U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 19, 2007

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

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Acting Assistant Attorney General Steven G. Bradbury before the Committee on July 26, 2006, at a hearing entitled "FISA for the 21st Century." We apologize for the delay in responding.

The attached responses do not reflect recent changes to the Foreign Intelligence Surveillance Act of 1978 (FISA) resulting from the passage of S.1927, the "Protect America Act of 2007." Based on discussions with your staff we understand the Committee's desire to receive these responses immediately, rather than incurring further delay if the Department were to revise the responses to correspond with recent changes in the law. We look forward to continuing to work with the Committee on this critical issue.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

FISA for the 21st Century
Wednesday, July 26, 2006
Questions for Steven G. Bradbury

Questions from Chairman Specter

1. **Can you describe the current process for seeking approval of an application for a warrant? How is this process more flexible from the process of seeking a routine criminal warrant? What are the problems with this process and how does my bill help solve some of them?**

ANSWER: Obtaining an order authorizing electronic surveillance under section 104 of FISA, 50 U.S.C. § 1804, requires the Department of Justice to prepare and to file an application that documents in detail the information justifying surveillance. For example, the statute and practice require that each application contain a lengthy statement of certain facts supporting the application and a certification from a high-ranking Executive Branch official with national security responsibilities who is appointed by the President with the advice and consent of the Senate. Moreover, all applications under section 104 must be approved by the Attorney General, as defined by FISA. Fulfilling these requirements can take substantial time and effort. The process of preparing, reviewing, and approving applications for orders to conduct electronic surveillance can impede the timely collection of foreign intelligence in certain circumstances.

FISA's provisions for emergency surveillance do not entirely ameliorate these problems. The emergency authorization provision in section 105(f) of FISA, 50 U.S.C. § 1805(f), which permits 72 hours of surveillance before obtaining a court order, does not allow the Government to undertake surveillance immediately. Rather, before surveillance can begin, the Attorney General first must personally "determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists." *Id.* § 1805(f)(2). Great care must be exercised in reviewing requests for emergency surveillance, because if the Attorney General authorizes emergency surveillance and the Foreign Intelligence Surveillance Court ("FISC") does not subsequently approve an application for the surveillance, then the surveillance must cease 72 hours after its initial authorization, and there is a presumption that the court would order disclosure of the surveillance to an affected person. *See id.* § 1806(j).

Although FISA does allow innovative approaches (which cannot be described in this unclassified setting), the approval process for electronic surveillance in ordinary criminal cases is in some ways more flexible than the process for obtaining an order authorizing electronic surveillance under FISA. Unlike under FISA, applications under Title III do not require the approval or certification of the Attorney General or another similarly high-level Executive Branch official. Instead, applications under Title III need only have the approval of the Assistant Attorney

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General for the Criminal Division or a deputy assistant attorney general in that division.

Finally, it is my understanding that the bill to which you refer, S. 2453, which was introduced in the 109th Congress, has undergone substantial revision, and has not been reintroduced in this Congress. Nevertheless, we continue to believe that any amendment to FISA should streamline the application and authorization procedures for obtaining an order authorizing electronic surveillance. More fundamentally, amending the definition of "electronic surveillance," in combination with other amendments to FISA, would help to restore FISA to its original focus on protecting the privacy of U.S. persons in the United States.

2. **Technology has changed tremendously since 1978. What are some of the technological hurdles that make FISA obsolete today? Do you agree with how S. 2453 deals with emerging technological issues? Is it feasible for the FISA Court to make the type of determinations and issue the type of program-wide warrants that the bill envisions?**

ANSWER: A full explanation of the technological changes that have impacted the operation of foreign intelligence collection conducted under FISA would require a discussion of highly classified and sensitive information. In short, since 1978 there has been a fundamental transformation in the means by which we transmit communications. Sheer fortuity in the development and deployment of new communications technologies, rather than a considered judgment of Congress, has resulted in a considerable expansion of the reach of FISA beyond the statute's original focus on the domestic communications of U.S. persons.

S. 2453, which was introduced in the 109th Congress, has undergone substantial revision and has not been reintroduced in this Congress. Nevertheless, we continue to believe that the definition of "electronic surveillance" must be changed to account for the revolution in communications technology since 1978. This critical term can and should be defined in a technologically neutral way that, in combination with other amendments, would return FISA to its original focus on protecting the privacy of U.S. persons in the United States.

3. **Would the President continue the Terrorist Surveillance Program (TSP) if the Foreign Intelligence Surveillance Court (FISC) or the Court of Review concluded that the program is unconstitutional?**

ANSWER: As you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated associated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC. Under these

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circumstances, the President determined not to reauthorize the Terrorist Surveillance Program when the last authorization expired.

4. **Was the Court of Review correct when it said that FISA cannot encroach on the President's constitutional authority?**

ANSWER: The Foreign Intelligence Surveillance Court of Review was correct when, relying upon the decisions of *every* court of appeals that had decided the issue, it took "for granted that the President" has the constitutional authority to conduct electronic surveillance to obtain foreign intelligence without prior judicial approval and that FISA "could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002). It is well established that the President has the independent constitutional authority to conduct foreign intelligence surveillance without prior judicial approval, even during times of peace. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d. 264, 271-77 (S.D.N.Y. 2000).

a. **If that is so, does repealing the so-called exclusivity provision do more than make clear that Congress does not wish to provoke a constitutional clash?**

ANSWER: Construing FISA to preclude the President from conducting electronic surveillance for the purpose of collecting foreign intelligence against an enemy during an armed conflict would raise a serious constitutional question. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 20-23 (Jan. 19, 2006) ("*Legal Authorities*"). Repealing the so-called exclusivity provision of FISA, codified at 18 U.S.C. § 2511(2)(f), simply would clarify that Congress does not intend to limit the authority that the President has under the Constitution, thus avoiding the potential for a serious constitutional dispute regarding whether FISA encroaches upon the President's inherent constitutional authority.

b. **Aside from the constitutional law, is it good policy to interfere with the President's ability to detect and prevent terrorist plots of a declared enemy?**

ANSWER: It is, of course, never good policy to interfere with either the Nation's ability to detect and to prevent terrorist plots or to engender a constitutional clash between the Branches. Intelligence indicates that, more than five years after al Qaeda succeeded in launching the single most deadly foreign attack on American soil in history, we continue to confront a determined and deadly enemy that is dedicated to launching additional catastrophic attacks against America.

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5. **Would simply throwing more resources into the current FISA process address the problems that required the President to create the Terrorist Surveillance Program (TSP)?**

ANSWER: No. Although additional resources are always welcome, committing even substantial additional resources within the current FISA framework would not provide the modernization that FISA needs. Several problems with FISA cannot be solved simply by allocating additional money and other resources to the process. Most importantly, the tremendous changes in global telecommunications technology since 1978 have resulted in the unintended expansion of the reach of FISA to include communications that Congress intended to exclude from the scope of the statute. Redefining "electronic surveillance," in combination with other amendments to FISA, would provide the Intelligence Community with much needed speed and agility and, at the same time, would have the effect of restoring FISA's original focus on protecting the privacy of U.S. persons in the United States.

6. **Could the new FISA title be used merely to collect evidence for criminal prosecutions?**

ANSWER: The proposed new title of FISA referenced in this question was part of S. 2453, which was introduced in the 109th Congress. S. 2453 has undergone substantial revision and has not been reintroduced in this Congress. We are not aware of any current legislative proposal that includes the proposed new title of FISA.

Questions from Senator Leahy

Questions regarding the "White House-Specter Compromise" refer to the substitute amendment to S.2453 marked "Discussion Draft" and attached hereto.

7. **The Justice Department White Paper on the Terrorist Surveillance Program assumes that the NSA's activities constitute "electronic surveillance" as defined by the Foreign Intelligence Surveillance Act ("FISA"). That is a reasonable assumption given the current definition of "electronic surveillance," which covers "any wire communication to or from a person in the United States ... if the acquisition occurs in the United States." But section 9 of the Chairman's bill narrows the definition of "electronic surveillance" and, in particular, repeals the language quoted above. Under the new definition, would the NSA's activities under the Terrorist Surveillance Program constitute "electronic surveillance"?**

ANSWER: We cannot comment here as to whether certain activities would or would not constitute "electronic surveillance" under any potential new definition of that term in FISA or under the current definition. To do so would require disclosing highly classified and exceptionally sensitive information. In any event, as you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the

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communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC. Under these circumstances, the President determined not to reauthorize the Terrorist Surveillance Program when the last authorization expired.

8. **The former presiding judge of the FISA court, Judge Royce Lamberth, said on May 8, 2006, that he believed government lawyers had not used evidence obtained by the NSA under the Terrorist Surveillance Program in FISA applications. Is Judge Lamberth correct on this point? Has the government used this information in its FISA warrant applications and, if not, why not?**

ANSWER: As a general matter, a judge of the FISC would be familiar with the factual basis for an application by the Government to authorize surveillance pursuant to FISA. As we previously have made clear, we cannot comment on the Department's communications with the FISC or on the operational details of the Terrorist Surveillance Program.

9. **Has the government used information obtained from the Terrorist Surveillance Program in criminal cases?**

ANSWER: We cannot discuss operational aspects of the Terrorist Surveillance Program, as noted in my answers to Questions 7 and 8. We note, however, that because the Program served a "special need, beyond the normal need for law enforcement," the warrant requirement of the Fourth Amendment did not apply to the Terrorist Surveillance Program. *See, e.g.*, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995). And, in view of the narrowly targeted nature of the Program, the essential government interest it served, the appropriate minimization techniques that were employed, and the careful and frequent review by high-level Executive Branch officials, the Program met the Fourth Amendment's reasonableness requirement. Therefore, there would appear to be no constitutional barrier to introducing evidence obtained through the Terrorist Surveillance Program in a criminal prosecution.

Nevertheless, several considerations would weigh against the use of such evidence in a criminal prosecution. The purpose of the Program was not to bring criminals to justice. Rather, it was a critical intelligence program that was part of an ongoing military operation that provided the United States with an early warning system to protect the Nation from foreign attack by a declared enemy of the United States—al Qaeda. Moreover, the use of such information would carry a substantial risk of disclosing classified information and impairing critical intelligence sources and methods.

10. **Suppose that someone in Pakistan is calling or e-mailing someone in Afghanistan. The call or e-mail is routed through a switch or a wire in the United States, where the government picks it up. Would the current FISA**

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statute require a warrant in that situation? If yes, please point me to specific language in FISA that you believe would require a warrant in this circumstance.

ANSWER: We cannot comment on this hypothetical in an unclassified forum, because that would require a discussion of highly classified and exceptionally sensitive technical and operational information.

11. You testified, in response to a question from Senator Specter, that "statutes can reasonably regulate exercises of the President's constitutional authority" but cannot "eliminate it or snuff it out." How does FISA as currently written -- by requiring the President to obtain a warrant for certain categories of domestic surveillance -- "eliminate" or "snuff out" the President's constitutional authority?

ANSWER: As I stated in my answer to Question 4, it is well established that the President has constitutional authority to conduct electronic surveillance without prior judicial approval for the purpose of collecting foreign intelligence. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d. 264, 271-77 (S.D.N.Y. 2000). Some have argued, however, that FISA precludes the President from conducting any electronic surveillance for the purpose of collecting foreign intelligence without obtaining an order from the FISC. If FISA were interpreted to require such an order in all circumstances—including during an armed conflict against an enemy who already has successfully attacked the United States and who repeatedly has avowed its intention to do so again—then it would eliminate the President's constitutional authority. Such a construction would raise a serious constitutional question. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 20-23 (Jan. 19, 2006) ("*Legal Authorities*").

White House-Specter Compromise

12. You testified at the hearing that "the President has pledged to the Chairman that he will submit his Terrorist Surveillance Program to the FISA court for approval, if the Chairman's legislation were enacted in its current form, or with further amendments sought by the Administration." Chairman Specter has said that the President objected to memorializing this "pledge" in legislation, *e.g.*, by having the bill *require* the President to submit the program to the FISA court, because the President does not want to bind future Presidents and make an institutional change in the powers of the presidency. Couldn't this objection be met by sunsetting the bill (or, alternatively, sunsetting only that portion of the bill that required the President to submit the program to the FISA court) on the last day of the President's term of office?

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ANSWER: S. 2453 is no longer pending before Congress. In addition, as you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC. Under these circumstances, the President determined not to reauthorize the Terrorist Surveillance Program when the last authorization expired.

13. **Let's say the Administration changes one aspect of the current Terrorist Surveillance Program, as for example by extending it to terrorists who are not affiliated with al Qaeda, or by lowering the self-imposed burden of establishing probable cause. Would the President's "pledge" to submit the program for judicial approval extend to the revised program?**

ANSWER: Please see my answer to Question 12.

14. **Please identify any provisions in the current version of the bill that the Administration (A) believes may be unconstitutional; (B) claims the authority to disregard, intends to disregard or will decline to enforce; (C) interprets in a manner inconsistent with the clear intent of Congress or consistent with its so-called "unitary executive" theory.**

ANSWER: S. 2453, which was introduced in the 109th Congress, has undergone substantial revision, and has not been reintroduced in this Congress. The Administration has put forward a comprehensive proposal to modernize FISA as Title IV of its proposed FY 2008 Intelligence Authorization Act, which we believe is constitutional. We would be pleased to work with Congress on ways to streamline and modernize FISA.

Section 3 of White House-Specter Compromise (proposing addition of new section 701 to FISA)

15. **The definition of "electronic tracking" proposed in the new section 701(4) is limited to the substance of a person's electronic communication where that person "has a reasonable expectation of privacy." This phrase appears in FISA and is repeated at several other points in the bill. When would a person talking on the telephone or sending an email to another person not have a reasonable expectation of privacy from government surveillance?**

ANSWER: As a general matter, an individual talking on the phone or sending an email to another individual would have a reasonable expectation of privacy. For example, the Senate committee report on FISA noted generally that two individuals "talking in a public park, far from any stranger, would not reasonably anticipate that their conversations could be overheard from afar through a directional microphone,

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and so would retain their right of privacy." S. Rep. No. 95-701, 95th Cong., 2d Sess. (1978) at 37, *reprinted in* 1978 U.S.C.C.A.N. 3973, 4006. The committee report also noted that an individual would not have a reasonable expectation of privacy "where a participant could reasonably anticipate that his activities might be observed." *Id.* Hence, for example, an individual talking on a speaker phone in a public place likely would not have a reasonable expectation of privacy. And prisoners communicating on prison telephones are generally considered not to have a reasonable expectation of privacy in their communications.

