

UNCLASSIFIED

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

July 27, 2007

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Mitch McConnell
Minority Leader
United States Senate

The Honorable Nancy Pelosi
Speaker
House of Representatives

The Honorable John A. Boehner
Minority Leader
House of Representatives

Dear Majority Leader Reid, Minority Leader McConnell, Madam Speaker, and Minority Leader Boehner:

I appreciate the opportunity for today's meeting between staff members and the constructive dialogue on legislation to modernize the Foreign Intelligence Surveillance Act (FISA) and restore our capability to help defend the country effectively. I am pleased that there appears to be genuine agreement on the need to act before the August recess to close gaps in our current capability.

Congressional staff provided thoughts on possible modifications of the current FISA court process as an interim solution to remedy this gap. Unfortunately, this proposal would not close critical gaps in the Intelligence Community's ability to provide warning of threats to the country. The proposal would continue the current situation that, in a significant number of cases, we would have to obtain court orders to collect foreign intelligence about foreign targets located overseas. The proposal would also require in practice that we continue to divert scarce counterterrorism experts to compiling court submissions in order to gain judicial approval to gather necessary foreign intelligence about these overseas targets. I conclude this proposal would not solve the deep concerns I have expressed about the current situation facing the country.

Attached is an interim proposal which I believe will effectively close the critical gaps in our intelligence capability in the short term. Although my strong preference is the immediate adoption of the proposal I transmitted to Congress in April, in light of the urgency of the

UNCLASSIFIED

UNCLASSIFIED

situation, I offer the attached significantly narrowed proposal focused on the current, urgent need of the Intelligence Community to provide warning. The proposal would make clear that court orders are not necessary to effectively collect foreign intelligence about foreign targets overseas. The proposal would also provide a means of obtaining assistance that may be required from private parties.

It is also my strong preference that we immediately provide liability protection for those

who are alleged to have assisted the government following September 11, 2001. However, in recognition of your indication that more time is necessary to consider this matter, the interim proposal does not contain such a provision. While far from ideal, this interim proposal would immediately give our Intelligence Community the tools it needs to protect the Nation, pending continued discussion of this important additional issue.

I am available to brief all members of the Congress at their earliest convenience on this matter. I look forward to continuing our discussions and constructive dialogue. If you have any questions on this matter, please contact me or the Chief of Staff to the President.

Sincerely,

J.M. McConnell

cc: The Honorable John D. Rockefeller IV
The Honorable Christopher S. Bond
The Honorable Silvestre Reyes
The Honorable Peter Hoekstra
The Honorable Patrick J. Leahy
The Honorable Arlen Specter
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith
Attachment: As stated

UNCLASSIFIED

Sec. 401. DEFINITION OF ELECTRONIC SURVEILLANCE.

Subsection (f) of section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801) is amended by inserting after subsection (f)(4) the following:

"Provided, that nothing in this definition shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States."

**SEC. 402. AUTHORIZATION FOR THE ACQUISITION OF CERTAIN
FOREIGN INTELLIGENCE INFORMATION.**

Title I of the Foreign Intelligence Surveillance Act is amended by adding after section 102 (50 U.S.C. § 1802) the following:

"AUTHORIZATION FOR ACQUISITION OF FOREIGN INTELLIGENCE
INFORMATION

"SEC. 102A. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through 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 Attorney General certifies in writing under oath that the Attorney General has determined that --

"(1) the acquisition does not constitute electronic surveillance;

"(2) 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;
"(3) a significant purpose of the acquisition is to obtain foreign intelligence information; and
"(4) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

"(b) SPECIFIC PLACE NOT REQUIRED.—A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

"(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is necessary to determine the legality of the acquisition under section 102B.

"(d) MINIMIZATION PROCEDURES.—An acquisition under this section may be conducted only in accordance with

the certification of the Attorney General and the minimization procedures adopted by the Attorney General. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a).

"DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION

"SEC. 102B. (a) DIRECTIVE.—With respect to an authorization of an acquisition under section 102A, the Attorney General may direct a person to

"(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition of foreign intelligence information in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that such person is providing to the target; and

"(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such person wishes to maintain.

