

# **OIP GROUP 6**

Gerry, Brett

FOIA Exemption b(6)

**From:** Starzak, Alissa (Intelligence) [REDACTED]@sscl.senate.gov [EFF2AG(1)-1]  
**Sent:** Friday, December 14, 2007 4:24 PM  
**To:** Livingston, J (Intelligence); Ben Powell; Rice, K (Intelligence); [REDACTED] Eisenberg, John; Demers, John (NSD); [REDACTED]; Gerry, Brett  
**Cc:** Healey, C (Intelligence); Davidson, M (Intelligence) [FOIA Exemptions b(2) and (6)]  
**Subject:** RE: FISA [FOIA Exemption b(3)]  
**Attachments:** Amendment Options.doc; EAS07D29\_xml.pdf; EAS07D46\_xml.pdf

To speed things up a bit (we're still waiting to get drafts back from legislative counsel), I thought it might be helpful to forward some of the ideas we've had for particular Rockefeller amendments. The word document that is attached does not distinguish between items we will be including in the discussion draft and those that will be prepared as separate amendments - it's just possible amendment ideas that deal with things other than the 2.5 issue. The leg counsel drafts include the exclusivity amendment that was circulated previously, and an amendment on an IG review.

Thanks -  
 Alissa

**From:** Livingston, J (Intelligence) [FOIA Exemptions b(2) and (6)] [EFF2AG(1)-2]  
**Sent:** Friday, December 14, 2007 11:39 AM  
**To:** Davidson, M (Intelligence); Ben Powell; [REDACTED] John Eisenberg; [REDACTED]; [REDACTED] Gerry, Brett (OLP)  
**Cc:** Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence) [FOIA Exemption b(6)]  
**Subject:** RE: FISA

FOIA  
 Exemption  
 b(3)

I just want to emphasize Mike's comment that Senator Bond has not agreed to a managers' amendment that would include anything beyond the deletion approach to the NSA reporting issue and a 2.5 fix that is acceptable to the IC, Democrats and Republicans. Specifically, Senator Bond has *not* agreed to any change in the current exclusive means language, a reduction in the sunset from 6 to 4 years, or the other provisions referenced by Mike in the below e-mail.

We've also asked Legislative Counsel to put together a discussion draft of a possible managers' amendment (that significantly beefs up the 2.5 application and order process for acquisitions conducted in the U.S. and reorganizes Title VII). Our draft, as earlier drafts, includes the names of Senators Rockefeller and Bond, but that is merely aspirational. Senator Rockefeller has *not* agreed to the version I've been sending around, nor has he agreed to the version that I'll send out when Legislative Counsel sends it to me.

I share Mike's hope that we can make the overall managers' amendment an attractive vehicle, but the issues of exclusive means and sunset are still very heavy lifts. Frankly, it's my understanding that our approach to 2.5 is still a heavy lift for the IC.

Also, I would like to second Mike's thanks on everyone's help, past, present, and future.

Jack

1/25/2008

FOIA Exemptions b(2)  
and (6)

FOIA Exemption b(3)

Page 2 of 2

**From:** Davidson, M (Intelligence)  
**Sent:** Friday, December 14, 2007 10:30 AM  
**To:** 'Ben Powell'; [REDACTED]; John Eisenberg; [REDACTED] Gerry, Brett (OLP)  
**Cc:** Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Allsa (Intelligence)  
**Subject:** FISA

FOIA Exemption b(6)

EFF2AG(1)-3

Dear All:

(As I started to write this, Ben called. We shared thoughts about the next couple of days. I thought I should continue the note, and send it out, just so that what follows is available to everyone.)

In light of the plan to move to proceed to FISA, with a cloture vote on a motion to proceed on Monday morning, followed by floor proceedings on the bill – including amendments, all matters relating to a possible managers amendment obviously need to be settled very soon.

Last night, we asked Legislative Counsel to prepare a discussion draft that puts together several things: (1) the draft that Jack had been developing on Americans overseas (with changes up to yesterday afternoon; Jack had received some further DOJ comments which he had not yet dealt with), some changes to that draft that we would recommend (Jack had already taken onboard ideas from a conversation Wednesday); (2) the exclusivity provision that we had previously circulated (John D. has the most recent e-copy, as of Sunday); (3) a change in the sunset to four years; (4) a suggestion on the reporting provision of concern to NSA; and (5) one or two other provisions for which Judiciary had proposed an amendment (e.g., on stays) for which some language accommodation might be possible, e.g., providing that the Court of Review decide, within 30 days of an appeal, whether all or parts of a correction order should be implemented pending appeal.

In this discussion draft, we're putting no names, recognizing to begin with that Senator Bond has not said that he is prepared to include anything beyond Americans overseas and something that addresses the NSA reporting issue. (And Senators Leahy and Specter will be reaching their own conclusions.)

There are other matters, of course, that I recognize are not presently candidates for a managers amendment – e.g., assessing compliance on minimization procedures, and IG review of the TSP. Those have been or are being drafted as separate amendments.

As I shared with Ben, there are members who believe very strongly that the collection inside the US against US persons outside the US should be done by a simple cross-reference to Title I, with a short list of any exceptions. There is I believe a great deal of merit in Jack's approach, and we've been mutually working to ensure that it contains all the key elements of a Title I procedure. But that may be an issue. My hope, for various reasons, is that we can also work to make the overall managers amendment an attractive vehicle by including provisions that, I truly believe, are going to be there in the end – e.g., exclusivity, the four-year sunset.