It is difficult, however, to identify in the abstract all of the many possible circumstances in which an expectation of privacy would be unreasonable. As you note, the phrase "reasonable expectation of privacy" already appears in FISA, although it is not defined there. *See, e.g.*, 50 U.S.C. § 1801(f). The Fourth Amendment jurisprudence regarding whether a person has a "reasonable expectation of privacy" provides guidance in interpreting the scope of the phrase under FISA. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001); *California v. Ciraolo*, 476 U.S. 207 (1986). Under the Fourth Amendment, aside from the well established expectation of privacy a person has in his home, *see Kyllo*, 533 U.S. at 33-34, 40, determining whether a person has a "reasonable expectation of privacy" is a fact-intensive issue, the resolution of which turns upon several inquiries regarding the scope of a search, the subjective expectations of the person, and the objective reasonableness of that expectation, *see Ciraolo*, 476 U.S. at 212-13; *Smith v. Maryland*, 442 U.S. 735, 741-43 (1979). Therefore, rather than attempt to identify in general terms all of the possible circumstances in which a person would not have a reasonable expectation of privacy, it is best to rely upon the case-by-case interpretation of the term in particular circumstances.

16. The term "electronic surveillance program" proposed in the new section 701(5) is defined as including situations "where it is not technically feasible to name every person or address every location to be subjected to electronic tracking." What does "technically feasible" mean? Is it different from, or does it include, "not feasible given the large number of persons or locations to be subjected to electronic tracking"?

ANSWER: These questions refer to the definition of "electronic surveillance program" in proposed section 701(5) of FISA. This provision appears in S. 2453, which was introduced in the 109th Congress. S. 2453 has undergone substantial revision, and it has not been reintroduced in this Congress. We are not aware of any current legislative proposal incorporating this definition of "electronic surveillance program."

17. In the same definition of "electronic surveillance program," what constitutes "an extended period of electronic surveillance"? Does this mean that something of shorter duration can be undertaken with no approvals?

ANSWER: Please see my answer to Question 16.

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18. The term "intercept" is defined in the new section 701(9) as acquisition "by a person" of a communication, "through the use of any electronic, mechanical, or other device." Would the meaning of this change if you removed "by a person?" If the acquisition is accomplished entirely by automation, with no person involved, would it not be an "intercept" and, therefore, not be governed by these rules?

ANSWER: These questions refer to the definition of "intercept" in proposed section 701(9) of FISA. This provision appears in S. 2453, which was introduced in the 109th Congress. S. 2453 has undergone substantial revision, and it has not been reintroduced in this Congress. We are not aware of any current legislative proposal that includes this definition of "intercept."

19. Separate from the Chairman's bill, does the Administration have a legal position on whether automatic searching of the contents of communications is a search or seizure for Fourth Amendment purposes?

ANSWER: As an initial matter, it is important to be clear that the Terrorist Surveillance Program did not involve any such activity. The Program targeted for collection only international communications into or out of the United States where there was probable cause to believe that at least one of the communicants was a member or agent of al Qaeda or an associated terrorist organization. As General Hayden correctly stated, the Terrorist Surveillance Program was *not* a "data-mining" program; it was not a "drift net out there where we're soaking up everyone's communications." Rather, under the Program, NSA targeted for interception "very specific communications" for which, in NSA's professional judgment, there was probable cause to believe that one of the parties to the communication was a member or an agent of al Qaeda or an affiliated terrorist organization—people "who want to kill Americans." Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html.

In any event, the Department of Justice has not announced a legal position regarding whether automatic searching of the contents of communications is either a search or a seizure under the Fourth Amendment to the Constitution of the United States.

Section 4 of White House-Specter Compromise (proposing addition of new section 702 to FISA)

20. Under the new section 702(a)(2), reauthorization of an electronic surveillance program can be "for a period of time not longer than [the Foreign Intelligence Surveillance Court] determines to be reasonable." Under this provision, a single judge could authorize a program for 5 or 10 years, or longer. Is there any way for a future judge to re-examine that decision? Does it seem appropriate not to

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give the judges any guidance on what Congress believes might be an outside limit on reasonableness?

ANSWER: These questions refer to proposed section 702(a) of FISA. This provision appears in S. 2453, which was introduced in the 109th Congress. S. 2453 has undergone substantial revision, and it has not been reintroduced in this Congress. We are not aware of any current legislative proposal that incorporates proposed section 702(a).

21. As I read the new section 702(a), a single FISA Court judge can issue and indefinitely renew an order for an "electronic surveillance program," with no possibility of review by another judge or panel of judges at any time. Is that correct?

ANSWER: Please see my answer to Question 20.

22. In your exchange with Senator Feinstein, you sought to reassure her that a program warrant under this bill would be kept in check because "It could only be approved for 90 days" and then the government "would have to come back in" to the FISA court for careful judicial review and reauthorization. Is it the Administration's position that, once a program warrant is sought and authorized under the bill, the government *must* submit to periodic review and reauthorization, or could the President simply continue the program past the initial 90-day period of authorization pursuant to his inherent authority under Article II?

ANSWER: These questions refer to provisions in S. 2453, which was introduced in the 109th Congress, that would have authorized the FISC to issue an order approving an "electronic surveillance program." S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal that incorporates these "electronic surveillance program" provisions.

23. Regarding mandatory transfer for review, wouldn't it be more reasonable to transfer cases to the Foreign Intelligence Surveillance Court of Review only after a regular District Court judge found that proceeding in the regular courts would violate the state secrets privilege? FISA was created to handle mainly ex parte proceedings. (Even in the one case that went to the Court of Review, only the government was a party, and others were limited to an amicus role.) Aren't the regular courts the best place for adversarial proceedings? Haven't regular courts for many years been making these kinds of decisions about the need to protect national security information, either in applying the state secrets privilege or the Classified Information Procedures Act?

ANSWER: These questions refer to provisions in S. 2453 concerning the transfer of cases to the Foreign Intelligence Surveillance Court of Review. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are

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aware of no current legislative proposal to transfer cases to the Court of Review. The Administration has proposed similar amendments that would authorize the transfer of cases involving classified communications intelligence activities to the Foreign Intelligence Surveillance Court ("FISC") as part of its proposed FY 2008 Intelligence Authorization Act. We would be pleased to work with Congress on ways to streamline and modernize FISA and to help protect critical national security information from disclosure.

We believe that transferring litigation concerning classified communications intelligence activities to the FISC (which we believe is better situated than the Court of Review to conduct discovery if necessary) from regular federal district courts would both help to protect national security and facilitate resolution of those cases by Article III judges with expertise in the statutory and constitutional issues raised by foreign intelligence surveillance.

24. If we adopt the mandatory transfer provisions as proposed, would the Administration agree to waive the state secrets privilege in litigation before the Foreign Intelligence Surveillance Court of Review and, if not, why not? Is the Administration seeking both the protection of the more secretive proceedings of the FISA court and full scope of the state secrets privilege?

ANSWER: These questions refer to provisions in S. 2453 concerning the transfer of cases to the Foreign Intelligence Surveillance Court of Review. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are aware of no current legislative proposal to transfer cases to the Court of Review. The Administration has proposed similar amendments that would authorize the transfer of cases involving classified communications intelligence activities to the FISC as part of its proposed FY 2008 Intelligence Authorization Act.

The Department of Justice would not—and should not—commit in advance to waive potential assertions of the state-secrets privilege in any litigation. The "well established" state-secrets privilege serves the essential function of allowing the Government to protect against the discovery of information in litigation, the disclosure of which could be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Accordingly, rather than agree to a universal waiver of the state-secrets privilege, the Department of Justice, as it has always done, would decide in each case whether to assert the privilege.

25. The bill would require transfer to the Foreign Intelligence Surveillance Court of Review of any case challenging the legality of "classified communications intelligence activity relating to a foreign threat, including an electronic surveillance program, or in which the legality of such activity or program is in issue." What sorts of cases would this language cover, besides cases challenging the legality of the so-called Terrorist Surveillance Program? Why shouldn't we

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narrow this language to apply only to the program that the President has acknowledged?

ANSWER: These questions refer to provisions in S. 2453 concerning the transfer of cases to the Foreign Intelligence Surveillance Court of Review. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are aware of no current legislative proposal to transfer cases to the Court of Review. The Administration has proposed similar amendments that would authorize the transfer of cases involving classified communications intelligence activities to the FISC as part of its proposed FY 2008 Intelligence Authorization Act.

The proposed narrowing language in this question would pose several disadvantages. First, the Government is currently litigating cases in various courts in which there are a variety of allegations that do not coincide with the Terrorist Surveillance Program. Such suits, even if baseless, can cause serious harm to national security because the Government is placed in the position of having to choose between asserting the state-secrets privilege and denying specific allegations (which itself discloses information). Second, plaintiffs likely would attempt to plead carefully to avoid such a narrow transfer provision—defeating its very purpose.

26. How would litigation in transferred cases before the Foreign Intelligence Surveillance Court of Review be conducted? What rules and procedures would apply?

ANSWER: These questions refer to provisions in S. 2453 concerning the transfer of cases to the Foreign Intelligence Surveillance Court of Review. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are aware of no current legislative proposal to transfer cases to the Court of Review. Any attempt to answer this question would be speculative at this time.

27. The proposed paragraph on dismissal of transferred cases (the new section 702(b)(5)) states that "a challenge to the legality of an electronic surveillance program [may be dismissed] for any reason provided for under law." What purpose does this paragraph serve, if any? What would change if this language were dropped?

ANSWER: This question concerns an aspect of the transfer provisions of S. 2453, which was introduced in the 109th Congress. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. Such language would make clear that both the FISC and the court in which litigation was instituted would have authority to dismiss a case at any time "for any reason provided for under law." In a transferred case, the FISC should not be limited to dismissing the case upon grounds related to national security, such as the state-secrets privilege. Rather, in the interest of judicial economy, the FISC should be free to dismiss a case for any reason warranted under law such as, for example, lack of standing or failure to state a claim upon which relief may be granted

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pursuant to Federal Rule of Civil Procedure 12(b)(6). Likewise, with regard to a case that has not yet been transferred to the FISC, the originating court should have authority to dismiss the case, for example, on the grounds of the state-secrets privilege. Finally, if the FISC were to transfer a case back to the originating court, the originating court should still have the authority to dismiss the case as provided for by law.

Section 8 of White House-Specter Compromise

28. Senator Specter has said that the "Executive Authority" provision of his bill does not grant the President any new authority, it simply recognizes any existing authority he may have. (A) Do you agree? (B) If so, could we accomplish this more clearly by amending the "Executive Authority" provision to read as follows: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers, to the extent that he retains any such authority despite the "exclusive means" clause of section 2511(2)(f) of title 18, United States Code"? Isn't that the way to ensure that Congress is not granting new authority to the President, but only acknowledging the possibility that he may have some residual authority?

ANSWER: We agree with Senator Specter's conclusion. Although S. 2453 has not been reintroduced in this Congress, it would have created a new section 801 of FISA, which would have provided: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." The plain terms of section 801 could not be read to grant the President any new authority. That interpretation of proposed section 801 is strongly supported by the Supreme Court's decision in *United States v. United States District Court* ("*Keith*"), 407 U.S. 297 (1972), which construed a similar provision then codified at 18 U.S.C. § 2511(3). Section 2511(3) stated that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [against specified dangers]." The Court wrote:

> At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection 'against actual or potential attack or other hostile acts of a foreign power.' But so far as the use of the President's electronic surveillance power is concerned, *the language is essentially neutral.*
>
> *Section 2511(3) certainly confers no power*, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. *In short, Congress simply left presidential powers where it found them.*

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Keith, 407 U.S. at 307 (emphases added). As the Supreme Court concluded, wording like that found in section 801 is particularly well-suited to making clear that Congress did not intend to create a constitutional clash between the Branches.

Moreover, the alternative language suggested by the question is not preferable to the language in proposed section 801. By its plain terms, proposed section 801 is a simple, clear statement that FISA should be interpreted to avoid a serious constitutional question that would arise if the statute were read to interfere with the President's well recognized constitutional authority to conduct electronic surveillance for foreign intelligence purposes even during times of peace, let alone during an armed conflict. Your proposed alternative language would perpetuate the difficult constitutional issue regarding the President's constitutional authority by suggesting that FISA did purport to extinguish the constitutional authority of the President.

29. The conforming amendments proposed in section 8(c) of the bill would prospectively immunize U.S. personnel from criminal liability for conducting warrantless electronic surveillance outside of FISA and Title III, if authorized by the President. Do you agree that this amendment has no retroactive effect?

ANSWER: This question concerns section 8(c) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates the provisions of section 8(c) of S. 2453.

30. Has the Department of Justice initiated any criminal investigations into possible violations of section 109 of FISA [18 U.S.C. 1809], which currently prohibits intentional wiretapping under color of law except as authorized "by statute." If not, why not?

ANSWER: To my knowledge, the Department of Justice has not initiated any criminal investigations into possible violations of section 109 of FISA, 50 U.S.C. § 1809. With respect to the Terrorist Surveillance Program addressed in the Department's *Legal Authorities* paper, even assuming that Program involved any "electronic surveillance," as defined by FISA, as we explained in *Legal Authorities*, section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See id.* at 20-23; 50 U.S.C. § 1809(a)(1). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda and its affiliates), and surveillance conducted pursuant to the Force Resolution therefore is consistent with FISA. *See Legal Authorities* at 23-28. The Force Resolution is a statute authorizing, among other well recognized incidents

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of the use of military force, the use of signals intelligence to learn the intentions of and to protect against al Qaeda and its affiliated terrorist organizations. *See id.*

Section 9 of White House-Specter Compromise

31. Section 9(b)(1) of the bill broadens yet again the definition of an "agent of a foreign power." It would now include any non-U.S. person who has, or is even expected to receive, information that relates to the ability of the United States to protect against a potential attack or sabotage. (A) What individuals who are not currently covered by FISA would be covered by this new definition? (B) Given the potential usefulness of vast categories of privately held information -- including credit card information, travel information, and other personal information of U.S. citizens -- in potentially helping the government to protect against an attack, does this make anyone who holds any of this information -- assuming they are not a U.S. person, but even if they work for a U.S. company -- an agent of a foreign power? (C) In this context, the term "person" includes a corporation. What is to keep this provision from being applied to foreign-owned banks, airlines, and communications service providers operating in the United States?

