

November 14, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Administration on the proposed substitute amendment you circulated to Title I of the FISA Amendments Act of 2007 (S. 2248), a bill “to amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that act, and for other purposes.” We have appreciated the willingness of Congress to address the need to modernize FISA permanently and to work with the Administration to do so in a manner that allows the intelligence community to collect the foreign intelligence information necessary to protect the Nation while protecting the civil liberties of Americans. With all respect, however, we strongly oppose the proposed substitute amendment. If the substitute is part of a bill that is presented to the President, we and the President’s other senior advisers will recommend that he veto the bill.

In August, Congress took an important step toward modernizing the Foreign Intelligence Surveillance Act of 1978 by enacting the Protect America Act of 2007 (PAA). The Protect America Act has allowed us temporarily to close intelligence gaps by enabling our intelligence professionals to collect, without a court order, foreign intelligence information from targets overseas. The intelligence community has implemented the Protect America Act in a responsible way, subject to extensive congressional oversight, to meet the country’s foreign intelligence needs while protecting civil liberties. Unless reauthorized by Congress, however, the authority provided in the Protect America Act will expire in less than three months. In the face of the continued terrorist threats to our Nation, we think it is vital that Congress act to make the core authorities of the Protect America Act permanent. Congressional action to provide protection from private lawsuits against companies that are alleged to have assisted the Government in the aftermath of the September 11th terrorist attacks on America also is critical to ensuring the Government can continue to receive private sector help to protect the Nation.

In late October, the Senate Select Committee on Intelligence introduced a consensus, bipartisan bill (S. 2248) that would establish a firm, long-term foundation for our intelligence community’s efforts to target terrorists and other foreign intelligence targets located overseas. While the bill is not perfect, it contains many important provisions, and was developed through a thoughtful process that ensured that the intelligence community retains the core authorities it needs to protect the Nation and that the bill would not adversely impact critical intelligence operations. Importantly, that bill would afford retroactive liability protection to communication service providers that are alleged to have assisted the Government with intelligence activities in the aftermath of September 11th. The Intelligence Committee recognized that “without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation. The

possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.” The committee’s measured judgment reflects the principle that private citizens who respond in good faith to a request for assistance by public officials should not be held liable for their actions. The bill was reported favorably out of committee on a 13-2 vote.

We respectfully submit that your substitute amendment to Title I of the Senate Intelligence Committee’s bill would upset some important provisions in the Intelligence Committee bill. The substitute also does not adequately address certain provisions in the Intelligence Committee’s bill that remain in need of improvement. As a result, we have determined, with all respect to your efforts, that the substitute would not provide the intelligence community with the tools it needs effectively to collect foreign intelligence information vital for the security of the Nation.

I. Limitations on Intelligence Collection and National Security Investigations

The substitute would make several amendments to S. 2248 that would have an adverse impact on our ability to collect effectively the foreign intelligence information necessary to protect the Nation. These amendments include the following:

Prohibits Intelligence and Law Enforcement Officials From Using Valuable Investigative Tools. The substitute contains an amendment to the “exclusive means” provision of FISA that could severely harm our ability to conduct national security investigations. As drafted, the provision would bar the use of national security letters, Title III criminal wiretaps, and other well-established investigative tools to collect information in national security investigations.

Threatens Critical Intelligence Collection Activities. The “exclusive means” provision also could harm the national security by disrupting highly classified intelligence activities. Among other things, ambiguities in critical terms and formulations in the provision—including the term “communications information” (a term that is not defined in FISA) and the introduction of the concept of targeting communications (as opposed to persons)—could lead the statute to bar altogether or to require court approval for overseas intelligence activities that involve merely the incidental collection of United States person information.

Limits Existing Provisions of Law that Protect Communications Service Providers. The portion of the substitute regarding protections to communication service providers under Government certifications contains ambiguities that could jeopardize our ability to secure the assistance of these providers in the future. This could hamper significantly the Government’s efforts to obtain necessary foreign intelligence information. As the Senate Intelligence Committee noted in its report on S. 2248, “electronic communications service providers play an important role in assisting intelligence officials in national security activities. Indeed, the intelligence community cannot obtain the intelligence it needs without assistance from these companies.”

Allows for Dangerous Intelligence Gaps During the Pendency of an Appeal. The substitute would delete an important provision in the bipartisan Intelligence Committee bill that would ensure that our intelligence professionals can continue to collect intelligence from overseas terrorists and other foreign intelligence targets during the pendency of an appeal of a decision of the FISA Court. Without that provision, whole categories of surveillances directed outside the United States could be halted before review by the FISA Court of Review.

