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ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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February 12, 2008

Mr. Fred Fielding
Counsel to the President
Office of the Counsel to the President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Fielding:

I am writing to follow up on previous letters and requests of January 5, 2006, February 8, 2006, July 30, 2007, September 11, 2007, October 15, 2007, and October 16, 2007, requesting information and documents from this Administration concerning the warrantless surveillance program, known as the terrorist surveillance program (TSP), first disclosed by the *New York Times* on December 16, 2005, and related matters.¹ Although some of the requested materials have been provided to some Judiciary Committee members, much of the information has not, and it is crucial that this material be produced as promptly as possible so that Congress may fulfill its legislative and oversight responsibilities. Indeed, review and consideration of the documents and briefings provided so far leads me to conclude that there is no basis for the broad telecommunications company amnesty provisions advocated by the Administration and contained in the Foreign Intelligence Surveillance Act (FISA) bill being considered today in the Senate, and that these materials raise more questions than they answer on the issue of amnesty for telecommunications providers. In order to more fully understand and react to the Administration's request for broad-based and retroactive amnesty for telecommunications firms, who may be in a position to divulge information concerning misconduct by Administration officials, it is imperative that you provide this information to us as promptly as possible, as we have been asking for many months on numerous occasions.

Throughout this past year, the Administration has sounded a drumbeat that Congress enact the Administration's request for amendments to the Foreign Intelligence Surveillance Act (FISA). However, during this same time, the Administration has denied to Congress essential documents and information that would permit Congress, in the exercise of its Article I

¹ Eric Lichtblau and James Risen, *Bush Lets U.S. Spy on Callers Without Courts*, The New York Times, Dec. 16, 2005.

Mr. Fred Fielding
Page Two
February 12, 2008

responsibilities, to consider the proposed amendments to FISA in a prudent and careful manner. This Administration cannot be heard to complain about the unwillingness of Congress to enact legislation that the Administration claims to be so vital for the national security when the Administration at the same time has denied to Congress documents and information that are essential to its legislative responsibilities. Frankly, the Administration's refusal to provide the requested information belies its position on the importance of the legislation: rather than the Administration giving Congress all the information it needs, the Administration has provided a slow trickle of information to only selected members of Congress, almost assuring that Congress cannot adequately consider its requests.

Once again, I have set forth below our request for documents and information. I further reiterate my request that all these materials, as well as those provided so far, be made available to the entire Judiciary Committee and, to the extent possible, to the American public via immediate and appropriate declassification. To assist the Administration in prioritizing its response, without altering our request for all the information below, I would stress three requests in particular:

First, please provide access to all Members of the House Judiciary Committee those briefings and materials you have made available to 19 Members as of now. Currently, it is my understanding that the entire membership of the House Permanent Select Committee on Intelligence and the Senate Committee on the Judiciary and the Senate Select Committee on Intelligence has been permitted to be "read in" to the TSP program. The only Committee of jurisdiction that has not been offered the same access is the House Judiciary Committee. This is unacceptable and serves little purpose but to impede our Members review of the program and understanding of your request for retroactive amnesty.

Second, please provide the Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States*. It is believed that this Memorandum is dated either October 17, 2001, or October 23, 2001.² Based on the title of this document, and based on the contents of similar

² In the August 2002 "Torture Memorandum," the Memorandum is referenced as having been dated October 17, 2001. See Jay S. Bybee, Assistant Attorney General, Department of Justice, "Memorandum for Alberto R. Gonzalez, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*," (Aug. 1, 2002) at 32. In a different DOJ Office of Legal Counsel Memorandum, the Memorandum was referenced as having been dated October 23, 2001. See "Memorandum for William J. Haynes, II, General Counsel,

Mr. Fred Fielding
Page Three
February 12, 2008

memoranda issued at roughly the same time, it appears that a substantial portion of this Memorandum provides a legal determination and analysis as to the nature and scope of the Presidential war powers to accomplish specific acts within the United States. Congress is entitled to know the executive branch's interpretation of its constitutional powers.

Third, please provide copies of filings, correspondence or transcripts of colloquies with the Foreign Intelligence Surveillance Court about TSP or other warrantless or other electronic surveillance programs, containing legal analysis, arguments, or decisions concerning the interpretation of FISA, the Fourth Amendment to the Constitution, the Authorization for the Use of Military Force enacted on September 18, 2001, or the President's authority under Article II of the Constitution.

In addition, as per our September 11, 2007, letter, we reiterate our requests for the following documents:

1. All documents from September 11, 2001, to the present, including e-mail, that reflect, discuss, or describe agreements or understandings between the White House, the Department of Justice, the National Security Agency, or any other entity of the Executive Branch and telecommunications companies, internet service providers, equipment manufacturers, or data processors regarding criminal or civil liability for assisting with or participating in warrantless electronic surveillance program(s).
2. An unredacted copy of the notes or program log of FBI Director Mueller provided to the House Judiciary Committee on August 14, 2007, concerning the March 2004 hospital visit to former Attorney General John Ashcroft and other events that former Deputy Attorney General James Comey described in his May 15, 2007, testimony before the Senate Judiciary Committee.
3. All documents from December 1, 2005, to the present related to the investigation by the Department of Justice's Office of Professional Responsibility (OPR) into the role of Department of Justice attorneys in the authorization and oversight of the warrantless electronic surveillance program, which was opened on January 11, 2006, and closed approximately three months later after OPR investigators were denied the necessary security clearances (OPR Investigation) that reflect, discuss, or describe the following:

Department of Defense, from Department of Justice, Office of Legal Counsel, *Re: Potential Legal Constraints Applicable to Interrogation of Persons Captured by U.S. Armed Forces In Afghanistan*," February 26, 2002, at 21, fn 16.

