U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 11, 2005

The Honorable Robert C. Scott
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Scott:

We are writing to provide additional information in response to a question you asked Attorney General Gonzales at the April 6, 2005, hearing of the House Judiciary Committee addressing reauthorization of the USA PATRIOT Act. During that hearing, you asked the Attorney General a question about the permissible purposes for obtaining a warrant under the Foreign Intelligence Surveillance Act (FISA), and the Attorney General indicated that he would get back to you on this matter. The Department hopes that the information provided in this letter satisfies your request.

Prior to the passage of the USA PATRIOT Act, FISA required that applications for orders authorizing electronic surveillance or physical searches had to include a certification from a high-ranking Executive Branch official that "the purpose" of the surveillance or search was to gather foreign intelligence information. This requirement came to be interpreted by the courts and the Justice Department to mean that the "primary purpose" of the collection had to be to obtain foreign intelligence information rather than evidence of a crime. Over the years, the prevailing interpretation and implementation of the "primary purpose" standard had the effect of sharply limiting coordination and information sharing between intelligence and law enforcement personnel. The courts evaluated the government's purpose for using FISA at least in part by examining the nature and extent of coordination between intelligence and law enforcement officials. As a result, the more coordination that occurred, the more likely courts would find that law enforcement, rather than foreign intelligence, had become the primary purpose of the surveillance or search.

Thankfully, section 218 of the USA PATRIOT Act erased this impediment to more robust information sharing between intelligence and law enforcement personnel and also provided the necessary impetus for the removal of the formal administrative restrictions as well as the informal cultural restrictions on information sharing. Section 218 did this by eliminating the "primary purpose" requirement. Under section 218 of the USA PATRIOT Act, the

government may now conduct FISA surveillance or searches if "a significant purpose" of the surveillance or search is obtaining foreign intelligence information, thus eliminating the need for courts to compare the relative weight of the "foreign intelligence" and "law enforcement" purposes of the surveillance or search. This provision thus has allowed for significantly more coordination and sharing of information between intelligence and law enforcement personnel.

During the hearing on April 6, you inquired as to what the "primary purpose" of electronic surveillance or physical searches under FISA would be if obtaining foreign intelligence information was "only" a significant purpose. This issue was addressed by the Foreign Intelligence Surveillance Court of Review ("FISA Court of Review") in its decision upholding the constitutionality of section 218. *See In re Sealed Case*, 310 F.3d 717 (FISCR 2002). In its opinion, the FISA Court of Review concluded that the government may not obtain electronic surveillance or physical search orders for "the purpose of gaining foreign intelligence information [with] a sole objective of criminal prosecution." *Id.* at 735. Rather, the FISA Court of Review held that the government satisfies the "significant purpose" test when the certification of the purpose of the electronic surveillance or physical searches "articulates a broader objective than criminal prosecution–such as stopping an ongoing conspiracy–and includes other potential non-prosecutorial responses." *Id.*

The FISA Court of Review also made clear, however, that the "primary purpose" of electronic surveillance or physical searches under FISA may be to prosecute an agent of a foreign power for a "foreign intelligence crime," such as terrorism or espionage. *See id.* at 734-35. It pointed out that "the government's concern with respect to foreign intelligence crimes is overwhelmingly to stop or frustrate the immediate criminal activity" and that "criminal process is often used as part of an integrated effort to counter the malign efforts of a foreign power." *Id.* at 744-45. Thus, for example, the best way to protect against the threat posed by a terrorist organization may be to arrest the known members of that group for terrorism-related criminal offenses.

The FISA Court of Review, however, also interpreted FISA, as amended by section 218 of the USA PATRIOT Act, as continuing to prevent the use of electronic surveillance or physical searches where the purpose is not to prosecute a foreign intelligence crime, but rather to prosecute an ordinary crime that is not inextricably intertwined with a foreign intelligence crime. *See id.* at 735-36. Although the FISA Court of Review recognized that "ordinary crimes might be inextricably intertwined with foreign intelligence crimes" and noted that a FISA warrant could issue where, for example, a group of international terrorists robbed banks in order to finance the building of a bomb, it concluded that "the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes." *Id.* at 736. Thus, for example, under the FISA Court of

Review's interpretation of section 218, the Department may not obtain an electronic surveillance or physical search order under FISA for the purpose of prosecuting an agent of a foreign power for ordinary crimes wholly unconnected to foreign intelligence, such as drug crimes that are unconnected to foreign intelligence crimes.

The aforementioned information, furthermore, is useful to analyzing the hypothetical you posed at the April 28, 2005, hearing of the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee regarding FISA's application to an individual representing a foreign government in the negotiations of a trade deal, who was also involved in illegal narcotics activity.

In the first place, it is important to recognize that a United States citizen does not become a permissible subject of electronic surveillance under FISA simply because of his employment by a foreign government to negotiate a trade deal. While employees of a foreign government who are not United States persons qualify as agents of a foreign power by virtue of their employment by a foreign government, United States persons do not. Rather, in order to qualify as an agent of a foreign power, a United States person must: (1) knowingly engage in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (2) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engage in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (3) knowingly engage in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; (4) knowingly enter the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assume a false or fraudulent identity for or on behalf of a foreign power; or (5) knowingly aid or abet any person in the conduct of activities described in (1), (2), or (3) or knowingly conspire with any person to engage in activities described in (1), (2), or (3). And without more, an American negotiating a trade deal on behalf of a foreign government plainly does not qualify as a legitimate subject of FISA surveillance. *See* 50 U.S.C. § 1801(b)(2).

Even, however, with respect to an alien in the United States to negotiate a trade deal on behalf of a foreign government, it would not currently be permissible under the FISA Court of Review's opinion for the Department to utilize FISA surveillance for the purpose of investigating that individual's possible violation of federal drug laws, at least where that violation is not connected with a foreign intelligence crime.

You have similarly raised other concerns about the use of FISA at other hearings. For example, you raised the possibility of using FISA for the unlawful purpose of blackmail at the April 26, 2005 hearing during questioning of James A. Baker, Counsel to the Intelligence Policy. Howver, FISA explicitly provides that "[n]o information acquired from an electronic surveillance [or physical search] pursuant to this title may be used or disclosed by Federal officers or employees except for lawful purposes." 50 U.S.C. §§ 1806(a), 1825(a).

In this same vain, some Members have raised concerns that FISA could be used against Members of Congress for political purposes (this concern was raised by Congresswoman Waters at a hearing the Committee held on April 19, 2005). However, when FISA was passed, Congress understood FISA to require "that the information sought involve information with respect to foreign powers or territories, and would therefore not include information solely about the views or planned statements or activities of Members of Congress, executive branch officials, or private citizens concerning the foreign affairs or national defense of the United States." H.R. Rep. 95-1283, pt. 1, at 49.I hope that you find this information useful as Congress proceeds to debate the reauthorization of those sixteen provisions of the USA PATRIOT that are currently scheduled to expire at the end of the year. The Department looks forward to working with you on this issue and other matters in the months to come.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security

The Honorable Daniel E. Lungren
The Honorable Mark Green
The Honorable Tom Feeney
The Honorable Steve Chabot
The Honorable Rick Keller
The Honorable Jeff Flake
The Honorable Mike Pence
The Honorable J. Randy Forbes
The Honorable Louie Gohmert
The Honorable Sheila Jackson-Lee
The Honorable Maxine Waters
The Honorable Martin T. Meehan
The Honorable William D. Delahunt
The Honorable Anthony D. Weiner