

DIANNE FEINSTEIN
CALIFORNIA



COMMITTEE ON APPROPRIATIONS
COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION
SELECT COMMITTEE ON INTELLIGENCE

United States Senate

WASHINGTON, DC 20510-0504

<http://feinstein.senate.gov>

January 26, 2006

The Honorable Pat Roberts
The Honorable John D. Rockefeller IV
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman and Mr. Vice Chairman,

I am pleased that the Committee will soon be meeting to plan and initiate an investigation into the facts and circumstances surrounding the Administration's program of warrantless domestic surveillance. I write today to bring to your attention an issue of particular significance related to this matter.

I have been deeply troubled by the fact that the Administration, if it believed it needed additional authorities related to domestic electronic surveillance, did not seek legislation granting them that authority.

My concern was heightened by statements made this week, in which the Attorney General explained, for the first time, that the decision to circumvent the procedures set forth in the Foreign Intelligence Surveillance Act was not only due to concerns of efficiency, but were also substantive. Specifically, he stated that "[w]e're talking about communications where one end of the call is outside the United States and where there's a reasonable basis to believe that a person on the call is either a member of al Qaeda or affiliated with al Qaeda." In other words, the difference between this secret program and the FISA law is not only the lack of involvement of court supervision, but a lowering of the standard of proof necessary to permit the collection: from "probable cause" to "reasonable basis." General Michael Hayden, the Deputy Director of National Intelligence, described the change on Tuesday in a public statement: "[t]he trigger is quicker and a bit softer."

In 2002 Senator Mike DeWine introduced legislation, S. 2659, which would have lowered the standard to "reasonable suspicion¹," at least in the case of non-U.S. persons. This appears to be a similar standard to the one cited this week by the Attorney General. The Department of Justice, at a hearing held in July of 2002, stated, in writing, that it had "been studying Sen. [sic] DeWine's proposed legislation. Because the proposed change raises both significant legal and practical issues, the Administration at this time is not prepared to support it."² This position, offered by James Baker, the Department of Justice's Counsel for Intelligence Policy, includes the following key statements:

The Department's Office of Legal Counsel is analyzing relevant Supreme Court precedent to determine whether a "reasonable suspicion" standard for electronic surveillance and physical searches would, in the FISA context, pass constitutional muster. The issue is not clear cut, and the review process must be thorough because of what is at stake, namely, our ability to conduct investigations that are vital to protecting national security. If we err in our analysis and courts were ultimately to find a "reasonable suspicion" standard unconstitutional, we could potentially put at risk ongoing investigations and prosecutions.

The practical concern involves an assessment of whether the current "probable cause" standard has hamstrung our ability to use FISA surveillance to protect our nation. We have been aggressive in seeking FISA warrants and, thanks to Congress's passage of the USA PATRIOT Act, we have been able to use our expanded FISA tools more effectively to combat terrorist activities. It may not be the case that the probable cause standard has caused any difficulties in our ability to seek the FISA warrants we require, and we will need to engage in a significant review to determine the effect a change in the standard would have on our ongoing operations. If the current

¹ S. 2659, *A bill to amend the Foreign Intelligence Surveillance Act of 1978 to modify the standard of proof for issuance of orders regarding non-United States persons from probable cause to reasonable suspicion*, attached.

² Statement of James A. Baker, Counsel for Intelligence Policy, Before the Select Committee on Intelligence, United States Senate, Concerning Proposals to Amend the Foreign Intelligence Surveillance Act of 1978, presented on July 31, 2002, attached.

standard has not posed an obstacle, then there may be little to gain from the lower standard and, as I previously stated, perhaps much to lose.

I assure [you] that we are moving expeditiously to answer these questions, which, of course, require input from agencies other than the Department of Justice that could be affected by the legislation.

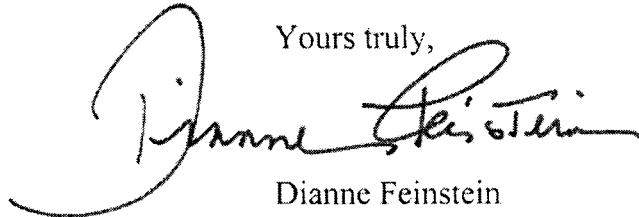
In sum, Mr. Baker led the Committee to believe that the Department of Justice was, in 2002, unsure of whether the adoption of a “reasonable suspicion” standard (even with judicial review) was either constitutional or necessary. However, the Attorney General’s public statements over the last week indicate that, at the very time that Mr. Baker was offering this testimony, the Department of Justice had in fact secretly answered both questions in the affirmative, was undertaking collection inside the United States using a lower “reasonable belief” standard, and was doing so without court supervision. It is important that we learn who within the Department of Justice or elsewhere in the Executive Branch who did know of the secret program allowed this testimony to go forward.

Senator DeWine’s proposal was a thoughtful and legitimate one, which could have eased the way before the Foreign Intelligence Surveillance Court if circumstances warranted. Perhaps, if the Department of Justice had briefed the Committee on the actual facts, there would have been widespread support for this proposal. But the Committee was not given that opportunity – the Department of Justice told us that they could not, at the time, support the initiative. In fact they had unilaterally adopted a similar standard, but were concealing that fact from the Committee.

I hope that the Committee’s review of this entire matter will include

inquiring whether the failure to brief the Committee as required by law was compounded by testimony which was at best misleading, and at worst, false.

Yours truly,

A handwritten signature in black ink, appearing to read "Dianne Feinstein". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Dianne Feinstein
U.S. Senator

DF: sac

cc: Senator Arlen Specter
Senator Patrick Leahy
Members of the Intelligence Committee

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The Honorable Pat Roberts
The Honorable John D. Rockefeller IV
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman and Mr. Vice Chairman,

Earlier today I wrote to you regarding testimony offered to the Intelligence Committee in July, 2002 during a hearing on a bill to amend the Foreign Intelligence Surveillance Act. That letter quoted from prepared testimony of Mr. James Baker of the Department of Justice. The actual quotation was drawn from the prepared statement as published on the Internet by the Federation of American Scientists, an organization which has a long history of publishing transcripts of Congressional documents related to intelligence and national defense. The specific document can be found at http://www.fas.org/irp/congress/2002_hr/index.html#fisa, and is also attached.

Today, I learned that the text as posted, and included in my letter, differs from the official text maintained by the Senate Select Committee on Intelligence. The original text does not contain the paragraphs attributed to Mr. Baker set off and quoted in my earlier letter, and differs in other respects.

I do not know why the two transcripts are different, and I have asked my staff to investigate. Nevertheless, the official transcript from Mr. Baker presents the same issues I raised in my letter: that Senator DeWine's proposal to lower the FISA standard was not supported by the Department of Justice, which stated that it presented "significant legal and practical issues," a position which appears at odds with what we now learn was an ongoing program to permit domestic surveillance using a "reasonable basis" standard and without court review. I therefore continue to urge that the Committee consider this information when it investigates the NSA warrantless electronic surveillance.

Yours truly,

Dianne Feinstein

DF: sac
Enclosure
cc: The Honorable Arlen Specter
The Honorable Patrick Leahy
Members of the Intelligence Committee