

OIP GROUP 6

Gerry, Brett

FOIA Exemption b(6)

From: Starzak, Alissa (Intelligence) [REDACTED]@sscl.senate.gov [EFF2AG(1)-1]
Sent: Friday, December 14, 2007 4:24 PM
To: Livingston, J (Intelligence); Ben Powell; Rice, K (Intelligence); [REDACTED] Eisenberg, John; Demers, John (NSD); [REDACTED]; Gerry, Brett
Cc: Healey, C (Intelligence); Davidson, M (Intelligence) [FOIA Exemptions b(2) and (6)]
Subject: RE: FISA [FOIA Exemption b(3)]
Attachments: Amendment Options.doc; EAS07D29_xml.pdf; EAS07D46_xml.pdf

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

Thanks -
 Alissa

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

FOIA
 Exemption
 b(3)

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

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

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

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

Jack

1/25/2008

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

Page 2 of 2

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

FOIA Exemption b(6)

EFF2AG(1)-3

Dear All:

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

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

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

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

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

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

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

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

Mike

1/25/2008

Gerry, Brett

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

All:

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

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

-Brett

1/30/2008

Gerry, Brett

EFF2AG(1)-24

Not Responsive

EFF2AG(1)-25

Not responsive

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

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

EFFAG(1)-26

Mike-

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

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

1/30/2008

Best,
Brett

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

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov> [redacted] EFF2AG(1)-27 [redacted] FOIA Exemption b(3)

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

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

Sent: Tue Nov 13 18:37:16 2007

Subject: FISA

FOIA Exemptions b(2) and (6)

[redacted] FOIA Exemption b(6)

[redacted] FOIA Exemption b(3)

[redacted] FOIA Exemptions b(2) and (6)

[redacted] FOIA Exemption b(6)

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

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

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

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

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

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

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

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

And a most happy Thanksgiving.

Mike

1/30/2008

Gerry, Brett

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

EFF2AG(1)-28

FOIA
Exemption
b(2) and b(6)

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

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

FOIA Exemptions b(2)
and (6)

EFF2AG(1)-29

Alissa,

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

██████████ FOIA Exemption (6)

Starzak, Alissa (Intelligence) wrote:

Ben –

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

Let us know.

Thanks –

Alissa

Gerry, Brett

FOIA Exemption b(6)

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

EFF2AG(1)-30

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

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

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

Subject: RE: Remaining issues

FOIA Exemption b(3)

FOIA Exemptions b(2) and (6)

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

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

EFF2AG(1)-31

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

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

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

Subject: RE: Remaining Issues

FOIA Exemption b(3)

Alissa-

FOIA Exemptions b(2) and (6)

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

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

-Brett

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

FOIA Exemption b(6)

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

EFF2AG(1)-32

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

To: Ben Powell; Healey, C (Intelligence)

FOIA Exemptions b(2) and (6)

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

Subject: RE: Remaining Issues

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

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

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

Chris --

FOIA Exemption b(3)

FOIA Exemption b(6)

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

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

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

We will discuss ASAP here and get back to you.

Healey, C (Intelligence) wrote:

EFF2AG(1)-34

Ben --

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

1/30/2008

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

Thanks for your help,

Chris

Christine Healey
Senate Select Committee on Intelligence

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

[REDACTED]@ssci.senate.gov

Gerry, Brett

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

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

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

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

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

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

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

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

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

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

or

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

Gerry, Brett

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

Great, thanks.

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

Vito and Patrick will be most welcome.

Sent from my BlackBerry Wireless Handheld

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

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

Davidson, M (Intelligence) wrote:

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

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

1/30/2008

(Intelligence); Nichols, Carl (CIV)

>Subject: Re: new drafts

>

>Mike-

>

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

>

>Thanks,

>Brett

FOIA Exemptions b(2) and (6)

FOIA Exemption b(6)

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

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

EFF2AG(1)-43

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

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

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

>Subject: RE: new drafts

>

>Ben, Brett, John, and Carl:

>

>

>

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

>

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

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

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

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

>Davidson, M (Intelligence) wrote:

EFF2AG(1)-45

>Sunday multi-tasking -- Redskins and FISA.

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

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

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

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

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

>Happy Columbus Day to all.

>Mike

>Sent from my BlackBerry Wireless Handheld

FOIA Exemptions b(2) and (6)

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

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

EFF2AG(1)-46

>To: Davidson, M (Intelligence)

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

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

>Subject: Re: new drafts

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

>Davidson, M (Intelligence) wrote:

EFF2AG(1)-47

> Ben, Brett, and John:

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

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

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

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

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

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

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

> How about starting Wednesday morning?

> Mike

EFF2AG(1)-48

Not responsive

Gerry, Brett

FOIA Exemption b(6)

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

EFF2AG(1)-58

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

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

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

FOIA Exemption b(6)

EFF2AG(1)-59

That is a safe approach.

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

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

FOIA Exemption b(6)

EFF2AG(1)-60

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

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

FOIA Exemption b(6)

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

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

EFF2AG(1)-61

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

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

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

FOIA Exemption b(6)

EFF2AG(1)-62

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

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

FOIA Exemption b(6)

C_healey@ssci.senate.gov

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

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

EFF2AG(1)-63

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

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

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

FOIA Exemption b(6)

EFF2AG(1)-64

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

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

Gerry, Brett

EFF2AG(1)-65

FOIA Exemption b(5),
WIF, Group 1

EFF2AG(1)-66

FOIA Exemption b(5),
WIF, Group 1

FOIA Exemption b(6)

EFF2AG(1)-67

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

FOIA Exemptions
b(2) and (6)

FOIA Exemption b(3)

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

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

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

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

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

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

Gerry, Brett

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov] EFF2AG(1)-72
 Sent: Monday, October 15, 2007 12:46 PM
 To: Gerry, Brett (OLP); Healey, C (Intelligence); Livingston, J (Intelligence); Nichols, Carl (CIV)
 Cc: Eisenberg, John; [redacted] Starzak, Alissa (Intelligence)
 Subject: RE: New bill versions
 Attachments: EAS07A89_xml.pdf FOIA Exemptions b(2) and (6) FOIA Exemption b(3)



EAS07A89_xml.pdf (111 KB)

Draft with edits, back from Legislative Counsel --

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] EFF2AG(1)-73
 Sent: Monday, October 15, 2007 11:58 AM
 To: Davidson, M (Intelligence); Healey, C (Intelligence); Livingston, J (Intelligence)
 Cc: Eisenberg, John; [redacted]; Starzak, Alissa (Intelligence)
 Subject: Re: New bill versions

Mike-

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

Thank you for your email, and for your willingness to ask for our technical assistance. We will be sensitive to your needs to keep any assistance tightly focused given when we are as a matter of process.

On the housekeeping issue, I think we will be getting you that document (if it is the same one we have discussed before), perhaps as early as today.

Thanks,
Brett

FOIA Exemption b(6)

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

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov> EFF2AG(1)-74
 To: Gerry, Brett (OLP); Healey, C (Intelligence) [redacted]@ssci.senate.gov>; Livingston, J (Intelligence) [redacted]@ssci.senate.gov>
 Cc: Eisenberg, John; [redacted]; Starzak, Alissa (Intelligence) [redacted]@ssci.senate.gov>
 Sent: Mon Oct 15 09:21:02 2007
 Subject: Re: New bill versions

FOIA Exemption b(3)

FOIA Exemptions b(2) and (6)

Brett,

Chris will have the best idea, as the morning goes on, about when we might expect the next draft back from Legislative Counsel, although it is possible that the next we hear is when the draft arrives. In addition to entering changes sent yesterday, they are undertaking a proof reading process. We'll keep you posted.

Yes, we very much would like to have the ODNI/DOJ/NSA team review it.

We're entering a time when all of us, starting with ourselves, will need to be modest regarding changes. As members review the draft we need to avoid any sense that it is a moving target. But we do want to catch errors and improve clarity when we can, and so another round of comments will be welcome.

There is also that other kind of technical assistance that we spoke about yesterday,

having some paragraphs or a few pages on matters that may/will come up.

