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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

June 27, 2007

Fred Fielding, Esq.
Counsel to the President, Office of Counsel to the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W., Rm 154
Washington, DC 20501

Dear Mr. Fielding:

For more than five years, the Bush Administration intercepted conversations of Americans in the United States without warrants and without following the procedures of the Foreign Intelligence Surveillance Act (FISA). The President confirmed this fact soon after it became public in December 2005. Since that time, the Senate Judiciary Committee has conducted an inquiry into this warrantless electronic surveillance. Over the past 18 months, this Committee has made no fewer than nine formal requests to the Department of Justice and to the White House, seeking information and documents about the authorization of and legal justification for this program. All requests have been rebuffed. Our attempts to obtain information through testimony of Administration witnesses have been met with a consistent pattern of evasion and misdirection.

Therefore, attached is a subpoena for documents related to the Committee's inquiry into the program or programs of warrantless electronic surveillance. The subpoena seeks, among other things, documents related to authorization and reauthorization of that surveillance; legal analysis or opinions about the surveillance; orders, decisions, or opinions of the Foreign Intelligence Surveillance Court (FISC) concerning the surveillance; agreements between the Executive Branch and telecommunications or other companies regarding liability for assisting with or participating in the surveillance; and documents concerning the shutting down of an investigation of the Department of Justice's Office of Professional Responsibility (OPR) concerning the surveillance.

This Committee's inquiry into this warrantless electronic surveillance is essential to the performance of its constitutional legislative and oversight responsibilities. The Administration has asked Congress to make sweeping changes to FISA – a crucial national security authority over which the Judiciary Committee has jurisdiction. It is impossible to make informed legislative decisions without understanding fully the Administration's interpretation of FISA and the perceived flaws in that legislation that led the Administration to operate a program outside of its provisions for more than five years. It is not enough to know the Administration's current legal justification for the surveillance.

All indications are that the legal analysis supporting this program of warrantless surveillance, and perhaps the program itself, has changed more than once since its inception; it could very well change again. For the Congress to legislate effectively in this area it must have full information about the Executive Branch's interpretations of FISA and how those interpretations have affected its enforcement of the Act.

The Administration's FISA proposal also contains provisions that would bring to an end lawsuits concerning participation of telecommunications carriers and other companies in this program of warrantless surveillance. This Committee cannot responsibly consider those provisions without knowing what government officials and the companies understood to be the legal basis for that participation at the time it occurred. The Supreme Court has said that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *McGrain v. Dougherty,* 273 U.S. 135, 175 (1927). The documents this Committee seeks are just that sort of information and we cannot do our job without them.

In addition, the Judiciary Committee is charged with oversight of the Executive Branch in the areas of constitutional protections and the civil liberties of Americans. The warrantless electronic surveillance program directly impacts those responsibilities. We cannot conduct this oversight without knowing the legal arguments the Administration has used to justify interception of the communications of Americans without a warrant. This Committee would be abdicating its responsibility if it failed to examine Executive Branch actions simply because we are told they have stopped. We have been given no assurance that these activities, or similar ones, will not resume based on the same or similar legal arguments. This Committee must conduct oversight to consider whether it wishes to act, through legislation or otherwise, to prevent such recurrence.

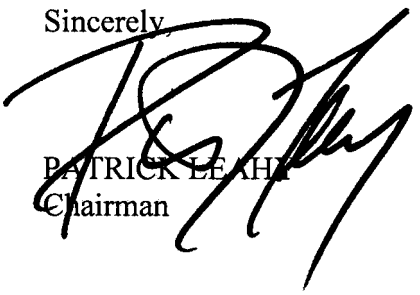
Oversight is also necessary to determine whether the Administration has conducted itself appropriately in carrying out and defending this warrantless surveillance. The testimony of former Deputy Attorney General James Comey before this Committee raises serious questions about the Administration's commitment to the rule of law. He testified that only the prospect of a mass resignation of virtually every senior officer in the Department of Justice caused the President to address serious Justice Department concerns about legality of the program. This came after the program had already been operating for more than two years. Later, when Attorney General Alberto Gonzales was asked during testimony before this Committee whether senior Justice Department officials expressed reservations about the warrantless surveillance program, the Attorney General responded "I do not believe that these DOJ officials . . . had concerns about this program." That response, at the very least, calls into question the Attorney General's candor with this Committee.

Finally, when the Department of Justice's own Office of Professional Responsibility (OPR) began an internal investigation into the role of Department of Justice attorneys in the authorization and oversight of the warrantless surveillance program, the Department of Justice and the White House denied the investigators the clearances they needed, thereby shutting the investigation down. The head of OPR has noted that in its 31-year history OPR has never before been prevented from pursuing an investigation. This action, too, raises questions about the Administration's motives and behavior.