Ben described his hope that the interagency team will have a chance to comment on our proposed managers amendment. Definitely. When we get it back from Legislative Counsel, we'll probably do one scrub of it here, but I hope by early afternoon to distribute to all for the interagency review. We'll also send any separately drafted amendments (e.g., IG review, compliance assessment).

Thanks for everyone's help – past, present, and future.

Mike

1/25/2008

**Gerry, Brett**

**From:** Gerry, Brett (OLP) EFF2AG(1)-19  
**Sent:** Friday, October 12, 2007 4:18 PM  
**To:** 'Livingston, J (Intelligence)'; Starzak, Alissa (Intelligence); Ben Powell; Healey, C (Intelligence)  
**Cc:** Eisenberg, Jeff; [REDACTED] Davidson, M (Intelligence); Rice, K (Intelligence); [REDACTED] Vito Potenza (work); Demers, John  
[FOIA Exemptions b(2) and (6)] (NSD); Nichols, Carl (CIV); Wainstein, Kenneth (NSD) [FOIA Exemption b(3)]  
**Subject:** Technical Assistance  
**Attachments:** FISA Mod SSCI Technical Assistance 11.0 (10.12.07) - Redline to Last Version Sent to Senate.doc

All:

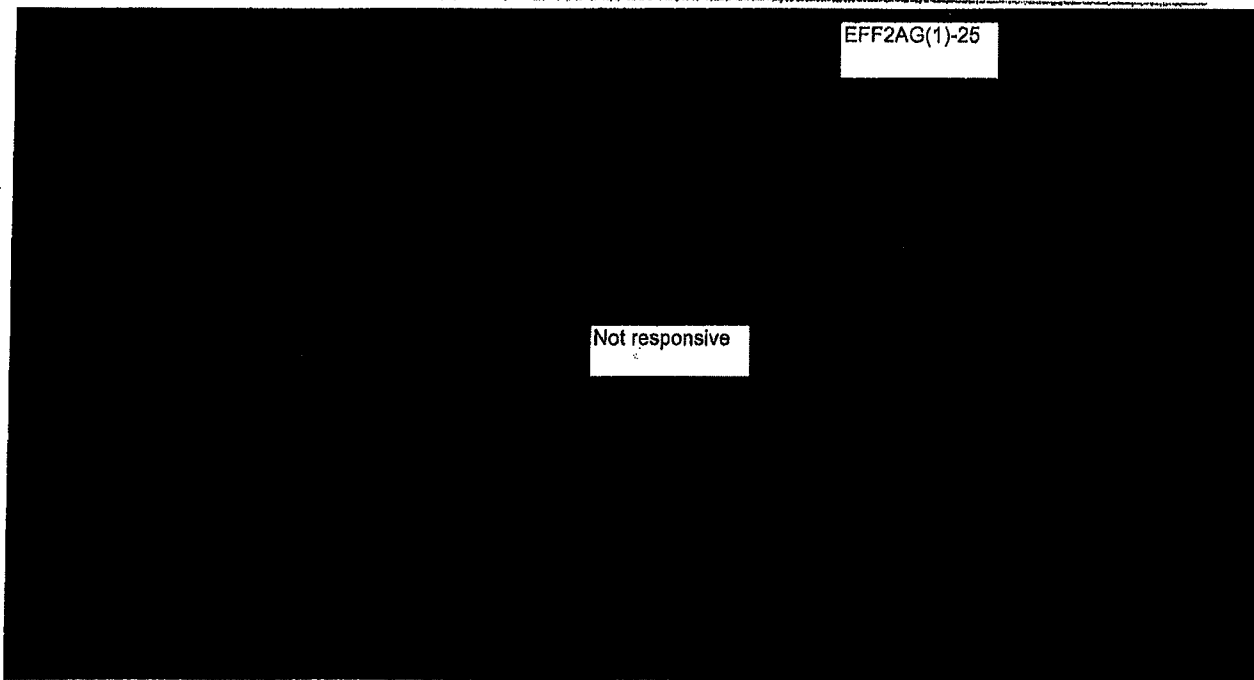
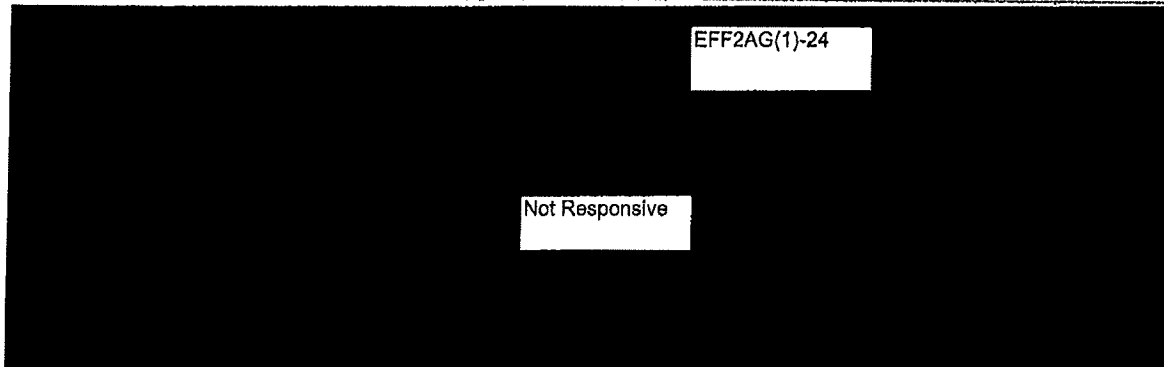
As I mentioned in a prior email, I am attaching an electronic (red-lined) version which includes a few technical changes from the version we circulated on Wednesday. A few things of note: (i) it includes a proposed review provision for 703(p); (ii) it strikes the list of foreign targets requirements (this concededly goes beyond "technical assistance," but given that it is not workable from our perspective we thought it merited special emphasis); (iii) there is language (which goes back to our original April proposal) that would strike the words "wire or" in FISA's 105(i) liability provision, and we do not believe this is a good idea; and (iv) would add transition procedures to preserve the "new FISA/old FISA" option. Happy to talk through any or all of these suggestions.