One is, as mentioned, the impact of the limitation of the definition of electronic surveillance on other sections or laws in which it appears: section 102, 109, 110, in a definition in title III of FISA, 2511 of title 18, and perhaps elsewhere.

One clearing the deck matter -- it wouldn't surprise me if a member at markup asks a question about the legal memo in support of a FISA application that we've discussed, and which Rockefeller and Bond have written to Peter Keisler about. Any help in resolving that would be most welcome.

Thanks for all that all of you have been doing.

Mike

Sent from my BlackBerry Wireless Handheld

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

From: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov> [EFF2AG(1)-75]
To: Healey, C (Intelligence); Davidson, M (Intelligence); Livingston, J (Intelligence)
Cc: Eisenberg, John <John.Eisenberg@usdoj.gov>; [REDACTED]
[REDACTED] Vito Potenza (work) [REDACTED] [FOIA Exemptions b(2) and (6)]
Sent: Mon Oct 15 07:56:22 2007
Subject: New bill versions

Mike, Jack- [FOIA Exemption b(3)]

Thanks for inviting us to the meeting yesterday. You mentioned yesterday that you might circulate a new version that reflects the changes discussed at our meeting -- please let me know if you would like our technical assistance on that draft (and, if you do, it would be great if you could let me know when we might expect it, so that I could give people here an advance heads-up).

Best,
Brett

FOIA Exemptions b(2)
and (6)

Gerry, Brett

From: Davidson, M (Intelligence) [redacted]@sssi.senate.gov
 Sent: Sunday, October 14, 2007 2:31 PM
 To: Nichols, Carl (CIV); [redacted] Livingston, J (Intelligence); Gerry, Brett (OLP); Healey, C (Intelligence); Storzak, Alissa (Intelligence); [redacted]
 Cc: Eisenberg, John; [redacted]; Rice, K (Intelligence); [redacted]
 Subject: [redacted] Demers, John (NSD); Wainstein, Kenneth (NSD)
 RE: Technical Assistance

EFF2AG(1)-82

FOIA Exemption b(3)

DNI/DOJ/NSA friends:

As you read your text messages on the way over --

You've probably noticed that the text distributed yesterday does not have items such as sunset, a broad definition of electronic surveillance, exclusivity, and some other matters that you've been reading. That's because what we're working to produce now is a joint Chairman/Vice Chairman mark. Matters not in agreement, such as the preceding, will be addressed by amendments.

One item that we left out is the provision on the status of collection pending appeal.

We are now thinking about the following idea, for which text needs to be written, but I just wanted to preview it for you.

We could include in section 103 a provision that is applicable to all of FISA that provides authority for a judge of the FISC, the court of review or a judge of it, the Supreme Court or a justice of it, to enter an order (in the same manner a district court, or a U.S. court of appeals, or the Supreme Court may do) to authorize collection or otherwise preserve the status quo pending appeal. That would, of course, be applicable to collection under the new title, but to all other titles as well.

The question whether collection under the new title pending appeal should be mandatory could then be the subject of an amendment, but there would at least be baseline authority to preserve the collection.

Let's add this idea to today's discussion.

Mike

PS. We've gotten back a full draft back from Legislative Counsel, with various questions identified, and will be able to make that available to everyone.

EFF2AG(1)-83

Not responsive

EFF2AG(1)-84

Not responsive



FOIA Exemption b(6)

EFF2AG(1)-85

----- Original Message -----
 From: "Davidson, M (Intelligence)" [REDACTED]@ssci.senate.gov]
 Sent: 10/13/2007 05:03 PM AST
 To: Livingston, J (Intelligence)" [REDACTED]@ssci.senate.gov>;
 <Brett.Gerry@usdoj.gov>; Healey, C (Intelligence)" [REDACTED]@ssci.senate.gov>; Starzak,
 Alissa (Intelligence)" [REDACTED]@ssci.senate.gov>; benjaap
 Cc: <John.Eisenberg@usdoj.gov>; [REDACTED]; Rice, K (Intelligence)" [REDACTED]
 [REDACTED]@ssci.senate.gov>; [REDACTED]; [REDACTED]
 <Carl.Nichols@usdoj.gov>; [REDACTED]
 Subject: Re: Technical Assistance

FOIA Exemption b(3)

FOIA Exemptions b(2) and (6)

And fine for me. (Someone will need to undertake to bring in periodic Redskins-Packers updates.)

Sent from my BlackBerry Wireless Handheld

FOIA Exemptions b(2) and (6)

EFF2AG(1)-86

----- Original Message -----
 From: Livingston, J (Intelligence)
 To: 'Brett.Gerry@usdoj.gov' <Brett.Gerry@usdoj.gov>; Healey, C (Intelligence); Starzak,
 Alissa (Intelligence); [REDACTED]
 Cc: 'John.Eisenberg@usdoj.gov' <John.Eisenberg@usdoj.gov>; [REDACTED]
 [REDACTED]; Davidson, M (Intelligence); Rice, K (Intelligence); [REDACTED]
 [REDACTED]
 <John.Demers@usdoj.gov>; 'Carl.Nichols@usdoj.gov' <Carl.Nichols@usdoj.gov>;
 [REDACTED]

FOIA Exemption b(3)

FOIA Exemption b(6)

Sent: Sat Oct 13 16:50:54 2007
 Subject: Re: Technical Assistance

I'm good with 3pm

Sent from my BlackBerry Wireless Device

FOIA Exemptions b(2) and (6)

EFF2AG(1)-87

----- Original Message -----
 From: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov>
 To: Healey, C (Intelligence); Livingston, J (Intelligence); Starzak, Alissa
 (Intelligence); [REDACTED]
 Cc: Eisenberg, John <John.Eisenberg@usdoj.gov>; [REDACTED]
 Davidson, M (Intelligence); Rice, K (Intelligence); [REDACTED]
 [REDACTED]; Demers, John (NSD) [REDACTED]; Nichols, Carl (CIV)
 <Carl.Nichols@usdoj.gov>; Wainstein, Kenneth (NSD) [REDACTED]
 Sent: Sat Oct 13 16:48:30 2007
 Subject: Re: Technical Assistance

FOIA Exemption b(3)

FOIA Exemption b(6)

Chris-

FOIA Exemption b(3)

We would be happy to meet tomorrow, although we prefer 3pm if it would make no difference to you. Otherwise we will make 2pm.

Thanks,

FOIA Exemption b(6)

Brett

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

From: Healey, C (Intelligence) [redacted]@ssci.senate.gov>
To: Gerry, Brett (OLP); Livingston, J (Intelligence) [redacted]@ssci.senate.gov>;
Starzak, Alissa (Intelligence) [redacted]@ssci.senate.gov>; Ben Powell <[redacted]>
Cc: Eisenberg, John; [redacted] Davidson, M (Intelligence)
[redacted]@ssci.senate.gov>; Rice, K (Intelligence) [redacted]@ssci.senate.gov>;
[redacted]; Demers, John (NSD); Nichols,
Carl (CIV); Wainstein, Kenneth (NSD)
Sent: Sat Oct 13 11:23:10 2007
Subject: RE: Technical Assistance

EFF2AG(1)-88.

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

Brett, et al -

We very much appreciate your technical assistance. While you were working on the technical assistance to the version you circulated Wednesday, we also were working to make changes to our draft. We would again appreciate your technical assistance.

We are planning to be here in the office at 2 pm tomorrow to finalize our draft mark. It might be that a meeting here tomorrow would be a productive way to address any technical issues identified in this draft.

I can be reached on my cell phone this afternoon [redacted] or here at the office, if you would like to discuss this.

