

Demers, John

NSL
page 2

From: Demers, John (NSD)
Sent: Monday, September 10, 2007 9:43 PM
To: Gerry, Brett (OLP); @ssci.senate.gov
Subject: Re: Vice Chairman White Paper and TP Sheet on FISA

(b)(3)

Exemption 6

Brett,

Jack (cc'ed) believes that the DNI made a prior court approval proposal and remembers discussing it with Ben. Do you remember anything about this? This is the last outstanding question.

Thanks,
John

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

From: Gerry, Brett (OLP) <@usdoj.gov>
To: Livingston, J (Intelligence) <@ssci.senate.gov>
Cc: Demers, John (NSD)
Sent: Mon Sep 10 18:02:12 2007
Subject: RE: Vice Chairman White Paper and TP Sheet on FISA

Jack-

We'll get back to you this evening, probably in the personage of John Demers (copied here). Is there a number where we can reach you?

Thanks,
Brett

From: Livingston, J (Intelligence) [mailto: @ssci.senate.gov]
Sent: Sunday, September 09, 2007 7:51 PM
To: Gerry, Brett (OLP)
Subject: Re: Vice Chairman White Paper and TP Sheet on FISA

Are you available to chat this evening? What's a good number to reach you?

Sent from my BlackBerry Wireless Device

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

From: Gerry, Brett (OLP) <@usdoj.gov>
To: Livingston, J (Intelligence)
Sent: Sat Sep 08 17:49:09 2007
Subject: Re: Vice Chairman White Paper and TP Sheet on FISA

I've reviewed per your request and can chat whenever you'd like.

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

From: Livingston, J (Intelligence) <@ssci.senate.gov>
To: Gerry, Brett (OLP)
Sent: Fri Sep 07 20:13:45 2007
Subject: Re: Vice Chairman White Paper and TP Sheet on FISA

Thanks.

Sent from my BlackBerry Wireless Device

NSD/

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

From: Gerry, Brett (OLP) <[redacted]@usdoj.gov>
To: Livingston, J (Intelligence) <[redacted]>

Sent: Fri Sep 07 20:09:24 2007

Subject: Re: Vice Chairman White Paper and TP Sheet on FISA

Jack-

We will review here as well, and will get back to you tomorrow.

Brett

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

From: Livingston, J (Intelligence) <[redacted]@ssci.senate.gov>
To: Gerry, Brett (OLP); [redacted]

Sent: Fri Sep 07 18:33:21 2007

Subject: FW: Vice Chairman White Paper and TP Sheet on FISA

Based on my conversations with Brett and Chris this morning, I'm now concerned that there may be issues with these documents as well. Could you please scrub these again. Is there any chance we're going to receive your suggested modifications today? It would be nice to have these done before David Kris's FISA conference. If there is some inadvertent sensitive material, we may have a containment issue as these documents have already been released publicly. Thanks.

I thought the presentation went very well this morning, although I heard that things heated up a bit after I left.

Demers, John

From: Livingston, J (Intelligence) [mailto:____@ssci.senate.gov] (b)(3)
Sent: Tuesday, October 09, 2007 11:01 AM
To: Ben Powell; Gerry, Brett ; Eisenberg, John; Demers, John (NSD); Potenza, Vito; Caproni, Valerie E.; Greer, John
Subject: FW: Draft of the RESTORE ACT
Attachments: FISAMOD_002_xml.pdf

Exemption 6

Have you seen this yet? I just got it and am starting to study it now. So far it looks pretty bad. It seems like they spent more time thinking about the title of the bill, instead of the problems we're trying to solve.

From: Donesa, Chris [mailto:____@mail.house.gov]
Sent: Tuesday, October 09, 2007 10:21 AM
To: Livingston, J (Intelligence)
Subject: FW: Draft of the RESTORE ACT

Yesterday's draft -

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

From: wyndee p [mailto:____]
Sent: Monday, October 08, 2007 9:59 AM
To: Apelbaum, Perry; DeBaca, Lou; Donesa, Chris; Lewis, Jim
Cc: Parker, Wyndee; Delaney, Mike; Bash, Jeremy; Greenwald, Eric; Vieira, Donald; Eoyang, Mieke
Subject: Draft of the RESTORE ACT

Jim, Chris, Perry and Lou,

Attached, please find a copy of the draft of the RESTORE Act which Chairmen Reyes and Conyers intend to introduce tomorrow.

Perry/Lou, please pass along to your Minority counterparts.

Please let us know if you have any questions or comments.

Thanks, Wyndee

NSDI

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10/1/2008

Demers, John

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

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

Exemption 6

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

SEGREGATE

Demers, John

From: Livingston, J (Intelligence) [@ssci.senate.gov]
Sent: Tuesday, October 16, 2007 9:35 PM
To: Gerry, Brett ; Ben Powell; Eisenberg, John; Demers, John (NSD); Vito Potenza (work); Greer, John; Caproni, Valerie E.
Cc: Wainstein, Kenneth (NSD)
Subject: Amendments

Exemption 6

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

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

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

You all had mentioned that you had changes to 106, so maybe some of those could form the basis of amendments. Please don't provide technical assistance or do any substantive work. Ideas are fine, we'll make our leg counsel do the work. I'm just willing to entertain your ideas, if you have any FISA fixes that you've been dying to have. Don't spend much time on this, because this entire exercise could be a waste of time if we reach an agreement.

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

NSD

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Demers, John

SEGREGATE

From: Davidson, M (Intelligence) @ssci.senate.gov
Sent: Monday, October 22, 2007 2:04 PM
To: Gerry, Brett ; Demers, John (NSD) b)(3)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: Technical assistance – Transition procedures **Exemption 6**

Ben and Brett,

Looking at the bill's transition procedures, in the course of preparing our section-by-section analysis, it strikes me that they need a careful scrub.

We'll do that here, but I was wondering, in the spirit of technical assistance, if you might do the same.

We've got three kinds of actions that need to be continued – authorizations, directives (both of those are AG/DNI action) and orders (a FISC action). I'm not sure that the present language provides systematically for each of them. For example, while authorizations and orders in effect on December 31, 2013, shall continue in effect the only directives referred to are those in effect on the date of the enactment of this Act.

Different subject – what does "(5) Extant Authorizations" apply to? Is it just a truism?

The string cites, sections 102 through 108, should be expanded to 102 through 109 as a result of a markup amendment adding the Feingold FISC orders amendment (section 103).

We're presently looking to file on Wednesday. Additional views are due end of tomorrow. We'd like to settle on technical changes some time tomorrow morning. Anything that you and colleagues can spot or suggest would be appreciated. (John Demers is looking at technical items regarding the en banc provision, that is, whether there need to be references to the en banc possibility in various parts of FISA or other parts of the bill.)

Mike

NSD

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9/25/2008

Demers, John

SEGREGATE

From: Davidson, M (Intelligence) @ssci.senate.gov
Sent: Tuesday, November 13, 2007 6:37 PM (b)(3)
To: Ben Powell; Gerry, Brett ; Eisenberg, John; Potenza, Vito; Nichols, Carl (CIV); Olsen, Matthew; Demers, John (NSD)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: FISA

Exemption 6

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

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

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

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

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

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

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

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

And a most happy Thanksgiving.

