



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 23 2002

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

Dear Mr. Chairman:

Enclosed please find responses to written questions to the Attorney General at the hearing before the Committee on the Judiciary entitled "Oversight Hearing of the Department of Justice" on July 25, 2002. We are providing responses to questions 14, 15, 31, 32, 33 and 34, all of which relate to the implementation of the USA PATRIOT Act, the changes the Act made to provisions of the Foreign Intelligence Surveillance Act (FISA), and the FISA process itself. The Department is continuing to gather information to answer the remaining questions posed to the Attorney General and we will forward those responses as soon as possible.

Please note that the response to question 14(b) requires the Department to provide information that is classified at the SECRET level. That classified information is being delivered to the Committee under separate cover and under the longstanding Executive branch practices on the sharing of operational intelligence information with Congress.

We appreciate your oversight interest in the Department's activities pursuant to the USA PATRIOT Act. We look forward to continuing to work with the Committee as the Department implements these important new tools for law enforcement in the fight against terrorism. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Bryant".

Daniel J. Bryant  
Assistant Attorney General

Enclosure

cc: The Honorable Orrin G. Hatch  
Ranking Minority Member

**Written Questions of Senator Patrick Leahy  
Chairman of the Senate Judiciary Committee  
to the Honorable John Ashcroft  
At the Hearing Before the Senate Judiciary Committee  
"Oversight Hearing on the Department of Justice"  
July 25, 2002**

**USA PATRIOT Act and Libraries**

**14. The Committee has learned of growing concern among professional librarians that the USA PATRIOT Act is leading to a greater number of federal law enforcement demands for records of the use of library services, as well as orders to librarians to keep those requests secret. There is confusion over whether the orders allow the librarians to disclose the fact of a request, without disclosing any substance such as the name of the person involved. It is also not clear whether these secrecy orders are being issued for general law enforcement purposes beyond the scope of the Foreign Intelligence Surveillance Act.**

**(A) Please clarify what the Department is doing to impose secrecy on its demands for information from libraries.**

A Court order issued pursuant to section 1861 of FISA (amended by section 215 of the USA PATRIOT Act) to compel the production of certain defined categories of business records would contain language which prohibits officers, employees or agents of companies or institutions receiving such an order from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to those defined categories of business records.

An FBI National Security Letter served upon an establishment, such as a library, for the purpose of obtaining electronic communications transactional records, contains language invoking Title 18, United States Code, Section 2709(c), which prohibits any officer, employee, or agent of the establishment from disclosing to any person that the FBI has sought or obtained access to that information or records.

**(B) How many demands for library information has the Department made since enactment of the USA PATRIOT Act, as well as the legal authority that was used to require secrecy?**

Section 215 of the USA PATRIOT Act amended the business records authority found in Title V of the Foreign Intelligence Surveillance Act (FISA). This authority can be used to obtain certain types of records from libraries that relate to FBI foreign intelligence investigations. Under the old language, the Foreign Intelligence Surveillance Court (FISC) would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance

and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

The classified semi-annual report discussing the use of sections 1861-1863 of FISA for the period June 30, 2001 through December 31, 2001 was provided to the Intelligence and Judiciary committees of both houses of Congress on April 29, 2002. That report was provided under cover letter to each committee chairman. Although not specified in the statute, the Department's practice has been to submit the reports covering January 1 through June 30 of a given year, by the end of December of that year. The Department of Justice is currently preparing the semi-annual report covering the period January 1, 2002 through June 30, 2002.

The Department is able at this time to provide information pertaining to the implementation of section 215 of the USA PATRIOT Act from January 1, 2002 to the present (December 23, 2002). That information is classified at the SECRET level and, accordingly, is being delivered to the Committee under separate cover.

**(C) How many libraries has the FBI visited (as opposed to presented with court orders) since passage of USA Patriot Act?**

Information has been sought from libraries on a voluntary basis and under traditional law enforcement authorities not related to the Foreign Intelligence Surveillance Act or the changes brought about by the USA PATRIOT Act. While the FBI does not maintain statistics on the number of libraries visited by FBI Agents in the course of its investigations, an informal survey conducted by the FBI indicated that field offices had sought information from libraries. For example, various offices followed up on leads concerning e-mail and Internet use information about specific hijackers from computers in public libraries.

