

AMENDMENT NO. _____ Calendar No. _____

Purpose: To expedite the review of challenges to directives
under the Foreign Intelligence Surveillance Act of 1978.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978,
to modernize and streamline the provisions of that Act,
and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. ROCKEFELLER
(for himself and Mr. BOND)

Viz:

1 On page 13, strike lines 3 through 13, and insert the
2 following:

3 “(C) STANDARDS FOR REVIEW.—A judge
4 considering a petition to modify or set aside a
5 directive may grant such petition only if the
6 judge finds that the directive does not meet the
7 requirements of this section, or is otherwise un-
8 lawful.

1 “(D) PROCEDURES FOR INITIAL RE-
2 VIEW.—A judge shall conduct an initial review
3 not later than 5 days after being assigned a pe-
4 tition described in subparagraph (C). If the
5 judge determines that the petition consists of
6 claims, defenses, or other legal contentions that
7 are not warranted by existing law or by a non-
8 frivolous argument for extending, modifying, or
9 reversing existing law or for establishing new
10 law, the judge shall immediately deny the peti-
11 tion and affirm the directive or any part of the
12 directive that is the subject of the petition and
13 order the recipient to comply with the directive
14 or any part of it. Upon making such a deter-
15 mination or promptly thereafter, the judge shall
16 provide a written statement for the record of
17 the reasons for a determination under this sub-
18 paragraph.

19 “(E) PROCEDURES FOR PLENARY RE-
20 VIEW.—If a judge determines that a petition
21 described in subparagraph (C) requires plenary
22 review, the judge shall affirm, modify, or set
23 aside the directive that is the subject of that pe-
24 tition not later than 30 days after being as-
25 signed the petition, unless the judge, by order

1 for reasons stated, extends that time as nec-
2 essary to comport with the due process clause
3 of the fifth amendment to the Constitution of
4 the United States. Unless the judge sets aside
5 the directive, the judge shall immediately affirm
6 or affirm with modifications the directive, and
7 order the recipient to comply with the directive
8 in its entirety or as modified. The judge shall
9 provide a written statement for the records of
10 the reasons for a determination under this sub-
11 paragraph.

12 On page 13, line 14, strike "(D)" and insert "(F)".

13 On page 13, line 17, strike "(E)" and insert "(G)".

14 On page 14, strike lines 10 through 19, and insert
15 the following:

16 "(C) STANDARDS FOR REVIEW.—A judge
17 considering a petition filed under subparagraph
18 (A) shall issue an order requiring the electronic
19 communication service provider to comply with
20 the directive or any part of it, as issued or as
21 modified, if the judge finds that the directive

1 meets the requirements of this section, and is
2 otherwise lawful.

3 “(D) PROCEDURES FOR REVIEW.—The
4 judge shall render a determination not later
5 than 30 days after being assigned a petition
6 filed under subparagraph (A), unless the judge,
7 by order for reasons stated, extends that time
8 if necessary to comport with the due process
9 clause of the fifth amendment to the Constitu-
10 tion of the United States. The judge shall pro-
11 vide a written statement for the record of the
12 reasons for a determination under this para-
13 graph.

14 On page 14, line 20, strike “(D)” and insert “(E)”.

15 On page 14, line 24, strike “(E)” and insert “(F)”.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To improve the bill.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978,
to modernize and streamline the provisions of that Act,
and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. ROCKEFELLER
(for himself and Mr. BOND)

Viz:

1 On page 6, line 13, strike “and” and all that follows
2 through page 10, line 5, and insert the following:

3 “(4) shall not intentionally acquire any commu-
4 nication as to which the sender and all intended re-
5 cipients are known at the time of the acquisition to
6 be located in the United States; and

7 “(5) shall be conducted in a manner consistent
8 with the fourth amendment to the Constitution of
9 the United States.

1 “(c) CONDUCT OF ACQUISITION.—An acquisition au-
2 thorized under subsection (a) may be conducted only in
3 accordance with—

4 “(1) a certification made by the Attorney Gen-
5 eral and the Director of National Intelligence pursu-
6 ant to subsection (f); and

7 “(2) the targeting and minimization procedures
8 required pursuant to subsections (d) and (e).

9 “(d) TARGETING PROCEDURES.—

10 “(1) REQUIREMENT TO ADOPT.—The Attorney
11 General, in consultation with the Director of Na-
12 tional Intelligence, shall adopt targeting procedures
13 that are reasonably designed to ensure that any ac-
14 quisition authorized under subsection (a) is limited
15 to targeting persons reasonably believed to be lo-
16 cated outside the United States and does not result
17 in the intentional acquisition of any communication
18 as to which the sender and all intended recipients
19 are known at the time of the acquisition to be lo-
20 cated in the United States.

21 “(2) JUDICIAL REVIEW.—The procedures re-
22 ferred to in paragraph (1) shall be subject to judicial
23 review pursuant to subsection (h).

24 “(e) MINIMIZATION PROCEDURES.—

1 “(1) REQUIREMENT TO ADOPT.—The Attorney
2 General, in consultation with the Director of Na-
3 tional Intelligence, shall adopt, consistent with the
4 requirements of section 101(h) or section 301(4),
5 minimization procedures for acquisitions authorized
6 under subsection (a).

7 “(2) JUDICIAL REVIEW.—The minimization
8 procedures required by this subsection shall be sub-
9 ject to judicial review pursuant to subsection (h).

10 “(f) CERTIFICATION.—

11 “(1) IN GENERAL.—

12 “(A) REQUIREMENT.—Subject to subpara-
13 graph (B), prior to the initiation of an acquisi-
14 tion authorized under subsection (a), the Attor-
15 ney General and the Director of National Intel-
16 ligence shall provide, under oath, a written cer-
17 tification, as described in this subsection.

18 “(B) EXCEPTION.—If the Attorney Gen-
19 eral and the Director of National Intelligence
20 determine that immediate action by the Govern-
21 ment is required and time does not permit the
22 preparation of a certification under this sub-
23 section prior to the initiation of an acquisition,
24 the Attorney General and the Director of Na-
25 tional Intelligence shall prepare such certifi-

1 cation, including such determination, as soon as
2 possible but in no event more than 168 hours
3 after such determination is made.

4 “(2) REQUIREMENTS.—A certification made
5 under this subsection shall—

6 “(A) attest that—

7 “(i) there are reasonable procedures
8 in place for determining that the acqui-
9 sition authorized under subsection (a) is tar-
10 geted at persons reasonably believed to be
11 located outside the United States and that
12 such procedures have been approved by, or
13 will be submitted in not more than 5 days
14 for approval by, the Foreign Intelligence
15 Surveillance Court pursuant to subsection
16 (h);

17 “(ii) there are reasonable procedures
18 in place for determining that the acqui-
19 sition authorized under subsection (a) does
20 not result in the intentional acquisition of
21 any communication as to which the sender
22 and all intended recipients are known at
23 the time of the acquisition to be located in
24 the United States, and that such proce-
25 dures have been approved by, or will be

1 submitted in not more than 5 days for ap-
2 proval by, the Foreign Intelligence Surveil-
3 lance Court pursuant to subsection (h);

4 “(iii) the procedures referred to in
5 clauses (i) and (ii) are consistent with the
6 requirements of the fourth amendment to
7 the Constitution of the United States and
8 do not permit the intentional targeting of
9 any person who is known at the time of ac-
10 quisition to be located in the United States
11 or the intentional acquisition of any com-
12 munication as to which the sender and all
13 intended recipients are known at the time
14 of acquisition to be located in the United
15 States;

16 “(iv) a significant purpose of the ac-
17 quisition is to obtain foreign intelligence
18 information;

19 “(v) the minimization procedures to
20 be used with respect to such acquisition—

21 “(I) meet the definition of mini-
22 mization procedures under section
23 101(h) or section 301(4); and

24 “(II) have been approved by, or
25 will be submitted in not more than 5

1 days for approval by, the Foreign In-
2 telligence Surveillance Court pursuant
3 to subsection (h);

4 “(vi) the acquisition involves obtaining
5 the foreign intelligence information from or
6 with the assistance of an electronic com-
7 munication service provider; and

8 “(vii) the acquisition does not con-
9 stitute electronic surveillance, as limited by
10 section 701; and

11 On page 13, strike lines 3 through 13, and insert the
12 following:

13 “(C) STANDARDS FOR REVIEW.—A judge
14 considering a petition to modify or set aside a
15 directive may grant such petition only if the
16 judge finds that the directive does not meet the
17 requirements of this section, or is otherwise un-
18 lawful.

19 “(D) PROCEDURES FOR INITIAL RE-
20 VIEW.—A judge shall conduct an initial review
21 not later than 5 days after being assigned a pe-
22 tition described in subparagraph (C). If the
23 judge determines that the petition consists of
24 claims, defenses, or other legal contentions that

1 are not warranted by existing law or by a non-
2 frivolous argument for extending, modifying, or
3 reversing existing law or for establishing new
4 law, the judge shall immediately deny the peti-
5 tion and affirm the directive or any part of the
6 directive that is the subject of the petition and
7 order the recipient to comply with the directive
8 or any part of it. Upon making such a deter-
9 mination or promptly thereafter, the judge shall
10 provide a written statement for the record of
11 the reasons for a determination under this sub-
12 paragraph.