Exemption 6

Thank you again,

Chris

Christine Healey

Senate Select Committee on Intelligence

[redacted] (direct)

[redacted]@ssci.senate.gov

FOIA Exemption b(6)

EFF2AG(1)-89

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@uadoj.gov]
Sent: Friday, October 12, 2007 4:18 PM
To: Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Ben Powell; Healey, C (Intelligence)
Cc: Eisenberg, John; [redacted]; Davidson, M (Intelligence); Rice, K (Intelligence); [redacted] Vito Potenza (work); Demers, John (NSD); Nichols, Carl (CIV); Wainstein, Kenneth (NSD)
Subject: Technical Assistance

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

All:

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

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

-Brett

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [redacted]@sscl.senate.gov] EFF2AG(1)-96
 Sent: Friday, October 19, 2007 1:16 PM
 To: Gerry, Brett (OLP); Eisenberg, John; [redacted] FOIA Exemptions b(2) and (6)
 Cc: Wainstein, Kenneth (NSD)
 Subject: RE: Congrats

The crappy amendments are going to go in pretty much as written, inconsistencies and all. We'll have to fix the inconsistencies in a managers' amendment. Send them over if you've got suggestions.

Our biggest problem is going to be figuring out a way to implement the Court approval of all 2.5s. We need to look at the data, at least from the last year or so. We need to build a matrix that includes, but is not limited to things like: (1) country where target is located; (2) countries where intercepts are being conducted; (3) means by which interception is being conducted; (4) basis for probable cause; (5) additional authorities needed to implement surveillance; (6) does the target's profile fit into the current FISA definitions, etc. We'll also need a briefing on all the various collection programs/methods out there. My sense is that some of this data will indicate that some targets are not amenable to the current FISA process and would be dropped out coverage. We've got to solve this problem. Better that we write the solution rather than someone on their side.

While I'm personally opposed to this concept (which is irrelevant since I don't have a certificate of election), and there are some on our side who would continue to resist procedurally, I'm not resisting any more until I have hard, cold facts that lead me to the conclusion that it can't be done and give us an opportunity to revisit the issue. So, I'm now working on the presumption that it can be done at least to some extent, maybe 80% or better.

What are your thoughts?

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
 Sent: Friday, October 19, 2007 10:00 AM
 To: Davidson, M (Intelligence); Livingston, J (Intelligence)
 Subject: RE: Congrats

EFF2AG(1)-97

Mike-

Also, at this point, is there any remaining opportunity for technical changes? In particular, one could imagine ways in which the introduction of the US persons amendment could create inconsistencies with existing provisions in the bill.

-Brett

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [mailto:[redacted]@sscl.senate.gov] EFF2AG(1)-98
 Sent: Friday, October 19, 2007 9:12 AM
 To: Gerry, Brett (OLP); Livingston, J (Intelligence)
 Subject: Re: Congrats

Brett,

We'll fold the amendments into the text this morning. As soon as we get that back from Legislative Counsel, and it looks to be in order, we'll send you a copy. I hope that happens before noon.

1/25/2008

Re: Congrats

Page 2 of 2

Do you have the US person outside the US amendment? If not, let me see whether we can get you that even before the full text comes back from Legislative Counsel.

We'll also be posting the text on our website sometime during the course of the day.

Let's talk soon about the path ahead.

We're deeply grateful for all your help.

Mike

Sent from my BlackBerry Wireless Handheld

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

From: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov>
To: Livingston, J (Intelligence); Davidson, M (Intelligence)
Sent: Fri Oct 19 08:20:10 2007
Subject: Congrats

Duplicate of
EFF2AG(1)-99

Mike, Jack:

Congratulations on getting a bill out of committee. If you are in a position to share the final text with us, we would be much obliged.

Best,
Brett

1/25/2008

Gerry, Brett

From: Gerry, Brett (OLP) [EFF2AG(1)-106]
Sent: Monday, October 22, 2007 5:58 PM
To: 'Davidson, M (Intelligence)'; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: RE: Draft US Person Technical Assistance [FOIA Exemptions b (2) and (6)]

Mike-

I have tried to reach you and Jack -- there are some significant issues with the transition procedures. What is the best way for us to talk through them?

-Brett [FOIA Exemption b(6)]

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

From: Davidson, M (Intelligence) [mailto:[REDACTED]@ssci.senate.gov] [EFF2AG(1)-107]
Sent: Monday, October 22, 2007 2:55 PM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: RE: Draft US Person Technical Assistance [FOIA Exemptions b(2) and (6)]

Brett,

Thanks for the draft amendment.

One person I'd like to share this with is Sen. Whitehouse who has a particular interest in the matter.

Let's be in touch soon on when to meet this week and how to proceed.

Mike

[REDACTED] Duplicate of EFF2AG(1)-104

[REDACTED] Not responsive

[REDACTED] Duplicate of EFF2AG(1)-105

[REDACTED] Not responsive

Gerry, Brett

From: Gerry, Brett (OLP) [EFF2AG(1)-108]
Sent: Monday, October 22, 2007 3:03 PM
To: 'Davidson, M (Intelligence)'; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: RE: Draft US Person Technical Assistance

FOIA Exemptions b(2) and b(6)

Mike-

I'll give you a call shortly, to explain the structure of the draft.

Best,
Brett

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

FOIA Exemptions b(6)

Duplicate of EFF2AG(1)-107

From: Davidson, M (Intelligence) [mailto:[REDACTED]@ssci.senate.gov]
Sent: Monday, October 22, 2007 2:55 PM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: RE: Draft US Person Technical Assistance

FOIA Exemptions b(2) and b(6)

Brett,

Thanks for the draft amendment.

One person I'd like to share this with is Sen. Whitehouse who has a particular interest in the matter.

Let's be in touch soon on when to meet this week and how to proceed.

Mike

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

Duplicate of EFF2AG(1)-104

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
Sent: Monday, October 22, 2007 12:58 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: Draft US Person Technical Assistance

FOIA Exemptions b(2) and b(6)

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

Duplicate of EFF2AG(1)-105

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
Sent: Monday, October 22, 2007 12:58 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Subject: Draft US Person Technical Assistance

FOIA Exemptions b(2) and b(6)

Mike, Jack-

As you know, the Administration has significant concerns with the amendment adopted last week concerning the surveillance of U.S. persons abroad. We were considerably more comfortable with the "carve-out-of-a-carve-out" approach reflected in the initial Committee draft, which would have avoided most of the operational issues that were discussed at the recent closed hearing concerning that subject.

Gerry, Brett

From: Gerry, Brett (OLP) [EFF2AG(1)-109]
Sent: Wednesday, October 24, 2007 1:08 PM
To: 'Davidson, M (Intelligence)'; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance [FOIA Exemptions b(2) and (6)]

Mike-

In this case, you may treat silence as assent. Thanks for your patience.

-Brett

[FOIA Exemption b(6)]

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

From: Davidson, M (Intelligence) [mailto:[REDACTED]@ssci.senate.gov] [EFF2AG(1)-110]
Sent: Wednesday, October 24, 2007 12:13 PM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance [FOIA Exemptions b(2) and (6)]

Brett,

Any further word on the 106 and PAA addition? May we assume it is OK?

Mike

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] [EFF2AG(1)-111]
Sent: Wednesday, October 24, 2007 10:17 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance

Mike-

[FOIA Exemption b(2) and b(6)]

Our quick reaction to your second point is that it is probably OK -- indeed, some of 106's requirements (like the caveat/use provision in 106(b)) already apply to PAA collection because of its placement in FISA's Title I. But we are confirming, and will let you know ASAP if we have any concerns.

First point seems fine as well.

Thanks,
Brett

[FOIA Exemption b(6)]

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

From: Davidson, M (Intelligence) [mailto:[REDACTED]@ssci.senate.gov] [EFF2AG(1)-112]
Sent: Wednesday, October 24, 2007 8:48 AM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]
Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance

Brett:

[FOIA Exemptions b(2) and (6)]

On the way home last night, two manifestations of an anomaly occurred to me, triggered by the non-reversion language.

One part can be dealt with by a parenthetical. At the end of 2013, the non-reversion language should make clear, as the proviso on the sunset does, that it is except for section 704 on the use of information.

The other part is this. We have not established a 704-like use provision that is applicable to Protect America Act collection, some of which may continue for up to year. So for some collection over the year following enactment, there will be a use provision, but for other collection there won't be a use provision, and the IC will have to keep straight whether an item came in as Protect America collection or Title VII collection.