I'll also offer the standard caveat that we oppose several of the provisions in this document, and that this is merely technical assistance. (I'm thinking about adding this disclaimer as a formal footer to my emails.)

-Brett

1/30/2008

Gerry, Brett



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

From: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov>  
To: Davidson, M (Intelligence)  
Sent: Sat Nov 17 12:29:51 2007  
Subject: Re: FISA

EFFAG(1)-26

Mike-

I apologize for not responding sooner. You may have heard already, but I wanted to let you know that the attorney general has asked me to be his chief of staff. Unfortunately (from my perspective), this will mean that fisa legislation drafting sessions will not be in my near future, although I will continue to be involved to the extent possible.

I am sure we will continue to have opportunities to work together, but did want to use this transition as an opportunity to let you know how much I have enjoyed working with you (and jack and chris and the rest of the ssci staff) to this point. The ssci fisa process was good, bipartisan government at its best, and we appreciate the work you did to make it so.

1/30/2008

Best,  
Brett

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

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov>

To: Ben Powell [redacted]; Gerry, Brett (OLP); Eisenberg, John; Potenza, Vito [redacted]; Nichols, Carl (CIV); [redacted]; Olsen, Matthew; Demers, John (NSD)

Cc: Livingston, J (Intelligence) [redacted]@ssci.senate.gov>; Healey, C (Intelligence) [redacted]@ssci.senate.gov>; Rice, K (Intelligence) [redacted]@ssci.senate.gov>; Starzak, Alissa (Intelligence) [redacted]@ssci.senate.gov>

Sent: Tue Nov 13 18:37:16 2007

Subject: FISA

FOIA Exemption b(6)

EFF2AG(1)-27

FOIA Exemption b(3)

FOIA Exemptions b(2) and (6)

FOIA Exemption b(6)

FOIA Exemption b(6)

FOIA Exemption b(3)

FOIA Exemptions b(2) and (6)

It's been such a long time that I've written to everyone that I'm not sure if I've forgotten someone.

The week after Thanksgiving, during which the Senate will be in recess (as will the House), would be a good time to gather again and take stock of where we are in advance of what should be a fast paced several weeks of session in December which will, we hope, include floor consideration of S. 2248.

There are undoubtedly ideas that DNI/DOJ/NSA might have in relation to amendments during our markup, there will be amendments or potential amendments coming out of the Judiciary Committee's consideration of the bill, and there may be suggestions from elsewhere (such as those David Kris has written about).

A question here is whether the Chairman and Vice Chairman will be proposing a managers amendment that addresses some of those matters.

Will you be in town and available? For starters in thinking of a day and time, how would Tuesday, November 27, either morning or afternoon work for everyone? I expect that we'll find that after an initial discussion we'll need to reconvene later in the week.

I'd like to involve Mary DeRosa (Leahy) and Nick Rossi (Specter) in these discussions. The Leadership will be expecting, I'm sure, that there will be an effort by the two committees to either bridge differences or at least identify and refine the choices that may be put before the Senate for votes.

At some point, it would be helpful for us to ask David Kris to come by to discuss his suggestions. That could be for a part of the Tuesday, November 27, discussion, or another time.

Please let us know whether that Tuesday, or another day that week, would work for you, and any ideas you might have about how we might proceed.

And a most happy Thanksgiving.

Mike

1/30/2008

Gerry, Brett

**From:** Gerry, Brett (OLP)  
**Sent:** Friday, October 12, 2007 2:40 PM  
**To:** ██████████ Starzak, Alissa (Intelligence)  
**Cc:** Ben Powell; Healey, C (Intelligence); Davidson, M (Intelligence)  
**Subject:** RE: Clarification on DOJ IG issue

EFF2AG(1)-28

FOIA  
Exemption  
b(2) and b(6)

I think they already have that language, but we will take a look at it to see if it can't be improved.

**From:** ██████████  
**Sent:** Friday, October 12, 2007 2:32 PM  
**To:** Starzak, Alissa (Intelligence)  
**Cc:** Ben Powell; Healey, C (Intelligence); Davidson, M (Intelligence); Gerry, Brett (OLP)  
**Subject:** Ré: Clarification on DOJ IG issue

FOIA Exemptions b(2)  
and (6)

EFF2AG(1)-29

Alissa,

Ben asked to me to respond. This seems to resolve the concern. Although, I note for the record that all the relevant IGs already have this this authority. As Brett mentioned, DOJ is sending over some additional technical assistance shortly that includes the "their agency" language.