13 “(E) PROCEDURES FOR PLENARY RE-
14 VIEW.—If a judge determines that a petition
15 described in subparagraph (C) requires plenary
16 review, the judge shall affirm, modify, or set
17 aside the directive that is the subject of that pe-
18 tition not later than 30 days after being as-
19 signed the petition, unless the judge, by order
20 for reasons stated, extends that time as nec-
21 essary to comport with the due process clause
22 of the fifth amendment to the Constitution of
23 the United States. Unless the judge sets aside
24 the directive, the judge shall immediately affirm
25 or affirm with modifications the directive, and

1 order the recipient to comply with the directive
2 in its entirety or as modified. The judge shall
3 provide a written statement for the records of
4 the reasons for a determination under this sub-
5 paragraph.

6 On page 13, line 14, strike "(D)" and insert "(F)".

7 On page 13, line 17, strike "(E)" and insert "(G)".

8 On page 14, strike lines 10 through 19, and insert
9 the following:

10 “(C) STANDARDS FOR REVIEW.—A judge
11 considering a petition filed under subparagraph
12 (A) shall issue an order requiring the electronic
13 communication service provider to comply with
14 the directive or any part of it, as issued or as
15 modified, if the judge finds that the directive
16 meets the requirements of this section, and is
17 otherwise lawful.

18 “(D) PROCEDURES FOR REVIEW.—The
19 judge shall render a determination not later
20 than 30 days after being assigned a petition
21 filed under subparagraph (A), unless the judge,
22 by order for reasons stated, extends that time

1 if necessary to comport with the due process
2 clause of the fifth amendment to the Constitu-
3 tion of the United States. The judge shall pro-
4 vide a written statement for the record of the
5 reasons for a determination under this para-
6 graph.

7 On page 14, line 20, strike "(D)" and insert "(E)".

8 On page 14, line 24, strike "(E)" and insert "(F)".

9 On page 15, beginning on line 10, strike "not later
10 than 7 days after the issuance of such decision".

11 On page 17, line 2, strike "States." and insert
12 "States and does not result in the intentional acquisition
13 of any communication as to which the sender and all in-
14 tended recipients are known at the time of the acquisition
15 to be located in the United States.".

16 On page 19, strike lines 10 through 12 and insert
17 the following:

18 "(ii) if the Government appeals an
19 order under this section, until the Court of

1 Review enters an order under subpara-
2 graph (C).

3 “(C) IMPLEMENTATION PENDING AP-
4 PEAL.—Not later than 60 days after the filing
5 of an appeal of an order under paragraph
6 (5)(B) directing the correction of a deficiency,
7 the Court of Review shall determine, and enter
8 a corresponding order regarding, whether all or
9 any part of the correction order, as issued or
10 modified, shall be implemented during the pend-
11 ency of the appeal.

12 On page 19, line 13, strike “(C)” and insert “(D)”.

13 On page 70, strike line 1 and insert the following:

14 **SEC. 110. WEAPONS OF MASS DESTRUCTION.**

15 (a) **DEFINITIONS.**—

16 (1) **FOREIGN POWER.**—Subsection (a)(4) of sec-
17 tion 101 of the Foreign Intelligence Surveillance Act
18 of 1978 (50 U.S.C. 1801(a)(4)) is amended by in-
19 serting “, the international proliferation of weapons
20 of mass destruction,” after “international ter-
21 rorism”.

22 (2) **AGENT OF A FOREIGN POWER.**—Subsection
23 (b)(1) of such section 101 is amended—

1 (A) in subparagraph (B), by striking “or”

2 at the end

3 (B) in subparagraph (C), by striking “or”

4 at the end; and

5 (C) by adding at the end the following new

6 subparagraphs:

7 “(D) engages in the international prolifera-

8 tion of weapons of mass destruction, or activi-

9 ties in preparation therefor; or

10 “(E) engages in the international prolifera-

11 tion of weapons of mass destruction, or activi-

12 ties in preparation therefor, for or on behalf of

13 a foreign power; or”.

14 (3) FOREIGN INTELLIGENCE INFORMATION.—

15 Subsection (e)(1)(B) of such section 101 is amended

16 by striking “sabotage or international terrorism”

17 and inserting “sabotage, international terrorism, or

18 the international proliferation of weapons of mass

19 destruction”.

20 (4) WEAPON OF MASS DESTRUCTION.—Such

21 section 101 is amended by inserting after subsection

22 (o) the following:

23 “(p) ‘Weapon of mass destruction’ means—

24 “(1) any destructive device described in section

25 921(a)(4)(A) of title 18, United States Code, that is

1 intended or has the capability to cause death or seri-
2 ous bodily injury to a significant number of people;

3 “(2) any weapon that is designed or intended to
4 cause death or serious bodily injury through the re-
5 lease, dissemination, or impact of toxic or poisonous
6 chemicals or their precursors;

7 “(3) any weapon involving a biological agent,
8 toxin, or vector (as such terms are defined in section
9 178 of title 18, United States Code); or

10 “(4) any weapon that is designed to release ra-
11 diation or radioactivity at a level dangerous to
12 human life.”

13 (b) USE OF INFORMATION.—

14 (1) IN GENERAL.—Section 106(k)(1)(B) of the
15 Foreign Intelligence Surveillance Act of 1978 (50
16 U.S.C. 1806(k)(1)(B)) is amended by striking “sab-
17 otage or international terrorism” and inserting “sab-
18 otage, international terrorism, or the international
19 proliferation of weapons of mass destruction”.

20 (2) PHYSICAL SEARCHES.—Section
21 305(k)(1)(B) of such Act (50 U.S.C. 1825(k)(1)(B))
22 is amended by striking “sabotage or international
23 terrorism” and inserting “sabotage, international
24 terrorism, or the international proliferation of weap-
25 ons of mass destruction”.

1 (c) TECHNICAL AND CONFORMING AMENDMENT.—

2 Section 301(1) of the Foreign Intelligence Surveillance
3 Act of 1978 (50 U.S.C. 1821(1)) is amended by inserting
4 “‘weapon of mass destruction,’” after “‘person’,”.

5 SEC. 111. TECHNICAL AND CONFORMING AMENDMENTS.

6 On page 84, line 12, strike “and 109” and insert
7 “109, and 110”.

8 On page 87, line 12, strike “and 109” and insert
9 “109, and 110”.

10 On page 87, line 21, strike “and 109” and insert
11 “109, and 110”.

12 On page 88, line 10, strike “and 109” and insert
13 “109, and 110”.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To require that certain records be submitted to Congress.

IN THE SENATE OF THE UNITED STATES—110th Cong., 2d Sess.

S. 2248

To amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that Act, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. ROCKEFELLER
(for himself and Mr. BOND)

Viz:

- 1 On page 56, strike line 14 and all that follows
- 2 through page 57, line 14, and insert the following:
- 3 (b) REPORTS BY ATTORNEY GENERAL ON CERTAIN
- 4 OTHER ORDERS.—Such section 601 is further amended
- 5 by adding at the end the following:
- 6 “(c) SUBMISSIONS TO CONGRESS.—The Attorney
- 7 General shall submit to the committees of Congress re-
- 8 ferred to in subsection (a)—

1 “(1) a copy of any decision, order, or opinion
2 issued by the Foreign Intelligence Surveillance Court
3 or the Foreign Intelligence Surveillance Court of Re-
4 view that includes significant construction or inter-
5 pretation of any provision of this Act, and any
6 pleadings, applications, or memoranda of law associ-
7 ated with such decision, order, or opinion, not later
8 than 45 days after such decision, order, or opinion
9 is issued; and

10 “(2) a copy of any such decision, order, or opin-
11 ion, and the pleadings, applications, or memoranda
12 of law associated with such decision, order, or opin-
13 ion, that was issued during the 5-year period ending
14 on the date of the enactment of the FISA Amend-
15 ments Act of 2008 and not previously submitted in
16 a report under subsection (a).

17 “(d) PROTECTION OF NATIONAL SECURITY.—The
18 Attorney General, in consultation with the Director of Na-
19 tional Intelligence, may authorize redactions of materials
20 described in subsection (c) that are provided to the com-
21 mittees of Congress referred to in subsection (a), if such
22 redactions are necessary to protect the national security
23 of the United States and are limited to particularly sen-
24 sitive sources and methods information or the identities
25 of targets.”.

1 (c) DEFINITIONS.—Such section 601, as amended by
2 subsections (a) and (b), is further amended by adding at
3 the end the following:

4 “(e) DEFINITIONS.—In this section:

5 “(1) FOREIGN INTELLIGENCE SURVEILLANCE
6 COURT; COURT.—The term “‘Foreign Intelligence
7 Surveillance Court’” means the court established by
8 section 103(a).

9 “(2) FOREIGN INTELLIGENCE SURVEILLANCE
10 COURT OF REVIEW; COURT OF REVIEW.—The term
11 ‘Foreign Intelligence Surveillance Court of Review’
12 means the court established by section 103(b).”.

Berhanu, Tsedey

From: Davidson, M (Intelligence) [mailto:____@ssci.senate.gov] b6
Sent: Tuesday, February 05, 2008 3:28 PM
To: Eisenberg, John
Cc: Demers, John; Livingston, J (Intelligence)
Subject: RE: Challenges/Enforcement -- Directives

Even if the due process standard remained, should the court at least also be authorized to grant an extension with the consent of the parties?

For example, in setting a briefing schedule both the Government and the provider, in a particular case, might agree that because of the complexity of a particular case additional time is needed. Or, they may be negotiating a resolution. Or they may agree that another case, pending decision, will resolve their dispute.