This could be avoided by a conforming provision added to the transition provisions (which could be called transition and conforming provisions) taken verbatim, except for the PAA reference:

(7) Information acquired from an acquisition conducted under the Protect America Act shall be deemed to be information acquired from an electronic surveillance pursuant to title I of the Foreign Intelligence Surveillance Act of 1978 () for the purposes of section 106 of that Act, except for the purposes of subsection (j) of such section." And there can be a cross-reference to this in the non-reversion language for the PAA.

Thoughts?

Mike

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov] EFF2AG(1)-113
Sent: Tuesday, October 23, 2007 7:56 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]; Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance

FOIA Exemptions b(2) and (6)

Mike-

Many thanks. On the transition procedures, one thing that is important (and which I expect is incorporated but which I wanted to confirm) is that the PAA authorizations not only remain in effect, but that acquisitions conducted under those authorizations do not revert to being electronic surveillance on the effective date of the new law. Language clarifying this would be most helpful.

Thanks again,
Brett

FOIA Exemption b(6)

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

From: Davidson, M (Intelligence) [mailto:[REDACTED]@ssci.senate.gov] EFF2AG(1)-114
Sent: Tuesday, October 23, 2007 7:42 PM
To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [REDACTED]; Starzak, Alissa (Intelligence)
Subject: RE: Draft US Person Technical Assistance

Brett, FOIA Exemptions b(2) and (6)

Save for the moment the page 6, line 25-26 suggestion (which John Dickas is hard at work on, consulting with other supporters of the amendment),

we'll incorporate everything -- although we have another way of covering authorizations, directives, or orders under the existing structure.

(3) on p. 57 will become AUTHORIZATIONS AND DIRECTIVES IN EFFECT, and be divided, as (2) is, into an (A) and (B) -- (A) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON THE DATE OF ENACTMENT, and (B) AUTHORIZATIONS AND DIRECTIVES IN EFFECT ON DECEMBER 31, 2013. That way we'll cover everything while keeping parallel the structure of (2) and (3).

Mike

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

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
Sent: Tuesday, October 23, 2007 8:30 AM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito;
[REDACTED] FOIA Exemptions b(2) and b(6)
Subject: RE: Draft US Person Technical Assistance

Duplicate of
EFF2AG(1)-105

Mike, Jack --

I am attaching a few proposed technical changes as you finalize the bill. Several concern clarifications to the transition procedures, and I've provided brief explanations besides each. I wanted to flag two that are of particular importance in the cover e-mail.

First, I understand that there is only room at the present time for purely technical amendments to the Sen. Wyden amendment. There is one proposed here that I believe falls into that category, and which I hope you can consider. The draft as written (section 703(c)(2)) applies to the targeting of "communications" of US persons outside the United States. This language, which I believe may stem from the fact that earlier drafts of the SSCI mark used a similar formulation in describing the section 703 authority, could be read to require court approval for the collection of incidental communications to Uspers overseas when a non-Uspers is the target, which we do not believe was intended. Reversing the order of the phrasing to make it clear that the requirement applies to the targeting of persons to acquire communications resolves any ambiguity.

Second, on the transition procedures, it is clear that directives issued under the PAA remain in effect until their expiration; it is not clear, however, that the authorizations themselves remain in effect, and that such authorizations do not again become electronic surveillance upon the repeal of the PAA. Depending on how it is read, this could cause significant disruption at the point of transition from the PAA to the section 703 authority. We believe based upon language that was in earlier drafts that this was unintended and may have been introduced by a leg counsel reorganization, and we hope it can be clarified.

Thanks,
Brett

Gerry, Brett

FOIA Exemption b(6)

From: Gerry, Brett (DLP) [EFF2AG(1)-115] [FOIA Exemption b(6)]
Sent: Tuesday, October 23, 2007 8:21 AM
To: [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov; [redacted]@ssci.senate.gov;
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; [redacted] [FOIA Exemption b(3)]
Subject: Re: Draft US Person Technical Assistance

FOIA Exemptions b(2) and (6)

Thanks mike.

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

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov [EFF2AG(1)-116] [FOIA Exemption b(6)]
To: Gerry, Brett (DLP); Livingston, J (Intelligence) [redacted]@ssci.senate.gov; Healey, [redacted] (Intelligence) [redacted]@ssci.senate.gov; Rice, K (Intelligence) [redacted]@ssci.senate.gov
Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito [redacted] [redacted]@ssci.senate.gov; Starzak, Alissa (Intelligence) [redacted] [FOIA Exemptions b(2) and (6)] [FOIA Exemption b(3)]
Sent: Tue Oct 23 20:06:33 2007
Subject: RE: Draft US Person Technical Assistance

Yes, the pen and ink on page 57 fills that page, and includes that, with this modification -- in essence, not 101(f) as limited (or clarified) in the respective Acts. Let's see what we get back from Leg. Counsel.

Duplicate of EFF2AG(1)-113

Duplicate of EFF2AG(1)-114

Gerry, Brett

From: Ben Powell [REDACTED] EFF2AG(1)-117
 Sent: Friday, October 19, 2007 2:18 PM
 To: Davidson, M (Intelligence)
 Cc: Gerry, Brett (OLP); Healey, C (Intelligence); Livingston, J (Intelligence); Eisenberg, John; Demers, John (NSD); Rice, K (Intelligence); Starzak, Allissa (Intelligence)
 Subject: Re: Wyden #3

thanks, will do.

Davidson, M (Intelligence) wrote:

>Ben, Brett, John E., John D.,

>

>Brett, John E, and I just spoke. To share with all --

>

>Yes, the amendment, most definitely, needs to be discussed. There was a
 >vigorous debate about it. We defended the joint mark, but a majority of
 >the committee --with votes on both sides of the aisle -- thought that
 >something stronger was needed. (The vote on the amendment will appear
 >in next week's report.) There is a recognition, nonetheless, that work
 >needs to be done on exactly how to protect US persons abroad. We should
 >start on that promptly, looking forward to a managers amendment.

>

>And, as mentioned in our conversation, please also work through the main
 >body of the bill (which includes changes from another amendment -- on
 >oversight -- we can send you that amendment so that it is easier for you
 >to identify those changes) for technical matters.

>

>There was also an agreement to include the same text of the compromise
 >provision that is in our intelligence authorization via our managers
 >amendment, as section 315, on FISC orders as well as opinions on
 >significant constructions of the Act. It will be in the full text that
 >we will send you shortly.

>

>Sometime next week we might all sit together to chart out the weeks
 >ahead, including briefings that particular members might receive on
 >particular issues.

>

>Mike

>

>

>

>

>

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

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

>Sent: Friday, October 19, 2007 11:41 AM

>To: Healey, C (Intelligence)

>Cc: Davidson, M (Intelligence); Livingston, J (Intelligence); Ben

>Powell; Eisenberg, John; Demers, John (NSD)

>Subject: RE: Wyden #3

>

>Chris-

>

>As written, this remains unworkable, as it would effectively bar
 >surveillance of US persons overseas in several circumstances. It also
 >has other serious technical problems we need to discuss.

>

>-Brett

>

Not Responsive

EFF2AG(1)-119

Gerry, Brett

From: Gerry, Brett (OLP) [EFF2AG(1)-120]
Sent: Friday, October 26, 2007 5:57 PM
To: 'Rice, K (Intelligence)'; Eisenberg, John
Cc: Livingston, J (Intelligence); [REDACTED] [FOIA Exemptions b(2) and (6)]
Subject: RE: Wyden amendments

Kathleen-

We drafted a comprehensive "technical assistance" proposal on the 2.5 issue, which I sent to Mike and Jack last weekend -- if you don't have it, let me know and I will send you a copy. That is in our view the best way to do a technically correct Sen. Wyden amendment (which of course we oppose). The other approach which we should pitch where we can is that language in the SSCI mark that was struck, which would have required probable cause determinations for U.S. persons surveilled under the section 703 authority (that is, the "carve out of a carve out"). That is much, much better than even a technically correct Sen. Wyden amendment.

On the IG review language, I would defer to Ben (copied here), who will have a better sense as to what NSA can and can't live with.