ANSWER: This question concerns section 9(b)(1) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. We continue to believe that FISA must be modernized. For that reason, we propose amending the definition of "agent of a foreign power" to include non-U.S. persons who possess or receive *significant* "foreign intelligence information," as defined by FISA, while in the United States. This amendment would allow the United States to acquire valuable intelligence from a non-U.S. person in the United States under circumstances in which the non-U.S. person's relationship to a foreign power is unclear.

32. Section 9(b)(2) amends and significantly narrows the definition of "electronic surveillance." What specific categories of surveillance activity would no longer require a warrant if this amendment were adopted?

ANSWER: This question concerns section 9(b)(2) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar amendments in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. We continue to believe that FISA must be modernized, and we would be pleased to work with Congress to accomplish this goal. In this unclassified setting we cannot describe specific surveillance activities that would no longer constitute "electronic surveillance." We can state that, in combination with other amendments to FISA, the revisions to the definition of "electronic surveillance" would have the effect of returning FISA to its original focus on protecting the privacy of U.S. persons in the United States. For further information, please see my answer to Question 2.

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33. Under what specific circumstances would the bill permit warrantless surveillance of domestic targets where current law requires a court order?

ANSWER: S. 2453, the bill referenced in this question, has not been reintroduced in this Congress. The Administration supports similar but more modest amendments to FISA, which are set forth in its proposed FY 2008 Intelligence Authorization Act. Although in this unclassified setting we cannot provide detail on the specific circumstances in which that proposal would permit foreign intelligence activities without an order from the FISC, the Administration's proposals would have the effect of returning FISA to its original focus on protecting the privacy of U.S. persons in the United States.

34. Section 9(b)(3) changes the definition of Attorney General from being restricted to the Attorney General himself or his Deputy, to now include any person "or persons" designated by the Attorney General. (A) Would this permit the Attorney General to delegate his authority to someone outside of the Department of Justice, *e.g.*, to someone in the NSA, CIA, or Defense Department? (B) Does the President's promise to sign this bill only if it is not amended include not placing limits on how many people can be the "Attorney General" at one time, or how far down the chain of command or in how many agencies the Attorney General can delegate his authority?

ANSWER: This question concerns section 9(b)(3) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates the provisions of section 9(b)(3) of S. 2453.

35. Section 9(b)(5) narrows the definition of "contents," when used with respect to a communication, to exclude information concerning the identity of the parties to the communication and information concerning the existence of the communication. Why is this change needed? What practical effect would it have? What specific categories of surveillance activity would no longer require a warrant if it were adopted?

ANSWER: Revising the definition of "contents" in FISA to include only "information concerning the substance, purport, or meaning of . . . communications," 18 U.S.C. § 2510(8), would harmonize FISA's definition of "contents" with the definition used in federal laws regulating electronic surveillance conducted for domestic law enforcement purposes. It also would make clear that the acquisition of information in which persons have no reasonable expectation of privacy is not subject to the very high standard of full-content interceptions under Title I of FISA.

36. Section 9(c) expands the so-called "embassy exception" to FISA. Why is this change needed? What practical effect would it have? What specific categories of surveillance activity would no longer require a warrant if it were adopted?

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ANSWER: This question concerns section 9(c) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar but more modest amendments in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. Attorney General authorization under current section 102 of FISA requires, among other things, circumstances in which the "communications [are] transmitted exclusively by means of communications used exclusively between or among foreign powers." In this unclassified setting we cannot describe specific categories of surveillance activities that would be affected by the proposal. We can state that the Administration's proposal would modernize FISA to account for changes in the means of communications among foreign powers that have seriously eroded the usefulness of the current version of section 102 of FISA. The focus of section 102 of FISA under the Administration's proposed revision would remain on the communications of traditional foreign powers.

37. Currently, FISA's "embassy exception" requires the Attorney General to certify, among other things, that "there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party." The White House-Specter compromise, in section 9(c), would delete this requirement. Why is this change needed? What practical effect would it have? Would it make it easier to collect and retain information about U.S. citizens?

ANSWER: This question concerns section 9(c) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar but more modest amendments in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. The current "no substantial likelihood" requirement in section 102 of FISA, coupled with changes in communications technology since FISA was enacted, reduces dramatically the usefulness of this provision. The Administration's proposal would help modernize FISA by allowing this provision to fulfill the role Congress envisioned in 1978. The focus of the provision would remain on communications of traditional foreign powers. And any surveillance conducted under the amended provision still would require that the Attorney General implement the "minimization procedures" required by section 101(h) of FISA. *See* FY 2008 Intelligence Authorization Act § 402(a) ("An electronic surveillance authorized under this section may be conducted only in accordance with the Attorney General's certification and the minimization procedures."); 18 U.S.C. § 1801(h) (defining minimization requirements).

38. Section 9(e) of the bill, entitled "Applications for Court Orders," deletes the current requirement to provide "a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance." Why?

ANSWER: This question concerns section 9(e) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar changes in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. This

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provision would help streamline FISA by reducing the burden involved in providing the FISC with information that is not necessary to protect the privacy of U.S. persons in the United States.

39. Section 9(e) also deletes the requirement that certifications be made by Senate-confirmed officers, providing instead that they may be made by "an[y] executive branch officer authorized by the President to conduct electronic surveillance for foreign intelligence purposes." (A) Who besides Senate-confirmed officers would this language include? (B) Please state your objection, if any, to the limitation in current law.

ANSWER: This question concerns section 9(e) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. The Administration's proposal would authorize an official "designated by the President to authorize electronic surveillance for foreign intelligence purposes" to make the certification required in a FISA application. This change would help to reduce a current bottleneck in the FISA process caused by the fact that very few officials currently can certify FISA applications. The provision would require a presidential designation, thus maintaining accountability.

40. Section 9(e) also deletes the current requirement to reveal all previous applications to other judges involving the people or places targeted by the application and the action taken on those applications. Absent this requirement, if a previous application was denied by another FISA judge, could the FBI take the application to another FISA judge and never have to reveal that it had previously been denied?

ANSWER: This question concerns section 9(e) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar amendments as part of its proposed FY 2008 Intelligence Authorization Act that would streamline FISA's application process. The Administration's proposal would not delete this requirement, but instead would require a summary of previous applications in lieu of the detailed statement of all previous applications currently required. This provision would help streamline FISA, and it would not permit the Government to present a previously denied application to a different judge. *See* 50 U.S.C. § 1803(a) (prohibiting this).

41. Section 106(i) of FISA currently requires that information obtained from communications that are accidentally intercepted without appropriate approval, where a warrant would have been required under law, shall be destroyed "unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person." This bill (in section 9(g)) amends that section of FISA to allow the Attorney General (which, under section 9(b)(3), could now mean anyone the Attorney General has designated) to decide to keep such information if he or she decides that it contains "significant foreign

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intelligence." Would that change apply to U.S. citizen phone calls and to information about U.S. citizens?

ANSWER: This question concerns section 9(g) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. The provision you reference, section 106(i) of FISA, currently applies only to certain radio communications. The Administration's proposed amendment to section 106(i) would help make FISA technologically neutral with respect to incidentally acquired information. This amendment also would ensure that the Government, upon the Attorney General's determination, can retain and act upon valuable foreign intelligence information that is collected *incidentally*, rather than being required to destroy information that could be critical to the national security.

42. Section 9(i) of the bill would amend FISA's criminal penalty provision [50 U.S.C. 1809(a)], which is already amended by section 8(c)(2) of the bill. Current law excepts from criminal liability those who engage in electronic surveillance "as authorized by statute." Section 8(c)(2) extends that exception to those who act "as authorized by statute *or under the Constitution*." Under section 9(i), the exception would cover those who act "as authorized by law." As between the amendments proposed in section 8(c)(2) and section 9(i), which does the Administration prefer and why?

ANSWER: This question concerns section 9(i) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates the provisions of section 9(i) of S. 2453. This amendment would simply acknowledge the President's constitutional authority and thus avoid a potential constitutional issue.

43. Section 9(j) of the bill repeals section 111 of FISA [50 U.S.C. 1811], which permits the Attorney General to authorize warrantless electronic surveillance to acquire foreign intelligence information for up to 15 days following a declaration of war by Congress. Why is this change needed? What practical effect would it have?

ANSWER: This question concerns section 9(j) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates the provisions of section 9(j) of S. 2453. The amendment would help modernize FISA. The United States has fought only five declared wars in its history, and the last ended more than 60 years ago.

44. Section 9(k) of the bill changes the definition of "physical search" in title III of FISA. Why is this change needed? What practical effect would it have?

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ANSWER: This question concerns section 9(k) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates the provisions of section 9(k) of S. 2453.

Questions from Sen. Kennedy

45. In December 2005, at a White House press briefing, General Hayden said that the NSA warrantless wiretapping program targeting communications that involve al Qaeda, with one end inside the United States, had been successful in detecting and preventing terrorist attacks. He also said that the program deals only with international calls with a time period much shorter than is typical under the Foreign Intelligence Surveillance Act.

When asked about the inadequacies of FISA, which led to the creation of the domestic spying program, General Hayden said that the "whole key here is agility... [and] the intrusion into privacy is significantly less. It's only international calls," and the time period for surveillance is shorter than that is generally authorized under the Foreign Intelligence Surveillance Act. Attorney General Gonzales reiterated the statement that the program was limited to those with ties to al Qaeda.

In a session with the *San Diego Union-Tribune*, General Hayden said that the publicly acknowledged program is "limited" and "focused," and has been "effective."

At the Senate Judiciary Committee hearing on July 26, 2006, Mr. Bradbury stated that the program involves "monitoring of international communications into and out of the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliate terrorist organization."

The program described in the bill negotiated by the Administration and Senator Specter is significantly broader than the program General Hayden said had been successful in detecting and preventing attacks. The bill would allow authorization of a spying program targeted not just at members of al Qaeda but at anyone "reasonably believed to have communication with or be associated with" *any* foreign powers or their agents engaged in terrorism preparations. This broad standard could sweep in thousands of innocent Americans who are unaware that they are "associated with" a person the government considers to be a terrorist.

General Hayden has also repeatedly stated that the targets for the wiretapping are approved by "shift supervisors," whom he later characterized as "senior executives." Yet, this bill authorizes the Attorney

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General to delegate his authority to anyone he wishes, instead of limiting the delegation to senior officials.

Questions: Members of the Administration have repeatedly claimed that the publicly announced program has saved an untold number of American lives.

- **Why did the Administration insist on a bill that would allow the authorization of a program that spies on even more Americans?**
- **Is this just another attempt to expand Executive authority even further, or does the Administration have a specific, documented need to spy on far larger numbers of innocent Americans than are at risk under the current program?**
- **What are the Administration's justifications for such a broad program that far exceed[s] the program described publicly by each of you in past statements and in testimony before this Committee?**

ANSWER: These questions concern S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal that includes the new title of FISA that was proposed in S. 2453, which would have provided for FISC approval of an "electronic surveillance program," as defined in S. 2453. The "electronic surveillance program" title proposed in S. 2453 was intended to be flexible, to enable the United States in the future to conduct programs of electronic surveillance to help protect the Nation from another attack by international terrorists, and to do so with the approval of the FISC in a manner consistent with the need for effective intelligence capabilities in an era of pervasive global communications. The proposed title was not intended to be limited to the Terrorist Surveillance Program that was publicly acknowledged by the President. Nor was it intended to "spy" on large numbers of Americans. As the Attorney General announced on January 10, 2007, a judge of the FISC approved FISA orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program is now subject to the approval of the FISC, and under the circumstances the President determined not to reauthorize the Terrorist Surveillance Program when it last expired.

46. At the July 26, 2006, Senate Judiciary Committee hearing, Mr. Bradbury described the NSA warrantless wiretapping program as "monitoring of international communications into and out of the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliate terrorist organization."

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Question:

- **What is the legal definition of an "affiliate terrorist organization"? Who makes the determination that an organization is one that is an "affiliate terrorist organization" to al Qaeda? What are the criteria used? How quickly is such a determination made?**

ANSWER: We cannot describe operational details of the Terrorist Surveillance Program. However, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC. The judge of the FISC had to determine that all statutory requirements of FISA were satisfied.

47. The Intelligence Authorization Act for fiscal year 2000 included a provision requiring a report to Congress from the intelligence community on the legal standards used by agencies in conducting signals intelligence, including electronic surveillance. Congress wisely saw the need to require legal justification from the intelligence community on any program affecting the privacy interests of Americans. The report was submitted before 9/11. In that report, the NSA said, "in order to conduct electronic surveillance against a U.S. person located within the United States, FISA requires the intelligence agency to obtain a court order from the Foreign Intelligence Surveillance Court." We must guarantee the same oversight in any new legislation.

Question:

- **Will the Administration agree to report on the legal standards being used now? Obviously, the standards provided to Congress in 2000 have become outdated and, perhaps, obsolete.**

ANSWER: This question may assume the continued operation of the Terrorist Surveillance Program. On January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC, and the President determined not to reauthorize the Program at that time. Prior to that time, the Intelligence Committees had been briefed on the operational details of the Program in accordance with the National Security Act and longstanding practice.

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48. At the June 26, 2006, Senate Judiciary Committee hearing, you agreed with Senator Cornyn's statement that "there have been at least three courts that have expressly acknowledged the President's inherent power under the Constitution to collect foreign intelligence during a time of war." You later said, "The only decisions from courts are that the President generally has authority under Article II to protect the country through foreign intelligence surveillance."