From: Eisenberg, John [mailto:John.Eisenberg@usdoj.gov]
Sent: Tuesday, February 05, 2008 3:09 PM
To: Davidson, M (Intelligence)
Cc: Demers, John; Livingston, J (Intelligence)
Subject: RE: Challenges/Enforcement -- Directives

In general, we (or perhaps I should say I) think that the time limit should be rigid. I acknowledge that there may be circumstances where due process may require an extension. While I don't know that the statute has to have that exception written in it (a court I think would read it into the statute), I can understand why one might think that the statute itself should recognize this possibility. But given what is at issue, I don't think less than this standard--mandated by the Constitution--ought to justify additional time. I also do not want to constitutionalize things, but I think of that as a circumstance in which a court says that the Constitution requires X, Y, or Z. That stops Congress from acting. I don't think that covers Congress saying that an extension is permissible when the Constitution requires it. But I am happy to drop that part too as unnecessary!

From: Davidson, M (Intelligence) [mailto:____@ssci.senate.gov] b6
Sent: Tuesday, February 05, 2008 2:09 PM
To: Eisenberg, John
Cc: Demers, John; Livingston, J (Intelligence)
Subject: RE: Challenges/Enforcement -- Directives

John E.,

Not wishing to unduly extend the correspondence, what I still can't comprehend is why Congress would turn each and every question about an extension in directive cases into a constitutional case -- is the extension required by the due process clause? -- given that there may be a host of practical reasons, often of interest to the Government, why a rigid time limit won't work.

As a matter of general philosophy, I'm going to guess that from time to time, at least, you think that the federal courts have gone astray when they find new requirements in constitutional provisions. I may be less troubled by that, but I do think that constitutionalizing (terrible word) the law of extensions goes too far.

I had always thought that "compelling" is a tough standard. What would take it a notch up?

Mike

5/15/2008

93

From: Eisenberg, John [mailto:John.Eisenberg@usdoj.gov]
Sent: Tuesday, February 05, 2008 12:19 PM
To: Davidson, M (Intelligence); Demers, John
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence);
Subject: RE: Challenges/Enforcement -- Directives

Mike:

Thanks. I worry that this language would be too flexible given what is at stake here. I suppose we were looking for a strong statement from Congress that a compelling reason would be one that was required by the Constitution and no more.
John

From: Davidson, M (Intelligence) [mailto: @ssci.senate.gov] b6
Sent: Tuesday, February 05, 2008 11:59 AM
To: Demers, John
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John
Subject: RE: Challenges/Enforcement -- Directives b6

Just talked with Jack about pending matters --

Let's say -- "unless the judge, by order, for compelling reasons stated, extends the time if necessary." So, no trivial reason, or mere convenience, but for compelling reasons which the court has to write down.

Mike

From: Davidson, M (Intelligence)
Sent: Monday, February 04, 2008 8:01 PM
To: 'Demers, John'
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John
Subject: RE: Challenges/Enforcement -- Directives b6

John:

Thanks for getting back.

The court, I imagine, had to write its rule in terms of the Constitution because it decided that only by invoking the Constitution could it ameliorate the rigidity of the statute.

It would be terrific to decide both challenges and enforcement proceedings in 30 days. The question is whether every question about an extension -- and in litigation we all know that there are circumstances that warrant them, e.g., an illness, a priority (NSD lawyers may be diverted to another more pressing matter), the pendency of another case that may resolve the dispute -- would have to be decided in constitutional terms whether there is a due process violation.

5/15/2008

I imagine on this one both the American Constitution Society and The Federalist Society would agree. Of all matters that should not become a constitutional decision, one is whether three or five or ten more days is needed for parties to present their arguments and for the court to act on them.

It's not a matter of weakening a standard but of recognizing, I believe, that of all the important things for which the due process clause should be invoked, deciding whether an NSD or provider lawyer's bout with the flu, or the judge's, is not one. Requiring that these matters "be decided in 30 days unless, for reasons stated in an order, the court determines that additional time is needed, with due regard for national security," or something like that, would achieve the objective.

Mike

From: Demers, John [mailto:____@usdoj.gov]
Sent: Monday, February 04, 2008 7:13 PM
To: Davidson, M (Intelligence)
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John
Subject: RE: Challenges/Enforcement -- Directives

Mike,

Thank you for all your work on this. I too am disappointed that the current Senator Rockefeller/ Senator Bond draft would not simply be agreed to. I thought that the 30-day period with the possibility of an extension as modelled after the court's own rules was quite reasonable. This is particularly true in light of the importance of the collection that would be at issue and that would not be on-going in the circumstances to which the time periods would apply. Thirty days is a tremendous lengthening beyond the current 72-hour requirement. Every day that we're not collecting the intelligence means not only a delay, but also the chance we may never get that intelligence at all, or not get it in time to act upon it. Thus, I'm concerned with any weakening of standard for extensions beyond that which the Constitution requires.

John

From: Davidson, M (Intelligence) [mailto:____@ssci.senate.gov] b6
Sent: Friday, February 01, 2008 4:24 PM
To: Demers, John
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John
Subject: RE: Challenges/Enforcement -- Directives

John,

I am attaching the modified amendment, which includes the language that grew out of the exchange below, providing for a decision "not later than 30 days after being assigned the petition, unless the judge, by order for reasons stated, extends that time as necessary to comport with the due process clause of the fifth amendment to the Constitution of the United States."

We were hoping that the amendment to the challenges/enforcement provision (a copy of which is attached) was one of several that could be accepted by agreement. That didn't happen. There was an objection based on the limitation of the extension power to when required by the due process clause. So, now the amendment is set down, under the UC, for debate and a vote.

Jack, Kathleen, and I spoke this morning, and I said that I would share with all my concerns and a suggestion.

5/15/2008

Overall, this is the kind of matter that I'm sure Members will want the combined legal Executive/Legislative Branch brainpower among us to find a solution that won't require a Senate vote.

As drafted, it would require the FISC to go through a constitutional analysis on every extension matter in challenges and enforcement proceedings. There are, of course, lots of reasons why additional time might be needed. Some cases may be more complex than others. The judge may be engaged in other FISC cases that have greater national security significance. The government and the carrier might need time to negotiate an accommodation. The court may be considering a related case, the decision in which might guide, if not control, the outcome. The issues might be difficult and although a decision could be reached without offending fundamental fairness, a couple of more days might allow for a better or at least better reasoned decision. And so on.

I hadn't been thinking about the AEDPA, mentioned in your note, and didn't get to look at it until today. The AEDPA, 28 USC 2266, provides for determinations in at least 120 days, and for an additional 30 days based on the service of the "ends of justice," which include such factors as the novelty of issues and the complexity or unusualness of the case, among others. Although one of the listed factors, "a miscarriage of justice," could readily be translated into due process terms, and perhaps the concerns about "unreasonableness" might also, the judge isn't being asked to frame the extension question in terms of the due process clause.

I think that saying the decision should be in 30 days, and requiring reasons for an extension, will work to convey what the Congress in the legislation expects. Perhaps it could be embellished as follows: "extends that time as necessary, with due regard to national security." Maybe there are other words that would work, but we shouldn't turn all extensions into constitutional issues. (The reason the FISC had to do that with the 72 hour requirement, I believe, is that would have been the only basis that they could think of to provide an exception to a rigid statutory requirement. But here, as we're writing the legislation, there is no need to bring the Constitution to it, and there needs to be flexibility to take account of the various reasons why a deadline cannot or should not be met.)

So, in the interest of getting to an answer that doesn't elicit an objection, requiring debate and a vote – while there are much bigger fish to fry that will require debate and votes, suggestions will be welcome.

Mike

From: Demers, John [mailto: [REDACTED]@usdoj.gov]
Sent: Thursday, January 31, 2008 2:30 PM
To: Davidson, M (Intelligence)
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); [REDACTED] Eisenberg, John
Subject: RE: Challenges/Enforcement – Directives

Mike,

Thanks. It would be a real help to have this provision in there. I do think that 30 days would be more than enough time to see a challenge through. The pressure is on us after all to get the briefing done. As for the escape hatch language, Congress has placed such limitations on courts in the past (like AEDPA), and courts assume that they can extend the time if Due Process requires. So why not track that concept directly rather than using the more ambiguous "informed and fair decision"? So it would say something like, "unless the judge, by order for the reasons stated, extends that time as necessary to comport with the Due Process Clause of the Fifth Amendment to the Constitution."

5/15/2008

Thanks,
John

From: Davidson, M (Intelligence) [mailto: @ssci.senate.gov] b6
Sent: Thursday, January 31, 2008 12:37 PM
To: Demers, John
Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence);
Subject: FW: Challenges/Enforcement -- Directives b6

John:

We've been working with Jack and Kathleen to try to resolve various amendments.

One of those is an amendment that Senator Bond filed last Friday, Senate Amendment (SA) 3941, on expedited review of challenges to directives. It would take the PAA provision on the disposition of frivolous challenges, and the further time limit on the consideration of challenges on the merits, and insert it into the paragraph in the pending bill on challenges.

In our conversations here, one thing we have discussed, apart from anything on frivolous challenges (and a word in a moment about the use of the term frivolous), that there is no reason to have a disparity between the challenge paragraph and the enforcement paragraph on time rules for the plenary consideration of petitions.

(Of course, there is no reason to have a provision on frivolous government enforcement petitions, which would never happen, right?)

Jack and Kathleen are now looking at the attached draft which I've prepared with Alissa. The thinking behind the draft is described in my e-mail below to Jack and Kathleen. Even while it is being reviewed here, we'd like to ask for your thoughts.

One question that we've received from other colleagues has been about the use of the word frivolous, such as what does it really mean. That leads to a thought, not included in the attached but one that we'd like to consider, to import all or part of the Rule 11 standard, one that the district judges who comprise the FISC have experience in applying, as follows:

“(D) PROCEDURES FOR INITIAL REVIEW. – The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition consists of claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

“(E) PROCEDURES FOR PLENARY REVIEW. – If the judge determines that the petition does not meet the standard in paragraph (D) and instead warrants plenary review, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

5/15/2008

So, please take a look at the attached, as well as the alternative paragraphs above, and let us know. This is something that we're trying to resolve in the next couple of hours. Much appreciated as always.