██████████ FOIA Exemption (6)

Starzak, Alissa (Intelligence) wrote:

Ben –

Wanted to check with you on one other thing. On Wednesday, you indicated that the Oversight section (section o) would be problematic if the DOJ IG was empowered to review NSA's compliance with acquisition and minimization procedures. Does the language in Wednesday's draft solve this problem? The draft indicates that the various IGs (including the DOJ IG) are authorized to review "the compliance of their agency or element." The addition seems to prevent the DOJ IG from reviewing NSA compliance, but we wanted to get a sense of whether you thought the revised language would work.

Let us know.

Thanks –

Alissa

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [redacted]@sscl.senate.gov

EFF2AG(1)-30

Sent: Friday, October 12, 2007 2:05 PM

To: Gerry, Brett (OLP); Starzak, Alissa (Intelligence); Ben Powell; Healey, C (Intelligence)

Cc: Eisenberg, John; [redacted] Davidson, M (Intelligence); Rice, K (Intelligence); [redacted] Vito Potenza (work); Demers, John (NSD); Nichols, Carl (CIV); Wainstein, Kenneth (NSD)

FOIA Exemption b(3)

Subject: RE: Remaining issues

FOIA Exemptions b(2) and (6)

This really does seem to be the most direct method of solving this problem.

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]

EFF2AG(1)-31

Sent: Friday, October 12, 2007 2:03 PM

To: Starzak, Alissa (Intelligence); Ben Powell; Healey, C (Intelligence)

Cc: Eisenberg, John; Livingston, J (Intelligence); [redacted] Davidson, M (Intelligence); Rice, K (Intelligence); [redacted] Vito Potenza (work); Demers, John (NSD); Nichols, Carl (CIV); Wainstein, Kenneth (NSD)

FOIA Exemption b(3)

Subject: RE: Remaining Issues

Alissa-

FOIA Exemptions b(2) and (6)

That was an initial stab at the problem, but I'm not sure it works. The version below works better (underlined language is new).

We will be sending along a larger set of technicals to our last draft shortly.

-Brett

(f) UNITED STATES PERSONS OVERSEAS. - An authorization under subsection (a) shall not be used to direct surveillance at a person reasonably believed to be located outside the United States who is known to be a United States person, unless the Attorney General determines that there is probable cause to believe that the person is a foreign power, agent of a foreign power, or an officer or employee of a foreign power. The Attorney General shall transmit a copy of this determination and any supporting affidavits to the Foreign Intelligence Surveillance Court. This determination shall be subject to judicial review pursuant to subsection (l).

FOIA Exemption b(6)

From: Starzak, Alissa (Intelligence) [mailto:[redacted]@sscl.senate.gov]

EFF2AG(1)-32

Sent: Friday, October 12, 2007 1:37 PM

To: Ben Powell; Healey, C (Intelligence)

FOIA Exemptions b(2) and (6)

Cc: Eisenberg, John; Gerry, Brett (OLP); Livingston, J (Intelligence); [redacted] Davidson, M (Intelligence); Rice, K (Intelligence); [redacted] Vito Potenza (work); Demers, John (NSD); Nichols, Carl (CIV); Wainstein, Kenneth (NSD)

Subject: RE: Remaining Issues

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

On issue (5) below, we noticed that the electronic version of the draft that Brett sent on Wednesday night had an extra sentence indicating "For the purpose of this subsection, a person may be an agent of a foreign power without regard to whether the person acts as such in the United States." I assume this sentence was added to resolve the section 2.5 agent of a foreign power issue. Is this issue still being vetted on your end, or does the addition resolve the problem?



**From:** Ben Powell [mailto: [REDACTED] ] FOIA Exemptions b(2) and (6) EFF2AG(1)-33  
**Sent:** Friday, October 12, 2007 9:30 AM  
**To:** Healey, C (Intelligence)  
**Cc:** Eisenberg, John; Gerry, Brett (OLP); Livingston, J (Intelligence); [REDACTED] Davidson, M (Intelligence);  
Rice, K (Intelligence); [REDACTED] Starzak, Alissa (Intelligence); Vito  
Potenza (work); Demers, John (NSD); Carl.Nichols@usdoj.gov; [REDACTED]  
**Subject:** Re: Remaining Issues

Chris --

FOIA Exemption b(3)

FOIA Exemption b(6)

Here was the list that I read as of when I had to leave at 4:30pm:

- 1) Liability: Mike D. was going to edit to reflect comments and send new text for Carl and team to review.
- 2) Issues with 703(a)(1) stating "Notwithstanding any other provisions of this Act . . ." (Instead of law). We needed to check in that -- obviously we strongly prefer "law" given the dangers of missing a section that some will argue prevent the collection. (For an example, see the CRS report that contains what is ultimately a flawed analysis of various statutes that it claims could prevent the collection). This requires a scrub of the US Code.
- 3) There was a discussion that all of us were looking at in terms of the issue of "specified targets" on page 4.
- 4) We are looking at an issue concerning the definition of foreign intelligence (primarily related to counternarco and counterintel).
- 5) Section 2.5 Issues, including the issue raised by Patrick concerning a difference between 2.5 and the agent of foreign power defin in FISA.
- 6) We are looking at the oversight issue. As we discussed, perhaps one way to handle would be to require DNI/AG to submit to committees an oversight plan that addresses oversight structure, role of IG, role of DOJ/NSD, role of ODNI (GC, CLPO), plan for providing info to committees, etc.