Thanks,
Brett

[FOIA Exemption b(6)]

From: Rice, K (Intelligence) [mailto:[REDACTED]@SSCI.senate.gov] [EFF2AG(1)-121]
Sent: Friday, October 26, 2007 4:42 PM
To: Gerry, Brett (OLP); Eisenberg, John
Cc: Livingston, J (Intelligence)
Subject: Wyden amendments

Brett/John—are you looking at ways to fix both of these amendments (2.5 and IG reviews)? We're starting to work with some of the Judiciary staffers in anticipation of their mark-up and would like to give them as much guidance on these issues as possible. Thanks. Kathleen

Gerry, Brett

[Redacted]

FOIA Exemption b(5),
WIF, Group 1

EFF2AG(1)-133

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

From: Livingston, J (Intelligence) [Redacted]@ssci.senate.gov>
To: Wainstein, Kenneth (NSD); Gerry, Brett (OLP); Ben Powell [Redacted]; Vito
Potenza (work) [Redacted]; Caproni, Valerie E. <Valerie.Caproni@fbi.gov>;
Eisenberg, John; Demers, John (NSD); [Redacted]
Sent: Mon Oct 15 16:16:32 2007
Subject: Exclusive Means

FOIA Exemption b(6)

EFF2AG(1)-134

FOIA Exemptions b(2) and (6)

FOIA Exemption b(3)

Rockefeller is insisting on putting in Mike's limited exclusive means language. Can you all live with that provision? If not, can it be modified. If it can't be modified, what are your arguments against the provision. It's not as bad as other exclusive means provisions I've seen, but up until now, we've held the line on this. However, it is likely that we don't have the votes to keep this out. It might be better to fix it now. This is one of the key last sticking points. We're trying to get an agreement with Rockefeller to protect the mark against any amendment to which they don't both agree. Thanks.

FOIA Exemption b(6)

Gerry, Brett

From: Davidson, M (Intelligence) [redacted]@sscl.senate.gov [EFF2AG(1)-143]
 Sent: Wednesday, October 24, 2007 6:30 PM
 To: Gerry, Brett (OLP); Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence)
 Cc: Olsen, Matthew; Demers, John (NSD); Eisenberg, John; Potenza, Vito; [redacted]
 Starzak, Alissa (Intelligence); Nichols, Carl (CIV); [redacted]
 Subject: FISA bill, Wednesday, 6 pm
 Attachments: ARM07U21_xml.pdf



ARM07U21_xml.pdf
(118 KB)

FOIA Exemptions b(2) and (6)

Brett, Matt, John D., John E., Ben, Vito, Carl, [redacted]

The attached is where we ended the day with technical corrections. We'll be comparing it with what we sent up to Legislative Counsel, but I thought you might like to see what we now have. (I already see a missing word -- "Act" on page 60, line 5; I'm sure there are other things to catch.)

John Dickas still has under consideration the technical change that he and Brett have discussed.

We should be filing the bill and our report tomorrow sometime after the meeting that Ben and I have discussed.

Many thanks once again for all your help.

Mike

Duplicate of EFF2AG(1)-109

Duplicate of EFF2AG(1)-110

Gerry, Brett

From: Gerry, Brett (OLP) EFF2AG(1)-180
Sent: Wednesday, October 10, 2007 7:24 PM
To: 'Livingston, J (Intelligence)'
Cc: [REDACTED]; Eisenberg, Joh FOIA Exemptions b(2) and (6)
Subject: FW: Electronic version
Attachments: FISA Mod SSCI Technical Assistance 7 0 (10 10 07) - Clean.doc

Jack-

Here it is. I've already sent it to Chris H. as well.

Thanks,
Brett

1/25/2008

Gerry, Brett

From: Gerry, Brett (OLP) [EFF2AG(1)-181]
Sent: Tuesday, October 16, 2007 2:07 PM
To: 'Livingston, J (Intelligence)'; Eisenberg, John; Ben Powell; Demers, John (NSD)
Cc: Wainstein, Kenneth (NSD)
Subject: RE: Exclusive statutory authority

John E. and I (and perhaps others) will be available to discuss when you get back. Thanks.

[FOIA Exemption b(6)]

From: Livingston, J (Intelligence) [mailto: [REDACTED]@sscl.senate.gov] [EFF2AG(1)-182]
Sent: Tuesday, October 16, 2007 2:00 PM
To: Gerry, Brett (OLP); Eisenberg, John; Ben Powell; Demers, John (NSD)
Cc: Wainstein, Kenneth (NSD)
Subject: Exclusive statutory authority
Importance: High

Here's Mike's exclusive statutory language.

Sec. 7. Clarification of exclusive statutory authorities for the conduct of electronic surveillance

- (a) Amendment to Foreign Intelligence Surveillance Act of 1978.—Section 109(a) of the FISA of 1978 (50 USC 1809(a)) is amended by striking "authorized by statute" each place that term appears and inserting "authorized by this title or chapter 119, 121, or 206 of title 18, USC"
- (b) Amendment to Title 18, USC.—Section 2511(2)(a)(ii)(B) of title 18, USC, is amended by striking "statutory requirements" and inserting "requirements under the FISA of 1978 (50 USC 1801 et seq.), this chapter, or chapter 121 or 206 of this title."

I need your best arguments against this language as soon as possible. They're hanging pretty tight on this issue and we need your position.

When I think about it, maybe the title is helping us because it talks about "exclusive statutory authorities" which is not the authority relied upon by the President (constitutional authorities). Maybe they are unwittingly making an argument that will help us. My recollection is that the debate over exclusive means was over whether to use exclusive means or exclusive statutory means. Exclusive means won. This might inject even more doubt into the process, although it has the unpleasant effect of providing less flexibility in this area.

I'll be out of pocket for the next hour or so. I'm going to go look at the documents in the OEOB.

Thanks.

1/25/2008

Gerry, Brett

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [redacted]@ssci.senate.gov] [EFF2AG(1)-183]
Sent: Friday, October 26, 2007 1:56 PM
To: Gerry, Brett (OLP); Ben Powell [FOIA Exemptions b(2) and (6)] [FOIA Exemptions b(2) and (6)]
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted]; Eisenberg, John; [redacted] Livingston, J (Intelligence); [redacted] [FOIA Exemption b(3)]
Subject: Bill and report filed [FOIA Exemption b(6)]
Attachments: ARM07U34_xml.pdf; FINAL FISA bill report.docx

To all:

Our numbers: S. 2248, S. Rep. No. 110-209, and Calendar No. 453.

As I understand it, Judiciary may wait a number of days before asking for the bill's sequential referral, so as not to have the clock start running before it is ready to schedule a November markup.

Once again, we are truly grateful for everyone's help and patience through this process. And I suspect that we all have a fair amount of work ahead.

Mike

FOIA Exemptions b(2) and (6)

From: Davidson, M (Intelligence)
Sent: Friday, October 26, 2007 11:15 AM [EFF2AG(1)-184]
To: 'Gerry, Brett (OLP)'; Ben Powell
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted]; Eisenberg, John; [redacted] Livingston, J (Intelligence); [redacted]
Subject: Final bill with the technical to the Wyden amendment
 [FOIA Exemption b(6)] [FOIA Exemption b(3)]
 Bottom of 6, line 25 to top of 7, line 4.

There is a related edit on page 8, lines 2-3: "the targeting of that United States person."

We should be filing in an hour.

FOIA Exemptions b(2) and (6)

From: Gerry, Brett (OLP) [mailto:Brett.Gerry@usdoj.gov]
Sent: Thursday, October 25, 2007 4:03 PM [EFF2AG(1)-185]
To: Davidson, M (Intelligence); Ben Powell
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted] Eisenberg, John; [redacted] Livingston, J (Intelligence); [redacted] [FOIA Exemption b(3)]
Subject: RE: our draft is attached [FOIA Exemption b(6)]

Thanks, Mike.