"(b) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (a).

"(c) FAILURE TO COMPLY.—In the case of a failure to comply with a directive issued pursuant to subsection (a), the Attorney General may invoke the aid of the court established under section 103(a) to compel compliance with the directive. The court shall issue an order requiring the person to comply with the directive if it finds that the directive was issued in accordance with subsection (a) and is otherwise lawful. Failure to obey an order of the court may be punished by the court as contempt of court. Any process under this section may be served in any judicial district in which the person may be found.

"(d) REVIEW OF PETITIONS.—(1) (A) A person receiving a directive issued pursuant to subsection (a) may challenge the legality of that directive by filing a petition with the pool established under section 103(e)(1).

"(B) The presiding judge designated pursuant to section 103(b) shall assign a petition filed under subparagraph (A) to one of the judges serving in the pool established by section 103(e)(1). Not later than 48 hours after the

assignment of such petition, the assigned judge shall conduct an initial review of the directive. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition. If the assigned judge determines the petition is not frivolous, the assigned judge shall, within 72 hours, consider the petition in accordance with the procedures established under section 103(e) (2) and provide a written statement for the record of the reasons for any determination under this subsection.

"(2) A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that such directive does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the directive, the judge shall immediately affirm such directive, and order the recipient to comply with such directive.

"(3) Any directive not explicitly modified or set aside under this subsection shall remain in full

effect.

"(e) APPEALS.—The Government or a person receiving a directive reviewed pursuant to subsection (d) may file a petition with the Court of Review established under section 103(b) for review of the decision issued pursuant to subsection (d) not later than 7 days after the issuance of such decision. Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition for a writ of certiorari by the Government or any person receiving such directive, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

"(f) PROCEEDINGS.—Judicial proceedings under this section shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

"(g) SEALED PETITIONS.—All petitions under this section shall be filed under seal. In any proceedings under

this section, the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information.

"(h) LIABILITY.—No cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section.

"(i) RETENTION OF DIRECTIVES AND ORDERS.—A directive made or an order granted under this section shall be retained for a period of not less than 10 years from the date on which such directive or such order is made."

(b) TABLE OF CONTENTS.—The table of contents in the first section of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after the item relating to section 102 the following:

"102A. Authorization for acquisition of foreign intelligence information.

"102B. Directives relating to electronic surveillance and other acquisitions of foreign intelligence information.

SEC. 403. TECHNICAL AMENDMENT AND CONFORMING AMENDMENTS.

Section 103(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended

(A)in paragraph (1), by striking "501(f)(1)" and inserting "10213(d) or 501(f)(1)"; and

(B)in paragraph (2), by striking "501(f)(1)" and inserting "10213(d) or 501(f)(1)".

SEC. 404. EFFECTIVE DATE.

(a) Except as otherwise provided, the amendments made by this Act shall take effect immediately after the date of the enactment of this Act.

(b) Notwithstanding any other provision of this Act, any order in effect on the date of enactment of this Act issued pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall remain in effect until the date of expiration of such order, and, at the request of the applicant, the court established under section 103 (a) of such Act (50 U.S.C. 1803(a)) may reauthorize such order as long as the facts and circumstances continue to justify issuance of such order under the provisions of the Foreign Intelligence Surveillance Act of 1978, as in effect on the day before the applicable effective date of this Act. The court established under section 103(a) of such Act shall extinguish any such order at the request of the applicant.

SEC. 405. CLARIFICATION ON THE DEFINITION OF ELECTRONIC SURVEILLANCE.

The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801) is hereby amended by adding a new section 112 as follows:

"Section 112. Clarifications on the Definition of Electronic Surveillance. (1) Whenever a member of the Intelligence Community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a), as amended, intentionally acquires the communications of a non-U.S. person reasonably believed to be located outside the United States and the primary purpose of such acquisition to acquire the communications of a particular, known person reasonably believed to be located in the United States, such activities shall be considered "electronic surveillance" as defined in section 101(f) (1)."