As for the David Kris proposal, folks will need to look at it. My extremely quick read, and noting this may be incorrect given how quick I read it, suggests there are some serious issues, both technically and substantive. First, he ties the work to elect surv -- that will raise a problem we can discuss in terms of what if something is not f(1-4) (think foreign-foreign)? can we then use compulsion? what type of proof is required? Second, it is cast in terms of "targeting an individual" which raises a number of questions of interpretation. Third, I want to discuss here the idea of actually having the AG/DNI authorize things that are "elect surveillance" without court orders. Something is bothering me about that idea in terms of can people somehow claim that now domestic-domestic can be authorized, etc. (presumably not given that it would then not be targeting individual outside the US), but I am concerned that doing it that way creates some kind of lurking problem.

We will discuss ASAP here and get back to you.

Healey, C (Intelligence) wrote:

EFF2AG(1)-34

Ben --

At our last meeting, you very helpfully read a list of issues that needed to be addressed further.

1/30/2008

We are moving along at a fast clip here and would very much appreciate receiving your feedback as soon as possible. In addition, Jack has provided you language proposed by David Kris on how the authorization could read. We all have a lot of interest in this proposal and would appreciate learning the DNI/DOJ/NSA views on it.

Thanks for your help,

Chris

Christine Healey  
Senate Select Committee on Intelligence

[REDACTED] (direct) FOIA Exemption b(6)

[REDACTED]@ssci.senate.gov

Gerry, Brett

From: Eisenberg, John [EFF2AG(1)-35]  
 Sent: Thursday, October 11, 2007 8:03 AM  
 To: Gerry, Brett (OLP); [redacted] 'Jack Livingston'; [redacted]; 'Mike Davidson'; 'K Rice'; 'Christine Healey'; [redacted]; [redacted]; 'Starzak, Alissa (Intelligence)'; 'Vito Potenza (work)'; Demers, John (NSD)  
 Subject: RE: Sleep on this? [FOIA Exemptions b(2) and (6)] [FOIA Exemption b(3)]

I agree with Brett and Ben. "Electronic targeting" would introduce another term--one that isn't defined.

From: Gerry, Brett (OLP) [FOIA Exemptions b(2) and (6)] [EFF2AG(1)-36]  
 Sent: Thursday, October 11, 2007 7:42 AM  
 To: [redacted]; Jack Livingston; [redacted] Mike Davidson; K Rice; Christine Healey; [redacted]; [redacted]; Starzak, Alissa (Intelligence); Eisenberg, John; Vito Potenza (work); Demers, John (NSD)  
 Subject: RE: Sleep on this? [FOIA Exemption b(3)]

I have reservations about the "monitoring" formulation, since monitoring is a term used in FISA's electronic surveillance definition to describe things that do not constitute the collection of communications. (In other words, one could read it to not encompass the collection of wire and radio communications.) The parenthetical on stored communications helps, but probably does not fully alleviate this problem.

Still thinking about electronic targeting, although I instinctively share some of Ben's worries. I am taking the liberty of copying John Demers.

From: [redacted] [mailto:[redacted]] [FOIA Exemptions b(2) and (6)] [EFF2AG(1)-37]  
 Sent: Thursday, October 11, 2007 12:36 AM  
 To: Jack Livingston; [redacted]; Mike Davidson; K Rice; Christine Healey; [redacted]; [redacted]; Starzak, Alissa (Intelligence); Gerry, Brett (OLP); Eisenberg, John; Vito Potenza (work)  
 Subject: Re: Sleep on this? [FOIA Exemption b(3)]

On first glance, puts all the emphasis on "electronic". Does that put us in a place where we have to use electronic methods when perhaps there is a better non-electronic way to do it? (And could be more precise to do it that way). While we can limit to act to providers and knock out some of the worries of too broad a statute, not sure we want to artificially force the method to be "electronic". But I could be incorrectly reading this and need to get views of doj/nsa.

FOIA Exemption b(2) and b(6) [FOIA Exemption b(6)] [EFF2AG(1)-38]  
 ----- Original Message -----  
 From: "Livingston, J (Intelligence)" [redacted]@ssci.senate.gov  
 Sent: 10/10/2007 08:37 PM AST  
 To: [redacted] Davidson, M (Intelligence)" [redacted]@ssci.senate.gov>; Rice, [redacted] (Intelligence)" [redacted].senate.gov>; Healey, C (Intelligence)" [redacted]@ssci.senate.gov>; [redacted]; [redacted]; Starzak, Alissa (Intelligence)" [redacted]@ssci.senate.gov>; Gerry, Brett (OLP)" <Brett.Gerry@usdoj.gov>; <John.Eisenberg@usdoj.gov>  
 Subject: Sleep on this?  
 FOIA Exemption b(3) [FOIA Exemptions b(2) and (6)] [FOIA Exemption b(3)]

I was thinking about other ways of solving the authorization problem. How about:

Sec. 703. (a) AUTHORIZATION.—(1) Notwithstanding any other law, but subject to the requirements of this title, the Attorney General and the Director of National Intelligence may authorize jointly, for periods of up to one year, the electronic targeting of persons reasonably believed to be located outside of the United States for the purpose of acquiring foreign intelligence information.

or

Sec. 703. (a) AUTHORIZATION.—(1) Notwithstanding any other law, but subject to the requirements of this title, the Attorney General and the Director of National Intelligence may authorize jointly, for periods of up to one year, the electronic monitoring (to include the collection of stored communications) of persons reasonably believed to be located outside of the United States for the purpose of acquiring foreign intelligence information."