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [mailto:[redacted]@ssci.senate.gov] [EFF2AG(1)-186]
Sent: Thursday, October 25, 2007 4:02 PM
To: Ben Powell
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted]; Gerry, Brett (OLP); Eisenberg, John; [redacted];

FOIA Exemptions b(2) and (6)

1/25/2008

FOIA Exemption b(6)

Livingston, J (Intelligence); [redacted] [redacted] FOIA Exemption (3)
Subject: RE: our draft is attached

On another front, Sen. Wyden and his principal co-sponsors of the Wyden amendment have agreed to the two line technical that Brett had sent over. We'll make that change in the bill filed tomorrow.

From: Ben Powell [mailto:[redacted]] ← EFF2AG(1)-187 FOIA Exemptions b(2) and (6)
Sent: Thursday, October 25, 2007 3:55 PM
To: Davidson, M (Intelligence) ←
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted] Gerry, Brett (OLP); John.Eisenberg@usdoj.gov; [redacted] ←
[redacted]; Livingston, J (Intelligence); [redacted] [redacted] FOIA Exemption b(3)
Subject: Re: our draft is attached
FOIA Exemption b(6)

Mike -- We are waiting on one final sign off on classification. I have meeting from 4-5pm and hopefully will have it when I return at 5pm. Have drafted a letter to you to sign once I get all the coordination done.

Gerry, Brett

FOIA Exemptions b(2) and (6)

From: Gerry, Brett (OLP)
Sent: Monday, October 22, 2007 2:25 PM
To: 'Davidson, M (Intelligence)'; [REDACTED] Demers, John (NSD)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Allssa (Intelligence); Eisenberg, John
Subject: RE: Technical assistance -- Transition procedures

EFF2AG(1)-188

Mike-

We are looking hard at the transition procedures as we speak, and will get you our thoughts by this evening. We had just spotted the directive problem as well.

I believe the "extant authorizations" section serves the function of clarifying that the government can request that the FISC extinguish FISA orders carried over at the point in time when they are transitioned into the new authority, but we will look at whether this is actually needed.

Thanks,
Brett

EFF2AG(1)-189

FOIA Exemptions b(2) and (6)

FOIA Exemption b(6)

From: Davidson, M (Intelligence) [mailto:[REDACTED]@sscl.senate.gov]
Sent: Monday, October 22, 2007 2:04 PM
To: [REDACTED] Gerry, Brett (OLP); Demers, John (NSD)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: Technical assistance -- Transition procedures

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.)

1/25/2008

Mike

1/25/2008

Gerry, Brett

From: Nichols, Carl (CIV) [FOIA Exemption b(2) and (6)]
Sent: Thursday, October 25, 2007 5:19 PM [EFF2AG(1)-196]
To: Davidson, M (Intelligence); Ben Powell [FOIA Exemption b(2) and (6)]
Cc: Potenza, Vito; [redacted] Gerry, Brett (OLP); Eisenberg, John; [redacted] Livingston, J (Intelligence); [redacted] [FOIA Exemption b(3)]
Subject: RE: our draft is attached [FOIA Exemption b(6)]

Mike:
 Just left you a voicemail. Some concerns were raised about the new paragraph, and I have some alternative language to propose. I think we can discuss on an open line; my number is 202-514-3310. Thanks,
 Carl

From: Davidson, M (Intelligence) [mailto:[redacted]@ssci.senate.gov] [FOIA Exemption b(6)] [EFF2AG(1)-197] [FOIA Exemptions b(2) and (6)]
Sent: Thursday, October 25, 2007 4:02 PM
To: Ben Powell [FOIA Exemption b(2) and (6)]
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted]; Gerry, Brett (OLP); Eisenberg, John; [redacted] [FOIA Exemption b(3)]
Subject: RE: our draft is attached [FOIA Exemptions b(6)]

On another front, Sen. Wyden and his principal co-sponsors of the Wyden amendment have agreed to the two line technical that Brett had sent over. We'll make that change in the bill filed tomorrow.

From: Ben Powell [mailto:[redacted]] [FOIA Exemption b(2) and (6)] [EFF2AG(1)-198]
Sent: Thursday, October 25, 2007 3:55 PM
To: Davidson, M (Intelligence)
Cc: Nichols, Carl (CIV); Potenza, Vito; [redacted] Gerry, Brett (OLP); John.Eisenberg@usdoj.gov; [redacted] Livingston, J (Intelligence); [redacted] [FOIA Exemption b(3)]
Subject: Re: our draft is attached [FOIA Exemptions b(6)]

Mike -- We are waiting on one final sign off on classification. I have meeting from 4-5pm and hopefully will have it when I return at 5pm. Have drafted a letter to you to sign once I get all the coordination done.

Gerry, Brett

To: Ben Powell; Livingston, J (Intelligence) [redacted] EFF2AG(2)-8

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

Subject: RE: Remaining Issues [redacted] FOIA Exemption b(3)

[redacted] FOIA Exemptions b(2) and (6)

Chris-

Our initial reaction is that we have some significant issues with the David Kris proposal; some of these are addressed by your change from "an individual" to "a person," but we still have significant concerns that we can discuss. On the domestic surveillance concern: wouldn't replacing "concerning" with "directed at," and the express limitation on targeting persons located in the US, address the concern?

On another front, we will be sending you at around 3pm some technical suggestions (red-lined) to the earlier technical assistance draft we provided. Think of it as technical assistance to the technical assistance.

Thanks,
Brett

[redacted] FOIA Exemptions b(2) and (6)

From: Ben Powell [mailto:[redacted]] [redacted] EFF2AG(2)-9

Sent: Friday, October 12, 2007 11:01 AM

To: Livingston, J (Intelligence)

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

Subject: Re: Remaining issues [redacted] FOIA Exemption b(3)

Still thinking, and others here may correct me, but if I have to put weight on something as the limitation, I tend toward a focus on the info you get from elect service providers if we can defin right (so not landlords, searching someone's home, etc.). In the Kris approach, we are back in a world of figuring out f(1-4) and applying it (which of course a redefin of elect surv would fix, but does the Kris approach put us back in a very technology dependent analysis?). Also, eliminates ability to use more precise targeting perhaps as we have to do it by elect surv.

Clearly, just my views and need to discuss here as this is just an offhand thought.

Livingston, J (Intelligence) wrote:

Correct. The programmatic warrant proposal is a non-starter and our current negotiations are well-beyond that concept. Specifically, we're interested in perhaps lifting some of David's language and modifying it for the authorization section. It would read something like this: "Notwithstanding any other law, the Director of National Intelligence and the Attorney General, may for periods of up to one year authorize electronic surveillance or a physical search of stored electronic communications targeting [a person] reasonably believed to be located outside of the United States [for the purpose of acquiring foreign intelligence information]." The bracketed text are our modifications to his language. This approach seems to eliminate the need for any carve out or clarification of electronic

surveillance. It's similar to the authority in 102(a), which allows the AG to authorize electronic surveillance in the U.S. under limited circumstances.

We avoid the individual problem by inserting person, which is broader, but still addresses the claim of dragnet surveillance.

Another appeal to this is that it doesn't force us to divide the world of electronic surveillance into the "acquisition activity" and "electronic surveillance" camps. Senator Bond has often expressed that part of the problem with explaining these issues to members and the public is this historical distinction.

You raise an interesting issue on compulsion. Section 102(a) contains many of the same elements we have been discussing here. For example, it requires a certification and permits the AG to direct a specified communication common carrier to provide assistance (and other things), but there is no compulsion mechanism like we've built into the PAA and drafts of this modernization legislation. Times have changed, and compulsion mechanisms are now necessary. I know Mike will hate this, but we may need to build in a compulsion mechanism into 102(a) for consistency's sake. Maybe I'm missing something, but I think the compulsion process we built into the PAA can be repeated even under the Krls approach.

I don't see how domestic to domestic surveillance can be authorized by this grant when it requires that the target must be reasonably believed to be located outside of the United States.

I think your first point may be the show-stopper. What if the activity falls outside of the definition like foreign to foreign? Does that mean that the AG/DNI could only authorize the collection of incidental communications? That doesn't make sense. Maybe there's a way to patch the language to ensure that the AG/DNI can authorize the full spectrum of necessary communications?