Questions:

- **You relied on the holdings of three federal courts, including the Second and Fourth Circuits, to support your contentions about executive authority. Why, then, do you support a bill that would strip those same courts of jurisdiction over all cases having anything to do with the NSA warrantless wiretapping program?**

ANSWER: Nothing in S. 2453 would have "stripp[ed]" any federal courts of appeals of jurisdiction in cases "having anything to do with" the Terrorist Surveillance Program. S. 2453 would have permitted the United States to transfer court cases challenging classified communications intelligence activities of the United States to the Court of Review from other courts. Consolidating litigation concerning highly classified communications intelligence activities before a single expert court would ensure uniformity in this critically important area of law and would help to protect critical national security information. Notably, the analysis of the courts of appeals opinions referenced in the question supports the conclusion that federal judges ordinarily lack the expertise called for in such cases.

For those reasons, the Administration supports amendments to FISA that would permit the transfer of cases challenging the legality of classified communications intelligence activities to the FISC and has proposed such amendments as part of its proposed FY 2008 Intelligence Authorization Act. As an initial matter, cases transferred from a district court should be transferred to the FISC, which is akin to a trial court for foreign intelligence surveillance matters, rather than to the Court of Review, which is an appellate court.

- **Which specific holdings of these cases do you rely on to support your view that "the President generally has authority under Article II to protect the country through foreign intelligence surveillance"?**

ANSWER: Every court of appeals to reach the question has concluded that the President possesses constitutional authority to conduct surveillance for foreign intelligence purposes without prior court approval, even during times of peace. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *see also United States v. bin Laden*, 126 F. Supp. 2d 264, 271-77 (S.D.N.Y. 2000). This conclusion is stronger still in the midst of a congressionally authorized armed conflict undertaken to prevent further

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attacks on the United States—the core of the President's authority under Article II of the Constitution. As the Supreme Court has long noted, "the President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874). Included within this constitutional responsibility is the authority to gather foreign intelligence. *See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."); *Totten v. United States*, 92 U.S. 105, 106 (1876) (explaining that the President "was undoubtedly authorized during the war, as commander-in-chief, . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy"); *see also United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed Forces.").

49. Section 8 of the Specter bill indicates that "nothing in [FISA] shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." The Attorney General has argued that the clause "does not change the status quo." At the hearing, you agreed with Senator Cornyn's suggestion that this language is nothing more than "a ratification . . . by Congress that the President has that authority".

However, when discussing this provision with Senator Specter, you acknowledged that "statutes can reasonably regulate exercises of the President's constitutional authority." When Senator Leahy asked you whether or not the President's Article II powers can be circumscribed by statute, you answered, "yes."

While your first set of answers is out of line with mainstream constitutional thought, your second set of answers is much more accurate. As the Supreme Court ruled in *Youngstown v. Ohio*, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," but "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

We still do not know the full contours of the warrantless surveillance program. Based on how the program has been described, it appears to ignore the specific requirements of FISA that bar domestic surveillance without a warrant. If this language is added to the bill, Congress would be expressly endorsing the President's interpretation of his authority over NSA wiretapping.

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Questions:

- **Senator Specter claimed "that line was in the FISA Act of 1978". You responded with "it was," but then clarified your comments to indicate that the bill "was amended to take it out at a later point." Wasn't this provision dropped just before FISA was passed?**

ANSWER: It is my understanding that such a provision was under consideration at some point, but that Congress ultimately did not enact a provision explicitly recognizing the President's inherent right under the Constitution to conduct foreign intelligence surveillance.

- **Doesn't the fact that this line wasn't included in the original legislation but rather was specifically removed from the original legislation suggest that the drafters wanted to make it clear that FISA would be the "exclusive means" under the *Youngstown* framework by which the President could conduct electronic surveillance?**

ANSWER: Whatever the intent of Congress in 1978, an act of Congress cannot strip the President of authority granted to him by the Constitution. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) ("Congress [cannot intrude] upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns . . . .") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring in judgment)); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (explaining that Congress may not use its legislative authority to "impede the President's ability to perform his constitutional duty"); *Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in judgment) (Congress many not "*interfere*[] *with the command of forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief.") (emphasis added). As we have stated, it is well established that the President has constitutional authority to conduct electronic surveillance without prior judicial approval for the purpose of collecting foreign intelligence. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d. 264, 271-77 (S.D.N.Y. 2000). FISA cannot eliminate the President's constitutional authority to conduct foreign intelligence surveillance without prior judicial approval against a hostile foreign power. *See In re Sealed Case*, 310 F.3d at 742. Accordingly, the proffered interpretation of the "exclusive means" provision of FISA risks a constitutional clash between the Executive Branch and Congress. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 19-23 (Jan. 19, 2006) ("*Legal Authorities*"). We believe that FISA must be interpreted, if "fairly possible," to avoid raising these serious constitutional concerns. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional

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authority is at its highest. *See Department of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security").

- **Do you agree that the inclusion of this language in the FISA statute will increase the likelihood that a Court will find the warrantless wiretapping program to be constitutional?**

ANSWER: We believe that the Terrorist Surveillance Program was constitutional. Amending FISA to include a provision stating that "[n]othing in [the] Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers" should not affect the constitutional analysis of the Terrorist Surveillance Program. As the Attorney General stated, the inclusion of such a statement in the legislation would simply recognize that FISA is not intended to affect those presidential authorities that Congress cannot constitutionally take away.

Such a reading is strongly supported by the Supreme Court's decision in *United States v. United States District Court* ("*Keith*"), 407 U.S. 297 (1972), which construed a similar provision then codified at 18 U.S.C. § 2511(3), involving the issuance of wiretap orders in criminal cases, which stated that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [against specified dangers]." The Court wrote:

> At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection 'against actual or potential attack or other hostile acts of a foreign power.' But so far as the use of the President's electronic surveillance power is concerned, *the language is essentially neutral.*
>
> *Section 2511(3) certainly confers no power*, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. *In short, Congress simply left presidential powers where it found them.*

Keith, 407 U.S. at 307 (emphases added). Therefore, we do not believe that proposed section 801 of FISA would have affected the analysis under the three-part framework established by Justice Jackson's concurring opinion in *Youngstown Steel*.

- **Given the established *Youngstown* framework for establishing the constitutionality of a presidential action, is the Attorney General's assertion that this clause "does not change the status quo" correct?**

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ANSWER: Yes. A statute, such as FISA, cannot eliminate the President's constitutional authority to conduct electronic surveillance without prior judicial approval of a foreign enemy, especially a hostile foreign power that has already struck within the United States. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002). Proposed section 801 of FISA simply would have clarified that Congress did not intend to limit the authority the President has under the Constitution to collect foreign intelligence, thus avoiding a serious constitutional dispute regarding whether FISA encroaches upon the President's inherent authority under the Constitution.

50. In *Hamdan*, the Supreme Court explained that even if the President has "independent power, absent congressional authorization, to convene military commissions," he still "may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers." 126 S. Ct. 2774 n.23. In a letter to Congress, thirteen of the nation's leading constitutional scholars indicate that, absent future congressional action, this language "strongly supports the conclusion that the President's NSA surveillance program is illegal."

Even ardent defenders of the program's legality, such as legal scholar Cass Sunstein, have acknowledged that, "after *Hamdan*, the NSA surveillance program, while still not entirely indefensible, seems to be on very shaky ground, and it would not be easy to argue on its behalf in light of the analysis in *Hamdan*."

Questions:

- **Do you disagree with the assessment of these leading constitutional scholars on the constitutionality of the NSA wiretapping program under the status quo? If so, please explain why. In your answer, please cite specific authorities supporting your legal position.**

ANSWER: Yes. As we have stated repeatedly, we believe that the Supreme Court's decision in *Hamdan v. Rumsfeld* does not undermine the analysis set forth in the Department's *Legal Authorities* paper outlining the legal basis for the Terrorist Surveillance Program, assuming that the Program involved "electronic surveillance." First, the relevant statutory scheme at issue in *Hamdan* is fundamentally different from the one potentially implicated by the Terrorist Surveillance Program. FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"). The primary provision at issue in *Hamdan*, Article 21 of the Uniform Code of Military Justice ("UCMJ"), has no analogous provision. Moreover, the Supreme Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004), that the Force Resolution satisfies a statute similar to FISA prohibiting detention of U.S. citizens "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Because the Terrorist Surveillance Program

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implicated a statutory regime analogous to the one at issue in *Hamdi*, we believe that the reasoning of that decision is more relevant to the Program than *Hamdan*.

Second, the UCMJ expressly deals with the Armed Forces and armed conflicts and wars. By contrast, Congress left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 1811, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). It therefore is more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by section 1811 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which, as noted, is intended to continue to apply for the duration of any armed conflict or war. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of surveillance of international communications. *See Legal Authorities* at 16-17 (describing examples of Presidents Wilson and Roosevelt); *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts).

Third, Congress's legislative authority is clearer with respect to the issues in *Hamdan* than is the case here. Under the Constitution, both the Executive Branch and Congress have authority with respect to national security and armed conflict. Congress has express constitutional authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Because of these explicit textual grants, Congress's authority is at a maximum in these areas, which have obvious applicability to the military commissions at issue in *Hamdan*. But there is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation, particularly during times of armed conflict. *See Legal Authorities* at 30-34. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns. *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) ("Congress cannot direct the conduct of campaigns.") (Chase, C.J., concurring in judgment)). Quoting Chief Justice Chase, the Court affirmed that each power vested in the President "'includes all authorities essential to its due exercise.'" *Id.* As explained in detail in our *Legal Authorities* paper, foreign intelligence collection is a fundamental and traditional component of conducting military campaigns. Therefore, under the reasoning adopted by *Hamdan*, the Terrorist Surveillance Program—which the President determined was essential to protecting the Nation and to conducting the campaign against al Qaeda—fell squarely within the President's constitutional authority. Moreover, nothing in *Hamdan* calls into question the uniform conclusion of *every* federal appellate court to have decided the issue that the President has constitutional authority to collect foreign intelligence information within the United States, consistent with the Fourth Amendment. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002) ("[A]ll the

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other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.").

Fourth, the Government did not argue in *Hamdan*, and the Court did not decide in that case, that the UCMJ would be unconstitutional as applied if it were interpreted to prohibit Hamdan's military commission from proceeding. *See* 126 S. Ct. at 2774 n.23. In order to sustain this argument, the Court would have had to conclude that the UCMJ, so interpreted, unduly interfered with "the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97. Such a showing would be considerably easier in the context of the Terrorist Surveillance Program, where speed and agility are so essential to the defense of the Nation.

Finally, the Government did not contend in *Hamdan* that the UCMJ must be interpreted, if "fairly possible," to avoid raising serious constitutional concerns. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Although we believe that FISA is best interpreted to allow statutes such as the Force Resolution to authorize electronic surveillance outside traditional FISA procedures, this interpretation is at least "fairly possible," and, in view of the very serious constitutional questions that otherwise would be presented, therefore must be accepted under the canon of constitutional avoidance. *See Legal Authorities* at 28-36.

- **Without this enabling legislation, do you agree with program supporters like Professor Sunstein who believe the program is likely to be adjudicated unconstitutional?**

ANSWER: No. As explained above, we continue to believe that the Terrorist Surveillance Program was constitutional.

51. During his questioning of you, Senator Specter claimed that "no statute, including the one I have proposed, can expand or contract the President's Article II powers." This is clearly incorrect, since a statute that represents a lawful exercise of Congress' powers can circumscribe the President's powers. You acknowledged this when you told Senator Specter that "statutes can reasonably regulate exercises of the President's constitutional authority," and again in a response to Senator Leahy on this same issue.

Questions:

- **Please provide us with any additional information you can on the**

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circumstances under which the President's Article II powers can be or have been circumscribed by statute.

- **In cases where there is a direct conflict between Congress' constitutional exercise of its power and the Executive's constitutional exercise of its power, what is the test that is used to determine which action prevails?**
- **Should courts be called upon to resolve these sorts of inter-branch conflicts? If the Supreme Court is not allowed to be the final arbiter of constitutionality in these cases, what check does Congress have on an Executive Branch that can simply ignore the laws that Congress passes?**

ANSWER: These questions raise complex issues that depend heavily upon the context and constitutional provisions involved. As Justice Jackson noted, these issues are difficult to evaluate in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of power of any of its branches based on isolated clauses or even single Articles torn from context."). Generally speaking, however, Congress may not use its legislative authority to usurp "Executive Branch functions," *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); nor may it "impede the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

Among the President's most basic constitutional duties is his duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. Hence, the courts have long acknowledged the President's inherent authority to take action to protect the Nation from attack, *see, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect Americans abroad, *see, e.g.*, *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). *See generally Ex parte Quirin*, 317 U.S. 1, 28 (1942) (recognizing that the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. 67 U.S. at 670; *see also Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). The President's authority is at its zenith in defending the Nation from attack and in conducting campaigns during time of armed conflict, and, accordingly, Congress's ability to regulate such efforts is sharply circumscribed. As then-Attorney General Robert H. Jackson observed, "in virtue of

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his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941) (internal quotation marks omitted); *accord Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) ("'Congress [cannot intrude] upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns'") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring in judgment)).

Wherever possible, a statute purporting to regulate the Executive's constitutional authority must be construed to avoid a serious constitutional question. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citations omitted). This canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security").

Where a direct conflict does occur in the context of a case or controversy, it may be appropriate for the courts to resolve the dispute. *See, e.g., Youngstown*, 343 U.S. at 584. There are several judicial doctrines, however, that may, depending on the circumstances, prevent the courts from intervening in some such disputes, such as the political question doctrine. *See, e.g., Baker v. Carr*, 369 U.S. 186, 208-37 (1962) (discussing political question doctrine); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."). Moreover, under the doctrine of state-secrets privilege, courts must decline to entertain certain cases concerning sensitive national security secrets, the disclosure of which could be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

Even when judicial review is not appropriate, Congress has other avenues available that can serve as a check on executive action. Under no circumstances, however, has this Administration "simply ignore[d]" laws enacted by Congress.