Gerry, Brett

From: [redacted] FOIA Exemptions b(2) and (6) EFF2AG(1)-39  
 Sent: Tuesday, October 09, 2007 11:39 PM  
 To: Mike Davidson  
 Cc: Gerry, Brett (OLP); Eisenberg, John; Jack Livingston; K Rice; Starzak, Alissa (Intelligence);  
 Christine Healey; Nichols, Carl (CIV)  
 Subject: Re: new drafts

Great, thanks.

----- Original Message -----  
 From: "Davidson, M (Intelligence)" [redacted]@ssci.senate.gov] FOIA Exemption b(6) EFF2AG(1)-40  
 Sent: 10/09/2007 09:26 PM AST  
 To: benjaap  
 Cc: <Brett.Gerry@usdoj.gov>; <John.Eisenberg@usdoj.gov>; Livingston, J (Intelligence)" <[redacted]@ssci.senate.gov>; Rice, K (Intelligence)" <[redacted]@ssci.senate.gov>; Starzak, Alissa (Intelligence)" <[redacted]@ssci.senate.gov>; Healey, C (Intelligence)" <[redacted]@ssci.senate.gov>; <Carl.Nichols@usdoj.gov>  
 Subject: Re: new drafts

Vito and Patrick will be most welcome.

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----  
 From: Ben Powell [redacted] FOIA Exemptions b(2) and (6) EFF2AG(1)-41  
 To: Davidson, M (Intelligence)  
 Cc: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov>; Eisenberg, John <John.Eisenberg@usdoj.gov>; Livingston, J (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Nichols, Carl (CIV) <Carl.Nichols@usdoj.gov>  
 Sent: Tue Oct 09 20:54:27 2007  
 Subject: Re: new drafts

See you at 1pm. Would like to have Vito/Patrick join us given how short the deadlines are and want to make sure we do not overlook a critical issue. Let me know if that is a problem. may need a few extra chairs.

Davidson, M (Intelligence) wrote:

>Yes, let's start at 1 pm.  
 >  
 >Ben and Carl -- does that work for you as well?  
 >  
 >Mike  
 >

>-----Original Message-----  
 >From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] EFF2AG(1)-42  
 >Sent: Tuesday, October 09, 2007 10:43 AM  
 >To: Davidson, M (Intelligence); [redacted] FOIA Exemptions b(2) and (6)  
 >Cc: Eisenberg, John; Livingston, J (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Healey, C

(Intelligence); Nichols, Carl (CIV)

>Subject: Re: new drafts

>

>Mike-

>

>I will be there, but am hoping we could start a bit later (say 1pm). (I have a conflict in the morning that will be very hard to break.). I know tomorrow am is bad for john also.

>

>Thanks,

>Brett

FOIA Exemptions b(2) and (6)

FOIA Exemption b(6)

>----- Original Message -----

>From: Davidson, M (Intelligence) <[redacted]@ssci.senate.gov>

EFF2AG(1)-43

>To: Ben Powell <[redacted]@ssci.senate.gov>

>Cc: Gerry, Brett (OLP); Eisenberg, John, Livingston, J (Intelligence) <[redacted]@ssci.senate.gov>; Rice, K (Intelligence) <[redacted]@ssci.senate.gov>; Starzak, Alissa (Intelligence) <[redacted]@ssci.senate.gov>; Healey, C (Intelligence) <[redacted]@ssci.senate.gov>; Nichols, Carl (CIV)

>Sent: Tue Oct 09 10:33:49 2007

>Subject: RE: new drafts

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>Ben, Brett, John, and Carl:

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>In the hope that tomorrow is OK for a marathon session, I've reserved a conference room from 10 on.

>On our end, we're on the hook to settle by sometime Thursday on what we'll be recommending that the Chairman and Vice Chairman present to the Committee for its markup on October 18.

>Let us know what will be possible on your end.

>Mike

>From: Ben Powell [mailto:[redacted]]

FOIA Exemptions b(2) and (6)

EFF2AG(1)-44

>Sent: Monday, October 08, 2007 12:15 PM

>To: Davidson, M (Intelligence)

>Cc: Brett.Gerry@usdoj.gov; john.eisenberg@usdoj.gov; Livingston, J (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); carl.nichols@usdoj.gov

>Subject: Re: new drafts

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>Mike -- If I read it right, I agree that we will need the #1 transition procedure as you suggest and it is important. I want to look more at #2 and #3.