From: Ben Powell [mailto: [REDACTED]] ← FOIA Exemptions b(2) and (6)

Sent: Friday, October 12, 2007 9:44 AM

EFF2AG(2)-10

To: Healey, C (Intelligence)

Cc: Eisenberg, John; Gerry, Brett (OLP); Livingston, J (Intelligence); [REDACTED] Davidson, M (Intelligence); Rice, K (Intelligence); [REDACTED]; Starzak, Alissa (Intelligence); Vito Potenza (work); Demers, John (NSD); Carl.Nichols@usdoj.gov;

FOIA Exemption b(6)

FOIA Exemption b(3)

Subject: Re: Remaining Issues

Chris -- also I assume you want us to comment on his redline of the PAA, not his programmatic warrant proposal (that is a whole different approach that I understand creates severe issues for us).

Ben Powell wrote:

Chris --

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

- 1) Liability: Mike D. was going to edit to reflect comments and send new text for Carl and team to review.
- 2) Issues with 703(a)(1) stating "Notwithstanding any other provisions of this Act . . ." (instead of law). We needed to check in that -- obviously we strongly prefer "law" given the dangers of missing a section that some will argue prevent the collection. (For an example, see the CRS report that contains what is ultimately a flawed analysis of various statutes that it claims could prevent the collection). This requires a scrub of the US Code.
- 3) There was a discussion that all of us were looking at in terms of the issue of "specified targets" on page 4.

4) We are looking at an issue concerning the definition of foreign intelligence (primarily related to counterarco and counterintel).

5) Section 2.5 issues, including the issue raised by Patrick concerning a difference between 2.5 and the agent of foreign power defin in FISA.

6) We are looking at the oversight issue. As we discussed, perhaps one way to handle would be to require DNI/AG to submit to committees an oversight plan that addresses oversight structure, role of IG, role of DOJ/NSD, role of ODNI (GC, CLPO), plan for providing info to committees, etc.

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

We will discuss ASAP here and get back to you.

Healey, C (Intelligence) wrote:

EFF2AG(2)-11

Ben --

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

Thanks for your help,

Chris

Christine Healey
Senate Select Committee on Intelligence

(Direct)
@ssci.senate.gov

FOIA Exemption b(6)

Gerry, Brett

From: Gerry, Brett (OLP) [FOIA Exemptions b(2) and (6)] [EFF2AG(2)-13]
Sent: Monday, October 22, 2007 2:25 PM
To: 'Davidson, M (Intelligence)'; [REDACTED] Demers, John (NSD)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); Elsenberg, John
Subject: RE: Technical assistance -- Transition procedures

Mike-

We are looking hard at the transition procedures as we speak, and will get you our thoughts by this evening. We had just spotted the directive problem as well.

I believe the "extant authorizations" section serves the function of clarifying that the government can request that the FISC extinguish FISA orders carried over at the point in time when they are transitioned into the new authority, but we will look at whether this is actually needed.

Thanks,
Brett

[FOIA Exemptions b(2) and (6)]

[FOIA Exemption b(6)]

From: Davidson, M (Intelligence) [mailto:[REDACTED]@sscl.senate.gov] [EFF2AG(2)-14]
Sent: Monday, October 22, 2007 2:04 PM
To: [REDACTED]; Gerry, Brett (OLP); Demers, John (NSD)
Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence)
Subject: Technical assistance -- Transition procedures

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.)

1/30/2008

Mike

1/30/2008

Gerry, Brett



EFF2AG(2)-17

FOIA Exemption b(6)

From: Bash, Jeremy [mailto:██████████@mail.house.gov] EFF2AG(2)-18
Sent: Tuesday, October 23, 2007 11:59 AM
To: Gerry, Brett (OLP); Ben Powell; ██████████ Eisenberg, John; Potenza, Vito
Cc: Greenwald, Eric; Parker, Wyndee FOIA Exemption b(3)
Subject: Question

I have a hypothetical question.

Under the Protect America Act, could the government install monitoring devices at communications nodes in the U.S. (not a term of art ... just encapsulating f(4) without getting into sensitive details) to detect *cyber threats* (ie, malware, malicious codes) from persons reasonably believed to be located outside the US?

I think the answer is yes – assuming all the other requirements of 105B have been met. Am I correct?

Sec. 105B. (a) Notwithstanding any other law, the Director of National Intelligence and the Attorney General, may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States if the Director of National Intelligence and the Attorney General determine, based on the information provided to them, that--

(1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to section 105C of this Act;

(2) the acquisition does not constitute electronic surveillance;

(3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;

(4) a significant purpose of the acquisition is to obtain foreign intelligence information; and

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [redacted]@ssci.senate.gov]
Sent: Thursday, October 18, 2007 8:47 AM
To: Elsenberg, John; [redacted] Gerry, Brett (OLP)
Subject: Fw: Exclusivity FOIA Exemptions b(2) and (6)

EFF2AG(2)-21

Does this or some variation work?

Sent from my BlackBerry Wireless Device

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

From: Davidson, M (Intelligence)
To: Livingston, J (Intelligence); Grannis, D (Intelligence)
Sent: Thu Oct 18 08:42:04 2007
Subject: Re: Exclusivity

EFF2AG(2)-22

Here's a thought, if the foreign to foreign idea doesn't work out --

Louis's point is that the Administration and the Vice Chairman had agreed to the 1978 statement on exclusivity.

OK. Strike the title VII reference, but make clear that the reference to electronic surveillance is as defined in 1978, i.e., not as limited by the PAA or this bill.

For example, "electronic surveillance (as defined by section 101, without the limitation in section 701)," (or as defined in section 101, as originally enacted in the FISA of 1978).

The net would be this: exclusivity would be no less than it was in 1978. If there are acquisition activities that never fell under FISA, FISA would not be exclusive for them. But if they would be electronic surveillance but for the PAA and this bill, FISA would continue to be exclusive for them.

Mike

Sent from my BlackBerry Wireless Handheld

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

From: Grannis, D (Intelligence)
To: Livingston, J (Intelligence); Davidson, M (Intelligence)
Sent: Thu Oct 18 00:19:13 2007
Subject: RE: Exclusivity

EFF2AG(2)-23

I agree that we need to work on this in the morning. I do not believe that Sen. Feinstein will support the change you suggest. I'd prefer to resolve the problem either by exempting foreign to foreign or otherwise changing a definition somewhere.

From: Livingston, J (Intelligence)
Sent: Thursday, October 18, 2007 12:18 AM
To: Davidson, M (Intelligence); Grannis, D (Intelligence)
Subject: Exclusivity

I just got an e-mail from Louis informing me that unless we can fix this exclusivity issue, the provision will be opposed by DOJ/DNI and get a veto threat from the White House. We need to see if we can work out a solution first thing in the morning. At this point, I'm inclined to just omit the current reference to Title VII if that solves the problem.

Fw: Exclusivity

Page 2 of 2

1/25/2008

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [redacted]@ssci.senate.gov [EFF2AG(2)-24]
Sent: Thursday, October 18, 2007 10:48 AM
To: Eisenberg, John
Cc: Gerry, Brett (OLP); [redacted] [FOIA Exemption b(2) and (6)]
Subject: RE: How about this?

So you're fine with "regardless of the limitation of section 701" vice your "without the limitation of section 701"? Can I take this to Bond as an acceptable compromise, and if he concurs go to press with the change?

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

From: Eisenberg, John [mailto:John.Eisenberg@usdoj.gov] [EFF2AG(2)-25]
Sent: Thursday, October 18, 2007 10:43 AM
To: Livingston, J (Intelligence)
Cc: Gerry, Brett (OLP); [redacted] [FOIA Exemptions b(2) and (6)]
Subject: RE: How about this?

I think this is the same as what we suggested earlier.

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

From: Livingston, J (Intelligence) [mailto:[redacted]@ssci.senate.gov] [EFF2AG(2)-26]
Sent: Thursday, October 18, 2007 10:25 AM
To: Eisenberg, John
Cc: Gerry, Brett (OLP); [redacted] [FOIA Exemptions b(2) and (6)]
Subject: FW: How about this?
Importance: High

Are you guys okay with this?