52. You have argued that one benefit of this legislation is that it provides "a very good mechanism" for reviewing the constitutionality of the warrantless wiretapping program. However, as you acknowledged, dozens of cases pending around the country "have challenged various versions of what has been alleged in the media." At the hearing, you said that you "do not think those disparate

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matters in litigation in various district courts around the country [are] an effective or appropriate way for any of these determinations to be made."

The federal civil justice system is the primary mechanism through which almost all constitutional challenges to legislation are adjudicated. Established procedures exist for handling classified information in a civil law context.

Questions:

- **What is ineffective about allowing the normal federal court system to handle these cases?**
- **What is inappropriate about allowing the normal federal court system to handle these cases?**
- **If judicial review of the program is supported by the administration, and the civil courts are ill-equipped to address these cases, will the Administration endorse a stand-alone statute that transfers jurisdiction over these cases to the FISA Court of Review? If not, why not?**

ANSWER: As you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program is now subject to the approval of the FISC.

Permitting litigation concerning classified communications intelligence activities in the federal district courts around the country raises significant national security concerns. A single court decision concerning a classified communications intelligence activity may have immediate, nationwide ramifications. For example, a decision that holds an intelligence activity illegal could, either temporarily or permanently, end that activity. Intelligence programs that are essential to national security should not be subject to a variety of potentially inconsistent decisions from federal district courts across the country. Consolidating litigation concerning highly classified communications intelligence activities before a single expert court would ensure uniformity in this critically important area of law.

Also, cases concerning intelligence activities often involve very sensitive classified information and highly technical issues. Recognizing those facts, Congress established the FISC and the Court of Review as specialized courts to address these complex issues and to do so with the appropriate facilities and expertise for handling such information. Unlike regular district courts, the FISC has specialized security procedures and secure facilities that are optimized for considering questions regarding highly sensitive intelligence issues. *Cf. Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975) ("It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive

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information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have."). At the same time, the judges of the FISC are Article III judges, who have the same experience handling adversary proceedings that every other federal judge has, but who also have experience deciding legal issues relating to intelligence collection and handling classified information. In addition, even if all federal district court judges had the necessary facilities and experience (which they do not), litigating such issues in dozens of courts across the country obviously increases the risks of inadvertent disclosures. For all of these reasons, the Administration supports amendments to FISA that would permit the transfer of cases challenging the legality of classified communications intelligence activities to the FISC and has proposed such amendments as part of its proposed FY 2008 Intelligence Authorization Act.

53. In the report of the American Bar Association Task Force on Domestic Surveillance, the ABA urged Congress to conduct a thorough, comprehensive investigation to determine:

a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA;
b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance;
c) whether the Congress was properly informed of and consulted as to the surveillance; and
d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies.

Questions:

- **What is your response to the recommendations and conclusions of the ABA Taskforce on Domestic Surveillance?**
- **Why can't such an inquiry be conducted, so that legislation is well-informed and tailored to address any deficiencies in current law?**

ANSWER: As you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC. Under these circumstances, the President determined not to reauthorize the Terrorist Surveillance Program when the last authorization expired. The Attorney General informed both the House Committee on the Judiciary and the Senate Judiciary Committee of these developments by letter on January 17, 2007.

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Furthermore, the Department of Justice and the Intelligence Community have provided extensive information to Congress about the Terrorist Surveillance Program. Every member of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence was briefed on the Program. Under the National Security Act and longstanding practice, these are the appropriate Committees to address such issues.

Moreover, in the past year, the Attorney General, attorneys from the Department of Justice, the Director of the CIA General Hayden, the Director of the NSA General Alexander, and other officials have participated in numerous congressional hearings, briefings, and discussions, written more than a dozen letters to Congress about the Program, and answered hundreds of questions for the record. In addition, in January 2006, the Department of Justice released the *Legal Authorities* paper presenting a detailed analysis of the legal basis for the Program, even assuming that it involved electronic surveillance as defined by FISA. For these reasons, we believe that Congress has ample information to make informed decisions regarding legislation that would streamline and modernize FISA. As always, we are willing to meet with appropriate Members and staff to provide additional assistance.

Questions from Sen. Feinstein

54. Background. In the 95th Congress back in 1978, language was eliminated from the 1968 Title III wiretap statute that expressly recognized the constitutional power of the President. It was replaced it with the current requirement that FISA "shall be the exclusive means" for conducting such surveillance.

In considering FISA in 1978, Congress also refused to enact language proposed by the Ford Administration that "[n]othing contained in this chapter shall limit the constitutional power of the President."

However, the Specter-White House bill now before us states, "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." The bill also contains other references authorizing unspecified actions "under the Constitution."

- ***In your opinion, what is the impact of having this language in the bill?***

ANSWER: Please see my answers to Questions 28 and 49.

55. Background. In the 1952 *Youngstown* case, Justice Jackson divided Presidential action into three areas:

1. **When the President acts consistent with the will of Congress;**
2. **When the President acts in an area in which Congress has not expressed itself; and**

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3. When the President acts in contravention of the will of Congress.

In the first circumstance, Presidential power is at it greatest, in the third, Presidential power is at its lowest. Justice Jackson wrote that:

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."

- ***In your opinion, how will the new Specter bill be analyzed in a Youngstown analysis given the deletion of the "exclusivity" language in FISA and with the addition of new language about the President's ability to act under the constitution?***

ANSWER: Please see my answer to Question 49.

- ***What legal limits, if any, would exist on the President's ability to conduct electronic surveillance for foreign intelligence without following FISA if we pass the new Specter bill?* Please answer according to what are the legal restrictions that the Specter bill places on the President, not what DOJ or the President may or may not do.**

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been introduced in this Congress. We are not aware of any legislation currently under consideration in this Congress, including the Administration's proposed FY 2008 Intelligence Authorization Act, that contains amendments to FISA similar to the provisions in S. 2453 to which you refer in this Question and in Question 54.

56. Background. Sen. Specter's new FISA bill eliminates the 15-day window on surveillance outside of FISA after a declaration of war. This could be interpreted to mean that after a declaration of war the President may unilaterally wiretap whomever he chooses until the end of the war without limitation.

While wars do not have specific end dates, usually there is some identifying action that signals the end – such as surrender of one party, annexation of a territory under dispute, a peace treaty, when one party unilaterally withdraws, etc. However, in the "war on terror" it is highly unlikely that there would be a similar triggering event that would signify the end.

- ***If the new Specter bill were to pass, how long would the President's authority last under the "war on terror"? Could it last decades? When would that authority end?***

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ANSWER: This question concerns certain provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are aware of no current legislative proposal that incorporates these provisions of S. 2453.

We note, however, that we have never suggested that the President's authority to conduct foreign intelligence surveillance is without limit, as this question implies. The Terrorist Surveillance Program, for example, was narrowly focused, targeting for collection only international communications into or out of the United States where there was probable cause to believe that at least one of the communicants was a member or agent of al Qaeda or an affiliated terrorist organization.

57. Background. Under the new Specter-Administration bill, a new blanket exception would be created to the FISA warrant requirement, allowing surveillance of anyone who is inside the United States but is not a U.S. person. Under the bill, such individuals could be wiretapped for up to a year upon a declaration by the Attorney General that they possess foreign intelligence information.

- ***Does "foreign intelligence" include economic trends overseas? What else does it include? Trade policies between the U.S. and another country? The strength of the dollar in another country? Currency valuations? Foreign stock prices and market fluctuations?***

ANSWER: FISA defines "foreign intelligence information" to include information relating to "grave hostile acts," "sabotage or international terrorism," or "clandestine intelligence activities" directed against the United States by a foreign power or one of its agents, or information concerning "national defense or . . . security" or the "conduct of foreign affairs." *See* 50 U.S.C. § 1801(e). Although the need to protect sensitive intelligence sources and methods prohibits a full discussion of the precise scope of these terms in this setting, these terms are well-defined in practice. Moreover, with regard to a United States person, such information is "foreign intelligence information" only if it is "necessary to protect against" such acts (sabotage, terrorism, or clandestine activities) or is "necessary to" national defense or security or the conduct of foreign affairs. *Id.*

58. It appears that this new Specter bill would authorize wiretapping of almost any individual in the United States who is not a U.S. person so long as this certification is made by the Attorney General.

- ***Is that correct? What are the limitations to such a broad authority?***

- ***How would this section affect foreign workers – including skilled workers on H-1-B visas – that U.S. companies routinely bring into the United States every day? If the Attorney General certified that a skilled worker possessed foreign intelligence, would this bill allow the Government to wiretap that worker while***

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he is here in the U.S.? Would this include all of his calls or emails with other U.S. corporate executives or other persons – without a FISA warrant or other court oversight?

ANSWER: This is not correct. The authority you reference emphatically would not have applied to "almost any individual in the United States who is not a U.S. person." In any event, this question concerns certain provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating this specific provision of S. 2453. The Administration supports modernization of FISA, including section 102 of FISA and has offered specific amendments to that end in its proposed FY 2008 Intelligence Authorization Act. We would be happy to answer the Committee's questions about the provisions in the Administration's new Intelligence Authorization proposal.

59. Background. Several of us in Congress – and especially those of us serving on the Intelligence Committees – were surprised and disappointed that we had to learn of the so-called Terrorist Surveillance Program from the *New York Times*. Since then, we have read reports about other programs as well.

A May 12, 2006 *USA Today* story, reporting on the NSA's apparent collection of millions or even billions of telephone records from major carriers, has been denied by some carriers but not others. Last week, it was revealed that Republican House Intelligence Chairman Hoekstra had sent a letter to the Administration complaining of another program that had not been disclosed to his committee. And in earlier testimony, the Administration has alluded to the possibility, but did not confirm, that other intelligence programs could exist.

- ***Are there any intelligence programs carried out by your agencies, or otherwise within the intelligence community that you know of, that have not been briefed to the Congressional intelligence committees?***

- ***Did anyone in the Administration offer, grant or otherwise provide in any way some sort of promise of immunity or offer of protection against civil or criminal liability to telecommunications or internet service provider or financial entities or any other company for their cooperation in any of the surveillance programs? If yes, under what legal authority?***

ANSWER: We can neither confirm nor deny in this setting any asserted intelligence activities or any aspects of such activities. Our inability to discuss such asserted programs in this setting should not be taken as an indication that any such programs exist. Consistent with the reporting requirements of the National Security Act and long-standing practice, the Executive Branch notifies Congress of the classified intelligence activities of the United States through appropriate briefings.

Questions from Sen. Feingold

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Following are questions regarding the July 25, 2006, version (marked "JEN06974") of Senator Specter's bill, which was originally introduced as S. 2453. Please respond to the greatest degree possible in an unclassified setting, and please endeavor to provide any classified answers at a clearance level that will allow at least some cleared Judiciary Committee staff to review the responses.

60. The Specter bill makes a number of changes to the existing FISA statute. In reviewing these changes to the statute, it would of course be helpful to know how the FISA court has interpreted it. Please provide copies of any FISA court decisions containing legal interpretations of provisions of FISA that are amended by the Specter bill.

ANSWER: As you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an affiliated terrorist organization. Pursuant to an agreement with the House and the Senate, the Department agreed to provide limited access to the orders of the FISC and related documents to certain Members of the House and the Senate and to certain staff members. As we noted at the time, this arrangement is extraordinary, providing Congress with unprecedented access to FISC documents.

61. At the hearing, General Hayden stated that Section 9 of the Specter bill originated at the NSA. Please explain with regard to each subsection of the Specter bill, including each subsection of Section 9, the degree to which you or anyone at your agency/department had input on it, and to the extent not addressed in the answers to the questions below, whether you support it.

ANSWER: The Department of Justice reviewed and provided technical assistance for several bills designed to modernize FISA, including S. 2453. We continue to believe that FISA must be modernized. For this reason, the Administration has suggested specific, critical amendments to FISA in its proposed FY 2008 Intelligence Authorization Act, which has been introduced in this Congress.

62. The Specter bill creates a new Title VII of FISA. Under this title, the FISA court would be granted the authority to issue program warrants. Under the bill, would the government ever be <u>required</u> by the statute to seek a warrant from the FISA court to engage in an existing or future electronic surveillance program?

ANSWER: This question concerns certain provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

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63. Please explain your understanding of the interplay in the new Title VII of FISA created by the Specter bill of the section 701 definitions of "electronic communication," "electronic tracking," and "electronic surveillance program." Also explain how those definitions vary from the definition of "electronic surveillance" in existing FISA Title I.

ANSWER: This question concerns certain provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

64. In the Specter bill, the newly inserted section 701(6) defines "foreign intelligence information" as having the same meaning as the current statute, but also adds "and includes information necessary to protect against international terrorism." Given the definitions already in the FISA statute, isn't this additional language just duplicative?

ANSWER: This question concerns proposed section 701(6) of FISA, which was introduced as part of S. 2453 in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

65. The current FISA statute defines "contents" as "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." The Specter bill, in creating the new Title VII, uses the term "substance" rather than "contents." It defines "substance" as "any information concerning the symbols, sounds, words, purport, or meaning of a communication, and does not include dialing, routing, addressing, or signaling." Please discuss whether you believe this alternate definition is necessary and if so, why. Please also discuss how you believe this alternate definition varies from the new definition of "contents" that Section 9 of the Specter bill would create in the existing FISA Title I.

ANSWER: Part of this question concerns certain provisions of S. 2453, which was introduced in the 109th Congress, creating a new Title VII of FISA. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453. With regard to the proposed revision to the definition of "contents" in Title I of FISA, please see my answer to Question 35.

66. In the Specter bill's new section 702, the FISA Court is given jurisdiction to issue an order authorizing an electronic surveillance program "to obtain foreign intelligence information or to protect against international terrorism." The Administration has publicly described the NSA program as involving communications where there is a reasonable basis to believe that one party to the

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communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.

a. Do you agree that the bill authorizes program warrants "to obtain foreign intelligence information" even when there is no connection to al Qaeda, and that this is broader even than what the President has stated he has authorized?

b. Do you agree that the bill authorizes program warrants "to obtain foreign intelligence information" even when there is no connection to terrorism, and that this is broader even than what the President has stated he has authorized?