> We got together last night and discussed a couple of issues. We are very concerned about creating a new definition of "communications". One concern is that we will miss something and then place a future President/Congress back into a TSP-like world -- and perhaps over a technical issue. For example, suppose there is some new communication tech that people overseas are using and we are able to get great intel from it. But for some reason it doesn't fit the definition b/c we didn't get it right. But then there is a fear that modifying it through Congress will be the subject of speculation and people will figure out (probably pretty easily) "oh, they know want to get [insert new tech here -- I don't know, make up something -- combined HDTV, Internet, VOIP, video teleconferencing via laser, quantum remote computing]". Also, we fear creating a new cottage industry at DOJ/OIPR where everything is delayed while everyone checks each new data piece to see if it fits the definition

of communication, when the real focus should be the target.

> We also worry that we will need to make the definitions so broad, that it will raise the "scary hypotheticals" problem and therefore we will still need to put in explicit limitations (as we would do anyways with the current PAA) such as "Act does not authorize opening mail, searching homes of Americans, etc."

> In any event, no need to debate it via email, but just some things we are looking deeply at and will want to sit down and discuss with you/Chris/Jack/Kathleen/Alissa this week.

>Davidson, M (Intelligence) wrote:

EFF2AG(1)-45

>Sunday multi-tasking -- Redskins and FISA.

>(1) The PAA's transition procedures includes:

>"The Government also may file new applications, and the court established under section 103(a) of the Foreign Intelligence Surveillance Act ... shall enter orders granting such applications ... as long as the application meets the requirements set forth under the provisions of such Act as in effect on the day before the effective date of this Act."

>It could turn out to be a useful, indeed necessary provision, if for example a question arises about the scope or constitutionality of the PAA (or its successor). In place of "as in effect on the day before the effective date of this Act," we could substitute "as in effect on the day before the effective date of the Protect America Act."

>(2) The necessity of the "clarification" or "limitation" on the definition of electronic surveillance remains unclear. Why isn't the affirmative grant of collection authority sufficient? In our report how do we complete this sentence: "The redefinition of electronic surveillance is required because \_\_\_\_\_."

>(3) But if we do include it, can we deal with the impact of the redefinition on the various places that the term electronic surveillance appears -- sections 102, 106, 109, 110, 301(5), by limiting the redefinition as follows: "Nothing in the definition of electronic surveillance under section 101(f), as applied to sections 104 and 105, shall be construed ..."

>Happy Columbus Day to all.

>Mike

>Sent from my BlackBerry Wireless Handheld

FOIA Exemptions b(2) and (6)

>----- Original Message -----

>From: Ben Powell <mailto: [redacted]>

EFF2AG(1)-46

>To: Davidson, M (Intelligence)

>Cc: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov> <mailto:Brett.Gerry@usdoj.gov> ; john.eisenberg@usdoj.gov <john.eisenberg@usdoj.gov> <mailto:john.eisenberg@usdoj.gov> ; Livingston, J (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); carl.nichols@usdoj.gov <carl.nichols@usdoj.gov>

>Sent: Fri Oct 05 17:58:54 2007

>Subject: Re: new drafts

>Thanks Mike. We will take a look and we can give you more detail in secure spaces about the current practice. Will have to check on schedule with Brett.

>Davidson, M (Intelligence) wrote:

EFF2AG(1)-47

Ben, Brett, and John:

I wanted to flag for your attention a paragraph that we added, in the draft sent earlier today, to the section on Directives

> - paragraph (2), on page 5, line 2-3.

> It provides that each directive shall contain a list of specific targets.

> The paragraph reflects a suggestion we received here that it would help allay the driftnet concern if it were clear that directives addressed specific targets.

> But, in including it, I realize that we don't know whether the practice now is for directives to include specific selectors, and hence whether a provision such as the one proposed would be consistent with current practice or a departure from it.

> When you do send your comments, your observations about this paragraph would be appreciated.

> Looking at next week, perhaps we should pick a time for a discussion that will go through every matter that should be discussed, and not end until we have done that.

> How about starting Wednesday morning?

> Mike

EFF2AG(1)-48

Not responsive



Gerry, Brett

FOIA Exemption b(6)

From: Eisenberg, John  
Sent: Monday, October 15, 2007 2:30 PM  
To: Gerry, Brett (OLP); [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov  
Cc: [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov  
Subject: RE: PAA expiration

EFF2AG(1)-58

And I think correct. The President signed on August 5, if I remember correctly. Feb 1 is 180 days later.

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

From: Gerry, Brett (OLP)  
Sent: Monday, October 15, 2007 2:29 PM  
To: [redacted]@ssci.senate.gov; Eisenberg, John; [redacted]@ssci.senate.gov  
Cc: [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov  
Subject: Re: PAA expiration

FOIA Exemption b(6)

EFF2AG(1)-59

That is a safe approach.

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

From: Healey, C (Intelligence) [redacted]@ssci.senate.gov  
To: Eisenberg, John; Livingston, J (Intelligence) <[redacted]@ssci.senate.gov>; Gerry, Brett (OLP)  
Cc: Davidson, M (Intelligence) [redacted]@ssci.senate.gov; Starzak, Alissa (Intelligence) [redacted]@ssci.senate.gov; Rice, K (Intelligence) [redacted]@ssci.senate.gov  
Sent: Mon Oct 15 14:25:42 2007  
Subject: RE: PAA expiration

FOIA Exemption b(6)

EFF2AG(1)-60

I will go with the President's statement that it is February 1st.