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

From: Grannis, D (Intelligence) [EFF2AG(2)-27]
Sent: Thursday, October 18, 2007 10:02 AM
To: 'John.Eisenberg@usdoj.gov'
Cc: 'Brett.Gerry@usdoj.gov'; [redacted]; Davidson, M [FOIA Exemption b(2) and (6)]
(Intelligence); Livingston, J (Intelligence)
Subject: FW: How about this?
Importance: High

Thanks John.

I'll take this to my boss - my off-the-bat thought is that it should be crystal clear that we're talking about the 101(f) definition before it is limited by section 701 - the "without" language below appears to do this but it might be made more clear. Perhaps:

Chapters 119 and 121 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance (as defined in section 101(f), regardless of the limitation of section 701) and the interception of domestic wire, oral, or electronic communications may be conducted.

I am also interested in following-up, when the information is available, on any type of collection for which this authority would not be exclusive (as we started to discuss last night).

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

From: Eisenberg, John <John.Eisenberg@usdoj.gov> [EFF2AG(2)-28]
To: Livingston, J (Intelligence); Davidson, M (Intelligence)
Cc: Gerry, Brett (OLP) <Brett.Gerry@usdoj.gov>; [redacted] [FOIA Exemptions b(2) and (6)]

<benjaap@dni.gov>; Eisenberg, John <John.Eisenberg@usdoj.gov>
Sent: Thu Oct 18 09:43:59 2007
Subject: How about this?

Chapters 119 and 121 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance (as defined in section 101(f) without the limitation of section 701) and the interception of domestic wire, oral, or electronic communications may be conducted.

The as originally enacted language could cause serious problems if the definition of elsur is ever changed (in a way that goes beyond the limited purpose stuff of the new title VII). If the actual definition changes so that something falls out, the language you suggested (and I pasted below) would mean that we have to use FISA because the activity was elsur in 1978, but we couldn't because in year 2021, the activity is not elsur.

I am happy to explain on the phone--that might be easier.

Your proposed language:

Chapters 119 and 121 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance (as defined in section 101(f) as originally enacted in 1978) and the interception of domestic wire, oral, or electronic communications may be conducted.

Gerry, Brett

FOIA Exemption b(6)

From: Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov] [EFF2AG(2)-29]
Sent: Thursday, November 15, 2007 6:13 PM
To: Gerry, Brett (OLP); Ben Powell; Eisenberg, John; Demers, John (NSD)
Cc: Rice, K (Intelligence)
Subject: Redlines
Importance: High
Attachments: HEN07L32(Leahy Sub).pdf; HEN07K38(Cardin sunset).pdf; HEN07K76(Feingold Reverse Targeting).pdf; HEN07L20(Feingold Bulk).pdf

We're working on a memo for Senator Bond to the Republican caucus. Could you please identify/confirm your anticipated redlines with the FAA that passed out of Senate Judiciary today.

Off the top of my head, I see:

- 1) Exclusive means
- 2) Four-year sunset
- 3) Certification element against bulk collection
- 4) Elimination of automatic stay
- 5) Limitation of use provisions
- 6) FISC compliance review (including ability to require additional information)
- 7) Elimination of retroactive and prospective carrier liability provisions
- 8) Elimination of preemption provision
- 9) Elimination of transition procedures
- 10) Maybe the new reverse targeting language, I think it might be problematic

While not a redline per se, the Leahy substitute also only allows the Deputy Director of the FBI to sign when the Director is absent. This would inject a weakness into the system, because aggrieved persons whose certifications were signed by the Deputy Director might attempt to litigate whether the Director was really absent at the time the certification was made. The original version doesn't contain this weakness, because the President either authorizes the DD as a certifying official, or he doesn't.

I'm attaching the relevant files.

Thanks.

1/25/2008

FOIA Exemptions b(2) and (6)

Gerry, Brett

From: Ben Powell [REDACTED] EFF3AG(2)-1

Sent: Thursday, February 21, 2008 8:18 PM

To: Davidson, M (Intelligence) FOIA Exemption b(3) FOIA Exemption b(6)

Cc: Demers, John; Eisenberg, John; Nichols, Carl (CIV); [REDACTED] Gerry, Brett ; Potenza, Vito; [REDACTED] Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); [REDACTED]@mail.house.gov; [REDACTED]@mail.house.gov; Johnson, A (Intelligence); Tucker, L (Intelligence); Weich, Ron (Reid); Lettre, Marcel (Reid); Hoy, Serena (Reid); Bash, Jeremy; Chris Donesa FOIA Exemption b(6)

Subject: Re: FISA, meeting tomorrow (Friday), 10, at HPSCI.

Mike --

Thanks for the note. We always appreciate the opportunity to engage in discussions with members and staff. Our dialogue over many months was constructive, bipartisan, and resulted in what we believe is a very good bill. Unfortunately, as I discussed on the phone with you, we are not going to be able to attend tomorrow's meeting at this point.

We understand from recent press releases that these meetings are perhaps more than technical discussions with the Intelligence Community, but instead are described as working meetings to reach a "compromise on FISA reform" and some type of pre-conference discussions. As I expressed on the phone, we are faced with a difficult situation where there are process (and substantive) disagreements between committee leaders as to the appropriate way forward in terms of resolving issues on a bipartisan basis. This presents us with the situation of appearing to engage in some type of conference discussions that are not bipartisan. I know from our phone conversation that this is not your intent, but hope you can also understand the difficulty we face being caught in the middle of this disagreement given the way these meetings are being described and understood by many people -- and the intense disagreement being expressed publicly by committee leaders as to the purpose of the meetings.

I can assure you that we believe this issue is of the greatest importance and remain willing to assist in any constructive way to resolve this. As everyone knows, the DNI and AG strongly support the Senate bill and believe it is the product of a careful, bipartisan process over many months that enables the IC to carry out its mission, while resolving certain concerns raised about the Protect America Act -- Ben

EFF3AG(2)-2

Davidson, M (Intelligence) wrote:

Ben, et al.

This is just to confirm the FISA meeting tomorrow, at HPSCI (H405), at 10, and that we are looking forward to ODNI/DOJ/NSA participation.

As you undoubtedly know, our Republican colleagues decided not to attend this afternoon's bicameral meeting (House and Senate Intelligence and Judiciary Committee staff), which just

concluded.

Working on the belief that every new day is a new opportunity, I hope that tomorrow's meeting will be bipartisan as well as bicameral. However that may develop, it is important that the DNI, DIRNSA, and AG allow for your participation, which has always been helpful, in responding to questions, providing information, and considering suggestions that the staff of these four committees may have in preparing members for important decisions in the days ahead.

None of us now knows whether the House will be asking for a conference or considering whether to send the bill back to the Senate with an amendment. At the very least, there may be a need for an amendment to the transition provisions that takes into account that the Protect America Act has expired, and perhaps provides for its extension retroactive to February 17 - as well as its repeal upon enactment of the FISA Amendments -- to make sure there has not even been an arguable gap in liability protection.

But whether there is a conference or an amendment from the House back to the Senate, members will have questions, and I know that you'll be able to help in answering them.

I've added Wyndee Parker and Perry Apelbaum to the cc list, so that they might keep their House Democratic and Republican colleagues up to date, and also Ron Welch, Marcel Lettre, and Serena Hoy, so that they can do the same for their counterparts in Senator McConnell's office.

Looking forward to seeing everyone tomorrow.

Mike

From: Davidson, M (Intelligence)

Sent: Friday, February 15, 2008 1:52 PM

To: Benjamin Powell; Demers, John (NSD); 'Eisenberg, John'; Carl.Nichols@usdoj.gov; [REDACTED]

[REDACTED] Gerry, Brett (OLP)

Cc: Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Allssa (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep)

Subject: FISA, next week

EFF3AG(2)-3

FOIA
Exemption b(6)

FOIA Exemption b(3)

FOIA Exemption b(6)

Ben, John D., John E., Carl, John G., [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.

6/23/2008

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

6/23/2008