**(D) Is the decision to engage in such surveillance subject to any determination that the surveillance is essential to gather evidence on a suspect which the Attorney General has reason to believe may be engaged in terrorism-related activities and that it could not be obtained through any other means?**

The authority to compel the production of business records from libraries does not permit any type of "surveillance." Under the Foreign Intelligence Surveillance Act (FISA), electronic surveillance authority is permissible upon a showing of probable cause that the target of the surveillance is a foreign power or an agent of a foreign power and each of the facilities or places at which the surveillance is being directed is being used or is about to be used by a foreign power or an agent of a foreign power.

As stated above, section 215 of the USA PATRIOT Act amended the business records authority found in Title V of FISA. This authority can be used for obtaining certain types of records from libraries that relate to FBI foreign intelligence

investigations. Under the old language, the FISC would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The PATRIOT Act changed the standard to simple relevance and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

**15. Sec. 215 of the Act expands the range of records that can be requested from a library or educational institution to include "business records" which may include information about individuals beyond the target of an investigation. What precautions is the Attorney General taking to isolate out only those records related to a specific target? How is the Attorney General ensuring the security and confidentiality of the records of others? How promptly have those records been returned to the institutions from which they were obtained?**

The current standard for obtaining business records is "relevance" but it requires more than just the Special Agent's belief that the records may be related to an ongoing investigation. Use of this technique is authorized only in full investigations properly opened in accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). The FISA business records authority stipulates that no investigation of a U.S. person may be conducted solely on the basis of activities protected by the First Amendment to the Constitution. The FISA Court will not order the production of business records unless it can be shown that the individual for whom the records are being sought is related to an authorized investigation.

The security and confidentiality of records is guaranteed by the FISA law which prohibits officers, employees or agents of companies or institutions receiving orders from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to information or records. The FBI obtains copies, not originals, of records from companies and institutions. Thus, there is no need to return records.

FBI Headquarters has charged field offices with the responsibility for establishing and enforcing appropriate review and approval processes for use of these expanded authorities. Compliance with these and other requirements is monitored through inspections and audits conducted by the FBI Inspection Division, the Intelligence Oversight Board, and the Department's Office of Intelligence Policy and Review.

## FISA Process

- 31. The Committee is examining the Justice Department's FBI's performance before the 9/11 attacks, and especially at the decision of FBI Headquarters officials to reject the request from the Minneapolis field office for a FISA search order in the Moussaoui case. FBI Agent Coleen Rowley has alleged that FBI Headquarters officials are too cautious because Justice Department has a policy of never losing a case before the FISA Court. Is that the Attorney General's policy, or does he expect Department attorneys to make their best judgements on the facts and law in each case?**

The Justice Department is appropriately aggressive in bringing applications before the Foreign Intelligence Surveillance Court and does not have a policy of never losing a case before the Court. Each application presented to the Court contains an affidavit of the investigating agent that attests to the facts of the case. A certification from the appropriate intelligence agency official is also attached. Before the case goes to Court, the Attorney General personally approves the application. In the cases presented before the Court, the judges ask questions, probe, and frequently demand additional information. Applications are revised as a result of this process, and some have been withdrawn and resubmitted with additional information.

## OLC Opinion: FISA

- 32. In the Attorney General's testimony before the Judiciary Committee, he referred to an Office of Legal Counsel memorandum or opinion relating to FISA issues and the 'agent of a foreign power' requirement. Please provide a copy of any such memorandum of opinion to the Committee.**

The Office of Legal Counsel memorandum referred to in the question constitutes confidential legal advice to the Office of the Deputy Attorney General. However, the Department's position and reasoning concerning these issues was set forth at length in a letter to the Chairman and Vice-Chairman of the Senate Select Committee on Intelligence, dated July 31, 2002, in connection with hearings held by that Committee on that day on S. 2586. A copy of that letter is provided herewith.