Limits Dissemination of Foreign Intelligence Information. The substitute would impose significant new restrictions on the use of foreign intelligence information, including information not concerning United States persons, obtained or derived from acquisitions using targeting procedures that the FISA Court later found to be unsatisfactory. By requiring analysts to go back to the databases and pull out the information, as well as to determine what other information is derived from that information, this requirement would place a difficult, and perhaps insurmountable, operational burden on the intelligence community in implementing authorities that target terrorists and other foreign intelligence targets located overseas. This requirement also strikes us as at odds with the mandate of the September 11th Commission that the intelligence community should find and link disparate pieces of foreign intelligence information. The requirement also harms privacy interests by requiring analysts to examine information that would otherwise be discarded without being reviewed.

Imposes Court Review of Compliance with Minimization Procedures. The substitute would allow the FISA Court to review compliance with minimization procedures that are used on a programmatic basis for the acquisition of foreign intelligence information by targeting individuals reasonably believed to be outside the United States. This could place the FISA Court in a position where it would conduct individualized review of the intelligence community's foreign communications intelligence activities. While conferring such authority on the court is understandable in the context of traditional FISA collection, it is anomalous in this context, where the court's role is in approving generally applicable procedures rather than individual surveillances.

Strikes a Provision Designed to Make the FISA Process More Efficient. The substitute would strike a provision from the bipartisan Senate Intelligence Committee bill that would allow the second highest-ranking FBI official to certify applications for electronic surveillance. Today, the only FBI official who can certify FISA applications is the Director, a restriction that can delay the initiation of surveillance when the Director travels or is otherwise unavailable. It is unclear why this provision from the Intelligence Committee bill, which will enhance the efficiency of the FISA process while ensuring high-level accountability, would be objectionable.

II. Necessary Improvements to S. 2248

The substitute also does not make needed improvements to the Senate Intelligence Committee bill. These include:

Provision Pertaining to Surveillance of United States Persons Abroad. The substitute does not make needed improvements to the Committee bill, which would require for the first time that a court order be obtained to surveil United States persons abroad. In addition to being problematic for policy reasons and imposing burdens on foreign intelligence collection abroad that do not exist with respect to collection for law enforcement purposes, the provision continues to have serious technical problems. As drafted, the provision would not allow for the surveillance, even with a court finding, of certain critical foreign intelligence targets, and would allow emergency surveillance outside the United States for significantly less time than the bipartisan Senate Intelligence Committee bill had authorized for surveillance inside the United States.

Maintains a Sunset Provision. Rather than achieving permanent FISA reform, the substitute maintains a six year sunset provision. Indeed, several members on the Judiciary Committee have indicated that they may propose amendments to the bill that would shorten the sunset, leaving the intelligence community and our private partners subject to an uncertain legal framework for collecting intelligence from overseas targets. Any sunset provision withholds from our intelligence professionals the certainty and permanence they need to conduct foreign intelligence collection to protect Americans from terrorism and other threats to the national security. The intelligence community operates much more effectively when the rules governing our intelligence professionals' ability to track our adversaries are established and are not changing from year to year. Stability of law, we submit, also allows the intelligence community to invest resources appropriately. In our respectful view, a sunset provision is unnecessary and would have an adverse impact on the intelligence community's ability to conduct its mission efficiently and effectively.

Fails to Remedy an Unrealistic Reporting Requirement. The substitute fails to make needed amendments to a reporting requirement in the Senate Intelligence Committee bill that poses serious operational difficulties for the intelligence community. The Intelligence Committee bill contains a requirement that intelligence analysts count "the number of persons located in the United States whose communications were reviewed." This provision would be impossible to implement fully. The provision, in short, places potentially insurmountable burdens on intelligence professionals without meaningfully protecting the privacy of Americans. The intelligence community has provided Congress with a further classified discussion of this issue.

We also are concerned by other serious technical flaws in the substitute that create uncertainty.

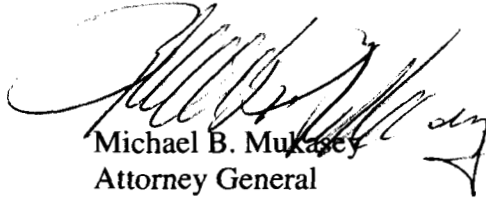
The Administration remains prepared to work with Congress towards the passage of a permanent FISA modernization bill that would strengthen the Nation's intelligence capabilities while respecting and protecting the constitutional rights of Americans, so that the President can sign such a bill into law. We look forward to working with you and the Members of the Judiciary Committee on these important issues.

Thank you for the opportunity to present our views. The Office of Management and

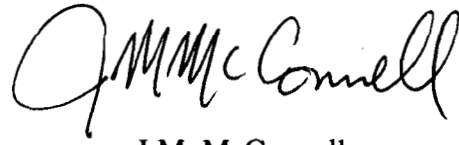
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Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this letter.

Sincerely,



Michael B. Mukasey
Attorney General



J.M. McConnell
Director of National Intelligence

cc: The Honorable Arlen Specter
Ranking Minority Member
The Honorable John D. Rockefeller
Chairman, Select Committee on Intelligence
The Honorable Christopher S. Bond
Vice Chairman, Select Committee on Intelligence