Mike

NSD

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9/25/2008

Demers, John

From: Davidson, M (Intelligence) @SSCI.senate.gov
Sent: Friday, November 30, 2007 9:48 AM
To: Ben Powell; Eisenberg, John; Demers, John (NSD); Potenza Vito; Gerry, Brett ;
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep)
Subject: Way Forward – Monday and Tuesday

(b)(3)

Exemption 6

Colleagues (with a copy to Brett as an alumnus of this process):

We've been advised that we should be ready to begin FISA floor proceedings next Thursday, December 6. The Senate being the Senate – Thursday could become the following Monday, but our responsibility is to be ready.

To do that, I believe we need to do the following, building, of course, on the discussion we had on Tuesday and will have today.

Meet for a slimmed down, long, pencil and pad, session on Monday. On the Senate side of this, we should have representatives of the Chairmen/Vice Chairman/Ranking of our two committees. There may be times during the course of the session when it would be wise to consult with staff who attend to the interests of other members, but basically this needs to be a session at which DNI/DOJ/NSA/Rockefeller/Bond/Leahy/Specter representatives make the progress that they can.

I've reserved space here from 1-6. Let me know if that time works.

After that meeting, all of us will need to consult with other colleagues and principals. On Tuesday, I propose that we get back together in the afternoon and review whatever text emerges from the Monday discussion, so that we can then advise our principals, including the Majority and Minority Leaders, that X issues have been resolved, and can be dealt with in a Managers Amendment, and Y issues will need to be resolved otherwise, if there remains a desire to pursue them.

Wednesday could then be devoted to the Legislative Counsel preparation of the necessary documents.

For myself, I'm hopeful that we can find ways for support of the bill to grow.

Let's take the last half hour of this afternoon's meeting, 2:30-3, to share ideas, on process and perhaps topics, for productive work next week.

Mike

Demers, John

From: Starzak, Alissa (Intelligence) [ssci.senate.gov] (b)(3)
Sent: Monday, December 03, 2007 6:26 PM
To: Ben Powell; Demers, John (NSD); Eisenberg, John; Olsen, Matthew
Cc: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep)
Subject: Redlined exclusivity provision
Attachments: Exclusivity language -- redline 12-3-07.doc **Exemption 6**



Exclusivity
language -- redlin...

Attached is the draft exclusivity provision that was circulated this afternoon, with the changes we discussed today in redline.

NSD/ 332

Demers, John

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From: Davidson, M (Intelligence) dssci.senate.gov
Sent: Monday, December 03, 2007 11:37 AM
To: Ben Powell; Livingston, J (Intelligence); Demers, John (NSD);
 Eisenberg, John;
Cc: Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: RE: today's meeting **Exemption 6**

Ben:

Yes, we want very much to proceed today at 1.

And I do think it would be useful to slim down. On our end, I'd like to begin with Rockefeller/Bond/Leahy/Specter representatives. That, not surprisingly, causes some angst here. There are people who attend to the interests of individual members of the two committees who have devoted a great deal of effort to these matters, and to whom those members will look for advice in assessing in what comes out of this process. But after several larger sessions, we need to give a smaller one a try.

At points in the discussion, I know there will be a strong interest, particularly from the Judiciary Committee, for one or several people to join us -- who may in fact be designees on our staff, for particular matters, but let's start with a smaller group than last week.

That said, when I went into our system on Friday to make a room reservation, the available room today was our hearing room, which is not exactly a sitting-around-a-conference-table environment. I may try to switch with people who had reserved our conference rooms, although with the addition of Leahy/Specter participants either of our SH-211 conference rooms would result in a tight fit.

On your end, I leave it entirely to your judgment. We have benefited throughout this process from the participation of DNI/DOJ/NSA colleagues. If meeting in SH-219 helps to give you additional latitude in that regard, that alone would be a good reason to meet there.

Mike

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

From: Ben Powell [mailto:dni.gov]
Sent: Monday, December 03, 2007 9:23 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence);
 ; Demers, John (NSD); usdoj.gov;

Subject: today's meeting

Mike -- Just wanted to check that you want to go ahead with a meeting today at 1pm. We will bring a smaller group if you want to hold a slimmed down meeting today. Assume we will do it in SSCI spaces?

Ben

NSD

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SEGREGATE

NSD
1/2/08**Demers, John**

From: Starzak, Alissa (Intelligence) @ssci.senate.gov (b)(3)
Sent: Friday, December 14, 2007 4:24 PM
To: Livingston, J (Intelligence); Ben Powell; Rice, K (Intelligence); Eisenberg, John; Demers, John (NSD); Gerry, Brett
Cc: Healey, C (Intelligence); Davidson, M (Intelligence)
Subject: RE: FISA **Exemption 6**
Attachments: Amendment Options.doc; EAS07D29_xml.pdf; EAS07D46_xml.pdf

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

Thanks –
Alissa

From: Livingston, J (Intelligence)
Sent: Friday, December 14, 2007 11:39 AM
To: Davidson, M (Intelligence); 'Ben Powell'; ; 'John Eisenberg'; @usdoj.gov';
'; 'Gerry, Brett (OLP)'
Cc: Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: RE: FISA

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

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

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

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

Jack

NSD

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9/25/2008

From: Davidson, M (Intelligence)

Sent: Friday, December 14, 2007 10:30 AM

To: 'Ben Powell'; John Eisenberg; @usdoj.gov'; ; Gerry, Brett (OLP)

Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)

Subject: FISA

dp

9/25/2008

Demers, John

From: Livingston, J (Intelligence) @ssci.senate.gov]
Sent: Monday, December 17, 2007 2:58 PM
To: Demers, John (NSD);
Subject: Fw: Amendments to D69
Attachments: EAS07D85_xml.pdf

(b)(3)

FYI

Sent from my BlackBerry Wireless Device

Exemption 6

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

From: Starzak, Alissa (Intelligence)
To: Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Healey, C (Intelligence); Davidson, M (Intelligence)
Sent: Mon Dec 17 14:46:06 2007
Subject: FW: Amendments to D69

Current managers' amendment. This should include everything, so if you catch something, please let me know ASAP.

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

From: Easley, Stephanie (Legis Counsel) [mailto: @slc.senate.gov]
Sent: Monday, December 17, 2007 2:45 PM
To: Starzak, Alissa (Intelligence)
Cc: Healey, C (Intelligence); Davidson, M (Intelligence)
Subject: RE: Amendments to D69

A new manager's amendment is attached (EAS0785.xml). I am working on the complete substitute now. Please let me know if you have any other edits.