Mr. Fred Fielding
Page Four
February 12, 2008

- a) consideration of the request for security clearances;
 - b) communications between White House personnel, including the President or the Vice President, and Department of Justice personnel about the OPR investigation or consideration of the request for security clearances; and
 - c) the reasons for suspending that investigation (since revived by the Attorney General).
4. Since September 11, 2001, all audits, reports, or evaluations of or concerning any warrantless surveillance program(s), whether conducted by government employees or private companies, including any reports as to the effectiveness of minimization standards to protect U.S. persons' communications.

I would also again ask that you ensure that the appropriate entity in the Administration immediately provide written responses to the following questions, which we have previously submitted last year:

1. Since September 11, 2001, has the Administration conducted any warrantless surveillance in the United States, other than through the warrantless electronic surveillance program the President acknowledged in late 2005 (known now as the Terrorist Surveillance Program), or as explicitly authorized by FISA, or any other warrantless surveillance techniques such as physical searches of home or offices or opening of mail? Are such activities continuing? Is the Administration currently conducting any foreign intelligence surveillance in the United States, other than that explicitly authorized by the Foreign Intelligence Surveillance Act (FISA)?
2. How many actionable leads have been referred to operational entities as a result of acquisitions of U.S. persons' conversations or communications?
 - a) Please break down the response as follows: 1) between September 11, 2001, and October 25, 2001; 2) between October 25, 2001, and January 10, 2007; 3) between January 10, 2007, and August 5, 2007; and 4) since August 5, 2007.
 - b) Of the actionable leads referred to operational entities, what have been the results? Please differentiate between counter-

terrorism, criminal investigations and prosecutions, counter-espionage, and in-theater combat operations. Please indicate with specificity whether any attacks have been averted.

3. How many conversations or communications (both incoming or outgoing) monitored under the programs have revealed a contact between a U.S. person and someone for whom there was probable cause to believe they were in or supporting al Qaeda? How many people in the U.S. have had email communications with someone considered to be in al Qaeda? How many of these conversations or communications have actually involved terrorist activity, as opposed to other topics of conversation? How many people have been charged with any wrongdoing as a result of such interceptions? How many terrorist activities have been disrupted as a result of such interceptions? How many people have been subjected to surveillance but not charged with any crime or otherwise detained?
4. How many persons whose conversations or communications were monitored under the programs have been subjected to any other surveillance techniques or searches, such as physical searches of home or offices, opening of mail, etc, whether subject to a warrant or not?
5. Have any U.S. persons whose conversations or communications were monitored under the programs been detained within the United States? Have any U.S. or foreign persons been interrogated or detained outside of the United States, whether by the United States or any other government, in significant part as a result of such monitoring?
6. Have journalists, lawyers, lawmakers (whether federal, state, or local), or aides had their conversations or communications monitored under the programs? If so, how many?
7. How many U.S. persons had conversations (voice or email content) or communications (call or email data) acquired through electronic surveillance programs? In how many of these acquisitions was the U.S. person the target of the acquisition? In how many of these acquisitions was the acquisition incidental? How many warrants for continued surveillance were sought after identification of someone as a U.S. person? How many such applications were denied? Please break down the response between warrantless and other electronic surveillance programs as to the following periods: a) between September 11, 2001, and

Mr. Fred Fielding
Page Six
February 12, 2008

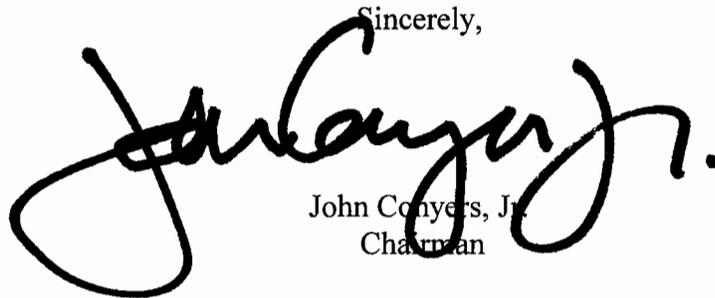
October 25, 2001; b) between October 25, 2001, and January 10, 2007; c) between January 10, 2007, and August 5, 2007; and d) since August 5, 2007.

8. How many individuals have been targeted for surveillance under the Protect America Act that involved foreign intelligence generally, as opposed to terrorism or nuclear proliferation?
9. Please identify any telecommunication companies or internet service providers that refused to allow access to communication streams without Court sanction or questioned the terms of the requests or demands which were being made of them and, to the extent that discussions with such companies were conducted orally rather than through written dialogue, please authorize the relevant parties to discuss the content of those discussions with Committee staff and Members.

I am enclosing for your information copies of previous requests concerning these matters made to the Administration.

Responses and questions should be directed to the Judiciary Committee Office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680). If answers need to be presented in a classified setting, we will make appropriate provisions. Thank you for your cooperation in this matter.

Sincerely,



John Conyers, Jr.
Chairman

Enclosures

cc: Hon. Michael Mukasey
Hon. Mike McConnell
Hon. Lamar S. Smith
Hon. Silvester Reyes
Hon. Peter Hoekstra