Mike

From: Davidson, M (Intelligence)
Sent: Thursday, January 31, 2008 10:49 AM
To: Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: Challenges/Enforcement -- Directives

Jack and Kathleen,

Here is proposed language. In addition to timing matters, there are a couple of small changes to make consistent the provisions governing challenges and enforcement. For example, in the challenge paragraph there had been specific reference to the modification of directives, but not in the enforcement paragraph. It should be in both. In the enforcement paragraph, there is specific reference to reviewing for compliance with paragraph (1) as well as section 703 as a whole; that's not in the challenge paragraph. The specific reference to paragraph (1) is superfluous because it is subsumed in the general requirement of meeting the requirements of the section.

On the main matter --

I took home last night the FISC rules, marked draft but nonetheless public, released in October, on the rules for PAA directive challenge cases.

The FISC obviously was troubled by the rigidity of the PAA provision requiring a decision at a fixed time. Its draft rules have an escape: "The 72 hour period may be extended if necessary to provide due process of law or otherwise comport with the Constitution of the United States."

In other words, Congress should not be instructing an Article III Court to act so quickly that it can't provide due process. Rather than bringing the Constitution into this, the proposal below simply provides that the judge may provide for additional time for the plenary decision (not the is-it-frivolous one) if by order, with reasons stated, the judge determines that additional time is needed for an informed and fair decision.

In drafting this, I also think we need to be practical about the time needed to receive briefs, hold a hearing, and render a decision on the plenary issue, which could involve both significant statutory and constitutional issues. The proposal below is for 45 days.

Let's discuss.

Mike

(4) CHALLENGING OF DIRECTIVES

(C) STANDARDS FOR REVIEW.-- A judge considering a petition to modify or set aside a directive

5/15/2008

may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) PROCEDURES FOR INITIAL REVIEW. — The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition is frivolous, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(E) PROCEDURES FOR PLENARY REVIEW. — If the judge determines that the petition is not frivolous, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

(5) ENFORCEMENT OF DIRECTIVES

(C) STANDARDS FOR REVIEW. — A judge considering a petition shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section, and is otherwise lawful.

(D) PROCEDURES FOR REVIEW. — The judge shall render a determination within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

Berhanu, Tsedey

From: Livingston, J (Intelligence)] b6
 Sent: Saturday, February 09, 2008 11:09 AM
 To: Tucker, L (Intelligence); Harold_H_Kim@who.eop.gov; Rice, K (Intelligence)
 Cc: Demers, John; Eisenberg, John; William_A_Burck@who.eop.gov; Margaret_B_Stewart@ovp.eop.gov; John_G_Emling@who.eop.gov; Daniel_P_Meyer@who.eop.gov; Abegg, John (McConnell)
 Subject: Re: Whitehouse Assessment Compliance Modification (Revised)

Minor suggestions. We should strike "FISA" and insert Foreign Intelligence Surveillance" to make it consistent with the way that term is used in the bill and in the FISA statute. Also, there should be a comma after the word "rules" since it's in a list.

The change to "court-approved" procedures makes sense, because it's more understandable than the proposed "approved procedures by agencies acting pursuant thereto." That makes it clear that we are only talking about targeting and minimization procedures submitted by the government to the the court for approval and not any other agency procedures that have applicability to FISA or collection, but no FISC involvement, e.g., the AG National Security Investigative Guidelines.

Sent from my BlackBerry Wireless Device

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

From: Tucker, L (Intelligence)
 To: 'Harold_H_Kim@who.eop.gov' <Harold_H_Kim@who.eop.gov>; Livingston, J (Intelligence); Rice, K (Intelligence)
 Cc: 'John_Eisenberg@usdoj.gov' <John_Eisenberg@usdoj.gov>; 'William_A_Burck@who.eop.gov' <William_A_Burck@who.eop.gov>; 'Margaret_B_Stewart@ovp.eop.gov' <Margaret_B_Stewart@ovp.eop.gov>; 'John_G_Emling@who.eop.gov' <John_G_Emling@who.eop.gov>; 'Daniel_P_Meyer@who.eop.gov' <Daniel_P_Meyer@who.eop.gov>; Abegg, John (McConnell)
 Sent: Sat Feb 09 10:53:30 2008
 Subject: Re: Whitehouse Assessment Compliance Modification (Revised)

So on language in comparing the two we're looking at a slight tweak at the end, correct? I believe DOJ never got back officially to Pelofsky on this, correct? If that's right, give us the reasons for the change and the concerns you have, we'll work with his staff on Monday and if need be later in the day we'll ask DOJ to get back to Pelofsky directly with the concerns.

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

From: Kim, Harold H. <Harold_H_Kim@who.eop.gov>
 To: Tucker, L (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)
 Cc: 'John_Eisenberg@usdoj.gov' <John_Eisenberg@usdoj.gov>; 'William_A_Burck@who.eop.gov' <William_A_Burck@who.eop.gov>; 'Margaret_B_Stewart@ovp.eop.gov' <Margaret_B_Stewart@ovp.eop.gov>; 'John_G_Emling@who.eop.gov' <John_G_Emling@who.eop.gov>; 'Daniel_P_Meyer@who.eop.gov' <Daniel_P_Meyer@who.eop.gov>; Abegg, John (McConnell)
 Sent: Sat Feb 09 08:43:38 2008
 Subject: Whitehouse Assessment Compliance Modification (Revised)

Louis, Jack and Kathleen: Please find below a revised version of the Whitehouse Assessment Compliance modification that incorporates comments from DNI and DOJ. Sorry that I can't send changes in redline since I'm on my blackberry.

Also, it is our understanding that acceptance of this language is predicated on Whitehouse's agreement to be with us on cloture and final passage. Please confirm. As always, don't hesitate to contact us with questions.

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

94

Hughes, Richard

From: Livingston, J (Intelligence) [redacted]@ssci.senate.gov]
Sent: Saturday, February 09, 2008 12:43 PM
To: Harold_H._Kim@who.eop.gov; Tucker, L (Intelligence); Rice, K (Intelligence)
Cc: Demers, John; Eisenberg, John; [redacted] William_A._Burck@who.eop.gov;
Margaret_B._Stewart@ovp.eop.gov; John_G._Emling@who.eop.gov;
Daniel_P._Meyer@who.eop.gov; Abegg, John (McConnell)
Subject: Re: Whitehouse Assessment Compliance Modification (Revised)

b2
b6

Is there any concern that the new language might have an adverse impact on the carriers since we've deleted the reference to "agencies"?

Sent from my BlackBerry Wireless Device

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

From: Kim, Harold H. <Harold_H._Kim@who.eop.gov>
To: Tucker, L (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: John.Demers@usdoj.gov [redacted]@usdoj.gov>; John.Eisenberg@usdoj.gov <John.Eisenberg@usdoj.gov>;
[redacted] Burck, William A. <William_A._Burck@who.eop.gov>; Stewart, Margaret B.
<Margaret_B._Stewart@ovp.eop.gov>; Emling, John G. <John_G._Emling@who.eop.gov>; Meyer, Daniel P.
<Daniel_P._Meyer@who.eop.gov>; Abegg, John (McConnell)
Sent: Sat Feb 09 08:43:38 2008
Subject: Whitehouse Assessment Compliance Modification (Revised)

b2
b6

Louis, Jack and Kathleen: Please find below a revised version of the Whitehouse Assessment Compliance modification that incorporates comments from DNI and DOJ. Sorry that I can't send changes in redline since I'm on my blackberry.

Also, it is our understanding that acceptance of this language is predicated on Whitehouse's agreement to be with us on cloture and final passage. Please confirm. As always, don't hesitate to contact us with questions.

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

95

Hughes, Richard

From: Tucker, L (Intelligence) [redacted] @SSCI.Senate.Gov] b6
Sent: Tuesday, February 12, 2008 8:47 AM
To: Harold_H._Kim@who.eop.gov; Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Demers, John; Eisenberg, John [redacted] William_A._Burck@who.eop.gov; Margaret_B._Stewart@ovp.eop.gov; John_G._Emling@who.eop.gov; Daniel_P._Meyer@who.eop.gov; Abegg, John (McConnell) b2 b6
Subject: Re: Whitehouse Assessment Compliance Modification (Revised)

Margaret/John, need to hear back from you with Admin position on this now. It's first amdt up at 10am.

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

From: Tucker, L (Intelligence)
To: 'Harold_H._Kim@who.eop.gov' <Harold_H._Kim@who.eop.gov>; Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: [redacted] @usdoj.gov' [redacted] @usdoj.gov'; 'John.Eisenberg@usdoj.gov' <John.Eisenberg@usdoj.gov>; [redacted] 'William_A._Burck@who.eop.gov' <William_A._Burck@who.eop.gov>; 'Margaret_B._Stewart@ovp.eop.gov' <Margaret_B._Stewart@ovp.eop.gov>; 'John_G._Emling@who.eop.gov' <John_G._Emling@who.eop.gov>; 'Daniel_P._Meyer@who.eop.gov' <Daniel_P._Meyer@who.eop.gov>; Abegg, John (McConnell) b2 b6
Sent: Mon Feb 11 18:56:56 2008
Subject: Re: Whitehouse Assessment Compliance Modification (Revised)

Here is new language agreed to by Senator Whitehouse. Please give us official Admin position asap. Thanks.

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 an order or a rule of the Court or with a procedure approved by the Court.

