "and, if applicable," and insert "or"
Page 7, line 5, strike "and, if applicable," and insert "or"
Page 7, line 9, remove brackets
Page 7, line 12, strike "Directives" and insert "Directions"
Page 7, line 13, strike "electronic surveillance" and insert
"acquisition"
Page 7, line 17, strike "communication" and insert "communications"
Page 7, line 21, strike "electronic surveillance" and insert
"acquisition authorized under this subsection,"
Page 7, line 22, strike "surveillance" and insert "acquisition"
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Page 8, line 6, strike "elec-tronic surveillance" and insert
"acquisition"
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Page 8, line 16, strike "paragraph (3)" and insert "this paragraph"

Hmmm. The closer this provision tracks to the current FISA emergency request language, the easier it will be for me to sell.

Page 8, strike line 25 through Page 9, line 14 and insert "reasonably determines that--(A) an emergency situation exists with respect to the acquisition of foreign intelligence information, to include the acquisition of stored electronic communications, within the United States to target a United States person reasonably believed to be located outside the United States before an order authorizing such acquisition can with due diligence be obtained; and (B) the factual basis for issuance of an order under this subsection to approve such acquisition exists; he may authorize the emergency acquisition if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to conduct such acquisition and if an application in accordance with this subsection is made to that judge as soon as practicable, but not more than 168 hours after the Attorney General authorizes such acquisition."

Page 9, line 17, strike "employment of electronic surveillance" and insert "acquisition"
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Page 10, strike lines 24 through Page 11, line 13.
Page 11, line 18, strike "a directive" and insert "an order or request for emergency assistance"
Page 11, line 23, remove brackets
Page 12, line 1, strike "(4) not later than 7 days after the issuance of such decision." and insert "(4)."
Page 12, line 15, strike "Acquisition Outside the United States" and insert "Other Acquisition"

Page 12, line 20, strike all after "In General.--" through Page 13, line 4 and insert "Acquisition by electronic, mechanical, or other surveillance device may not intentionally target a United States person reasonably believed to be located outside the United States to acquire the contents of a wire or radio communication sent by or intended to be received by that United States person under circumstances in which a person has a reasonable expectation of privacy and a warrant would be

required for law enforcement purposes if the technique were used inside the United States, unless the Foreign Intelligence Surveillance Court has entered an ex parte order pursuant to paragraph (3). The Foreign Intelligence Surveillance Court shall have jurisdiction to enter such order pursuant to paragraph (3)."

Page 13, strike line 6 and all that follows through line 25 and insert "(i) Moving or Misidentified Targets.--In the event"

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Page 14, after line 10, insert new clause (ii) Applicability.--If the acquisition constitutes electronic surveillance targeting a United States person reasonably believed to be located outside the United States to acquire foreign intelligence information, to include the acquisition of stored electronic communications, when acquisition is conducted within the United States, the procedures in subsection (a) shall apply.

Page 14, line 13, strike "sub-section (a)" and insert "this subsection"

Page 15, line 6, strike [and, if applicable section 301(4)] and insert "or section 301(4)"

Hmmm. I think we have to go back to the language similar to the original formulation here for the order. Your formulation has the court authorizing the acquisition. We can't have the Court actually authorizing acquisitions in this context, because the means of surveillance might violate the laws of some foreign country. Thus, the Court can only issue an order stating that the required elements have been met.

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Page 16, strike line 15 and insert "or section 301(4); it shall issue an ex parte order so stating."

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Page 17, line 23, strike all through page 18, line 1 and insert "(D) Duration.--An order under this"

Page 18, strike line 11 through line 23 and insert "reasonably determines that--(A) an emergency situation exists with respect to the acquisition of foreign intelligence information, to include the acquisition of stored electronic communications, to target a United States person reasonably believed to be located outside the United States before an order authorizing such acquisition can with due diligence be obtained; and (B) the factual basis for issuance of an order under this subsection to approve such acquisition exists; he may authorize the emergency acquisition if a judge having jurisdiction under section 103 is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to conduct such acquisition and if an application in accordance with this

subsection is made to that judge as soon as practicable, but not more than 168 hours after the Attorney General authorizes such acquisition."

Page 20, strike lines 7 through line 20.

Page 20, line 23, remove brackets

Page 21, line 1, strike "(4) not later than 7 days after the issuance of such decision." and insert "(4)."

I think that's all of them. (Kathleen, feel free to chime in if I've missed anything.)