## USA PATRIOT ACT

- 33. The Committee is looking into reports that FBI Headquarters supervisors were "chilled" and became more cautious in forwarding FISA application to the Justice Department and to the FISA Court ("FISC") during 2000 and 2001, before the 9/11 attacks, because the FISA Court (FISC) barred certain FBI supervisory special agents from appearing before it.**

**(A) How many FBI personnel were barred by the FISC from appearing before it?**

One FBI supervisory special agent has been barred from appearing before the Court. In March of 2001, the government informed the Court of an error contained in a series of FISA applications. This error arose in the description of a "wall" procedure. The Presiding Judge of the Court at the time, Royce Lamberth, wrote to the Attorney General expressing concern over this error and barred one specifically-named FBI agent from appearing before the Court as a FISA affiant.

**(B) When did the FISC take these actions?**

This action was taken by then-Presiding Judge Lamberth on March 9, 2001.

**(C) How did the FISC communicate these actions to the Justice Department or to the FBI?**

Then-Presiding Judge Lamberth communicated this action to the Justice Department in a Memorandum to the Attorney General dated March 9, 2001.

**(D) What actions, if any, did the Justice Department take in response to the communications from the FISC barring certain FBI supervisory agents from appearing before the FISC?**

Following receipt of the letter, FBI Director Freeh personally met twice with then-Presiding Judge Lamberth to discuss the accuracy problems and necessary solutions. The FBI refined a set of interim procedures that it had developed in November 2000. On April 6, 2001, the FBI disseminated to all field divisions and relevant headquarters divisions a set of new mandatory procedures to be applied to all FISAs within the FBI. These procedures, known as the "Woods procedures," are designed to help minimize errors in and ensure that the information provided to the Court is accurate. The procedures were briefed to the full FISA Court in May 2001. They have been declassified at the request of your Committee.

On May 18, 2001, the Attorney General issued a memorandum setting forth FISA policy, including mandated "direct contact" between FBI field offices and DOJ's Office of Intelligence Policy and Review, streamlined FISA pleadings, additional training, and a study of electronic connectivity between the Department of Justice and the FBI.

The matters involving accuracy in FISA pleadings were also referred to the Department's Office of Professional Responsibility for a thorough investigation. That investigation is pending.

**(E) Please provide the Committee with any memoranda or communications between or relating to the FISC's actions barring certain FBI supervisory agents from appearing before the FISC?**

We are aware of the FISC action barring only one FBI supervisory agent from appearing before the Court, based upon the Court's Memorandum to the Attorney General in March 2001. We will confer with the Court about the provision of this Memorandum, which is classified at the SECRET level, to the Committee. We can advise you, however, that the document reports the Court's concern that the FBI's previous corrective action had been ineffective in solving the problem of inaccurate information in FBI affidavits. The Memorandum further advises that the Office of Intelligence Policy and Review (OIPR) must conduct an inquiry regarding this matter. OIPR referred the matter to the Department's Office of Professional Responsibility, which is conducting an investigation and drafting a report concerning the conduct that was the basis of the Court's Memorandum.

After receipt of the Court's Memorandum to the Attorney General, OIPR prepared initial fact-finding documentation relevant to OPR's investigation. That documentation was turned over to the FISC and to OPR when the matter was referred there. We will advise when the Department's action on this matter is completed.

**34. There are also reports that FISC has not yet implemented the USA PATRIOT Act, which amended FISA to authorize orders if "a significant purpose" is to collect foreign intelligence and to authorize FISA coordination with law enforcement against terrorist and spies. What are the Justice Departments views on this issue? Does the Attorney General think FISC's action had a "chilling" effect of the FBI?**

The FISC's May 17, 2002 Order approved in part and disapproved in part the Department's new Intelligence Sharing Procedures. On November 18, 2002, the Foreign Intelligence Surveillance Court of Review rejected the FISC's analysis and approved in full the March 2002 Intelligence Sharing procedures.