NSD

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9/25/2008

Demers, John

NSD
2 pages

From: Demers, John (NSD)
Sent: Sunday, December 16, 2007 5:30 PM
To: @ssci.senate.gov'
Subject: Fw: FISA

b(3)

FYI

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

From: Demers, John (NSD)
To: @ssci.senate.gov' <@ssci.senate.gov>
Sent: Sun Dec 16 17:29:39 2007
Subject: Re: FISA

Exemption 6

Alissa,

Just a few things in addition those that apply from my comments to Jack:

P. 25, l. 19. Replace "authorization" with "order". We've tried to be very careful in this section not to say that the Court is authorizing the acquisition for the reasons we've expressed having to do with the authorization of acquisitions abroad.

Sec 707. I'm not sure why you would treat the 705 info as subject to all the 106 restrictions. You are applying to this information restrictions that have never applied before. I thought the point was just to get the Ct to find pc. These restrictions can be quite burdensome re: dissemination and tracking terrorists in the US. For instance, we have to put the FISA caveat when we distribute info for law enforcement purposes. But this tells the recipient we have a FISA on a person--a classified and closely held fact. Thus this requirement effectively means that, at times, we have not been able to distribute info to, e.g. state and local police to try to track terrorists here. I'm not sure why we would import this problem to a new set of information where we've not had this issue.

P. 35, l. 20. No comma between "domestic" and "wire"

P. 37 in the conforming changes to 2511, please add the language from Senator Bond's version re: section 2511(2)(a)(ii)(A). This is important if we're going to be able to issue 2511 cert to persons who help us under section 705. And please make the change from 704 in Jack's language to 705. We would of course also like the remaining conforming amendments in Jack's draft and I'm not sure why you would be opposed.

All this said, I'm sure you know that in every way this draft differs from Senator Bond's, we prefer his.

And that said, we appreciate all the effort you have made to coordinate with us and narrow differences.

John

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

From: Starzak, Alissa (Intelligence) <@ssci.senate.gov>
To: Starzak, Alissa (Intelligence) <@ssci.senate.gov>; Livingston, J (Intelligence) <@ssci.senate.gov>; Rice, K (Intelligence) <K_Rice@ssci.senate.gov>; chrisdt@dni.gov <chrisdt@dni.gov>; SMOJMD.USDOJ.gov <SMOJMD.USDOJ.gov>; Demers, John (NSD); SMOJMD.USDOJ.gov

Cc: Healey, C (Intelligence) <@ssci.senate.gov>; Davidson, M (Intelligence) <@ssci.senate.gov>
Sent: Sun Dec 16 12:31:08 2007

Subject: RE: FISA

Apparently, my blackberry didn't attach the draft. It's actually attached this time.

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

From: Starzak, Alissa (Intelligence)
Sent: Sunday, December 16, 2007 11:44 AM
To: Starzak, Alissa (Intelligence); Livingston, J (Intelligence);
K (Intelligence); ; Rice,
; usdoj.gov'; @usdoj.gov';
; @usdoj.gov'
Cc: Healey, C (Intelligence); Davidson, M (Intelligence)
Subject: Re: FISA

[2 Attachments]

John, we just got your emails on the changes to Jack's draft. We'd appreciate your comments on the sections of the attached amendment that are different than Jack's version. (We can incorporate any of the formatting changes from your earlier emails.)

Thanks --
Alissa

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

From: Starzak, Alissa (Intelligence)
To: Livingston, J (Intelligence); 'Ben Powell' <
'@dni.gov>; 'John Eisenberg' ; Rice, K (Intelligence);
'@usdoj.gov'; '@usdoj.gov';
' < : 'Gerry,
Brett (OLP)' < @usdoj.gov>
Cc: Healey, C (Intelligence); Davidson, M (Intelligence)
Sent: Fri Dec 14 16:24:29 2007
Subject: RE: FISA

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

Thanks -

Alissa

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A

Demers, John

From: Demers, John
Sent: Wednesday, January 23, 2008 5:00 PM
To: 'Starzak Alissa (Intelligence)'; Ben Powell; Potenza, Vito;
 Patrick Reynolds; patrickjreynolds; Eisenberg, John;
Cc: Healey, C (Intelligence); Davidson, M (Intelligence); Livingston, J (Intelligence); Rice, K
 (Intelligence)
Subject: RE: FISA Meeting

(b)(3)

Tracking: Recipient Read
 'Starzak, Alissa (Intelligence)'

Ben Powell
 Potenza, Vito

Exemption 6

Eisenberg, John Read: 1/23/2008 5:00 PM
 Read: 1/23/2008 5:55 PM

Healey, C (Intelligence)
 Davidson, M (Intelligence)
 Livingston, J (Intelligence)
 Rice, K (Intelligence)

Here are a few nits and typos. We are assuming that the changes we agreed upon yesterday will be reflected in the document and so have not repeated them here. Let me know if you have any questions. Thanks, John

P. 4, l. 14, delete "704 or 705" and insert "704, 705, or 706"

P. 13, l. 33, delete "(b)(3)" and insert "(b)"

P. 14, l. 20, delete "(b)(1)(F)(v)" and insert "(b)(1)(F)"

P. 14, l. 21, delete "(b)(3)" and insert "(b)"

P. 17, l. 15, insert "is to be conducted inside the United States and" after "acquisition". This addition describes what we are actually doing under section 704 and avoids a potential ambiguity over the meaning of "acquisition." That is, it is possible to read the phrase to mean that if we could get the same information here or abroad, we need to get it here. This is not the intent of the provision, which is to require us to go under 704 rather than 705 if the activity is covered by 704.

P. 23, l. 37, delete "(a)(2) and (b)" and insert "(a)(2), (b), and (c)"

P. 23, l. 38, delete "703(h)(3)" and insert "703(g)(3)"

P. 24, l. 2, delete "703(h)" and insert "703(g)"

NSD/

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9/25/2008

P. 24, l. 8, delete "704" and insert "707"

From: Starzak, Alissa (Intelligence) [mailto: @ssci.senate.gov]
Sent: Tuesday, January 22, 2008 9:35 PM
To: Ben Powell; Potenza, Vito; Patrick Reynolds;
 Demers, John; Eisenberg, John;
Cc: Healey, C (Intelligence); Davidson, M (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)
Subject: RE: FISA Meeting

To follow up on our meeting today, the following is my list of topics on which we are waiting for more DOJ/DNI/NSA input. (Unlike Ben, I need to write down my lists.)

Managers' amendment issues (We are hoping to have answers to these by tomorrow morning, so that we can finalize the managers' amendment.)

- In 703(a), you were going to confirm that it is not a problem to use the phrase "when the acquisition is conducted within the United States from or with the assistance of an electronic communication service provider".
- In 703(b)(2), you were planning on addressing whether "of such acquisition" poses operational problems.
- In the certification in 705(b)(4), you were planning on getting back to us on the use of the term "foreign intelligence information."
- In 703, you were going to take back the question of whether there needs to be a reference to stored electronic "data" like there is in 704.