ANSWER: These questions concern certain provisions of S. 2453, which was introduced in the 109th Congress, creating a new Title VII of FISA. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

67. In the Specter bill's new section 702, the FISA Court's initial authorization of an "electronic surveillance program" cannot be for longer than 90 days, but a re-authorization can be for as long as the court determines is "reasonable." What do you believe is the justification, if any, for not limiting reauthorization to 90 days?

ANSWER: These questions concern certain provisions of S. 2453, which was introduced in the 109th Congress, creating a new Title VII of FISA. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

68. The Specter bill's new section 702(b) establishes guidelines for mandatory transfers of cases to the FISA Court of Review, and refers to "any case before any court." Do you believe that these mandatory transfer provisions would apply to pending cases?

ANSWER: These questions concern certain provisions of S. 2453, which was introduced in the 109th Congress, creating a new Title VII of FISA. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating these provisions of S. 2453.

69. In the Specter bill's new section 702(b), the mandatory transfer provision applies to any case "challenging the legality of classified communications intelligence activity relating to a foreign threat, including an electronic surveillance program, or in which the legality of any such activity or program is in issue." "Electronic surveillance program" is defined in the bill, but there is no definition in the current FISA statute or in the Specter bill of a "classified communications intelligence activity." What do you read this term to mean, and what types of cases beyond those involving "electronic surveillance programs" do you believe would be covered by this term?

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ANSWER: We believe that the term "classified communications intelligence activities" has a clear and limited meaning. We cannot, however, give examples of such activities in this setting, because providing such examples could reveal highly classified and exceptionally sensitive information concerning intelligence sources and methods. We would be willing to provide further information concerning the scope of the term to Members of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence in an appropriate classified setting.

70. In the Specter bill's new section 702(b), the mandatory transfer provision, cases are transferred to the FISA Court of Review "for further proceedings under this subsection." But, there is no subsection defining the procedures for the FISA Court of Review's "further proceedings," as there was in prior versions of the bill.

- **a. Did you or anyone at your agency/department request or suggest that the paragraph in earlier versions of the bill entitled "Procedures for Review" be removed? If so, why?**
- **b. As you read this subsection, what relief would the FISA Court of Review have the authority to grant if it found that the program at issue were illegal?**
- **c. As you read this subsection, what role would the parties challenging the program play in the FISA Court of Review proceedings?**

ANSWER: These questions concern the transfer provisions of S. 2453. S. 2453 was introduced in the 109th Congress, and has not been reintroduced in this Congress. We are not aware of any current legislative proposal that would transfer cases to the Foreign Intelligence Surveillance Court of Review.

71. The Specter bill's new section 702(b)(3) preserves "all litigation privileges" for any case transferred to the FISA Court of Review.

- **a. Do you read this as being intended to cover the state secret privilege?**
- **b. If so, has the state secrets privilege ever before been invoked in the FISA court? Why would it be necessary to invoke the state secrets privilege in a court that operates in a one-sided, secret process?**

ANSWER: Although S. 2453 is no longer pending before Congress, the Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. The Administration's Intelligence Authorization proposal would preserve "all litigation privileges" in any case transferred to the FISC, as well as in any appeal to the Court of Review from a judgment of the FISC in a transferred case.

We would interpret the preservation of "all litigation privileges" to include the state-secrets privilege. The "well established" state-secrets privilege serves the essential function of allowing the Government to protect against the discovery of information in litigation, the disclosure of which could be harmful to national

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security. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). To date, there has been no need to invoke the privilege in the FISC, due to its limited jurisdiction and the nature of proceedings before it. In the event that adversary litigation were transferred to the FISC or the Foreign Intelligence Surveillance Court of Review from the federal district courts, it might be necessary for the Government to assert the state-secrets privilege. Notwithstanding the FISC's special procedures and secure facilities, it is possible that in adversary proceedings other parties could disclose classified information if they were to obtain access to it. Moreover, the privilege protects more than the disclosure of information to other litigants. In appropriate cases, the privilege operates to prevent disclosure even to the court.

72. The Specter bill repeals sections 111, 309, and 404 of the FISA statute, which, notwithstanding any other law, give the President the authority to use electronic surveillance, physical searches, or pen registers or trap and trace devices without a court order for up to fifteen days following a declaration of war by Congress. Does the Administration support this repeal of these provisions, which on their face appear to grant additional surveillance options to the executive branch in time of war? If so, why?

ANSWER: These questions concern certain provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal containing these provisions.

73. The Specter bill, in section 8(c)(2)(A)(i), inserts "or under the Constitution" in 50 U.S.C. § 1809(a)(1). What is the effect of this amendment to section 1809?

ANSWER: Again, this question relates to provisions of S. 2453 that are not included in any legislation pending before Congress of which we are aware. Nevertheless, such an amendment to 50 U.S.C. § 1809(a)(1) would avoid a serious constitutional issue that would arise if FISA were interpreted to preclude the President from exercising his constitutional authority to collect foreign intelligence. It is well established that the President possesses constitutional authority to conduct foreign intelligence surveillance without prior judicial approval for the purpose of gathering foreign intelligence. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d. 264, 271-77 (S.D.N.Y. 2000). A statute, such as FISA, cannot eliminate that constitutional authority. *See In re Sealed Case*, 310 F.3d at 742. Accordingly, revising 50 U.S.C. § 1809(a)(1) would clarify that the conduct of electronic surveillance for the purpose of collecting foreign intelligence pursuant to *either* the President's constitutional authority or a statute is lawful and that FISA should not be construed to infringe upon the constitutional authority of the President.

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74. The Specter bill, in section 8(c)(2)(A)(iii), adds a third category of criminal activity to 50 U.S.C. § 1809(a). This third category is similar to the second category, 1809(a)(2).

a. Please explain your view of the difference between the language of the new 1809(a)(3), "knowingly discloses or uses information obtained under color of law by electronic surveillance ..."; and the language of the existing 1809(a)(2), "discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance ..."

b. Second, the new 1809(a)(3) would add the phrase "in a manner or for a purpose" prior to "authorized." Do you agree with this added language, and if so, why?

c. Third, it ends with the phrase "authorized by law," rather than "authorized by statute" as 1809(a)(2) does, or "authorized by statute or under the Constitution," as the bill would amend 1809(a)(2) to read. Please explain the reason, if any, for not adopting the same phrase as in 1809(a)(2), either in current law or as it would be amended by the bill.

ANSWER: These questions concern provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal containing these provisions.

75. The Specter bill, in section 8(c)(2)(B), increases the penalties of violating 50 U.S.C. 1809's criminal prohibitions, both in amount of maximum fines ($10,000 to $100,000) and maximum prison term (five years to fifteen years). Do you support these changes? If so, why do you believe they are justified?

ANSWER: These questions concern provisions of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal containing these provisions.

76. The Specter bill, in section 9(b)(1), inserts an additional category into the current FISA statute's definition of a non-U.S. person "agent of a foreign power" – someone who "possesses or is expected to transmit or receive foreign intelligence information within the United States." Given that section 1801(b)(1)(C) of FISA already includes any non-U.S. person engaged in "activities in preparation" of international terrorism, do you believe this added language is necessary? If so, why?

ANSWER: The proposed amendment to the definition of "agent of a foreign power" would improve the Intelligence Community's ability to protect the national security of the United States in circumstances where it is difficult to establish the precise connection of a non-U.S. person to a specific foreign power. That is why the Administration supported this amendment in the 109th Congress and has proposed a similar amendment to FISA in this Congress as part of its proposed FY 2008 Intelligence Authorization Act.

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77. The Specter bill, in section 9(b)(2), modifies section 1801(f) of FISA, defining "electronic surveillance." The opening language of the definition in 1801(f)(1) – "the acquisition by an electronic, mechanical or other surveillance device" – is replaced with "the installation or use of an electronic, mechanical or other surveillance device." Please explain the effect you think this would have on the FISA process, and any reason you see for the change in definitional language.

ANSWER: The proposed changes would modernize the definition of "electronic surveillance" to address changes in telecommunications technology and would make the definition technologically neutral. The redefinition of "electronic surveillance," in combination with other amendments to FISA, would help restore FISA's focus on protecting the privacy of U.S. persons in the United States. The applicability of FISA should not depend on the precise means by which a communication is transmitted or on where or how the communication is intercepted. The redefinition, in combination with other amendments to FISA, would enable the FISC and the Government to focus its limited resources on those applications to conduct electronic surveillance that most directly implicate the privacy of U.S. persons in the United States. The Administration continues to believe that FISA must be modernized and supports nearly identical revisions to section 101(f)(1) of FISA as part of its proposed FY 2008 Intelligence Authorization Act.

78. The Specter bill, in section 9(b)(2), modifies section 1801(f) of FISA, defining "electronic surveillance." The new section 1801(f)(1) would cover only the "intentional collection of information." No such limitation exists in the current 1801(f)(1). Please explain what you think would be the effect of this new limitation.

ANSWER: We disagree with the suggestion that "[n]o [intent] limitation exists in current section 1801(f)(1)." Section 1801(f)(1) explicitly limits that component of the definition of "electronic surveillance" to acquisition of "the contents [of communications that] are acquired by *intentionally* targeting [a] particular, known United States person." (Emphasis added.) In any event, a revised definition of "electronic surveillance" could help to achieve FISA's original purpose, as discussed above. We believe that such a redefinition, in combination with other amendments to FISA, would protect the national security better, and also would have the effect of increasing privacy protections for U.S. persons in the United States. The Administration continues to believe that FISA must be modernized and has proposed similar revisions to the definition of "electronic surveillance" as part of its proposed FY 2008 Intelligence Authorization Act.

79. The Specter bill, in section 9(b)(2), modifies section 1801(f) of FISA, defining "electronic surveillance." The current language in 1801(f)(1) refers to a person "who is in the United States" while the new language refers to a person "who is reasonably believed to be in the United States." Please explain what you think would be the effect of this new language.

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ANSWER: Due to the nature of modern telecommunications, the location of parties to a communication is not always clear. The Intelligence Community ought to be able to rely on reasonable conclusions about the location of particular individuals. Currently, in such circumstances, the Intelligence Community would not be able to use information that had been collected based on a reasonable assessment that the target was outside the United States when subsequent information calls that conclusion into doubt. The Administration continues to believe that FISA must be modernized and has proposed the same revision to the definition of "electronic surveillance" as part of its proposed FY 2008 Intelligence Authorization Act.

80. The Specter bill, in section 9(b)(2), modifies section 1801(f) of FISA, defining "electronic surveillance." It would limit the definition in 1801(f)(1) to "the intentional collection of information concerning a particular known person ... by intentionally targeting that person..." In contrast, the current language of 1801(f)(1) covers the "acquisition ... of the contents of any ... communication sent by or intended to be received by" a particular person who is intentionally targeted. Would this change in the definition mean that if the government targeted an individual to obtain information about someone other than that person, that it would fall outside the definition of "electronic surveillance"? Please explain your view of the effect of this change to the definition.

ANSWER: This question concerns a provision of S. 2453, which was introduced in the 109th Congress. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. We continue to believe that FISA must be modernized. To that end, we believe that it is crucial to establish a technologically neutral definition of "electronic surveillance" that does depend on the fortuities of how or where the communication is intercepted or the information is acquired. In combination with other amendments to FISA, this change would enable the FISC and the Government to focus resources on surveillance activities that most directly implicate the privacy of U.S. persons in the United States.

81. The Specter bill, in section 9(b)(2), modifies section 1801 of FISA defining "electronic surveillance." It creates a two-part definition of "electronic surveillance," in which the second half of the definition covers "any communication" where "both the sender and all intended recipients are in the United States." In all four parts of the current FISA definition, the phrase "by an electronic, mechanical, or other surveillance device" is used. The second part of the definition in the Specter bill does not use this language. Please explain your view of the legal effect of this omission.

ANSWER: Section 9(b)(2) of S. 2453 would have amended the definition of "electronic surveillance" in 50 U.S.C. § 1801(f). In combination with other amendments to FISA, a revised definition of "electronic surveillance" would have the effect of restoring FISA to its original focus on protecting the privacy of U.S. persons in the United States. There is no need to specify the type of device in the second

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definition, which would cover certain communications no matter how the Government acquires them. The Administration's proposed FY 2008 Intelligence Authorization Act follows the same course.

82. The Specter bill, in section 9(b)(3), modifies section 1801 of FISA defining "Attorney General" to include "a person or persons designated by the Attorney General or Acting Attorney General." What limit would there be on the ability of the Attorney General to designate individuals, including employees of agencies/departments other than the Justice Department, as "Attorney General" for purposes of FISA? To the degree that your answer references regulations, could the Attorney General amend those regulations without congressional approval?

ANSWER: These questions concern a provision of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal incorporating this provision.

83. The Specter bill, in section 9(b)(4)(C), modifies the FISA definition of "minimization procedures" by striking 50 U.S.C. § 1801(h)(4), which requires that any contents of communications to which a U.S. person is a party shall not be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a FISA court order is obtained or the Attorney General determines the information indicates a threat of death or serious bodily harm to any person. Please discuss what you believe are the advantages of entirely eliminating 1801(h)(4) from the current FISA statute.

ANSWER: Striking 50 U.S.C. § 1801(h)(4) would be a conforming amendment that would be necessary in light of proposed amendments to 50 U.S.C. § 1802(a), which is addressed in my answers to Questions 36, 37, and 86. The Administration supports a similar amendment to section 1801(h)(4) as part of its proposed FY 2008 Intelligence Authorization Act.

84. The current FISA statute, in section 1801(n), defines the covered "contents" of communication as: "when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." The Specter bill, in section 9(b)(5), replaces the definition of "contents" with the definition contained in 18 U.S.C. § 2510(8) – "when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication."

- **a. The new definition does not cover "any information concerning the identity of the parties to such communication." Please discuss what you believe is the effect of this proposed change.**
- **b. The new definition does not cover "any information concerning...the existence...of that communication." Please discuss what you believe is the effect of this proposed change.**

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ANSWER: Please see my answer to Question 35.

85. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA. Section 1802(a)(1) authorizes the President to engage in electronic surveillance without court order for up to one year in certain limited circumstances "under this subchapter." The Specter bill modifies this phrase to "under this title." In your opinion, what effect would this change have?