**U.S. Department of Justice**

**Office of Legislative Affairs**

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*Washington, D.C. 20530*

July 31, 2002

The Honorable Bob Graham  
Chairman  
Select Committee on Intelligence  
United States Senate  
Washington, D.C. 20510

The Honorable Richard C. Shelby  
Vice-Chairman  
Select Committee on Intelligence  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Vice Chairman:

The letter presents the views of the Justice Department on S. 2586, a bill “[t]o exclude United States persons from the definition of ‘foreign power’ under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism.” The bill would extend the coverage of the Foreign Intelligence Surveillance Act (“FISA”) to individuals who engage in international terrorism or activities in preparation therefor without a showing of membership in or affiliation with an international terrorist group. The bill would limit this type of coverage to non-United States persons. The Department of Justice supports S. 2586.

We note that the proposed title of the bill is potentially misleading. The current title is “To exclude United States persons from the definition of ‘foreign power’ under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism.” A better title, in keeping with the function of the bill, would be something along the following lines: “To expand the Foreign Intelligence Surveillance Act of 1978 (‘FISA’) to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group.”



Additionally, we understand that a question has arisen as to whether S. 2586 would satisfy constitutional requirements. We believe that it would.

FISA allows a specially designated court to issue an order approving an electronic surveillance or physical search, where a significant purpose of the surveillance or search is “to obtain foreign intelligence information.” *Id.* §§ 1804(a)(7)(B), 1805(a). Given this purpose, the court makes a determination about probable cause that differs in some respects from the determination ordinarily underlying a search warrant. The court need not find that there is probable cause to believe that the surveillance or search, in fact, will lead to foreign intelligence information, let alone evidence of a crime, and in many instances need not find probable cause to believe that the target has committed a criminal act. The court instead determines, in the case of electronic surveillance, whether there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” *id.* § 1805(a)(3)(A), and that each of the places at which the surveillance is directed “is being used, or about to be used, by a foreign power or an agent of a foreign power,” *id.* § 1805(a)(3)(B). The court makes parallel determinations in the case of a physical search. *Id.* § 1824(a)(3)(A), (B).

The terms “foreign power” and “agent of a foreign power” are defined at some length, *id.* § 1801(a), (b), and specific parts of the definitions are especially applicable to surveillances or searches aimed at collecting intelligence about terrorism. As currently defined, “foreign power” includes “a group engaged in international terrorism or activities in preparation therefor,” *id.* § 1801(a)(4) (emphasis added), and an “agent of a foreign power” includes any person who “knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power,” *id.* § 1801(b)(2)(C). “International terrorism” is defined to mean activities that

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended--
  - (A) to intimidate or coerce a civilian population;
  - (B) to influence the policy of a government by intimidation or coercion; or
  - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

*Id.* § 1801(c).

S. 2586 would expand the definition of "foreign power" to reach persons who are involved in activities defined as "international terrorism," even if these persons cannot be shown to be agents of a "group" engaged in international terrorism. To achieve this expansion, the bill would add the following italicized words to the current definition of "foreign power": "*any person other than a United States person who is, or a group that is, engaged in international terrorism or activities in preparation therefor.*"

The courts repeatedly have upheld the constitutionality, under the Fourth Amendment, of the FISA provisions that permit issuance of an order based on probable cause to believe that the target of a surveillance or search is a foreign power or agent of a foreign power. The question posed by S. 2586 would be whether the reasoning of those cases precludes expansion of the term "foreign power" to include individual international terrorists who are unconnected to a terrorist group.

The Second Circuit's decision in *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), sets out the fullest explanation of the "governmental concerns" that had led to the enactment of the procedures in FISA. To identify these concerns, the court first quoted from the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*"), which addressed "domestic national security surveillance" rather than surveillance of foreign powers and their agents, but which specified the particular difficulties in gathering "security intelligence" that might justify departures from the usual standards for warrants: "[Such intelligence gathering] is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [dealing with electronic surveillance in ordinary criminal cases]. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency. Thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Duggan*, 743 F.2d at 72 (quoting *Keith*, 407 U.S. at 322). The Second Circuit then quoted a portion of the Senate Committee Report on FISA: "[The] reasonableness [of FISA procedures] depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. . . . Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (quoting S. Rep. No. 95-701, at 14-15, reprinted in 1978 U.S.C.C.A.N. 3973, 3983) ("Senate Report"). The court concluded:

Against this background, [FISA] requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of [FISA]. These requirements make it reasonable to dispense with a requirement that the FISA Judge find

probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information.