Other issues

- We asked if you would provide a description of what can be said on an unclassified basis about the concerns raised by Senator Feingold's bulk collection language.
- We will explain why the 704 application does not include information on particular facilities to John Dickas, but if you want to reach out to him to explain the operational concerns in more detail, it might help things along.
- We asked if you would be willing to look at whether provisions from any existing amendments – like the language in the Kennedy amendment – might be workable.
- We asked if you would take a hard look at the language that is based on the Feinstein immunity amendment. Although we know you oppose changes of this sort, we would like to make sure that if it becomes an issue, we have the right standard, etc.

Let me know if there's anything I missed.

Thanks –
 Alissa

From: [mailto:]
Sent: Friday, January 18, 2008 11:46 AM
To: Starzak, Alissa (Intelligence)
Cc: Ben Powell; Potenza, Vito; ; John Demers;
 Eisenberg, John;

9/25/2008

Subject: Re: FISA Meeting

Alissa,

To follow up on our previous conversation, I have discussed with NSA and DOJ and we should be able to assemble the group for a meeting on Tuesday at 3:30pm. Please let us know which room it will be in.

Starzak, Alissa (Intelligence) wrote:

Hi all –

Attached is a draft of the managers' amendment in substitute form with some proposed Rockefeller edits in redline. (Some of the edits are just corrections that we missed the last time around.) Although we haven't had the opportunity to speak with Jack or Kathleen about any of these changes yet, we thought it made a lot of sense to send them out to everyone at once to give everyone as much time as possible to review. If everyone is available, it might make sense to meet on Tuesday morning as well, to have some last discussions in person.

A few comments and questions about this draft:

We added language on the section 703 authorization (p. 4 of this redline) to try to be upfront as possible about what this provision actually does. Given how clear we are in section 704 that we are talking about collection inside the US, it seemed to make sense to do the same thing here.

Although we have a reference to stored electronic "data" in section 704 (p. 11), there is no similar mention in 703. Does that difference cause any problems?

Should the agency assessment be prepared on a particular timetable? I added in a blank on page 10 line 5 with a bracketed question mark on this one.

To address some of our colleagues' concerns that there could be collection under 705 on an employee of a foreign power that doesn't involve foreign intelligence, we added in a certification by the AG that the information is FI and a significant purpose of the acquisition is to obtain FI. Review on this certification is limited to whether the certification contains all required elements.

Given the limited review on this certification, this provision also might present an opportunity to address one of Mike's longstanding concerns. He has noted in the past that courts will want to know that 705 acquisitions are being conducted in accordance with EO 12333, even if we expressly give them have no ability to review that determination. Because this FI piece is just a certification, which involves no substantive court review, this topic could potentially be added here without granting the court any review over the issue. In other words, on p. 17 line 40, we could potentially add "(C) the acquisition will be conducted under guidelines approved by the Attorney General pursuant to Executive Order 12333 or any successor order."

We added in the proposed section of 2511 from Senator Feinstein's exclusivity amendment that notes that the certification "shall identify the specific statutory provision." (p. 23, lines 8-12) Although there will obviously be more discussion about exclusivity, it seemed like this one might be able to stand on its own. We would be interested to hear your thoughts on this.

9/25/2008

It's probably worth doing a careful scrub of the transition procedures in Title III to make sure that they fit with the changes in the managers' amendment.

We're also interested to hear thoughts on a number of other proposals that seek to address various Senators' concerns:

Given the amount of judiciary committee concern on the stay pending appeal provision, we had proposed a compromise position that would strike lines 14-15 on p. 9 and insert the following:
“(ii) if the Government appeals an order under this section, until the Court of Review enters an order under subsection (C).

(C) IMPLEMENTATION PENDING APPEAL.—No later than 30 days after an appeal to it of an order under paragraph (5)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the appeal.”

Senator Feingold had proposed a bulk collection amendment in judiciary that had some operational problems. To address some of those concerns about bulk collection, however, would it be possible to change the targeting procedures requirement (p. 4 lines 25-29) to read:

“The Attorney General, in consultation with the DNI, shall adopt targeting procedures that are reasonably designed to ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States, and that at least one party to a communication acquired is a specific individual target reasonably believed to be outside the United States.”

Senator Kennedy has proposed a 2.5 related amendment, part of which includes the destruction of any collection obtained when all parties to the communication are known to be located in the United States. This idea seems to be generally consistent with NSA's practices in other kinds of collection, and requiring destruction of communications collected when targets were later determined to be in the US might help address some of the judiciary committee's concern about ensuring that there are consequences when collection is not conducted appropriately. What are your thoughts on adding this type of clause? To give you a sense of the language (and without considering exactly where in the bill it would go), the Kennedy provision reads as follows:

“Persons in the United States. – The minimization procedures required by this subsection shall require the destruction, upon recognition, of any communication as to which the sender and all intended recipients are known to be located in the United States, a person has a reasonable expectation of privacy, and a warrant would be required for law enforcement purposes, unless the Attorney General determines that the communication indicates a threat of death or serious bodily harm to any person.”

We look forward to your comments.

Thanks –
Alissa

9/25/2008

Demers, John

From: Demers, John
Sent: Thursday, January 24, 2008 8:17 AM
To: @SSCI.senate.gov'
Cc: @SSCI.senate.gov'
Subject: Re: Rockefeller-Bond managers' amendment

(b)(3)

Exemption 6

We didn't thanks. I will talk to Dickas this morning to see if I can convince him about facilities but it looks like I may not succeed.

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

From: Rice, K (Intelligence) <@SSCI.senate.gov>
To: Demers, John;
Cc: Livingston, J (Intelligence) <SSCI.senate.gov>
Sent: Thu Jan 24 08:07:58 2008
Subject: Fw: Rockefeller-Bond managers' amendment

Final attached for your review. I wasn't sure if you had this or not. Thanks. Kathleen

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

From: Starzak, Alissa (Intelligence)
To: Intel-GDG
Sent: Wed Jan 23 19:27:49 2008
Subject: Rockefeller-Bond managers' amendment

Attached is the Rockefeller-Bond managers' amendment to the FISA bill, as well as a redline that shows the changes from the Committee's original bill. The amendment is in the form of a complete substitute. We're still proofing it, but we wanted to circulate it to give folks an opportunity to take a look at it.

NSDI

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Demers, John

From: Livingston, J (Intelligence) [@ssci.senate.gov]
Sent: Thursday, January 24, 2008 1:51 PM
To: Demers, John;
Subject: Managers' Amendment

(b)(3)

Exemption 6

Are you guys okay. I've gone through it and it looks all the agreed upon changes were made. Thanks.

Sent from my BlackBerry Wireless Device

NSDI

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9/25/2008

Demers, John

From: Davidson, M (Intelligence) @ssci.senate.gov
Sent: Thursday, January 24, 2008 7:42 PM
To: Demers, John
Cc: Ben Powell; Livingston, J (Intelligence); Dickas, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence);
Subject: Sen. Wyden – facilities

(b)(3)

John:

Exemption 6

I know you've been talking with John Dickas, and possibly also with Jack regarding Sen. Wyden's concern about the absence of a facilities provision in section 705.

The future path of the bill is, of course, uncertain now, but, who knows, maybe discussions between now and the Monday cloture vote, or following it if cloture is not invoked, will seek a way forward on outstanding issues.