I imagine that there will be some modifications to this text after we negotiate with Mike, but it's my hope that this will largely be acceptable to them. If you have time once you've finished with this, it might be good to have this text cut and pasted into EAS07C96 (substitute Managers' Amendment) starting on page 25 and going through page 39. Thanks.

Jack

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

From: Easley, Stephanie (Legis Counsel)

[mailto: [REDACTED]@slc.senate.gov]

Sent: Thursday, November 29, 2007 4:23 PM

To: Livingston, J (Intelligence)

Subject: RE: New amendment is attached (EAS07C97.xml)

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Thanks.

Stephanie

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From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]

Sent: Thursday, November 29, 2007 3:14 PM

To: Easley, Stephanie (Legis Counsel)

Subject: RE: New amendment is attached (EAS07C97.xml)

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

From: Easley, Stephanie (Legis Counsel)

[mailto: [REDACTED]@slc.senate.gov]

Sent: Thursday, November 29, 2007 1:34 PM

To: Livingston, J (Intelligence)

Subject: New amendment is attached (EAS07C97.xml)

Here it is. Let me know if you have questions or edits.

Thanks.

Stephanie

9/25/2008

Demers, John

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov
Sent: Tuesday, December 04, 2007 10:54 AM
To: Demers, John (NSD)
Subject: FW: 2.5

Exemption 6

I just sent this to the relevant players w/i SSCI. Do you have any concerns, comments?

From: Livingston, J (Intelligence)
Sent: Tuesday, December 04, 2007 10:53 AM
To: Davidson, M (Intelligence); Pelofsky, Eric (Intelligence); Dickas, J (Intelligence)
Cc: Rice, K (Intelligence); Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: 2.5

Eric and I had a productive discussion last night on the 2.5 issue. I think we're in agreement on many issues (most of them being with respect to subsection (b) [in mine] and paragraph (2) [In Eric's]).

During our discussion, Eric fairly asked why we needed procedures different in subsection (a) [in mine] and paragraph (1) [in Eric's]. At that time, I could only come up with two. I thought of two more this morning. Here they are:

- 1) I think it's easier to solve the "officer, employee [or member] of a foreign power" issue with a separate set of procedures, rather than creating two definitions for agent of a foreign power within Title I.
- 2) The acquisitions authorized by Section 704 [in mine] and subsection (c) [in Eric's] involve both electronic surveillance and limited physical search (e.g., stored electronic communication), so reference to only Title I does not appear to suffice. This acquisition authority is a bit of a hybrid.
- 3) Unlike the proposed Section 704(a), neither Title I nor Title III of FISA contain a particularized probable cause requirement that the target of the surveillance must be reasonably believed to located outside the United States. This makes sense, because FISA was never drafted to cover this sort of surveillance.
- 4) It's easier to reference the minimization procedure definitions in 101(h) and 301(4) in a separate set of procedures.

I think it's easier to develop acceptable procedures for this collection in subsection (a) or paragraph (2) that it is to attempt to revise Titles I and III remotely from Section 704 or subsection (c). I don't think we should make the changes in Title I or Title III, because of their limited applicability. I'm going to go through the FISA application and order provisions again to see if there are other useful elements that could be added to improve upon these Section 704(a) FISA court orders better. If you have any suggested additions, I'd appreciate your input.

Thanks.

NSD,

335

9/25/2008

Demers, John

From: Demers, John (NSD)
Sent: Tuesday, December 04, 2007 9:56 AM
To: 'Livingston, J (Intelligence)'
Cc: 'Rice, K (Intelligence)'
Subject: RE: Foreign Intelligence Information

Exemption 6

No, I think it's good if it's there.

From: Livingston, J (Intelligence) [mailto:██████████@ssci.senate.gov]
Sent: Tuesday, December 04, 2007 9:55 AM
To: Demers, John (NSD)
Cc: Rice, K (Intelligence)
Subject: FW: Foreign Intelligence Information

I just sent the following change to EAS07D01 to leg counsel:

On page 12, line 6, strike "Acquisition by" and insert "Acquisition of foreign intelligence information by". I think that addresses at least part of Mike's concern.

From: Livingston, J (Intelligence)
Sent: Tuesday, December 04, 2007 9:44 AM
To: 'Demers, John (NSD)'
Subject: Foreign Intelligence Information

For subsection (b) of our 2.5 draft (EAS07D01), we do not tie acquisition to foreign intelligence information in paragraph (1)(A). It's difficult to work it into the current formulation because the first sentence is worded in the negative to account for the "warrant would be required" language. This is essentially your preferred language. Did you leave out the reference to foreign intelligence information out on purpose? If not, we need to find a way to work it back in.