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

From: Kim, Harold H. <Harold_H._Kim@who.eop.gov>
To: Tucker, L (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: [redacted] @usdoj.gov' [redacted] @usdoj.gov'; John.Eisenberg@usdoj.gov <John.Eisenberg@usdoj.gov>; [redacted] Burck, William A. <William_A._Burck@who.eop.gov>; Stewart, Margaret B. <Margaret_B._Stewart@ovp.eop.gov>; Emling, John G. <John_G._Emling@who.eop.gov>; Meyer, Daniel P. <Daniel_P._Meyer@who.eop.gov>; Abegg, John (McConnell) b2 b6
Sent: Sat Feb 09 08:43:38 2008
Subject: Whitehouse Assessment Compliance Modification (Revised)

Louis, Jack and Kathleen: Please find below a revised version of the Whitehouse Assessment Compliance modification that incorporates comments from DNI and DOJ. Sorry that I can't send changes in redline since I'm on my blackberry.

Also, it is our understanding that acceptance of this language is predicated on Whitehouse's agreement to be with us on cloture and final passage. Please confirm. As always, don't hesitate to contact us with questions.

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

6/16/2008

91

Berhanu, Tsedey

From: Davidson, M (Intelligence) [] b6
Sent: Friday, February 15, 2008 1:52 PM
To: Benjamin Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); [] Gerry, b3
Brett b6
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa
(Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep)
Subject: FISA, next week

Ben, John D., John E., Carl, [] and from our alumni list, Brett, FYI: b3
b6

I mentioned to Ben just before yesterday's hearing, at which the DNI testified, the interest here in beginning discussions to resolve House-Senate differences.

To launch the discussions, the initial discussion next Thursday afternoon, FYI, is proposed to be a congressional discussion – bipartisan, bicameral (Intelligence and Judiciary, and leadership staff, both Houses), as an opportunity for concerned staff, both Houses to spend a couple of hours identifying questions.

To be followed the following morning, ODNI/NSA/DOJ invited – next Friday, February 22, 10 am, HPSCI to host. It would be good, I believe, to plan on a long morning or even the better part of the day, and be prepared to continue over the weekend, or certainly on the following Monday. There is a great desire to be able to present to Members when they return on Feb. 25 any resolution of issues that can be achieved and a delineation of those that remain to be resolved.

We've been very grateful for your active participation in all that has preceded. This might seem Pollyannish, but I'm actually optimistic that we can find a path.

I'll be away Tuesday and Wednesday. Jack, I believe, will be here starting Wednesday. [] will be here b6
throughout the week, and probably would be the best person with whom to be in touch regarding any fine tuning on time, etc.

Mike

Farris, Bette

Subject: Congressional Call
Start: Thu 2/28/2008 4:30 PM
End: Thu 2/28/2008 4:40 PM
Show Time As: Tentative
Recurrence: (none)
Meeting Status: Tentatively accepted
Required Attendees: Gerry, Brett ; Demers, John; Benczkowski, Brian A (OLA)
Optional Attendees: Eisenberg, John

AG's Office
AG will call Cong. Lincoln Davis POC: Monica Hayden
AO: Brett Gerry DOJ: John Demers, John Eisenberg (Optional), Brian Benczkowski

b6

Farris, Bette

Subject: Updated: Congressional Call

Start: Thu 2/28/2008 5:30 PM

End: Thu 2/28/2008 5:40 PM

Recurrence: (none)

Meeting Status: Accepted

Required Attendees: Gerry, Brett ; Demers, John; Benczkowski, Brian A (OLA); Eisenberg, John

AG's Office

AG will call Cong. Earl Pomeroy. POC: Stacy Austad

AO: Brett Gerry DOJ: John Demers (Mandatory), Brian Benczkowski, John Eisenberg (Optional)

b6

Farris, Bette

Subject: Updated: Congressional Call

Start: Fri 2/29/2008 10:00 AM

End: Fri 2/29/2008 10:10 AM

Recurrence: (none)

Meeting Status: Accepted

Required Attendees: Gerry, Brett ; Benczkowski, Brian A (OLA); Eisenberg, John; Demers, John

Optional Attendees: Gerry, Brett

AG's Office

Congressman Allen Boyd will call POC: Robin Nichols, 2 7

AO: Brett Gerry DOJ: Brian Benczkowski, John Eisenberg, John Demers, Brett Gerry (Optional)

b6

Farris, Bette

Subject: Updated: Congressional Calls
Start: Fri 2/29/2008 2:45 PM
End: Fri 2/29/2008 3:25 PM
Show Time As: Tentative
Recurrence: (none)
Meeting Status: Tentatively accepted
Required Attendees: Benczkowski, Brian A (OLA); Demers, John
Optional Attendees: Gerry, Brett ; Eisenberg, John

AG's Office

2:45p Congressman Chet Edwards (TX) Congressman's cell
3:00p Congressman Arthur Davis (AL), POC: Beverly George
3:15p Congressman Mike Ross (AR), POC: Drew Goesl
3:30p Congressman Jim Marshall (GA), POC: Mary Hobbs

POC: Leah Cohen
@mail.house.gov
@Mail.House.Gov

66

AO: Brett Gerry DOJ: Brian Benczkowski, John Demers, John Eisenberg (optional), Brett Gerry (optional)

Farris, Bette

Subject: Updated: Congressional Call

Start: Wed 3/5/2008 3:00 PM

End: Wed 3/5/2008 3:10 PM

Recurrence: (none)

Meeting Status: Accepted

Required Attendees: Gerry, Brett ; Demers, John; Eisenberg, John; Benczkowski, Brian A (OLA);]

AG's Office

AO: Brett Gerry DOJ: John Demers, John Eisenberg, Brian Benczkowski,] -]

AG will call Congressman Chris Carney POC: April]

b6

102

Farris, Bette

Subject: Congressional Call

Start: Wed 3/5/2008 4:30 PM

End: Wed 3/5/2008 4:40 PM

Recurrence: (none)

Meeting Status: Accepted

Required Attendees: Gerry, Brett ; Demers, John; Eisenberg, John;] Benczkowski, Brian A (OLA)

AG's Office

AO: Brett Gerry DOJ: John Demers, John Eisenberg,] Brian Benczkowski

AG will call Cong. Ike Skelton POC: Ryan Dillan []

bb

Farris, Bette

Subject: Updated: Congressional Call

Start: Wed 3/5/2008 5:00 PM
End: Wed 3/5/2008 5:10 PM

Recurrence: (none)

Meeting Status: Accepted

Required Attendees: Gerry, Brett ; Demers, John; Eisenberg, John; Benczkowski, Brian A (OLA) []

AG's Office

AO: Brett Gerry DOJ: John Demers, John Eisenberg, Brian Benczkowski, []
AG will call Congressman Joe Donnelly POC: Nathan Fenstermacher []

b6

Berhanu, Tsedey

From: Davidson, M (Intelligence) [redacted] @ssci.senate.gov] b6
Sent: Tuesday, March 18, 2008 10:55 AM
To: Livingston, J (Intelligence); [redacted] Demers, John; Eisenberg, John; Nichols, Carl (CIV);
 DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem);
 Solomon, Matthew (Judiciary-Dem) Rice, K (Intelligence);
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: Re: On the return of H.R. 3773 to the Senate

Jack,

One premise of your note is that we have talked too much ("ad nauseum" in the statement of the official position). But it is just the reverse. There is only one proof in this pudding. Until we have produced a law, we will not have talked enough.

A second premise is that there is no occasion to talk until the House acts on the Senate bill. It has. There is nothing pending in the House. The bill has been sent back to us with a House amendment. The ball is in our court.

There are two things the Senate can now do. It can insist on its amendment and request a conference. Or it can work to fashion an amendment to send back to the House that has a reasonable chance of becoming law. Neither will be an easy route. But both are possible. In contrast, waiting for the House to act on something that isn't before it will get us nowhere.

A note about what we sent over on Friday --

It is comprised, in our view, of modest, practical suggestions for resolving Title I differences with the House while providing the DNI and AG with necessary tools, including speed of action. But no hubris here. We're eager to sit down, with text in front of all and pencils in hand. We're also eager to receive other modest, practical ideas, from all quarters, including importantly ones that you may offer.

Mike

Sent from my BlackBerry Wireless Handheld

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

From: Livingston, J (Intelligence)
To: Davidson, M (Intelligence); [redacted]; Demers, John (NSD) [redacted] @usdoj.gov>;
 'Eisenberg, John' <John.Eisenberg@usdoj.gov>; 'Carl.Nichols@usdoj.gov' <Carl.Nichols@usdoj.gov>; Potenza, Vito [redacted]
 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)
Sent: Mon Mar 17 17:34:00 2008
Subject: RE: On the return of H.R. 3773 to the Senate

Mike,

The following is the official Bond position on your e-mail on Friday. "While Friday was good theater, the result leaves us in the exact same position as before. We had a strong bipartisan, DNI/DOJ supported FISA bill that the President would have signed into law and that the House didn't vote on even though it was supported by a majority in the House. And, we still have a strictly partisan House-passed bill that doesn't work, is not supported by the DNI/DOJ and would be vetoed by the President. They are not in the same ballpark for a conference and the House needs to act on the bipartisan, workable, Senate bill before further discussions over provisions that we have discussed ad nauseum to date, is warranted."

From my perspective, your current draft includes too many of the House's partisan provisions—provisions that are unacceptable to the Senate minority and, I assume, to the Intelligence Community. Unless you can scale your current draft back to a couple of “modest changes,” Senator Bond sees little merit in having further staff discussions. Thanks.