If that occurs, we should see whether there is an answer to Senator Wyden's concern. If there is, I believe that we will have resolved all outstanding matters on Americans abroad.

So, just at the level of technical assistance, could you or colleagues suggest legislative language that would couple the language that Senator Wyden seeks with language that would provide sufficient operational flexibility? That is, if an amendment were to be offered, what might it look like?

Many thanks.

Mike

NSDI

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9/25/2008

Demers, John

From: Demers, John
Sent: Monday, January 28, 2008 1:02 PM
To: 'Rice, K (Intelligence)'
Cc: Livingston, J (Intelligence)
Subject: RE: FISC

(b)(3)

Exemption 6

I can't find anywhere where we have publicly stated when we filed the procedures with the Court. So I think the answer is no.

John

From: Rice, K (Intelligence) [mailto: @SSCI.senate.gov]
Sent: Monday, January 28, 2008 11:10 AM
To: Demers, John
Cc: Livingston, J (Intelligence)
Subject: FISC

John—Can we say anything publicly about the length of time that was taken to review the PAA targeting procedures? Thanks. Kathleen

NSD/

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9/25/2008

Demers, John

From: Demers, John
Sent: Tuesday, January 29, 2008 3:46 PM
To: Livingston, J (Intelligence)
Subject: FW: [Fwd: Fw: 180 day warrantless surveillance amendment]

(b)(3)

If you do agent of a foreign power or foreign power maybe drop the "armed."

Exemption 6

From: Demers, John
Sent: Sunday, January 27, 2008 4:48 PM
To: Eisenberg, John; Ben Powell;
Subject: RE: [Fwd: Fw: 180 day warrantless surveillance amendment]

Two thoughts.

To increase the likelihood to getting support we should probably insert "territorial" before "United States" and "armed" before "attack."

For the same reason, you may also want to add a notice requirement where there has been an attack and a declaration of war. The purpose here would be so that Congress knew that the President was exercising this authority, even though it will of course know that the attack or declaration occurred.

One other thought, should we tie to the surveillance to the need for it? FISA does not and no draft has but if we think it will help chances of passage might be a good idea.

Thanks.

From: [mailto: @dni.gov]
Sent: Sunday, January 27, 2008 1:24 PM
To: Eisenberg, John; Demers, John; Ben Powell;
Subject: [Fwd: Fw: 180 day warrantless surveillance amendment]

FYI - the attached is being considered as a second degree amendment.

NSD/

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9/25/2008

Demers, John

From: Rice, K (Intelligence) [redacted]@SSCI.senate.gov]
Sent: Tuesday, January 29, 2008 8:09 PM
To: [redacted] Demers, John
Cc: Livingston, J (Intelligence)
Subject: FW: Kennedy domestic surveillance amendment
Attachments: HEN08108_xml.pdf

b)3.

Any comments?

Exemption 6

From: Davidson, M (Intelligence)
Sent: Tuesday, January 29, 2008 8:07 PM
To: Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: Kennedy domestic surveillance amendment

Jack and Kathleen:

We've had exchanges with NSA on Kennedy's domestic surveillance amendment, which Kennedy's office had worked on with David Kris.

As you'll see from the e-mails, NSA says that most of the provisions do not do operational harm to NSA, except for section 703(e)(2) – on page 3, lines 7-17 of the attached.

We've suggested to Kennedy's office that (e)(2) be deleted, which they are willing to do. We can ask them to prepare a clean copy.

It would be terrific if, as modified, it could be accepted. We should, of course, ask Justice to review this as well. Perhaps in the morning we could go over any pending amendments (this one, the stay amendment– with your suggestion via the second degree, any others), to see whether we could put together a small package of items that might be an initial contribution toward a larger agreement.

Mike

Chris - You are correct, the current test for retaining incidentally collected purely domestic comms is the AG's determination that there is a threat of death or serious bodily harm. We are trying to change that test on the grounds that there is important information that needs to be shared that just doesn't fit into this very narrow test.
Alonzo

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

From: Healey, C (Intelligence) [mailto:redacted@ssci.senate.gov]
Sent: Tuesday, January 29, 2008 4:02 PM
To: Robertson, Alonzo ; Davidson, M (Intelligence)
Cc: Greer, John
Subject: RE: Question on TSP

Alonzo –

NSD/Withheld 383

9/25/2008

Thanks for reply.

I have some follow up questions concerning your points on the proposed Section 703(e)(2):

What are the current rules that apply to destruction of purely domestic collection?

Is the standard of "significant foreign intelligence information" (vice "threat of death or seriously bodily harm") currently in effect for PAA collection?

Don't current provisions with respect to a determination of threat of death or serious bodily harm refer to the Attorney General?

Thanks for your help,

Chris

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

From: [mailto:]
Sent: Tuesday, January 29, 2008 3:37 PM
To: Davidson, M (Intelligence)
Cc: Healey, C (Intelligence);
Subject: FW: Question on TSP

Mike,
John asked me to respond to this message.

NSA has looked at Sen. Kennedy's domestic surveillance proposal and determined that most of the provisions do not cause operational harm to the Agency except Section 703(e)(2). This section is a problem for the reasons articulated below, i.e.:

- (1) There is no grace period before destruction is required of any purely domestic comms;
- (2) The standard for keeping the information is inappropriate, and there are cases when important information (e.g., location of a spy in the US) ought to be retained and disseminated. Under this proposal, such information could not be retained because if it did not meet the test of "threat of death or serious bodily harm." rather than a more relevant standard such as whether it contains significant FII; and
- (3) The AG is not the only one who should make the determination that the information contains significant FII. Such a determination should be within the purview of the head of an IC element.

Please let us know if we can be of further assistance.

Legislative Attorney

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

From: Davidson, M (Intelligence) [mailto:]
Sent: Tuesday, January 29, 2008 9:03 AM
To:
Cc: Healey, C (Intelligence)

9/25/2008

Subject: Re: Question on TSP

I'm forever (or at least usually) an optimist. I believe it can be done. But I also believe that there is a small list of last steps toward a solution that would help get us there.

I recognize that some of them -- exclusivity, sunset, IG TSP review -- have been/will be decided in other Executive Branch venues. Their resolution will get us a long way to the finish line

The Kennedy domestic surveillance amendment could also help untie the knot. Is there agreement that it presents no serious operational problem? And that it is fully consistent with everything everyone says and believes about the bill? Any help that NSA can give on this would be valuable.

Mike

Sent from my BlackBerry Wireless Handheld

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

From:
To: Davidson, M (Intelligence)
Cc: Healey, C (Intelligence)
Sent: Mon Jan 28 20:08:37 2008
Subject: Re: Question on TSP

Mike

You are probably tired of people asking, but what is your sense of prospects of getting a bill? Do you have an idea of what amendments might be coming? Thanks

John

Demers, John

From: Demers, John
Sent: Friday, January 25, 2008 6:57 PM
To: 'Livingston, J (Intelligence)'
Subject: RE: Stay/correction pending appeal

Exemption 6

Why? I thought the manager's amendment was closed. Let them offer whatever amendments they want. We're opposed on substance for the reasons we've talked about. Are we going to get something?