*Id.* at 73. The court added that, *a fortiori*, it “reject[ed] defendants’ argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target *has committed a crime.*” *Id.* at n.5. See also, e.g., *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (per then-Circuit Judge Kennedy); *United States v. Nicholson*, 955 F. Supp. 588, 590-91 (E.D. Va. 1997).

We can conceive of a possible argument for distinguishing, under the Fourth Amendment, the proposed definition of “foreign power” from the definition approved by the courts as the basis for a determination of probable cause under FISA as now written. According to this argument, because the proposed definition would require no tie to a terrorist group, it would improperly allow the use of FISA where an ordinary probable cause determination would be feasible and appropriate – where a court could look at the activities of a single individual without having to assess “the interrelation of various sources and types of information,” see *Keith*, 407 U.S. at 322, or relationships with foreign-based groups, see *Duggan*, 743 F.2d at 73; where there need be no inexactitude in the target or focus of the surveillance, see *Keith*, 407 U.S. at 322; and where the international activities of the United States are less likely to be implicated, see *Duggan*, 743 F.2d at 73. However, we believe that this argument would not be well-founded.

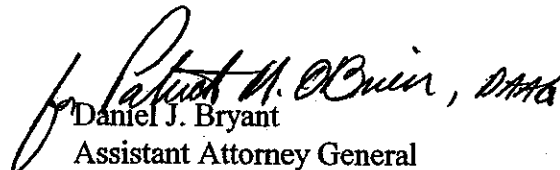
The expanded definition still would be limited to collecting foreign intelligence for the “international responsibilities of the United States, [and] the duties of the Federal Government to the States in matters involving foreign terrorism.” *Id.* at 73 (quoting Senate Report at 14). The individuals covered by S. 2586 would not be United States persons, and the “international terrorism” in which they would be involved would continue to “occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.” 50 U.S.C. § 1801(c)(3). These circumstances would implicate the “difficulties of investigating activities planned, directed, and supported from abroad,” just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *Duggan*, 743 F.2d at 73 (quoting Senate Report at 14). To overcome those difficulties, a foreign intelligence investigation “often [will be] long range and involve[] the interrelation of various sources and types of information.” *Id.* at 72 (quoting *Keith*, 407 U.S. at 322). This information frequently will require special handling, as under the procedures of the FISA court, because of “the need to maintain the secrecy of lawful counterintelligence sources and methods.” *Id.* at 73 (quoting *Keith*, 407 U.S. at 322). Furthermore, because in foreign intelligence investigations under the expanded definition “[o]ften . . . the emphasis . . . [will be] on the prevention of unlawful activity or the enhancement of the government’s preparedness for some possible future crisis or emergency,” the “focus of . . . surveillance may be less precise than that directed against more conventional types of crime.” *Id.* at 73 (quoting *Keith*, 407 U.S. at 322). Therefore, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for the S. 2586.

Indeed, S. 2586 would add only a modest increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95-1283, at pt. 1, 74 and n.38 (1978). The interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

The events of the past few months point to one other consideration on which courts have not relied previously in upholding FISA procedures – the extraordinary level of harm that an international terrorist can do to our Nation. The touchstone for the constitutionality of searches under the Fourth Amendment is whether they are "reasonable." As the Supreme Court has discussed in the context of "special needs cases," whether a search is reasonable depends on whether the government's interests outweigh any intrusion into individual privacy interests. In light of the efforts of international terrorists to obtain weapons of mass destruction, it does not seem debatable that we could suffer terrible injury at the hands of a terrorist whose ties to an identified "group" remained obscure. Even in the criminal context, the Court has recognized the need for flexibility in cases of terrorism. See *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). Congress could legitimately judge that even a single international terrorist, who intends "to intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion" or "to affect the conduct of a government by assassination or kidnapping," 50 U.S.C. § 1801(c)(2), acts with the power of a full terrorist group or foreign nation and should be treated as a "foreign power" subject to the procedures of FISA rather than those applicable to warrants in criminal cases.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

  
Daniel J. Bryant  
Assistant Attorney General

cc: The Honorable Charles E. Schumer  
The Honorable Jon L. Kyl