Jack

From: Davidson, M (Intelligence)
Sent: Friday, March 14, 2008 5:43 PM
To: Ben Powell; Demers, John (NSD); Eisenberg, John; Carl.Nichols@usdoj.gov; Potenza, Vito; 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: On the return of H.R. 3773 to the Senate

b3
b2

Dear ODNI/DOJ/NSA and Senate Intelligence and Judiciary colleagues:

Given the possibility, as is now occurring, that the FISA bill would come back to the Senate, over the last day or so Chris, Alissa, and I have prepared a draft for discussion. It is not a formal Rockefeller draft, but something that we hope advances the discussion, together with ideas that all of you might put on the table. It will, of course, be important to begin a discussion that also includes House colleagues, and we will share this with them. Still, it will be good to get our mutual bearings on the Senate side, and we hope this will make a contribution to that end.

The underlying document begins with the Senate amendment to H.R. 3773. The strike outs and insertions represent a combination of matters (additions, deletions, or modifications) in the House amendment that we would propose for acceptance, or matters that we would propose be amended in some way. There are a number of items in the House amendment that are not included (e.g., the Commission and statute of limitations amendment). The matters taken or modified from the House amendment include both substantive matters and drafting recommendations from the House Legislative Counsel, some of which, such as much of Title III, the two Legislative Counsel offices worked on together.

All of the proposed changes are in Titles I and III. The attached makes no changes to Title II.

Principal items are:

The proposed sunset, which is in Title III (in accordance with a Legislative Counsel placement recommendation), is December 2011, in order to provide more time for experience than the 2009 date would allow while making clear the expectation that the permanent system should be settled on during the term of the President who will be elected this November.

The Feinstein exclusivity amendment is included. For ourselves, we have not foreclosed the possibility of including some form of the additional text that David Grannis had been exchanging with Jack and John D. on collection following an attack on the United States, particularly one for which the Congress enacts an AUMF. That could very well be a subject of

5/15/2008

discussion.

The IG review provision is included -- as the text had been developed by Senator Leahy, with the House modification that the IGs should select one of them who is presidentially appointed and Senate confirmed to coordinate the review. Not to mix up legislative issues, but we would be happy if that turned out to be an Inspector General for the Intelligence Community.

Our proposed alternative to the electronic surveillance definition carve-out, which we believe achieves everything that may have been sought in the carve-out, is in section 702(c)(2) on page 4: "Nothing in the definition of electronic surveillance shall be construed to require an application under section 104 for an acquisition that is targeted in accordance with this section at a person reasonably believe to be located outside the United States." If there is any need to have anything that achieves the purpose of a carve-out (to confess, we're doubters about that in light of the "notwithstanding any" preface to section 702 (old 703)), new 702(c)(2) does that by making clear that nothing in the definition of e.s. produces the consequence to be avoided, namely, a requirement of proceeding under Title I. And because, that can be achieved without a change in the definition of e.s., there is no need for any of the anti-carve-out provisions in the bill. We've placed a substantially identical provision in section 703 (old 704).

A key aspect of the attached is a solution, which we believe works, to the timing of judicial review debate.

Whatever the practical or theoretical significance of the prior approval/pre-approval debate may have been before enactment of the PAA when every authorization under the PAA would be a first-time authorization, the fact is that a large part of what occurs in the future will be an annual cycle of reauthorizations.

702(i)(5), on page 11, is designed to encourage orderliness in that annual process by providing, to the extent practicable, a schedule of synchronized handoffs from one year's authorizations to the next, while making it absolutely clear in 5(E) that the AG/DNI are free to submit certifications for additional authorizations at other times during the year as necessary.

Building on this, as a matter of both administrative and judicial efficiency, the AG/DNI should be able to submit, in advance of the expiration of an annual authorization (or set of them) the certification and procedures for the new authorization year. That, as a practical matter, will allow for approval by the beginning of the new authorization year. But the attached makes perfectly clear that at any time, without characterizing it as an emergency, the AG/DNI may provide for immediate action.

There is a goal or expectation, but not a mandate, that accompanies this. Approval by the beginning of a new authorization year (subject to the AG/DNI's immediate implementation power) serves valuable interests, none of which involves any solicitude toward foreign targets. It will mean that directives which are issued come with the strength, that may be important someday to a doubtful carrier, that the U.S. person protections (i.e., the completeness of certifications and adequacy of targeting and minimization procedures) have been approved. It will also increase the opportunity to be able (note, not mandated, but be able) to make corrections before collection begins. The same goal, when possible, exists for new authorizations.

But to underscore the point again, the attached is written to give the AG/DNI the full authority to begin when needed, and to continue until directed otherwise by the Court of Review.

One other topic -- guidelines. You'll see that we propose, in 702(f) on pages 4-5 a general provision for guidelines,

applicable to all the limitations in 702(b), without any required detail, the existence of which the AG/DNI must certify, but which are submitted to committees here, not to the FISC for review.

These are highlights. There are other items, all of which we should discuss.

Chris and Alissa are here next week; I'll be away. We'll reverse that during the second week of the recess. Please don't hesitate to begin an exchange of thoughts with whomever may be here. Let's definitely plan to sit down together as early as possible during the first week back.

And a Happy Easter and start of spring to all.

Mike

5/15/2008

Hughes, Richard

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; 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

(b)(2)
(b)(6)
(b)(3)

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

From: Livingston, J (Intelligence) [mailto:]@ssci.senate.gov] **b6/b3/b2**
Sent: Friday, April 04, 2008 1:16 PM
To: Davidson, M (Intelligence); Ben Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; 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

Mike,

Consistent with our earlier discussion this morning, I just spoke with Louis and I need to keep Monday free to help out with the Minority Report to the Committee's Phase II reports. Louis has authorized me to participate in bipartisan negotiations on Friday, April 11. My schedule is pretty open that day, so if you want to go with the 2:00 meeting time, or perhaps something earlier, that's fine with me. Thanks.

Jack

From: Davidson, M (Intelligence) **[REDACTED]**
Sent: Friday, March 28, 2008 4:54 PM
To: 'Ben Powell'; 'Demers, John (NSD)'; 'Eisenberg, John'; 'Carl.Nichols@usdoj.gov'; 'Potenza, Vito'; '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

(b)(2)
(b)(3)
(b)(6)

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.

7/16/2008

167

Looking forward to seeing all.

Mike

From: Davidson, M (Intelligence)
Sent: Friday, March 14, 2008 5:43 PM
To: 'Ben Powell'; Demers, John (NSD); 'Eisenberg, John'; Carl.Nichols@usdoj.gov; Potenza, Vito
 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: On the return of H.R. 3773 to the Senate

Dear ODNI/DOJ/NSA and Senate Intelligence and Judiciary colleagues:

Given the possibility, as is now occurring, that the FISA bill would come back to the Senate, over the last day or so Chris, Alissa, and I have prepared a draft for discussion. It is not a formal Rockefeller draft, but something that we hope advances the discussion, together with ideas that all of you might put on the table. It will, of course, be important to begin a discussion that also includes House colleagues, and we will share this with them. Still, it will be good to get our mutual bearings on the Senate side, and we hope this will make a contribution to that end.

The underlying document begins with the Senate amendment to H.R. 3773. The strike outs and insertions represent a combination of matters (additions, deletions, or modifications) in the House amendment that we would propose for acceptance, or matters that we would propose be amended in some way. There are a number of items in the House amendment that are not included (e.g., the Commission and statute of limitations amendment). The matters taken or modified from the House amendment include both substantive matters and drafting recommendations from the House Legislative Counsel, some of which, such as much of Title III, the two Legislative Counsel offices worked on together.

All of the proposed changes are in Titles I and III. The attached makes no changes to Title II.

Principal items are:

The proposed sunset, which is in Title III (in accordance with a Legislative Counsel placement recommendation), is December 2011, in order to provide more time for experience than the 2009 date would allow while making clear the expectation that the permanent system should be settled on during the term of the President who will be elected this November.

The Feinstein exclusivity amendment is included. For ourselves, we have not foreclosed the possibility of including some form of the additional text that David Grannis had been exchanging with Jack and John D. on collection following an attack on the United States, particularly one for which the Congress enacts an AUMF. That could very well be a subject of discussion.

The IG review provision is included -- as the text had been developed by Senator Leahy, with the House modification that the IGs should select one of them who is presidentially appointed and Senate confirmed to coordinate the review. Not to mix up legislative issues, but we would be happy if that turned out to be an Inspector General for the Intelligence Community.

Our proposed alternative to the electronic surveillance definition carve-out, which we believe achieves everything that may have been sought in the carve-out, is in section 702(c)(2) on page 4: "Nothing in the

7/16/2008

definition of electronic surveillance shall be construed to require an application under section 104 for an acquisition that is targeted in accordance with this section at a person reasonably believe to be located outside the United States." If there is any need to have anything that achieves the purpose of a carve-out (to confess, we're doubters about that in light of the "notwithstanding any" preface to section 702 (old 703)), new 702(c)(2) does that by making clear that nothing in the definition of e.s. produces the consequence to be avoided, namely, a requirement of proceeding under Title I. And because, that can be achieved without a change in the definition of e.s., there is no need for any of the anti-carve-out provisions in the bill. We've placed a substantially identical provision in section 703 (old 704).

A key aspect of the attached is a solution, which we believe works, to the timing of judicial review debate.

Whatever the practical or theoretical significance of the prior approval/pre-approval debate may have been before enactment of the PAA when every authorization under the PAA would be a first-time authorization, the fact is that a large part of what occurs in the future will be an annual cycle of reauthorizations.