From: Livingston, J (Intelligence) [mailto:jlivingst@ssci.senate.gov]
Sent: Friday, January 25, 2008 6:51 PM
To: Demers, John; Ben Powell
Subject: FW: Stay/correction pending appeal

FYI. Thoughts?

From: Davidson, M (Intelligence)
Sent: Friday, January 25, 2008 6:25 PM
To: Livingston, J (Intelligence); Rice, K (Intelligence)
Cc: Healey, C (Intelligence); Starzak, Alissa (Intelligence)
Subject: Stay/correction pending appeal

I know there are far bigger fish to fry, but on the assumption that there has to be a way to resolve some outstanding issues, how about this on stays --

"No later than 30 days after an appeal to it of an order under paragraph (5)(B) directing the correction of a deficiency, or within such further period of time as it may by order require, the Court of Review shall determine, and enter a corresponding order, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the appeal."

This would ensure that the Court of Review has the time that it needs, while also ensuring that it looks at the matter within the first 30 days, decides whether it needs more time, and then enters an order on implementation pending appeal when it is prepared to do so.

Mike

NSD/

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Demers, John

From: Livingston, J (Intelligence) [@ssci.senate.gov]
Sent: Tuesday, January 29, 2008 7:36 PM
To: Demers, John; Ben Powell
Subject: FW: FISA Amendment

Attachments: HEN08117_xml.pdf

Exemption 6



HEN08117_xml.pdf
(30 KB)

Do you all have any comments on this amendment? Can you live with it? We might be able to use it to break Senator Feinstein away from the pack. Thanks.

NSD/

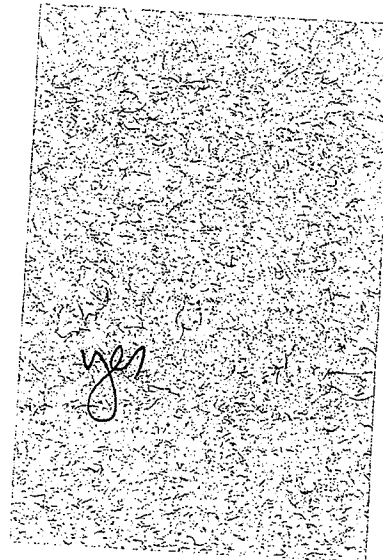
380

Demers, John

From: Livingston, J (Intelligence) | @ssci.senate.gov]
Sent: Wednesday, January 30, 2008 4:28 PM
To: Demers, John; Ben Powell
Subject: Bond WMD Amendment
Importance: High

Exemption 6

I may have a chance of getting the WMD amendment accepted. However, the Democrats have expressed concern about the use of the term "destructive device" in the definition of WMD. The term references 19 USC 921 and seems to include bombs, mines, grenades, large bore guns, I'm guessing howitzers, etc. While in the criminal context we want to nail people using such devices, in the foreign intelligence context, we're more interested in CBR weapons, which are covered in the rest of the definition. Do you guys have any serious heartburn if I strike the "destructive device" paragraph? Thanks.



NSD/

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9/25/2008

Demers, John

From: Demers, John
Sent: Thursday, January 31, 2008 10:58 AM
To:
Subject: FW: Feingold 3909
Importance: High
Tracking: Recipient Read
Read: 1/31/2008 10:59 AM

Exemption 6

What do you think?

From: Livingston, J (Intelligence) [mailto: @ssci.senate.gov]
Sent: Thursday, January 31, 2008 10:30 AM
To: Demers, John; Ben Powell;
Subject: Feingold 3909
Importance: High

We had proposed the following compromise to Feingold 3909:

Strike all (of the Bond second degree to Feingold 3909) and insert the following:

On page 1, strike all after line 5 through page 2, line 14 and insert the following:

“(c) Submissions to Congress.—To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Attorney General shall submit to the committees of Congress referred to in subsection (a)—(1) a copy of any decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the of Review that includes significant construction or interpretation of any provision of this Act, and any pleadings, applications, or memoranda of law associated with such decision, order, or opinion, not later than 45 days after such decision, order, or opinion is issued; and
(2) a copy of any such decision, order, or opinion, and the pleadings, applications, or memoranda of law associated with such decision, order, or opinion, that was issued during the 5-year period ending on the date of the enactment of the FISA Amendments Act of 2008 and not previously submitted in a report under subsection (a).”

Apparently, Feingold’s people don’t like the National Security Act language “consistent with due regard for the protection”, because the meanies in the administration have used this language in the past to not provide information to the full committee, etc., etc.

Melvin is trying to reach a compromise with Feingold’s people and is suggesting that they accept this language for a new subsection (d): “The Attorney General may authorize redactions of materials provided to the Committees of Congress referred to in subparagraph (a), provided such redactions are necessary to protect the national security of the United States and are limited to particularly sensitive sources and methods information or the identities of targets.”

NSD/

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9/25/2008

What are your thoughts. I need a pretty quick turnaround. Thanks.

Jack

9/25/2008

Demers, John

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



Exemption 6

HEN08153_xml.pdf
(30 KB)

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

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

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

Many thanks,
David

David Grannis
Professional Staff Member
Senate Select Committee on Intelligence
[REDACTED]

NSD/Withheld 395

Demers, John

From: Demers, John (b)(3)
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

Exemption 6

Tracking:

Recipient	Message Status
'Davidson, M (Intelligence)'	
Olsen, Matthew	
Livingston, J (Intelligence)	
Healey, C (Intelligence)	
Rice, K (Intelligence)	
Starzak, Alissa (Intelligence)	

Eisenberg, John

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

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From: Demers, John [mailto:John.Demers@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); 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

9/25/2008

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."

Thanks,
John

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1 page

Demers, John

From: Davidson, M (Intelligence) [redacted] @ssci.senate.gov] b(3)

Sent: Monday, February 04, 2008 8:01 PM

To: Demers, John **Exemption 6**

Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); [redacted] Eisenberg, John

Subject: RE: Challenges/Enforcement – Directives

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.

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

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J. Powell

Demers, John

From: Livingston, J (Intelligence) [redacted] @ssci.senate.gov [redacted]
Sent: Monday, February 04, 2008 10:57 PM
To: Demers, John; Ben Powell
Cc: Olsen, Matthew; Rice, K (Intelligence); [redacted]
Subject: Bond Amendments

(b)(3)

Exemption 6

[redacted] Eisenberg, John

Hey, I just got out of a meeting [redacted]

Looking first at expedited review (HEN08149), I wish I had read this e-mail more carefully before I went into the meeting. They want to amend it in two places. First, on page 3, line 2, strike "to comport with the due process clause of the fifth amendment to the Constitution of the United States" and insert ", with due regard to national security". Second, same change on page 4, line 8. It appears from your e-mail below that you object to changing the language away from the due process exception. It seems to me that due regard to national security could cut both ways, meaning that it could be used as a reason not to extend consideration beyond 30 days. Regardless, no matter how much we try to box the court in, it will still be able to take as much time as it wants to decide the case. Does this language have any problems that I'm missing? The only advantage we get if this language works for us, is that it'll get accepted into the bill without a vote. Generally, Senator Bond likes it when we can get his amendments in a bill without a vote, provided that we don't have to compromise too much on our preferred language.

