U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 20, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find attached responses to questions for the record posed to Attorney General Gonzales following his appearance before the Senate Committee on the Judiciary on April 5, 2005. The subject of the hearing was, "Oversight of the USA PATRIOT Act". With this letter we are pleased to transmit the remaining portion of unclassified responses to questions posed to the Attorney General. This transmittal supplements our earlier letter, dated June 29, 2005.

We trust you will find this information helpful. If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Hearing Before the Senate Judiciary Committee On "OVERSIGHT OF THE USA PATRIOT ACT" Witness: Attorney General Alberto Gonzales April 5, 2005

Follow up Questions from Chairman Specter

1. When "roving" or "multi-point" surveillance authority under FISA was debated on the Senate floor, Senator Feingold offered an amendment that would have imported an "ascertainment" requirement from the criminal wiretap law (Title III) and added it to FISA. His amendment would have required the person implementing a roving FISA order to ascertain the presence of the target before conducting the surveillance. A similar requirement has been proposed as part of the SAFE Act. Given that a multi-point FISA wiretap could conceivably cover several different devices, should Congress import some type of ascertainment requirement to reduce the potential interception of innocent third-party communications?

ANSWER: No. The "ascertainment" requirement contained in the criminal wiretap statute applies to the interception of oral communications, such as through bugging and not interception of wire or electronic communications, such as telephone calls. The statute states interception of oral communication "shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order." 18 U.S.C. § 2518(12).

In the context of wire or electronic communications, the criminal wiretap statute imposes a more lenient standard allowing surveillance to be conducted "only for such time as it is reasonable to presume that [the target of the surveillance] is or was reasonably proximate to the instrument through which such communication will be or was transmitted." 18 U.S.C. § 2518(11)(b)(iv).

The SAFE Act's ascertainment requirement thus would make it more difficult for investigators to conduct roving wiretaps against international terrorists and spies than it is to conduct such wiretaps against drug dealers and organized crime figures.

Moreover, the Foreign Intelligence Surveillance Act (FISA), contains safeguards to ensure that the government does not intrude on the privacy of innocent Americans. These safeguards include the requirements that: all targets of roving wiretap orders must be identified or described in the order of the FISA Court; the FISA Court must find probable cause to believe the target is an agent of a foreign power, such as a terrorist or a spy, to issue a roving wiretap order; the order will be issued only if the FISA Court determines the target may thwart surveillance; and all roving surveillance orders must include court-approved minimization procedures that limit the acquisition, retention, and

dissemination of information and communications involving United States persons. In light of these protections, and the fact that foreign governments and international terrorist groups regularly utilize counter-surveillance techniques that are more sophisticated than ordinary criminals, we believe the roving provisions of FISA must be flexible to allow the United States to successfully monitor the activities of foreign powers and their agents and must not contain an ascertainment requirement.

Finally, please see the enclosed documents regarding section 206 of the USA PATRIOT Act and the Department's views letter on the SAFE Act. (Enclosures 1 & 2)

At the hearing, Attorney General Gonzales said that Section 207, by extending the duration of FISA surveillance of non-U.S. persons, had saved the Department "nearly 60,000 attorney hours." At the same time, however, the Attorney General was unprepared to discuss the length of time it takes for the Department to process a FISA surveillance order.

2. How long, on average, does it take to obtain a first-time surveillance order under FISA?

ANSWER: It is difficult to answer this question because the Department historically has not tracked electronically the interval between the time an FBI agent in the field first begins to formulate a request for FISA collection until the time the order is signed by the FISA court. The estimated number of attorney hours saved that was referenced in the Attorney General's testimony was only intended to reflect the number of hours saved at Main Justice, and was not an estimate of the number of hours saved at the FBI.

3. What factors contribute to the total time needed to obtain such an order?

ANSWER: A variety of factors can affect the time it takes to obtain an order for surveillance or search under FISA. The main factors that determine the time it takes to process a request for FISA coverage are the priority assigned to the request by the Intelligence Community and the strength of the factual predication underlying the request. Urgent requests that meet the criteria and requirements of FISA are handled as emergency or expedited matters. Lower priority requests, as well as those that require additional investigation or other steps to fulfill the requirements of the Act, are handled as promptly as possible. Additional factors that contribute to the time it takes to process a FISA request include the certification and approval requirements of the Act as well as the fact that most FBI requests originate from FBI field offices around the country but are attested to by FBI headquarters agents in Washington, D.C., creating a need for additional procedures to verify the factual accuracy of the request before filing.