There is no legitimate argument for withholding the requested materials from this Committee. The Administration cannot thwart the Congress's conduct of its constitutional duties with sweeping assertions of secrecy and privilege. The Committee seeks no intimate operational facts and we are willing to accommodate legitimate redactions of the documents we seek to eliminate reference to these details. We ask that you segregate any documents containing classified national security information and deliver those separately to the Office of Senate Security in Room S-407 of the Capitol, where they will be maintained in compliance with all security laws and regulations. Only Committee members and appropriately cleared staff will be permitted to review them.

I continue to hope that the Administration will cooperate with the Committee's investigation; this Committee remains willing to work to with you and accommodate legitimate concerns in connection with your compliance with this subpoena. I look forward to your compliance with the Judiciary Committee's subpoena by the return date of July 18, 2007.

Sincerely,



PATRICK LEAHY
Chairman

UNITED STATES OF AMERICA

Congress of the United States

To Joshua Bolton or other Custodian of Records, White House Office, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the Committee on the Judiciary of the Senate of the United States, on July 18, 2007, at 2:00 o'clock p.m., at their committee room 226 Dirksen Senate Office Building, then and there to testify what you know relative to the Committee's inquiry into the program or programs of warrantless electronic surveillance that include one that has been identified as the "Terrorist Surveillance Program," and to bring with you the documents described in Attachment A under the terms and conditions stated therein. A personal appearance at the above-referenced date and time will not be necessary if the documents described in Attachment A are delivered to the Committee's offices or, if they contain classified national security information, to the Office of Senate Security at least 24 hours prior to the scheduled return.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To any Committee staff member or U.S. Marshal to serve and return.

Given under my hand, by authority vested
in me by the Committee, on this 27 day
of JUNE, 2007.

Senator Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate

Attachment A

Documents Subpoenaed

1. Complete and unredacted versions of the following:

   A. All documents from September 11, 2001 to the present constituting the President's authorization or reauthorization of the warrantless electronic surveillance program (see Definitions, #1);

   B. All documents from September 11, 2001 to the present containing analysis or opinions from the Department of Justice, the National Security Agency, the Department of Defense, the White House, or any other entity within the Executive Branch on the legality of, or legal basis for, the warrantless electronic surveillance program, including documents that describe why the surveillance at issue should not or could not take place consistent with the requirements and procedures of the Foreign Intelligence Surveillance Act (FISA);

   C. All documents from September 11, 2001 to the present, including orders, decisions, or opinions of the Foreign Intelligence Surveillance Court (FISC), and pleadings submitted to the FISC, that reflect communications with the FISC or any FISC judges about the warrantless electronic surveillance program, containing legal analysis, arguments, or decisions concerning the interpretation of FISA, the Fourth Amendment to the Constitution, the Authorization for the Use of Military Force enacted on September 18, 2001, or the President's authority under Article II of the Constitution;

   D. All documents from September 11, 2001 to the present that reflect, discuss, or describe agreements or understandings between the White House, the Department of Justice, the National Security Agency, or any other entity of the Executive Branch and telecommunications companies, internet service providers, equipment manufacturers, or data processors regarding criminal or civil liability for assisting with or participating in the warrantless electronic surveillance program;

   E. All documents from September 11, 2001 to the present in the categories described in sections A-D, above related to the classified intelligence program that was the subject of discussion during the March 2004 hospital visit to former Attorney General John Ashcroft and other events that former Deputy Attorney General James Comey described in his May 15, 2007 testimony before the Senate Judiciary Committee, whether or not you consider that program to be covered by sections A-D, above;

F. All documents from December 1, 2005 to the present related to the investigation by the Department of Justice's Office of Professional Responsibility (OPR) into the role of Department of Justice attorneys in the authorization and oversight of the warrantless electronic surveillance program, which was opened on January 11, 2006 and closed approximately three months later after OPR investigators were denied the necessary security clearances ("OPR Investigation") that reflect, discuss, or describe: 1) consideration of the request for security clearances; 2) communications between White House personnel, including the President or the Vice President, and Department of Justice personnel about the OPR investigation or consideration of the request for security clearances; or 3) the reasons for ending that investigation;

G. All documents from January 1, 2004 to the present related to the transfer of the powers of the Attorney General from then-Attorney General John Ashcroft to then-Deputy Attorney General James Comey in or around March, 2004 that reflect, discuss, or describe 1) the date, time, or manner of that transfer of power; 2) communication with or notice to White House personnel, including the President or the Vice President, about that transfer of power; 3) knowledge of White House personnel about that transfer of power.