Turning to WMD (HEN08144). First, Lara raised the issue that US companies could be treated as foreign powers and be subjected to FISA. I informed her that US companies are considered as U.S. persons and would not be pled as foreign powers. She wanted to know if that was in an opinion somewhere (I said I doubted it) and Evan wanted to know if that was somewhere in the legislative history (I said I couldn't recall). Second, we then turned to the next topic which was the definition of WMD. They want to know if we can build in the "capability to cause death or serious bodily injury to a significant number of people" that appears on page 3, line 8 into the three remaining sub-elements of the definition (they don't want poison tipped umbrellas to be WMD, although if a proliferator went on a stabbing spree, maybe he could still qualify). It seems to me that we could strike "that is intended or has the capability to cause death or serious bodily injury to a significant number of people" from page 3, line 6, and insert it at the end of the subsection so that it applies to all four types of WMD. However, I note that you all apparently lifted the definition straight from 18 USC 2332a, so it might not be a good idea to change it too much more than we already have. Third, they want to add a criminal nexus to the current structure, e.g., make a new category of foreign power that reads "a group that knowingly engaged in the international proliferation of weapons of mass destruction." I wasn't too keen on that approach. I showed more interested in the definition of a new term "international proliferation," mainly because I knew it would make Mike squirm. Lara volunteered to take a stab at it (I'm sure we'll love it). There might be some long term benefit to defining this concept, because we might eventually be able to apply it to U.S. persons (which I at one point suggested was a logical follow on to Evan's desire to have a closer link to criminality—he looked at me like I was insane).

Upon further reflection, this seems like a pretty tough assignment. I couldn't find a ready-made definition. Mixing the international terrorism definition with 18 USC 794 let me come up with this:

"International proliferation" means activities that—(1) would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) transcend national boundaries in terms of the means by which they are accomplished; and (3) appear to be intended—(A) to use, possess, build, construct, create, operate, transfer, spread, or propagate one or more weapons of mass destruction; or (B) communicate, deliver, transmit,

or attempt to communicate, deliver, or transmit, directly or indirectly, any document, writing, code, signal, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or other information that could be used to build, construct, create, operate, transfer, spread, or propagate one or more weapons of mass destruction."

After reading it again, I think I wasted my time. We may just have to leave things as they are. International proliferation should probably be resigned to the same fate as pornography, we'll know it when we see it. Sorry for the rambling e-mail.

Jack

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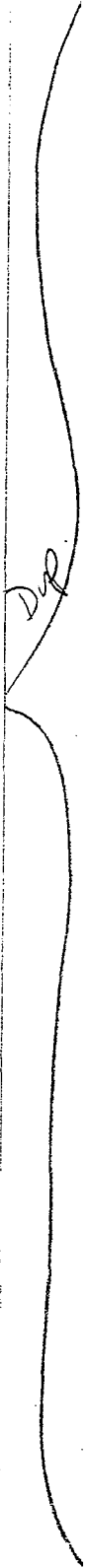
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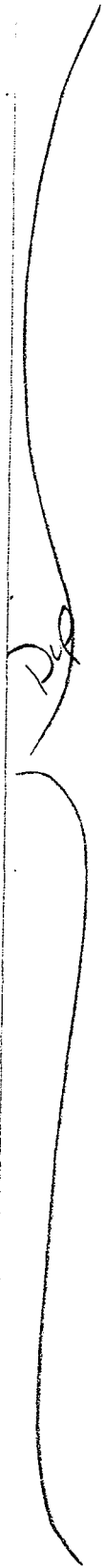
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XSD
1 page

Demers, John

From: Davidson, M (Intelligence) @ssci.senate.gov
Sent: Tuesday, February 05, 2008 11:59 AM
To: Demers, John
Cc: Olsen, Matthew; Livinaston, J (Intelliaence); Healev, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Eisenberg, John
Subject: RE: Challenges/Enforcement – Directives

(b)(3)

Exemption 6

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

DUP

DP.

DP.
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Dr.

DP

DR

Demers, John

From: Davidson, M (Intelligence) [redacted] @ssci.senate.gov] (b)(3)
Sent: Tuesday, February 05, 2008 6:32 PM
To: Ben Powell; Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John; Pelofsky, Eric (Intelligence)
Subject: RE: Sen. Whitehouse Proposal on Minimization

Senator Whitehouse gave me a second copy. The text that you set forth below matches exactly.

For starters, the best place might be at the end of section 703, as a new section 703(1).

"Bill" could then be changed to "section," and as Ben notes, "Foreign Intelligence Surveillance Court" substituted for "FISA Court".

To conform to usage elsewhere in the Act, "agencies" could be changed to "elements of the Intelligence Community".

The provision would then read:

"Section 703(1). Nothing in this section shall be considered to reduce or contravene the inherent authority of the Foreign Intelligence Surveillance Court to determine, or enforce, compliance with its orders, rules and approved procedures by elements of the Intelligence Community acting pursuant thereto."

Mike

Exemption 6

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

From: Ben Powell [mailto:
Sent: Tuesday, February 05, 2008 6:13 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John (NSD); Pelofsky, Eric (Intelligence)
Subject: Sen. Whitehouse Proposal on Minimization

Sen. Whitehouse has provided a draft proposal to reflect his concerns about court power to review minimization while also reflecting the concerns we have expressed. The text is as follows:

"Nothing in this bill shall be considered to reduce or contravene the inherent authority of the FISA Court to determine, or enforce, compliance with its orders, rules and approved procedures by agencies acting pursuant thereto."

I have committed to the Senator to review and provide him with feedback as soon as possible.

[As a pure technical matter, assume we will suggest changing "bill" to the ("section" or "Act" or etc.) and "FISA Court" to "Foreign Intelligence Surveillance Court". I wanted to make sure though that I sent the text exactly as provided by Sen. Whitehouse.]

1 pass

Demers, John

From: Pelofsky, Eric (Intelligence) [redacted] @ssci.senate.gov] [redacted]
Sent: Tuesday, February 05, 2008 6:45 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John;
Subject: Re: Sen. Whitehouse Proposal on Minimization

(b)(3)

Exemption 6

Admittedly I'm doing all of this from a blackberry [redacted] but I thought I noticed an "and" in Ben's draft and an "or" in the version I received from the Senator (in the passage about orders, rules, approved procedures").

It seems to me that "Act" and "Foreign Intelligence Surveillance Court" would be appropriate substitutions.