ANSWER: This change would have no material effect upon the meaning of 50 U.S.C. § 1802(a)(1).

86. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA. The current section 1802 requires the Attorney General to certify that "the electronic surveillance is solely directed at" the acquisition of certain covered communications. The Specter bill strikes the "solely directed at" phrase. Given this modification, what showing about the surveillance do you believe the Attorney General would have to make to meet the requirements of this provision? Please explain whether you support this change, and if so, why.

ANSWER: This question concerns section 9(c) of S. 2453, which was introduced in the 109th Congress. The Administration has proposed similar but more modest amendments to section 102 of FISA in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. As noted in my answers to Questions 36 and 37, this change would help modernize FISA by allowing this provision to fulfill the role Congress envisioned in 1978. Section 102 of FISA requires, among other things, circumstances in which the "communications [are] transmitted exclusively by means of communications used exclusively between or among foreign powers." The change would modernize FISA to account for technological changes in the means by which the communications at issue actually are transmitted today. The focus of the provision should remain on the communications of traditional foreign powers, and any surveillance conducted under the amended provision still would require that the Attorney General implement the "minimization procedures" required by section 101(h) of FISA. *See* FY 2008 Intelligence Authorization Act § 402(a) ("An electronic surveillance authorized under this section may be conducted only in accordance with the Attorney General's certification and the minimization procedures."); 18 U.S.C. § 1801(h) (defining minimization requirements).

87. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA, which permits electronic surveillance without a court order in certain limited circumstances. The language of 1802(a)(1)(A)(i) currently requires a showing that the communications being pursued are "communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title." The Specter bill, in contrast, would require only that the communications being pursued were "communications of foreign powers, as defined in section 101(a),

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an agent of a foreign power as defined in section 101(b)(1)." This is a significant expansion of section 1802's exemption from the usual FISA court order requirement.

- **a. Do you support this modified language of section 1802? If so, please discuss the justification for eliminating the limiting language that requires the means of communications be "used exclusively between or among foreign powers."**
- **b. If you do support the modified language of section 1802, please explain the justification for expanding the "foreign powers" covered by this blanket exemption from those defined in 1801(a)(1)-(3) to all "foreign powers."**
- **c. If you do support the modified language of section 1802, please explain the justification for adding non-U.S. person agents of foreign powers to this blanket exemption.**
- **d. In combination with the change to the definition of "agent of foreign power" elsewhere in the bill, wouldn't this mean that the government could wiretap without a warrant the calls of any non-U.S. person in the United States who possessed or was expected to transmit or receive "information with respect to a foreign power or foreign territory that relates to ... the conduct of the foreign affairs of the United States"? Wouldn't this be a very broad category covering foreign nationals who have nothing to do with terrorism and no intent to harm the United States in any way?**

ANSWER: This question concerns provisions in section 9(c) of S. 2453, which was introduced in the 109th Congress. As explained above in answers to Questions 36, 37, and 86, we do support amending section 102 of FISA. That is why the Administration has proposed similar but more modest amendments to section 102 as part of its proposed FY 2008 Intelligence Authorization Act. The Administration's proposal to eliminate the requirement that the means of communication be used "exclusively" among foreign powers would modernize FISA to account for technological changes in the means of communications among foreign powers that have seriously eroded the usefulness of the current version of section 102. At the same time, unlike section 9(c) of S. 2453, the Administration's proposal would not expand section 102 to apply to all foreign powers, nor would it expand section 102 to apply to agents of a foreign power. We believe that these amendments would modernize FISA in ways that better protect the Nation while also increasing protection of civil liberties.

88. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA, which permits electronic surveillance without a court order in certain limited circumstances. The Specter bill strikes the requirement of 1802 that the Attorney General certify that "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party." Please discuss your view of the justification, if any, for repealing this requirement.

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ANSWER: Please see my answer to Question 37.

89. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA. In creating a new 1802(b), the Specter bill creates a completely new category of Attorney General authority – that as long as the Attorney General certifies that given information, facilities or technical assistance does not fall within the definition "electronic surveillance," the Attorney General can require any electronic communications service, landlord, custodian or other person to furnish such information, facilities, or technical assistance. Please discuss what you consider to be the advantages, if any, of this new provision.

ANSWER: Since the enactment of FISA, it always has been the case that certain types of communications intelligence activities fell outside the scope of "electronic surveillance" under 50 U.S.C. § 1801(f). It is, however, advantageous to be able to enlist private parties to assist the Government even when the surveillance at issue does not fall within the definition of "electronic surveillance." The proposed amendment would have supplied this authority and would have permitted third parties, such as Internet service providers and landlords, to challenge an order by the Attorney General compelling their compliance. The Administration has proposed a similar amendment in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act. We continue to believe that this change is critical.

90. The Specter bill, in section 9(c), makes a number of changes to section 1802 of FISA. The Specter bill creates a new 1802(c), which is similar to the language of the current FISA section 1802(a)(4) that permits the Attorney General to order carriers to provide assistance to implement section 1802 and allows them to be compensated.

a. The current 1802(a)(4) only applies to "electronic surveillance authorized by this subsection." The new 1802(c) would apply to "electronic surveillance or the furnishing of any information, facilities, or technical assistance authorized by this section." Please discuss your view of the effect of the difference between these two formulations.

b. The current 1802(a)(4) also only applies to a "specified communication common carrier." The new 1802(c) applies to "any electronic communication service, landlord, custodian or other person (including any officer, employee, agent, or other specified person thereof) who has access to electronic 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." Do you agree with this change? If so, please discuss why you believe that this wider scope is needed.

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ANSWER: As discussed in my answer to Question 89, some communications intelligence activities do not constitute "electronic surveillance" under 50 U.S.C. § 1801(f) as defined currently or under the proposed redefinition that was included in S. 2453. It is essential that the Government be able to compel third parties to assist the Government, while allowing these parties to challenge such an order in court. To that end, the Administration has proposed such amendments to FISA in the 110th Congress as part of its proposed FY 2008 Intelligence Authorization Act.

91. The Specter bill, in section 9(c), creates a new section 1802(d), which reads: "Electronic surveillance directed solely at the collection of international radio communications of diplomatically immune persons in the United States may be authorized by an official authorized by the President to engage in electronic surveillance for foreign intelligence purposes in accordance with procedures approved by the Attorney General." Please discuss whether you believe this added authorization is necessary, and if so, why.

ANSWER: These questions concern a provision in section 9(c) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal containing this provision.

92. The Specter bill, in section 9(e), would strike requirements (6), (8), (9) and (11) from the section 1804(a) of FISA, the provision that lays out the required components of FISA applications for electronic surveillance.

a. Please discuss whether you believe these changes are necessary, and if so, why.

b. Do you believe that the information required in these paragraphs was not helpful to the FISA court?

ANSWER: These questions concern several provisions of S. 2453, which was introduced in the 109th Congress. We continue to support streamlining the required statements in section 104(a) of FISA to reduce the administrative burden involved in the FISA process and because these requirements are not necessary to protect the privacy interests of U.S. persons in the United States. The Administration, however, does not propose eliminating current paragraphs (6), (8), and (9) from section 104(a), but rather has proposed streamlining these aspects of the application process as part of its proposed FY 2008 Intelligence Authorization Act. The Administration continues to believe that paragraph (11) of section 104(a), which requires that where "more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device," is unnecessary. These amendments would improve the administrative efficiency of the Department of Justice and the Intelligence Community in preparing applications to submit to the FISC and would allow the Government and the FISC to concentrate on the information needed to protect the privacy of persons in the United States.

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93. The Specter bill, in section 9(f)(4), would substantially modify section 1805(e)(1) of FISA, which sets the time limits for a FISA surveillance order. Under current law, FISA surveillance can be authorized for at most ninety days; except that for a non-U.S. person agent of a foreign power, it can be 120 days at most; and for surveillance of certain types of foreign powers, a year at most. The Specter bill replaces these three tiers with a single time limit – a maximum limit of a court order of surveillance for one year – even for U.S. persons.

a. Please discuss whether you believe this change is necessary, and if so, why.

b. Please explain your understanding of what is intended by the second sentence of the new 1805(e)(1) that would be created by the Specter bill: "If such emergency employment of electronic surveillance is authorized, the official authorizing the emergency employment of electronic surveillance shall require that the minimization procedures required by this title for the issuance of a judicial order be followed."

ANSWER: These questions concern provisions of section 9(f)(4) of S. 2453, which was introduced in the 109th Congress. The Administration's FY 2008 Intelligence Authorization Act proposes similar but more modest changes to FISA. The Administration's proposal would establish a revised section 105(d)(1) of FISA that would extend the maximum initial term of authorization for electronic surveillance *of a non-U.S. person* who is an agent of a foreign power to one year from the current 120 days. This amendment would not affect the initial duration of an order authorizing electronic surveillance of U.S. persons, which would remain at 90 days. This revision would have the benefit of reducing the time spent preparing applications for renewals relating to non-U.S. persons, thereby allowing more resources to be devoted to cases involving U.S. persons.

The proposed FY 2008 Intelligence Authorization Act also would extend the maximum term of authorization to conduct electronic surveillance upon renewal of an order authorizing electronic surveillance of any person to up to one year. Because the FISC already has approved the surveillance for an initial period, and because it also has an opportunity to monitor the surveillance through the initial term of the order, a longer renewal period may be warranted. Again, a longer duration of a renewed order would allow more resources to be devoted to other foreign intelligence activities. Of course, under the Administration's proposal, the Government would not seek longer periods—nor would we expect the FISC to grant longer periods—where that would not be reasonable.

With regard to subpart (b) of this question, the Administration's proposed FY 2008 Intelligence Authorization Act would include a provision similar to the quoted sentence in a revised section 105(e)(4) of FISA. That revised section would provide that if the Attorney General authorizes emergency electronic surveillance, then he "shall require that the minimization procedures required by this title for the issuance of a judicial order be followed." The meaning of this provision is self-evident: Any

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emergency surveillance must follow the minimization procedures required by revised section 101(h) of FISA.

94. The Specter bill, in section 9(g), modifies section 1806(i) of FISA, which requires the destruction of certain communications contents that were unintentionally acquired unless the Attorney General determines they indicate a threat of death or serious bodily harm to any person. The amendment would allow the Attorney General to retain any unintentionally acquired communications contents that he determines contains "significant foreign intelligence."

a. Please discuss whether you believe this change is necessary, and if so, why.

b. In making this determination, what procedures do you believe the law would require the Attorney General to undertake?

ANSWER: The Administration supports a virtually identical amendment as part of its proposed FY 2008 Intelligence Authorization Act. We continue to believe that FISA must be modernized, and this change would help make the statute technologically neutral. With regard to the first part of this question, please see my answer to Question 41. With regard to the second part of this question, the Attorney General, in consultation with appropriate officers and personnel from the Intelligence Community, including the Director of National Intelligence, would determine whether the "foreign intelligence information," as defined by 50 U.S.C. § 1801(e), was "significant."

95. The Specter bill, in section 9(i), strikes section 1809(a) of the current FISA and replaces it with new language. But the Specter bill, in section 8(c), makes different line-by-line amendments to section 1809(a) of the FISA statute. Do you agree that these two provisions of the proposed legislation are inconsistent and cannot both become law? Of the two provisions, which do you support and why?

ANSWER: These questions concern an alleged drafting discrepancy between sections 8(c) and 9(i) of S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress, and we are not aware of any current legislative proposal that contains this apparent discrepancy.

96. The Specter bill, in section 9(k), modifies section 1827 of FISA by expanding the exception to the criminal prohibition of warrantless physical searches in section 1827(a)(1) to include "except as authorized...under the Constitution." What authority to do warrantless physical searches do you believe is granted "under the Constitution"? Also please discuss whether you believe this change is necessary, and if so, why.

ANSWER: Please see my answer to Question 44.

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97. The Specter bill, in section 9(k), modifies section 1827(a)(2) of FISA by omitting the phrase – "for the purpose of obtaining intelligence information." Please discuss whether you believe this change is necessary, and if so, why.

ANSWER: Please see my answer to Question 44.

Questions from Sen. Schumer

98. On July 13, Senator Specter announced that he had reached a deal with the White House on his legislation to authorize the Terrorist Surveillance Program and re-write much of the Foreign Intelligence Surveillance Act (FISA). This was just two weeks after the Supreme Court's decision in *Hamdan*, which many have characterized as a rebuke of the Administration's legal defense of the President's warrantless surveillance program.

- **Do you continue to believe that the NSA Surveillance Program is legal and Constitutional and that it would survive any legal challenge in the FISA Court?**

ANSWER: Yes.

- **If the administration has "the authority, both from the Constitution and the Congress, to undertake this vital program," as President Bush asserted in January, what need is there to legislate on this issue from your perspective?**

ANSWER: Although the President had ample constitutional and statutory authority to implement the Terrorist Surveillance Program, that Program has not been reauthorized, and any electronic surveillance that may have been occurring as part of the Program is now subject to the approval of the FISC, as noted in my answer to Question 3.

FISA still provides a vital framework for the Intelligence Community, but it is now imperative that Congress and the Executive Branch shift their focus away from former intelligence programs and cooperate to close critical gaps in our intelligence capabilities under FISA while ensuring proper protections for the civil liberties of U.S. persons. FISA has been and continues to serve as the foundation for conducting electronic surveillance of foreign powers and agents of foreign powers in the United States. Nevertheless, FISA can and must be improved. The most serious problems with the statute stem from the fact that FISA presently defines the term "electronic surveillance" in a way that depends upon communications technology and practices as they existed in 1978. This technology-dependent approach has had dramatic but unintended consequences, sweeping within the scope of FISA a wide range of communications intelligence activities that Congress intended to exclude from the scope of FISA. This unintended expansion of FISA's scope has hampered our intelligence capabilities and has caused the Intelligence Community, the Department

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of Justice, and the FISC to expend precious resources obtaining court approval to conduct intelligence activities directed at foreign persons overseas.