702(i)(5), on page 11, is designed to encourage orderliness in that annual process by providing, to the extent practicable, a schedule of synchronized handoffs from one year's authorizations to the next, while making it absolutely clear in 5(E) that the AG/DNI are free to submit certifications for additional authorizations at other times during the year as necessary.

Building on this, as a matter of both administrative and judicial efficiency, the AG/DNI should be able to submit, in advance of the expiration of an annual authorization (or set of them) the certification and procedures for the new authorization year. That, as a practical matter, will allow for approval by the beginning of the new authorization year. But the attached makes perfectly clear that at any time, without characterizing it as an emergency, the AG/DNI may provide for immediate action.

There is a goal or expectation, but not a mandate, that accompanies this. Approval by the beginning of a new authorization year (subject to the AG/DNI's immediate implementation power) serves valuable interests, none of which involves any solicitude toward foreign targets. It will mean that directives which are issued come with the strength, that may be important someday to a doubtful carrier, that the U.S. person protections (i.e., the completeness of certifications and adequacy of targeting and minimization procedures) have been approved. It will also increase the opportunity to be able (note, not mandated; but be able) to make corrections before collection begins. The same goal, when possible, exists for new authorizations.

But to underscore the point again, the attached is written to give the AG/DNI the full authority to begin when needed, and to continue until directed otherwise by the Court of Review.

One other topic -- guidelines. You'll see that we propose, in 702(f) on pages 4-5 a general provision for guidelines, applicable to all the limitations in 702(b), without any required detail, the existence of which the AG/DNI must certify, but which are submitted to committees here, not to the FISC for review.

These are highlights. There are other items, all of which we should discuss.

Chris and Alissa are here next week; I'll be away. We'll reverse that during the second week of the recess. Please don't hesitate to begin an exchange of thoughts with whomever may be here. Let's definitely plan to sit down together as early as possible during the first week back.

And a Happy Easter and start of spring to all.

Mike

7/16/2008

Hughes, Richard

From: Demers, John
Sent: Tuesday, April 08, 2008 6:30 PM
To: 'Ben Powell'; Davidson, M (Intelligence)
Cc: [redacted] Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; [redacted] Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Subject: RE: FISA, Friday, 2

(b)(6)
(b)(2)
(b)(3)

I will be there at 2 pm Friday.

From: Ben Powell
Sent: Tuesday, April 08, 2008 2:56 PM
To: Davidson, M (Intelligence)
Cc: Demers, John; [redacted] Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; [redacted] Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem)
Subject: Re: FISA, Friday, 2

(b)(2)
(b)(6)
(b)(3)

I have not had a chance to check with John D. and [redacted] but 2pm works for me.

Davidson, M (Intelligence) wrote:

After talking with Jack, 2 pm Friday works for those of here. Hope it does for everyone else. I've reserved the same room in SH-211 that we used yesterday.
Mike

Hughes, Richard

From: Livingston, J (Intelligence) []@ssci.senate.gov] b6/b2/b3
Sent: Tuesday, April 15, 2008 6:10 PM
To: Davidson, M (Intelligence); Ben Powell; Demers, John; []; Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; []; 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); []@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

From: Davidson, M (Intelligence)
Sent: Tuesday, April 15, 2008 4:16 PM
To: 'Ben Powell'; Demers, John (NSD); []; Eisenberg, John; Carl.Nichols@usdoj.gov; Potenza, Vito; 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); []@mail.house.gov
Subject: FISA, Monday, April 21, 1 pm

Ben, John D., [], Jack, Kathleen, Mary, Nick, Zulima, and Matt:

Further to our discussion this past Friday, HPSCI has offered to host the initial bipartisan, bicameral, ODNI/DOJ/NSA discussion on the Senate amendment, the House amendment, and all ideas that may advance our common goal of producing a FISA bill that will pass both Houses and gain the President's signature.

Wyndee will send out invitations on the House side. Invitations to Senator Reid's and Senator McConnell's staff will also be sent.

Would Monday, April 21, 1 pm, H-405, work for all?

It would also be good if we penciled in a second time next week, perhaps Friday afternoon, for a continuation of the Monday discussion, so that by the end of the week we all had a fairly good idea of how close or far we are.

Mike

7/16/2008

108

Hughes, Richard

From: Davidson, M (Intelligence) [REDACTED] @ssci.senate.gov] b6
Sent: Tuesday, April 15, 2008 5:07 PM
To: [REDACTED]
Cc: Demers, John; [REDACTED] Eisenberg, John; Nichols, Carl (CIV); Vito Potenza (work) [REDACTED] (b)(2)
 [REDACTED] Livingston, J (Intelligence); Rice, K (Intelligence); DeRosa, Mary (b)(6)
 (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (b)(3)
 (Judiciary-Dem); Healey, C (Intelligence); Starzak, Alissa (Intelligence); Wyndee Parker;
Subject: RE: FISA, Monday, April 21, 1 pm

Monday morning, at 10, in our hearing room, SH-219, works for Wyndee and for us.

From: [REDACTED]
Sent: Tuesday, April 15, 2008 4:51 PM
To: Davidson, M (Intelligence)
Cc: Ben Powell; John Demers; [REDACTED] John Eisenberg; Carl Nichols; Vito Potenza (work); [REDACTED] (b)(2)
 [REDACTED] Livingston, J (Intelligence); Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); (b)(6)
 Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem); Healey, C (b)(3)
 (Intelligence); Starzak, Alissa (Intelligence); Wyndee Parker;
Subject: Re: FISA, Monday, April 21, 1 pm

Mike -- I can't make Monday afternoon between 12-5. I can make a meeting before noon and I am flexible on Tuesday. But unfortunately, I am not able to change my current plans for Monday afternoon.

Ben

-----"Davidson, M (Intelligence)" [REDACTED] @ssci.senate.gov> wrote: -----

To: "Ben Powell" [REDACTED] "Demers, John (NSD)" [REDACTED] @usdoj.gov>, [REDACTED] (b)(2)
 [REDACTED] "Eisenberg, John" <John.Eisenberg@usdoj.gov>, [REDACTED]
 [REDACTED] @usdoj.gov>, "Potenza, Vito" [REDACTED] (b)(6)
 [REDACTED] @nsa.gov> [REDACTED] @dni.gov>, [REDACTED] @dni.gov>] "Livingston, J (Intelligence)" (b)(6)
 [REDACTED] @ssci.senate.gov>, "Rice, K (Intelligence)" [REDACTED] @ssci.senate.gov>, "DeRosa, (b)(3)
 Mary (Judiciary-Dem)" [REDACTED] @Judiciary-dem.senate.gov>, "Rossi, Nick (Judiciary-Rep)" [REDACTED]
 [REDACTED] @judiciary-rep.senate.gov>, "Espinel, Zulima (Judiciary-Dem)" [REDACTED]
 [REDACTED] @Judiciary-dem.senate.gov>, "Solomon, Matthew (Judiciary-Dem)" [REDACTED]
 [REDACTED] @Judiciary-dem.senate.gov>
From: "Davidson, M (Intelligence)" [REDACTED] @ssci.senate.gov>
Date: 04/15/2008 04:15PM
cc: "Healey, C (Intelligence)" [REDACTED] @ssci.senate.gov>, "Starzak, Alissa (Intelligence)" [REDACTED] b6
 [REDACTED] @ssci.senate.gov>, [REDACTED] @mail.house.gov>
Subject: FISA, Monday, April 21, 1 pm

Ben, John D., [REDACTED], Jack, Kathleen, Mary, Nick, Zulima, and Matt:

Further to our discussion this past Friday, HPSCI has offered to host the initial bipartisan, bicameral, ODNI/DOJ/NSA discussion on the Senate amendment, the House amendment, and all ideas that may advance our common goal of producing a FISA bill that will pass both Houses and gain the President's signature.

Wyndee will send out invitations on the House side. Invitations to Senator Reid's and Senator

7/16/2008

109

McConnell's staff will also be sent.

Would Monday, April 21, 1 pm, H-405, work for all?

It would also be good if we penciled in a second time next week, perhaps Friday afternoon, for a continuation of the Monday discussion, so that by the end of the week we all had a fairly good idea of how close or far we are.

Mike

W/S
B/S

Hughes, Richard

From: Demers, John
Sent: Tuesday, April 15, 2008 6:20 PM
To: @ssci.senate.gov;
Cc: Eisenberg, John; Nichols, Carl (CIV);
@ssci.senate.gov;
@Judiciary-dem.senate.gov;
@Judiciary-dem.senate.gov;
@ssci.senate.gov;
@ssci.senate.gov;
@mail.house.gov;
Subject: Re: FISA, Monday, April 21, 1 pm

(b)(2)
(b)(6)
(b)(3)

That would work for me.
Thanks,
John

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

From: Davidson, M (Intelligence) @ssci.senate.gov
To: [redacted]
Cc: Demers, John; [redacted] Eisenberg, John; Nichols, Carl (CIV); [redacted]
[redacted] Livingston, J (Intelligence) @ssci.senate.gov;
Rice, K (Intelligence) @ssci.senate.gov; DeRosa, Mary (Judiciary-Dem) @Judiciary-dem.senate.gov;
Rossi, Nick (Judiciary-Rep) @Judiciary-dem.senate.gov;
Espinel, Zulima (Judiciary-Dem) @Judiciary-dem.senate.gov;
Solomon, Matthew (Judiciary-Dem) @ssci.senate.gov;
Healey, C (Intelligence) @ssci.senate.gov; Starzak, Alissa (Intelligence) @ssci.senate.gov;
Wyndee Parker <@mail.house.gov>

(b)(2)
(b)(6)
(b)(3)

Sent: Tue Apr 15 17:06:42 2008
Subject: RE: FISA, Monday, April 21, 1 pm

Monday morning, at 10, in our hearing room, SH-219, works for Wyndee and for us.