NSD

336

9/25/2008

Demers, John

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov
Sent: Tuesday, December 04, 2007 8:12 PM
To: Demers, John (NSD)
Subject: Re: 2.5

Yes. Call me if you can please. [REDACTED] Thanks.

Exemption 6

Sent from my BlackBerry Wireless Device

----- Original Message -----
From: Demers, John (NSD) <[REDACTED]@usdoj.gov>
To: Livingston, J (Intelligence)
Sent: Tue Dec 04 20:08:46 2007
Subject: Re: 2.5

Well, I would hate to be in a position where Eric's draft is easier to fix than yours if there are problems. Does your draft now cover all acquisitions for FII abroad where there is a reasonable expectation of privacy?

----- Original Message -----
From: Livingston, J (Intelligence) <[REDACTED]@ssci.senate.gov>
To: Demers, John (NSD)
Sent: Tue Dec 04 20:03:37 2007
Subject: Re: 2.5

Yes. But ideally we wouldn't want to.

Sent from my BlackBerry Wireless Device

----- Original Message -----
From: Demers, John (NSD) <[REDACTED]@usdoj.gov>
To: Livingston, J (Intelligence)
Sent: Tue Dec 04 20:01:01 2007
Subject: Re: 2.5

Is there a chance to do anything after it's been filed?

----- Original Message -----
From: Livingston, J (Intelligence) <[REDACTED]@ssci.senate.gov>
To: Demers, John (NSD)
Sent: Tue Dec 04 19:59:33 2007
Subject: 2.5

Leg counsel probably won't have text for me sometime until tomorrow. I'll forward it to you when I get it. We won't have much time to check it, because I'm getting the sense that they might want to file it tomorrow.

Sent from my BlackBerry Wireless Device

NSD

337

Demers, John

37
4 p. 563

From: Demers, John (NSD)
Sent: Wednesday, December 05, 2007 1:36 PM
To: [REDACTED]@ssci.senate.gov
Subject: Re: New amendment is attached (EAS07D01.xml)

We will scan and send by email.

Exemption 6

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

From: Livingston, J (Intelligence) <[REDACTED]@ssci.senate.gov>
To: Demers, John (NSD)
Sent: Wed Dec 05 13:16:43 2007
Subject: RE: New amendment is attached (EAS07D01.xml)

I'm still preparing for conference. I'd prefer to meet and get them if possible, or arrange for a time when I can be standing by the fax. If you have time to have someone type them up, we've got the time. Thanks.

From: Demers, John (NSD) [mailto:[REDACTED]@usdoj.gov]
Sent: Wednesday, December 05, 2007 1:11 PM
To: Livingston, J (Intelligence)
Subject: RE: New amendment is attached (EAS07D01.xml)

Jack,

We will get your comments ASAP. I have made them on the draft. Can I fax them to you?

John

From: Livingston, J (Intelligence) [mailto:[REDACTED]@ssci.senate.gov]
Sent: Wednesday, December 05, 2007 12:11 PM
To: Demers, John (NSD)
Subject: RE: New amendment is attached (EAS07D01.xml)

I think you've got time. We're all focused on Intel Auth right now. I haven't even had a chance to work through the documents myself yet. My only concern is that Bond might want me to file something today, although I will be recommending against that.

From: Demers, John (NSD) [mailto:[REDACTED]@usdoj.gov]
Sent: Wednesday, December 05, 2007 12:09 PM
To: Livingston, J (Intelligence)
Subject: RE: New amendment is attached (EAS07D01.xml)

NSD

338

Jack,

We may have significant comments here that I'm working through now. What's the timing?

Thanks,

John

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]
Sent: Wednesday, December 05, 2007 7:52 AM
To: Demers, John (NSD)
Subject: Fw: New amendment is attached (EAS07D01.xml)

This came in late last night. I'll start looking at it soon.

Sent from my BlackBerry Wireless Device

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

From: Easley, Stephanie (Legis Counsel) < [REDACTED]@slc.senate.gov>
To: Livingston, J (Intelligence)
Cc: Rice, K (Intelligence)
Sent: Wed Dec 05 00:08:08 2007
Subject: RE: New amendment is attached (EAS07D01.xml)

Two versions of your request are attached (EAS07D09.xml and EAS07D11.xml). One is cut and bite amendments and the other is a stand alone bill. If you go forward with the stand alone bill, you may want to change to short and long titles. It would be very confusing to have multiple bills with the same short title floating around.

I think I got all your changes. Please let me know if I missed anything. I will look them both over again in the morning, but I wanted to get something to you in time for your meeting.