To rectify these problems, the Administration has proposed comprehensive amendments to modernize FISA that would make the statute technology neutral, enhance the Government's authority to secure assistance from private entities in conducting lawful foreign intelligence activities, and streamline the application and approval process before the FISC. By modernizing FISA, we can both provide the Intelligence Community with an enduring, agile, and efficient means of collecting foreign intelligence information and strengthen the privacy protections for U.S. persons in the United States. For further explanation of the importance of these amendments to FISA, please see my answers to Questions 1, 2, 89, 90, and 92.

- **Would you prefer that Congress not legislate in this area at all?**

ANSWER: No. Congress can and should play a critical role in protecting the Nation by modernizing and streamlining FISA. Please see my answers to Questions 1 and 2.

- **Did the Supreme Court's recent ruling in *Hamdan* play any role in the Administration's decision to support Senator Specter's legislation?**

ANSWER: No.

99. Senator Specter has characterized his bill as simply allowing the Court to decide the Constitutionality of the program, including whether the President has the authority to authorize this surveillance. It has been said that if kept in its precise current form, the President will submit the program to the FISA Court. Why doesn't the Administration just submit the program to the FISA Court now, without any legislation?

ANSWER: As you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC.

100. If the Specter bill is passed in its current form, what signing statement do you anticipate the President issuing in connection with it?

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress.

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101. If the Specter bill is passed in its current form, and the Administration then voluntarily submitted the program to the FISC, would the Administration argue that the Specter bill authorized the NSA's Terrorist Surveillance Program?

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress. In addition, as you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC.

102. Do you believe that the portion of the Specter bill that allows the President to submit the NSA surveillance program to the FISA Court is constitutional? Specifically, do you believe this provision does not run afoul of the constitutional proscription against advisory opinions?

ANSWER: These questions concern certain provisions of S. 2453 relating to "electronic surveillance programs," a term defined in S. 2453. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are not aware of any current legislative proposal that incorporates these provisions of S. 2453.

103. The Specter bill provides that any cases pending right now – upon application by the Attorney General – must be transferred to the FISA Court of Review. The bill also provides that the decision of that FISA Court "shall be subject to certiorari review in the United States Supreme Court."

- **Is it your understanding that one who is challenging a FISA Court decision favorable to the government may obtain review before the Supreme Court under the bill?**

- **What are the arguments against allowing the constitutional review in a traditional Federal District Court, with expedited review to the Supreme Court, so long as the court applies the procedures and standards of the Classified Information Procedures Act?**

ANSWER: These questions refer to provisions of S. 2453 concerning the transfer of cases to the Foreign Intelligence Surveillance Court of Review. S. 2453, which was introduced in the 109th Congress, has not been reintroduced in this Congress. We are not aware of any current legislative proposal that would transfer cases to the Court of Review. The Administration has proposed similar amendments that would authorize the transfer of cases involving classified communications intelligence activities to the FISC as part of its proposed FY 2008 Intelligence Authorization Act.

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With respect to conducting litigation on sensitive foreign intelligence matters in federal district courts, please see my answer to Question 52. We believe that permitting litigation concerning classified communications intelligence activities in the federal district courts raises significant national security concerns. A single court decision concerning a classified communications intelligence activity could have immediate, nationwide ramifications. Intelligence programs that are essential to national security should not be subject to a variety of potentially inconsistent decisions from federal district courts across the country.

Moreover, federal district courts, unlike the FISC, do not have specialized security procedures and secure facilities that are optimized for adjudicating cases regarding highly sensitive intelligence issues. *Cf. Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975) ("It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have."). Nor do federal district courts have expertise in addressing the complex legal, factual, and technical issues concerning foreign intelligence surveillance activities. Consolidating litigation involving classified communications intelligence activities before the FISC would capitalize upon the unique advantages of that court while retaining all of the advantages—and none of the potential disadvantages—of litigating in a regular federal district court.

104. During his February appearance before the Committee, Senator Biden asked Attorney General Gonzales what harm had been caused by public disclosure of the warrantless surveillance program. He responded: "You would assume that the enemy is presuming we are engaged in some kind of surveillance. But if they're not reminded about it all the time in the newspapers and in stories, they sometimes forget." When I asked him the same question in July, he deferred to the intelligence community.

- **Do you have a better answer as to how the disclosure that wiretapping is going on harmed national security?**

- **To your knowledge have any officials in the intelligence community had direct discussions with Attorney General Gonzales or officials in his Department about how disclosure of the program harmed national security? If so, what was said?**

ANSWER: As you know, foreign intelligence collection activities are highly classified and extremely sensitive. It therefore would be inappropriate for me to discuss in this setting the specific way in which the disclosure of the Terrorist Surveillance Program harmed national security. As a general matter, however, I believe we all recognize that the more details our enemies know about our intelligence activities, the more likely it is they will evade detection.

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105. Do you have legal or constitutional concerns about the use of warrantless physical searches in the United States?

ANSWER: I assume that this question does not concern warrantless physical searches where consent has been given. Consent searches are a valid exception to the warrant provisions of the Fourth Amendment to the Constitution. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). I also assume that this question does not concern warrantless physical searches that occur during law enforcement operations pursuant to one of the many well recognized exceptions to the warrant requirement of the Fourth Amendment, such as a search incident to a lawful arrest, *Maryland v. Buie*, 494 U.S. 325, 334 (1990), exigent circumstances, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978), "hot pursuit," *United States v. Santana*, 427 U.S. 38, 42-43 (1976), or the plain view doctrine, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). Nor do I understand this question to involve the warrantless searching of materials or vessels entering or leaving the United States pursuant to the well recognized border search exception to the Fourth Amendment. *See, e.g., United States v. Ramsey*, 431 U.S. 606, 616 (1977).

A warrantless physical search that does not fall within the scope of any of these doctrines would raise a constitutional issue under the Fourth Amendment if the search were unreasonable. The legality of any physical search ultimately depends upon its reasonableness. *See United States v. Knights*, 534 U.S. 112, 118-19 (2001). The Supreme Court has made clear that warrantless physical searches may be reasonable in situations involving "special needs" that go beyond a routine interest in law enforcement. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995); *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("When faced with special law enforcement needs, diminished expectations or privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). We do not think it is appropriate, however, for us to opine on this complex question in the abstract.

106. To your knowledge, has the Administration ever used its commander-in-chief powers or the AUMF to justify warrantless physical searches?

ANSWER: To my knowledge, the Administration has not invoked either the President's constitutional authority as Commander in Chief or the statutory authorities granted by the AUMF to authorize physical searches in the United States without prior judicial approval.

Questions from Sen. Durbin

107. You testified:

The United States, the most advanced Nation on earth, confronts the threat of al Qaeda with a legal regime designed for the last century and geared

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more toward traditional case-by-case investigations. ... Chairman Specter's legislation includes several important reforms to update FISA for the 21st century. ... Changes contained in the Chairman's bill would correct the most significant anachronisms in FISA."

If we have a legal regime that is "designed for the last century" and FISA includes "significant anachronisms," why, almost five years after 9/11 and after we enacted and reauthorized the PATRIOT Act, has the Administration not previously requested changes in the law that would bring FISA into the 21st Century?

ANSWER: We have sought specific changes to FISA since September 11, 2001. The Administration did not seek a general modernization of FISA before 2006, in part out of the concern for protecting sensitive intelligence sources and methods. Moreover, FISA is a complicated statute, and it has taken time for the Executive Branch to reach consensus on how to modernize FISA. What is most important, however, is that we now stand ready to work with Congress to streamline and to modernize FISA. Indeed, the Administration has put forward a comprehensive proposal to modernize FISA as Title IV of its proposed FY 2008 Intelligence Authorization Act.

108. On January 25, over six months ago, Senators Reid, Kennedy, and Feingold and I sent a letter to President Bush asking what changes in the law he believes are necessary to permit effective surveillance of suspected terrorists, and why these changes are needed. We still have not received a response. I have attached this letter.

Please respond to the questions raised in our letter.

ANSWER: As the President and other officials have explained on a number of occasions, there are several problems with the current procedures for obtaining an order authorizing electronic surveillance under FISA. Most importantly, through sheer happenstance, the definition of "electronic surveillance" has come to sweep in activities of the sort Congress specifically excluded from the scope of FISA in 1978. We believe the definition should be changed to reflect this reality, and we should do so in a way that does not depend on specific technologies. We also believe that the FISA application process can and should be streamlined. These changes would, we believe, better protect the Nation and better protect the privacy of U.S. persons in the United States.

109. If the Specter bill is enacted into law as currently drafted, will the Administration abide by its terms in all circumstances?

ANSWER: The Executive Branch has followed—and will continue to follow—the laws of the United States, including the Constitution and FISA.

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110. If the Specter bill is enacted into law as currently drafted, can you assure us that the President will not issue a signing statement claiming that the law or a portion of the law is unconstitutional?

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress.

111. If, pursuant to the Specter bill, the Attorney General submits the NSA program to the FISA court and the FISA court holds that the program is illegal, can you assure us that the Administration will abide by such a ruling?

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress. In addition, as you are aware, on January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or an agent of al Qaeda or an affiliated terrorist organization. As a result of these orders, any electronic surveillance that may have been occurring as part of the Terrorist Surveillance Program now is subject to the approval of the FISC.

112. The Specter bill would add a new section to FISA that would say:

> **Nothing in this Act shall be construed to limit the constitutional authority of the President to gather foreign intelligence information or monitor the activities and communications of any person reasonably believed to be associated with a foreign enemy of the United States.**

Why is this section needed? Would the Administration continue to support the Specter bill if this section were removed from the bill?

ANSWER: Please see my answers to Questions 28 and 49.

113. In the Administration's view, does the Specter bill give the President the power to do anything that he cannot already do under his inherent constitutional authority?

ANSWER: This question concerns S. 2453, which was introduced in the 109th Congress. S. 2453 has not been reintroduced in this Congress.

114. The Specter bill would repeal the provision of FISA that makes FISA and the criminal wiretap statute the "exclusive means" for conducting electronic surveillance. The Administration has taken the position that the Authorization to Use Military Force implicitly repeals the "exclusive means" provision.

If your position is correct, then why is it necessary for the Specter bill to repeal

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the "exclusive means" provision?

ANSWER: The Administration has taken no such position. As set forth in the Department of Justice's *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*Legal Authorities*"), we do not believe that the text of FISA requires an amendment to FISA to authorize additional electronic surveillance. Rather, by expressly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," 50 U.S.C. § 1809(a)(1), FISA contemplates that surveillance may be authorized by another statute without following the specific and detailed procedures set forth in FISA. *See Legal Authorities* at 21-24. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), is just such a statute authorizing the President to conduct electronic surveillance of al Qaeda and affiliated terrorist organizations without prior judicial approval. *See Legal Authorities* at 23-28. Therefore, the Force Resolution did not impliedly repeal section 2511(2)(f); it instead is best read as an authorization to conduct electronic surveillance outside the procedures expressly enumerated in FISA.

This interpretation is consistent with the understanding that section 109(b) of FISA incorporates other laws, which thereby constitute procedures for purposes of section 2511(2)(f). *See Legal Authorities* at 22-23 & n.8. Indeed, at the time FISA was enacted, pen-register surveillance was "electronic surveillance" within the meaning of FISA, but was not authorized by either Title III or by FISA when conducted for ordinary law enforcement purposes. Congress adopted the affirmative defense in section 109(b) of FISA's criminal penalty provision to ensure that such activities could continue in the domestic law enforcement context despite the so-called exclusivity provision in section 2511(2)(f). *See* H.R. Rep. No. 95-1283, Part I, at 100 n.54 (1978) ("As noted earlier, the use of pen registers and similar devices for law enforcement purposes is not covered by [Title III] of this Act and [the exclusivity provision in section 2511(2)(f)] is not intended to prohibit it. Rather, because of the criminal defense provision of section 109(b) [of FISA, 50 U.S.C. § 1809(b)], the 'procedures' referred to in section 2511(2)(f) include acquiring a court order for such activity. It is the committee's intent that neither this [exclusivity provision] nor any other provision of the legislation have any effect on the holding in *United States* v. *New York Telephone* that rule 41 of the Federal Rules of Criminal Procedure empowers federal judges to authorize the installation of pen registers for law enforcement purposes."). Hence, it cannot be—and is not—the case that section 2511(2)(f) prohibits all electronic surveillance that is conducted outside the specific and detailed procedures set forth in section 104 of FISA.

In addition, if section 2511(2)(f) were read, as the question suggests, to prohibit all electronic surveillance other than that authorized by the express procedures of FISA, serious constitutional questions would arise. It is well established that the President has constitutional authority to conduct electronic surveillance without prior judicial approval for the purpose of collecting foreign intelligence. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev.

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2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d. 264, 271-77 (S.D.N.Y. 2000). Accordingly, FISA cannot eliminate the President's constitutional authority to conduct foreign intelligence surveillance without prior judicial approval against a hostile foreign power. *See In re Sealed Case*, 310 F.3d at 742. The question's proffered interpretation of the exclusivity provision of FISA risks a constitutional clash between the Executive Branch and Congress. *See Legal Authorities* at 19-23. We believe, consistent with repeated holdings of the Supreme Court, that FISA must be interpreted, if "fairly possible," to avoid raising these serious constitutional concerns. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). As noted above, our interpretation of FISA does not involve any implied repeal. It does, however, gain strength from the well-established canon of constitutional avoidance. Nevertheless, we have also explained that if these arguments were unavailable, the Force Resolution would in fact constitute a limited, implied repeal of the exclusivity provision. *See Legal Authorities* at 36 n.21.

115. In its findings, the Specter bill inaccurately states that the 9/11 Commission concluded that the FBI could not meet the requirements to obtain a FISA order to search Zacarias Moussaoui's computer before 9/11. In fact, the 9/11 Commission report actually concluded that the FBI did not submit a FISA application for Moussaoui's computer because they believed they did not have enough evidence to obtain a FISA warrant. A report issued by Senators Leahy, Specter, and Grassley concluded that the FBI misinterpreted FISA and they could have in fact obtained a warrant.

Is the Moussaoui finding in the Specter bill inaccurate?

ANSWER: Regardless of which description is accurate—and I am not in a position to speak with any authority regarding the FBI's actions concerning Mr. Moussaoui—the application procedures under FISA should be revised as noted above.

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