The documents produced under sections A-G, above shall include, but not be limited to:

i. Any memoranda authored or co-authored by former Deputy Attorney General James Comey on or around March 10, 2004 concerning legal issues related to the warrantless electronic surveillance program or the classified intelligence program described in section E, above;

ii. All memoranda or opinions authored or co-authored by former Department of Justice officials Jack Goldsmith, Patrick Philbin, or John Yoo concerning legal issues related to the warrantless electronic surveillance program or the classified intelligence program described in section E, above;

iii. Any memoranda from the Department of Justice Office of Intelligence Policy and Review concerning legal issues related to the warrantless electronic surveillance program or the classified intelligence program described in section E, above.

iv. Any Department of Justice Office of Legal Counsel (OLC) memoranda or opinions concerning legal issues related to the warrantless electronic surveillance program or the classified intelligence program described in section E, above;

v. Any memoranda or opinions from then-Counsel to the President Alberto Gonzales and provided to Former Deputy Attorney General James Comey on or about March 10, 2004 concerning legal issues related to the warrantless

electronic surveillance program or the classified intelligence program described in section E, above;

vi. Any certifications by the Attorney General or other Executive Branch official pursuant to 18 USC 2511(2)(a)(ii) provided to any telecommunications company, internet service provider, equipment manufacturer, or data processor in connection with requests for assistance with the warrantless electronic surveillance program or the classified intelligence program described in section E, above;

vii. The January 10, 2007 orders of the FISC referenced in the January 17, 2007 letter from Attorney General Gonzales to Senator Patrick Leahy, authorizing the warrantless electronic surveillance program.

Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agent, employee, or representative acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control or any third party.

2. No documents as defined herein called for by this request shall be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee. If you have knowledge that any subpoenaed document as defined herein has been destroyed, discarded, or lost, identify the subpoenaed document and provide an explanation of the destruction, discarding, loss or disposal and the date at which then document was destroyed, discarded or lost.

3. This subpoena is continuing in nature. Any document not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto with an explanation of why it was not located or discovered by the return date.

4. If you believe any responsive documents are protected by a privilege, you are required to provide a privilege log that (1) identifies any and all responsive documents to which the privilege is asserted, (2) sets forth the date, type, addressee(s), author(s) (and, if different, the preparer and signatory), general subject matter, and indicated or known circulation of the document, and (3) states the privilege asserted in sufficient detail to ascertain the validity of the claim of privilege.

5. Production with respect to each document shall include all electronic versions and data files from email applications as well as from word processing, spreadsheet,

or other electronic data repositories applicable to any attachments, and shall be provided to the Committee where possible in its native file format and shall include all original metadata for each electronic documents or data file.

6. To the extent possible, documents containing classified national security information must be segregated from those not containing such information. All classified documents must be handled consistent with relevant security laws and regulations and delivered to the Office of Senate Security in room S-407 of the United States Capitol.

Definitions

1. The term "the warrantless electronic surveillance program" as used in this subpoena refers to a classified intelligence program or programs that include electronic surveillance involving the interception without a court order, and without following the requirements and procedures of the Foreign Intelligence Surveillance Act, of communications with at least one participant present in the United States, including all related, predecessor, or subsequent versions of that program or programs. This includes a program that the Bush Administration has identified as the "Terrorist Surveillance Program" and at least some portion of which the President confirmed publicly in December 2005.

2. The term "document" as used in this subpoena includes all emails, memoranda, reports, agreements, notes, correspondence, files, records, and other documents, data or information in any form, whether physical or electronic, maintained on any digital repository or electronic media, and should be construed as it is used in the Federal Rules of Civil Procedure.

3. The terms "related" and "relating" with respect to any given subject, shall be construed broadly to mean anything that constitutes, contains, embodies, reflects, identifies, concerns, states, refers to, deals with or is in any manner whatsoever pertinent to the subject.

4. The terms "including" and "includes," with respect to any given subject, shall be construed broadly so that specification of any particular matter shall not be construed to exclude any documents that you have reason to believe the Committee might regard as responsive.

5. The term "Department of Justice" includes without limitation, anyone presently or formerly employed, assigned, or detailed there.

6. The term "White House" includes: all offices, individuals, or entities within the White House Office, including the Office of the Counsel to the President, the Office of the Chief of Staff, and the President himself; the Office of the Vice

President, including the Vice President himself; and the National Security Council and its staff.

7. The term "Bush Administration" refers to the Executive Branch during the terms of presidency of George W. Bush.

8. The terms "you" and "your" include all offices, individuals, or entities within the White House Office, including the Office of the Counsel to the President, the Office of the Chief of Staff, and the President himself, and, without limitation, anyone presently or formerly employed, assigned, or detailed there.