4. Have the changes made by Section 207—which require the Department to renew such orders less frequently—led to a reduction in the time needed to obtain an order?

ANSWER: Yes. The changes have allowed the Department to no longer spend time on repeated renewals every 90 days for orders for surveillance of certain non-U.S. person cases after those targets have been initially approved for such intelligence collection by a FISA Court judge, as well as repeated renewals of physical search applications every 45 days for all agents of foreign powers. These changes have permitted more resources to be dedicated to the careful processing of U.S. person cases and the processing of increased volumes of other FISA requests.

5. Are the most exigent cases being processed more rapidly?

ANSWER: Yes. As noted in the answer to question number three above, urgent requests that meet the criteria and requirements of FISA are handled as emergency or expedited matters.

At the hearing, Attorney General Gonzales said the FISA court has "granted the department's request for a 215 order 35 times as of March 30, 2005." One of the concerns raised by critics of Section 215 is that it does not require individualized suspicion—that is, the records sought by the government need not relate directly to a specific investigative target.

11. Can you report in an unclassified response whether any of the 35 orders issued under Section 215 have any been for a large category of documents—such as a list of the members of a group or organization?

ANSWER: The answer to this question is classified and was provided to the Committee under separate, classified cover on July 21, 2005.

12. Have any of the 35 orders been issued for "tangible things" other than business records? If so, can you generally describe those "tangible things"?

ANSWER: The tangible things sought in each instance were records kept by an entity that maintains records in the ordinary course of their operations. We provided additional information responsive to this question under separate, classified cover on July 21, 2005.

15. Without discussing the specifics of classified cases, can you report whether Section 215 has allowed the FBI to obtain records that it could not otherwise have obtained using preexisting legal tools?

ANSWER: Although it is possible that some of the records obtained could have been obtained pursuant to federal grand jury subpoenas or National Security Letters, we believe that section 215 was the appropriate tool to use in these circumstances in light of the underlying nature and purpose of the investigations at issue.

16. For electronic surveillance under FISA, there are minimization requirements. Are there similar limits on the Government's ability to retain or disseminate documents regarding innocent third parties obtained under Section 215?

ANSWER: All applications for electronic surveillance and physical search under FISA must include proposed minimization procedures that are approved by the Attorney General. The FISA Court reviews those procedures to determine whether they meet the definition of such procedures under the Act, and then orders the government to follow them in implementing the surveillance or search. Limits on the FBI's use of materials collected pursuant to section 215 orders are contained in the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection that were promulgated on October 31, 2003.

17. Have any materials obtained via Section 215 been used in subsequent criminal proceedings?

ANSWER: Not to our knowledge.

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 amended the FISA definition of an "agent of a foreign power" to include a foreign national who is preparing for, or engaging in, international terrorism. This amendment is subject to the sunset provision of section 224 of the USA PATRIOT Act.

20. Can you report in an unclassified response whether this new authority—to treat so-called "Lone Wolf" terrorists as agents of a foreign power—[has] been used since its adoption late last year?

ANSWER: The answer to this question is classified and was provided to the Committee under separate, classified cover on July 21, 2005.

21. Would you agree that it may be difficult to assess the impact of this provision by the sunset date, December 31, 2005?

ANSWER: The Department strongly supports repealing the sunset on the "Lone Wolf" provision. If an individual is engaging or preparing to engage in international terrorism, investigators should be able to obtain FISA surveillance of that individual. The "Lone Wolf" provision allows FISA to be used to investigate only non-United States persons who are engaged in international terrorism or are preparing to engage in international terrorism, even if they are not known to be affiliated with an international terrorist group. Prior to the amendment, the FBI could not obtain a FISA surveillance order of an international terrorist unless it could establish a connection to a foreign organization. The "Lone Wolf" provision therefore closed a dangerous gap in our ability to protect against terrorism, as even a single foreign terrorist with a chemical, biological, or radiological weapon, or an airplane could inflict terrible damage on this country. The threat lone wolf terrorists pose will not cease to exist at the end of 2005. Moreover, the provision protects civil liberties of Americans, as it applies only to non-U.S. persons; applies only to international and not domestic terrorism; and requires court authorization and the use of significant restrictions on the collection, retention, and dissemination of information acquired through surveillance.