Does the FISC ever issue orders to the Dept. of Justice (because it is not an "element of the Intelligence Community")? [redacted]

Thanks,
Eric

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

From: Davidson, M (Intelligence)
To: 'Ben Powell' <@dni.gov>; Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John (NSD) <@usdoj.gov>; Pelofsky, Eric (Intelligence)
Sent: Tue Feb 05 18:32:22 2008
Subject: RE: Sen. Whitehouse Proposal on Minimization

Senator Whitehouse gave me a second copy. The text that you set forth below matches exactly.

For starters, the best place might be at the end of section 703, as a new section 703(l).

"Bill" could then be changed to "section," and as Ben notes, "Foreign Intelligence Surveillance Court" substituted for "FISA Court".

To conform to usage elsewhere in the Act, "agencies" could be changed to "elements of the Intelligence Community".

The provision would then read:

"Section 703(l). Nothing in this section shall be considered to reduce or contravene the inherent authority of the Foreign Intelligence Surveillance Court to determine, or enforce, compliance with its orders, rules and approved procedures by elements of the Intelligence Community acting pursuant thereto."

Mike

9/25/2008

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DUP
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Demers, John

From: Demers, John
Sent: Wednesday, February 06, 2008 7:03 PM
To: 'Grannis, D (Intelligence)'
Cc: 'Livingston, J (Intelligence)'; 'Ben Powell';
(Intelligence)'
Subject: Exclusive Means

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Eisenberg, John; 'Rice, K
Exemption 6

David,

I'm sorry that further discussions on this issue appear to have broken down, but thanks for considering this technical fix. For the reason I mentioned on the phone, this would be very important to us and doesn't have a substantive effect on the provision.

Suggested revision:

Page 4, line 21. "(c) The authority granted in this section includes the authority to acquire stored electronic communications and stored electronic data in the custody of an electronic communication service provider (as that term is defined in section 702)."

Thanks,
John

Tracking:

Recipient

Read

'Grannis, D (Intelligence)'

'Livingston, J (Intelligence)'

'Ben Powell'

Eisenberg, John

Read: 2/6/2008 7:03 PM

'Rice, K (Intelligence)'

1 page

Demers, John

From: Pelofsky, Eric (Intelligence) [redacted] @ssci.senate.gov [redacted]
Sent: Wednesday, February 06, 2008 9:11 PM 3
To: Ben Powell
Cc: Davidson, M (Intelligence); Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John;
Subject: RE: Sen. Whitehouse Proposal on Minimization

Exemption 6

Ben,

Thank you for emailing me. [redacted] Subsequent to sending my email to Mike, I learned that Sen. Whitehouse spoke to Vice Chairman Bond on the floor of the Senate and the Vice Chairman indicated that the proposed alternative to amendment no. 3920 was acceptable to him. [redacted]

Eric

DNV

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Re: [Sen. Whitehouse Proposal on] Minimization

Page 1 of 2

NSD, page 2

Demers, John

From: Pelofsky, Eric (Intelligence) [redacted] @ssci.senate.gov [redacted]
Sent: Wednesday, February 06, 2008 6:03 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John [redacted]
Subject: Re: [Sen. Whitehouse Proposal on] Minimization

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Exemption 6

Mike,

Have you heard from anything from DOJ or DNI today on this? If not, I will reach out.

thanks,
Eric



2/6

9/25/2008

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DUP

NSD 1 page

Demers, John

From: Livingston, J (Intelligence) [redacted] [ssci.senate.gov]
 Sent: Wednesday, February 06, 2008 9:22 PM
 To: [redacted] Tucker, L (Intelligence)
 Cc: Rice, K (Intelligence); Demers, John;
 Subject: Re: Sen. Whitehouse Proposal on Minimization

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Exemption 6

It's our understanding that the acceptance was conditional upon Senator Whitehouse agreeing to support final passage and to not offer assessment of compliance at conference (although his wording choice would let him vote for it if someone else raised it). We are also interested in any reformulation of the language that DOJ and/or ODNI comes up with. The deal isn't done—Senator Whitehouse is still considering whether to agree to the conditions.

Sent from my BlackBerry Wireless Device

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Demers, John

From: Davidson, M (Intelligence) [mailto:dm@ssci.senate.gov] **Exemption 6**
Sent: Friday, February 15, 2008 1:52 PM
To: Benjamin Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); Gerry, Brett
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, [redacted] (and from our alumni list, Brett, FYI):

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. Chris will be here throughout the week, and probably would be the best person with whom to be in touch regarding any fine tuning on time, etc.

Mike

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Demers, John

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From: Davidson, M (Intelligence) [redacted] @ssci.senate.gov [redacted]
 Sent: Friday, February 22, 2008 11:41 PM
 To: [redacted]; Livingston, J (Intelligence); @mail.house.gov;
 @mail.house.gov; Healey, C (Intelligence)
 Cc: [redacted]; Demers, John
 Subject: Re: Update

Exemption 5

Exemption 6

Ben,

Thanks for the update.

Given the sending of the letter to Chairman Reyes (copies to Chairman Rockefeller, Ranking Member Hoekstra, and Vice Chairman Bond), which I assume the press has, I think it is imperative that there now will be a prompt public assurance.

Hope that the ODNI will do that as quickly as possible.

Mike

Sent from my BlackBerry Wireless Handheld

D.P.

Demers, John

From: Bash, Jeremy [redacted] @mail.house.gov [redacted] 3
Sent: Saturday, February 23, 2008 1:33 PM
To: Davidson, M (Intelligence); [redacted] Livingston, J (Intelligence); Donesa, Chris; Healey, C (Intelligence)
Cc: [redacted] Demers, John
Subject: RE: Update

[redacted] agree with Mike that the public record needs to be corrected promptly. [redacted]

Exemption 6

DE

Demers, John

3 1 page

From: Parker, Wyndee [mailto:wyndee.parker@mail.house.gov]

Sent: Tuesday, March 04, 2008 12:21 PM

Exemption 6

To: [redacted]@ssci.senate.gov

Cc: [redacted] Demers, John; Eisenberg, John; Nichols, Carl (CIV); Vito Potenza; [redacted]@ssci.senate.gov; Mary Derosa; Nick Rossi; Doneso, Chris; [redacted] Apfelbaum, Perry; [redacted]@reid.senate.gov; [redacted]@mcconnell.senate.gov

Subject: RE: FISA, meeting tomorrow (Tuesday), 1 pm,

Kathleen,

I am confused by your message. I understand that Senate Republican staff will attend the meeting and that it will therefore be bipartisan.

Thanks, Wyndee

DP

DR
L

Demers, John

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From: Davidson, M (Intelligence) [redacted] @ssci.senate.gov [redacted]
Sent: Friday, March 14, 2008 5:43 PM
To: Ben Powell; Demers, John; Eisenberg, John; Nichols, Carl (CIV); 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)
Subject: On the return of H.R. 3773 to the Senate
Attachments: FISA proposal – 3-14-08.doc

Exemption 6

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

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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.

9/25/2008

Mike

9/25/2008

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Demers, John

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

Sent: Monday, March 17, 2008 5:34 PM

Exemption 6

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,

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

DJP
[Handwritten scribbles]

9/25/2008

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[Handwritten signature]