From: [redacted]
Sent: Tuesday, April 15, 2008 4:51 PM
To: Davidson, M (Intelligence)
Cc: Ben Powell; John Demers; [redacted] John Eisenberg; Carl Nichols; Vito Potenza
(work); [redacted] Livingston, J (Intelligence); 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); Wyndee Parker;
Subject: Re: FISA, Monday, April 21, 1 pm

(b)(2)
(b)(6)
(b)(3)

Mike -- I can't make Monday afternoon between 12-5. I can make a meeting before noon and I am flexible on Tuesday. But unfortunately, I am not able to change my current plans for Monday afternoon.

Ben

-----"Davidson, M (Intelligence)"<@ssci.senate.gov> wrote: -----
To: "Ben Powell" [redacted] "Demers, John (NSD)" <@usdoj.gov>,
[redacted] "Eisenberg, John" <John.Eisenberg@usdoj.gov>,
<Carl.Nichols@usdoj.gov>, "Potenza, Vito" [redacted] "Livingston, J" [redacted]

(b)(2)
(b)(6)
(b)(3)
110

66

(Intelligence)" [@ssci.senate.gov>, "Rice, K (Intelligence)"
 @ssci.senate.gov>, "DeRosa, Mary (Judiciary-Dem)" @Judiciary-
 dem.senate.gov>, "Rossi, Nick (Judiciary-Rep)" @judiciary-rep.senate.gov>,
 "Espinel, Zulima (Judiciary-Dem)" @Judiciary-dem.senate.gov>, "Solomon,
 Matthew (Judiciary-Dem)" @Judiciary-dem.senate.gov>
 From: "Davidson, M (Intelligence)" @ssci.senate.gov>
 Date: 04/15/2008 04:15PM
 cc: "Healey, C (Intelligence)" @ssci.senate.gov>, "Starzak, Alissa
 (Intelligence)" @ssci.senate.gov>, < @mail.house.gov>
 Subject: FISA, Monday, April 21, 1 pm

Ben, John D., [Jack, Kathleen, Mary, Nick, Zulima, and Matt: 62 63 66

Further to our discussion this past Friday, HPSCI has offered to host the initial bipartisan, bicameral, ODNI/DOJ/NSA discussion on the Senate amendment, the House amendment, and all ideas that may advance our common goal of producing a FISA bill that will pass both Houses and gain the President's signature.

Wyndee will send out invitations on the House side. Invitations to Senator Reid's and Senator McConnell's staff will also be sent.

Would Monday, April 21, 1 pm, H-405, work for all?

It would also be good if we penciled in a second time next week, perhaps Friday afternoon, for a continuation of the Monday discussion, so that by the end of the week we all had a fairly good idea of how close or far we are.

Mike



Hughes, Richard

From: [redacted]
 Sent: Tuesday, April 15, 2008 4:51 PM
 To: Mike Davidson
 Cc: Ben Powell; Demers, John; [redacted] Eisenberg, John; Nichols, Carl (CIV); Vito Potenza (work); [redacted] Jack Livingston; K Rice; Mary DeRosa; Nick Rossi; Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem); Christine Healey; Alissa Starzak; Wyndee Parker; [redacted]
 Subject: Re: FISA, Monday, April 21, 1 pm

(b)(2)
 (b)(6)
 (b)(3)

Mike -- I can't make Monday afternoon between 12-5. I can make a meeting before noon and I am flexible on Tuesday. But unfortunately, I am not able to change my current plans for Monday afternoon.

Ben

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

To: [redacted] "Demers, John (NSD)" @usdoj.gov>,
 [redacted] "Eisenberg, John" <John.Eisenberg@usdoj.gov>,
 <Carl.Nichols@usdoj.gov>, "Potenza, Vito" [redacted] "Livingston, J
 (Intelligence)" [redacted] @ssci.senate.gov>, "Rice, K (Intelligence)"
 [redacted] @ssci.senate.gov>, "DeRosa, Mary (Judiciary-Dem)" @Judiciary-
 dem.senate.gov>, "Rossi, Nick (Judiciary-Rep)" @judiciary-rep.senate.gov>,
 "Espinel, Zulima (Judiciary-Dem)" @Judiciary-dem.senate.gov>, "Solomon,
 Matthew (Judiciary-Dem)" < [redacted] @Judiciary-dem.senate.gov>
 From: "Davidson, M (Intelligence)" < [redacted] @ssci.senate.gov>
 Date: 04/15/2008 04:15PM
 cc: "Healey, C (Intelligence)" < [redacted] @ssci.senate.gov>, "Starzak, Alissa (Intelligence)"
 [redacted] @ssci.senate.gov>, [redacted] @mail.house.gov>
 Subject: FISA, Monday, April 21, 1 pm

b6
 b3
 b2

Ben, John D., [redacted] Jack, Kathleen, Mary, Nick, Zulima, and Matt:

[Handwritten signature]

Further to our discussion this past Friday, HPSCI has offered to host the initial bipartisan, bicameral, ODNI/DOJ/NSA discussion on the Senate amendment, the House amendment, and all ideas that may advance our common goal of producing a FISA bill that will pass both Houses and gain the President's signature.

Wyndee will send out invitations on the House side. Invitations to Senator Reid's and Senator McConnell's staff will also be sent.

Would Monday, April 21, 1 pm, H-405, work for all?

It would also be good if we penciled in a second time next week, perhaps Friday afternoon, for a continuation of the Monday discussion, so that by the end of the week we all had a fairly good idea of how close or far we are.

Mike

Hughes, Richard

From: Tucker, L (Intelligence) [redacted] @SSCI.Senate.Gov] b6
Sent: Monday, April 21, 2008 9:47 AM
To: Livingston, J (Intelligence); Davidson, M (Intelligence); Ben Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); Potenza, Vito; Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem); [redacted] @mail.house.gov; [redacted] @mail.house.gov; [redacted] @mail.house.gov; [redacted] @mail.house.gov; Johnson, A (Intelligence); [redacted] @mail.house.gov; Abegg, John (McConnell); Hawkins, Tom (McConnell); [redacted] @mail.house.gov; [redacted] @mail.house.gov; [redacted] @mail.house.gov; Lettre, Marcel (Reid); daniel_p._meyers@who.eop.gov; harold_h._kim@who.eop.gov; joel_d._kaplan@who.eop.gov; [redacted] @mail.house.gov; Healey, C (Intelligence); Starzak, Alissa (Intelligence); [redacted] @mail.house.gov; Weich, Ron (Reid); Wolfe, J (Intelligence)
Subject: RE: FISA

My apologies on incorrectly conveying Jim Wolfe's email address. It is [redacted] @ssci.senate.gov. Only NSA clearances have been sent so far this morning. We will start with an unclassified session. Please have your security manager send your clearance to Jim Wolfe at the address above if you would like to participate in a classified later this morning. b6

From: Tucker, L (Intelligence)
Sent: Saturday, April 19, 2008 1:16 PM
To: Livingston, J (Intelligence); Davidson, M (Intelligence); Ben Powell; Demers, John (NSD); Eisenberg, John; Carl.Nichols@usdoj.gov; Potenza, Vito; Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem); [redacted] @mail.house.gov; [redacted] @mail.house.gov; [redacted] @mail.house.gov; Johnson, A (Intelligence); [redacted] @mail.house.gov; Abegg, John (McConnell); Hawkins, Tom (McConnell); [redacted] @mail.house.gov; [redacted] @mail.house.gov; [redacted] @mail.house.gov; Lettre, Marcel (Reid); daniel_p._meyers@who.eop.gov; harold_h._kim@who.eop.gov; joel_d._kaplan@who.eop.gov; [redacted] @mail.house.gov; Healey, C (Intelligence); Starzak, Alissa (Intelligence); [redacted] @mail.house.gov; Weich, Ron (Reid); Wolfe, J (Intelligence)
Subject: FISA b6

Staff: Congressman Hoyer and Senator Bond have been in contact regarding a possible way forward with respect to FISA. Senator Bond expressed to Congressman Hoyer that because the Senate bill has bipartisan support with a supermajority in the Senate and an apparent simple majority in the House and is supported by the DNI/DOJ/Administration, he believed the most helpful way forward would be to hear from the House Democratic Leadership what specific modifications to the Senate bill the House Democrats require to allow a version of that bill a vote on the House floor, while retaining bipartisan Senate/House and DNI/DOJ/Administration support. Congressman Hoyer conveyed to Senator Bond that he will respond with such specifics to Senator Bond this week, and with that understanding he asked him to send staff to (and to ask his respective colleagues to send staff to, and to encourage the Administration to participate in) a bicameral, bipartisan and Administration staff meeting on Monday to hear from House Democrat staff the primary concerns of their principals and their ideas on possible ways forward. Senator Bond agreed and has asked me to convey that Republican staff from the following offices (House/Senate Leadership, House/Senate Intelligence and Judiciary Committees, as well as representatives from the DNI/DOJ/White House) are planning to attend a meeting with Democrat staff from those respective offices. The meeting will be held in the Senate Intelligence Committee space, Senate Hart Building Room 219 at 10am on Monday morning. I would ask that offices send only necessary staff (preferably 2-3) as the room will fill up rather quickly. If we are to hear/discuss classified matters (as I imagine we will) then staff will need to send their clearances to: [redacted] @ssci.senate.gov (the SSCI's security manager) first thing Monday morning. If staff without clearances are necessary then we can hold an unclassified portion first and then a classified discussion thereafter. I look forward to seeing you all Monday morning.

7/15/2008 113