Christine Healey  
Senate Select Committee on Intelligence  
[redacted] (direct)  
[redacted]@ssci.senate.gov

FOIA Exemption b(6)

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

From: Eisenberg, John [mailto:John.Eisenberg@usdoj.gov]  
Sent: Monday, October 15, 2007 2:20 PM  
To: Healey, C (Intelligence); Livingston, J (Intelligence); Gerry, Brett (OLP)  
Cc: Davidson, M (Intelligence); Starzak, Alissa (Intelligence); Rice, K (Intelligence)  
Subject: RE: PAA expiration

EFF2AG(1)-61

I haven't thought about it--perhaps because in my heart of hearts I continue to believe Congress will make it permanent!

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

From: Healey, C (Intelligence) [mailto:[redacted]@ssci.senate.gov]  
Sent: Monday, October 15, 2007 2:19 PM  
To: Eisenberg, John; Livingston, J (Intelligence); Gerry, Brett (OLP)  
Cc: Davidson, M (Intelligence); Starzak, Alissa (Intelligence); Rice, K (Intelligence)  
Subject: PAA expiration

FOIA Exemption b(6)

EFF2AG(1)-62

On a different note, what does OLC consider to be the day that the PAA expires?

Christine Healey  
Senate Select Committee on Intelligence  
[redacted] (direct)

FOIA Exemption b(6)

C\_healey@ssci.senate.gov

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

From: Eisenberg, John [mailto:John.Eisenberg@usdoj.gov]  
Sent: Monday, October 15, 2007 1:12 PM  
To: Livingston, J (Intelligence); Gerry, Brett (OLP); Ben Powell; Vito  
Potenza (work); Demers, John (NSD); [REDACTED] FOIA Exemption b(3)  
Cc: Davidson, M (Intelligence); Healey, C (Intelligence); Starzak,  
Alissa (Intelligence); Rice, K (Intelligence)  
Subject: RE: revisions

EFF2AG(1)-63

I think "surveillance" is fine here because it is a limitation on  
"electronic surveillance." I think you're probably right with respect  
to "directed."

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

From: Livingston, J (Intelligence) [mailto:[REDACTED]@ssci.senate.gov]  
Sent: Monday, October 15, 2007 1:09 PM  
To: Gerry, Brett (OLP); Ben Powell; Vito Potenza (work); Demers, John  
(NSD); [REDACTED]; Eisenberg, John FOIA Exemption b(3)  
Cc: Davidson, M (Intelligence); Healey, C (Intelligence); Starzak,  
Alissa (Intelligence); Rice, K (Intelligence)  
Subject: FW: revisions

FOIA Exemption b(6)

EFF2AG(1)-64

Are we sure we don't want to modify 701 to read "Nothing in the  
definition of electronic surveillance under section 101(f) shall be  
construed to encompass [any acquisition] that is [targeted] in  
accordance with this title at a person reasonably believed to be located  
outside the United States."?

Doesn't this make more sense than the current language of "Nothing in  
the definition of electronic surveillance under section 101(f) shall be  
construed to encompass [surveillance] that is [directed] in accordance  
with this title at a person reasonably believed to be located outside  
the United States."?

Gerry, Brett

EFF2AG(1)-65

FOIA Exemption b(5),  
WIF, Group 1

EFF2AG(1)-66

FOIA Exemption b(5),  
WIF, Group 1

FOIA Exemption b(6)

EFF2AG(1)-67

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

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov  
To: Gerry, Brett (OLP); Ben Powell [REDACTED]; Eisenberg, John; Demers, John (NSD); Vito Potenza (work) [REDACTED]; Caproni, Valerie E' <Valerie.Caproni@ic.fbi.gov>  
Cc: Wainstein, Kenneth (NSD)  
Sent: Tue Oct 16 21:34:56 2007  
Subject: Amendments

FOIA Exemptions  
b(2) and (6)

FOIA Exemption b(3)

Senator Bond and Senator Rockefeller have not yet reached a deal on the Chairman/Vice Chairman mark. The deadline for amendments is tomorrow at 12:00 noon.

We are presently putting together amendments on the following issues in the event that a deal to protect the mark is not reached.

- 1) Define electronic surveillance (technology neutral DNI April definition)
- 2) Define contents consistent with Title III
- 3) Add WMD to agent of a foreign power, with conforming amendments
- 4) Strike second element of probable cause physical search applications to make it consistent with the Court's finding
- 5) Add to exception for emergency authorizations not approved by the FISC to allow retention of "critical foreign intelligence" in addition to current "threat of death or serious bodily harm"
- 6) Add beefed up immunity language for carriers in the foreign targeting procedures.
- 7) Add back in the requirement that the FISC act on the any challenge of a directive within 72 hours and put the frivolous wording back in.

You all had mentioned that you had changes to 106, so maybe some of those could form the basis of amendments. Please don't provide technical assistance or do any substantive

work. Ideas are fine, we'll make our leg counsel do the work. I'm just willing to entertain your ideas, if you have any FISA fixes that you've been dying to have. Don't spend much time on this, because this entire exercise could be a waste of time if we reach an agreement.

One caveat, no need to suggest the redefinition of agent of a foreign power to include non-us persons with foreign intelligence information. Thanks.