Thanks,

Stephanie

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

From: Livingston, J (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]
Sent: Tuesday, December 04, 2007 9:52 AM
To: Easley, Stephanie (Legis Counsel)
Cc: Rice, K (Intelligence)
Subject: FW: New amendment is attached (EAS07D01.xml)

Okay, how about this? On page 12, line 6, strike "Acquisition by" and insert "Acquisition of foreign intelligence information by"

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

From: Livingston, J (Intelligence)
Sent: Tuesday, December 04, 2007 9:50 AM
To: Easley, Stephanie (Legis Counsel)
Cc: Rice, K (Intelligence)
Subject: FW: New amendment is attached (EAS07D01.xml)

Crap, forget that last change for now. I need to think this one through. I can't have the court "authorizing" anything with respect to subsection (b) orders.

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

From: Livingston, J (Intelligence)
Sent: Tuesday, December 04, 2007 9:47 AM
To: Easley, Stephanie (Legis Counsel)
Cc: Rice, K (Intelligence)
Subject: FW: New amendment is attached (EAS07D01.xml)

Could I add one more change please. On page 12, line 19, strike "order pursuant" and insert "order authorizing the acquisition of foreign intelligence information pursuant"

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

From: Livingston, J (Intelligence)
Sent: Monday, December 03, 2007 9:33 PM
To: Easley, Stephanie (Legis Counsel)
Cc: Rice, K (Intelligence)
Subject: RE: New amendment is attached (EAS07D01.xml)

Stephanie,

I have some changes to EAS07D01. I will need them incorporated into EAS07C96, although I need 96 restyled as a McConnell/Bond stand-alone bill that could be Rule 14ed onto the calendar in the event the current negotiations are not productive.

Page 1, strike lines 1-4 and insert "Beginning on page 6, strike line 13 and all that follows through page 8, line 24 and insert "(c) United States Person Located Outside the United States.--The intentional targeting of U.S. persons reasonably believed to be located outside the United States shall be conducted in accordance with section 704 of this Act." [This approach saves us from having to worry about all the conforming amendments caused by the deletion of subsection (c)].

Page 2, insert the following after line 6 but before line 7:

"On page 33, line 17, strike "eral--" and insert "eral reasonably--"
"On page 37, line 22, strike "General--" and insert "General reasonably--" [somehow the word "reasonably" got dropped from both of these emergency authorization provisions]

Page 16, line 20, strike "(ii) Review of Minimization Procedures.--" and insert " (ii) Review of Probable Cause.--If the Foreign Intelligence Surveillance Court determines that there is insufficient probable cause to issue an order under subparagraph (A), the Court shall enter an order so stating and provide a written statement for the record of the reasons for such determination. The Government may appeal an order under this clause pursuant to paragraph (5).

(iii) Review of Minimization Procedures.--" [I'm sure that this is not the best way to do this, but I just need to insert a new clause (ii) and move the current clause (ii) down to clause (iii)].

Page 19, line 7, strike "for approval"

Page 19, line 11, strike "surveillance" and insert "acquisition"

I have one more change, but I'm not sure how to accomplish it or where to put it. Maybe you've run across a similar situation before. Let me describe the problem I'm trying to solve. Subsection (a) creates a FISC

order (approval) procedure for when the target is outside the US, but the acquisition will be done in the US. Subsection (b) creates a FISC order (finding, not approval) procedure for when the target is outside the US, but is silent on where the acquisition will occur (it also contains a forcing mechanism to subsection (a) when the acquisition occurs in the United States). Now, here's the problem. Let's say I have a target reasonably believed to be located outside the United States. I want to use the (a) procedures because I'm doing some of the acquisition in the United States, but I also want to use the (b) procedures to conduct an acquisition outside the United States. Ideally, I only want the Government to have to apply for one order on the same target, but that allows acquisition under both subsections (a) and (b). The trick is that it's important the Court not "approve" the acquisition outside the United States (only enter an order stating its findings) and that the Government shall not be required to provide any information on the means by which the acquisition outside the United States is being conducted (although it's fine that the means be specified for any acquisition inside the US). Maybe we can call them "(c) Joint Orders.--In situations in which the acquisition against a U.S. person target will be conducted both within and outside the United States, the Foreign Intelligence Surveillance Court may, upon the request of the Government, issue a joint ex parte order against such target that meets the requirements of both subsections (a) and (b)." I'm not sure that this is sufficient. What do you think? Sorry to force you through my convoluted thought process.

Thanks.

Jack