ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 17, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 30530

Dear Mr. Attorney General:

We are writing about disturbing new revelations concerning NSA domestic wiretapping activities and about the Department's continuing refusal to provide Judiciary Committee members with access to information about the current version of the NSA's wiretapping program. Congress' oversight responsibilities require that, on a confidential basis if necessary, you provide answers to the troubling questions that have been raised.

Former Deputy Attorney General Comey testified this week about a dramatic series of events in March, 2004 concerning the Justice Department's conclusion that a classified Administration program, widely believed to be the Terrorist Surveillance Program, was not legal as then conducted and that the Department could not certify its legality without alteration. After an unsuccessful effort by you and then-White House Chief of Staff Andrew Card to convince Attorney General Ashcroft to certify the program from his hospital bed, Mr. Comey explained, the program was reauthorized without Department certification, but was subsequently changed pursuant to the President's direction and then certified by the Department. This would appear to contradict your testimony to both the House and the Senate in 2006 that there was not serious disagreement within the Department about the Terrorist Surveillance Program as confirmed by the President in late 2005. The Department has recently stated that you stand by this testimony.

These facts raise extremely disturbing questions about just what wiretapping or other activity was being conducted by the Administration that its own Justice Department lawyers concluded had no proper legal basis. In the exercise of its oversight responsibilities, it is crucial that Congress ascertain the full picture of what happened. In particular, we ask for a prompt response, under classified cover if necessary, to the following questions: 1) Is Mr. Comey's testimony about the events of March, 2004 as provided this week to the Senate Judiciary

Committee (a copy of which is enclosed with this letter) accurate and, if not, please explain your version of what happened; 2) Was the classified program referred to by Mr. Comey the Terrorist Surveillance Program, as it existed prior to the changes made according to the Justice Department's recommendations and, if not, what was the classified program that Mr. Comey was referring to? 3) Who was involved in deciding to seek approval from Attorney General Ashcroft from his hospital bed and who made the telephone call to arrange your visit to his bedside; 4) What was the basis for the Administration's decision on March 10-11 to continue with the program despite the Department's objections, how long did it so continue. Please provide copies of any legal or other memoranda on the subject; 5) What was the basis for the Department's objections to the program. Please provide copies of any Office of Legal Counsel or other documents relating to those objections; and 6) What changes were made to the program to resolve the Department's objections?

We similarly remain extremely concerned about your continuing refusal to provide access for House Judiciary Committee members to information on the Administration's current version of the domestic wiretapping program described in your January 17, 2007, letter to House and Senate members. We believe that your refusal violates applicable legal requirements and precedents, and threatens to effectively eliminate meaningful Judiciary Committee oversight and legislative activity concerning this crucial issue.

Specifically, your January 17 letter informed us that the Foreign Intelligence Surveillance Court (FISC) had recently issued orders authorizing the government to engage in electronic surveillance of certain communications into or out of the United States, and that any electronic surveillance that had been occurring as part of the Administration's Terrorist Surveillance Program (TSP) will now be conducted subject to the approval of the FISC. Your letter also stated, however, that although Intelligence Committee members had been briefed on the orders and the program, you offered to brief only the Chairman and Ranking Member of the Judiciary Committee concerning the wiretapping program. In response to several written requests to you, Assistant Attorney General Hertling reiterated in a February 9, 2007, letter that only the Chairman and the Ranking Member could review and receive a briefing on the new FISC orders and surveillance program, even though all Intelligence Committee members "have been briefed on the new orders, consistent with their oversight authority."

Your position, however, fails to account for the fact that the Judiciary Committee also has crucial oversight authority in this area – the need for which was highlighted by Mr. Comey's testimony – and which simply cannot be exercised without the access that has been requested, and is contrary to law and precedent. Specifically:

1. The Judiciary Committee has oversight and legislative authority in this area requiring access to the requested information. House Rule X specifically provides that the Judiciary Committee has jurisdiction over the judiciary and judicial proceedings, espionage, civil liberties, criminal law enforcement, and federal courts and judges. The Judiciary Committee's oversight responsibility for the Foreign Intelligence Surveillance Act (FISA) extends as far back as its initial drafting. The Committee shared in the drafting and amendment of FISA, from the time it was introduced, through the adoption of the PATRIOT Act, and through the hearings and deliberations on PATRIOT Act reauthorization. The Committee's jurisdiction also clearly encompasses the FISC itself, which is an Article III court comprised of Article III judges, as well as the Department of Justice, which made the relevant requests to FISC and will continue to do so. Last year, the House Judiciary Committee and Congress considered specific proposals to change FISA. This year, questions have been raised as to whether, in light of the TSP and the FISC rules now governing such surveillance, changes should be considered to FISA or the FISC. The Administration is again seeking changes to FISA which will come before this Committee for consideration. Without access to the information requested, it is impossible for the Judiciary Committee to even consider any of these proposals.

2. FISA itself recognizes the principle that all legislative committees must be able to obtain access to even confidential information in order to carry out their legislative functions, as do House Rules. 50 U.S.C. § 1808(a)(1) requires the Attorney General to give a detailed report to the Intelligence Committees on electronic surveillance under FISA, and then goes on to state specifically that "[n]othing in this subchapter shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties." House Rule X, clause 11(b)(3) similarly provides that nothing concerning the authority of the House Intelligence Committee "shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee," as in this case.

3. The House Judiciary Committee, as well as other committees in addition to the Intelligence Committees, often obtain confidential intelligence-related information in carrying out their duties. Examples range from classified reports provided by you to the Judiciary Committee relating to the use of FISA and PATRIOT Act authority to the recent National Intelligence Estimate, which was provided to the House Armed Services and International Affairs committees and to an Appropriations subcommittee.

4. Only when the law so provides specifically or when the Committee and the Executive Branch agree can information be provided only to the Committee chairman and ranking member. In a few particular instances, such as the provisions of the National Security Act of 1947 concerning presidential notification to Congress about "covert action," Congress has specifically authorized the President to limit disclosure to specified Congressional leaders, including the chairman and ranking member of selected committees. See 50 U.S.C. 413b(c)(2). Otherwise, such limited disclosure has occurred only where the Executive Branch and the Committee agree. Most recently, for example, the President sought to restrict disclosure of information on the pre-FISA NSA warrantless wiretapping program to the chairman and ranking member of the intelligence committees, but then authorized access for the entire committees when they so requested, as in this case.

5. Court precedent similarly supports Committee access to the information requested. As the Supreme Court recognized many years ago, a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions the legislation is intended to affect or change." McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Indeed, the D.C. Circuit specifically declined to uphold an Executive Branch claim that it could withhold confidential national security information from a subcommittee of the House Committee on Interstate and Foreign Commerce, since that would contradict the "equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative function." United States v. A.T.& T, 567 F.2d 121, 131-33 (D.C. Cir, 1977). The Executive Branch and the Committee later reached agreement on access to the information concerning the investigation, which concerned allegations of warrantless national security wiretapping.

6. The description by the President's own representative, White House Press Secretary Tony Snow, of the recent actions by the FISC make clear that much of the information requested should be provided to the Judiciary Committee under FISA itself. In a January 17, 2007 press briefing, Mr. Snow said, *inter alia*, that "[t]he FISA Court has published the rules under which [surveillance] activities may be conducted," that "the Foreign Intelligence Surveillance Court has put together its guidelines and its rules "governing the conduct of such surveillance, and that the Administration's electronic surveillance activities will "continue[] under the rules that have been laid out by the court." Press Briefing by Tony Snow, Jan. 17, 2007 (available at http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html). FISA itself explicitly requires that FISC rules and procedures be reported specifically to the House Judiciary Committee, among others. See 50 U.S.C. 1803(f)(2)(F). In light of the mandate of FISA itself, and the representations of the White House Press Secretary, the

full Judiciary Committee should have complete access to the new FISC rules discussed by Mr. Snow.

7. The FISC has no objections to Congressional access to the information, and the standards of access applied to the Intelligence Committee can be applied to the Judiciary Committee as well. In response to a letter from the Senate Judiciary Committee, the Chief Judge of the FISC, U.S. District Judge Colleen Kollar-Kotelly, has indicated that she has no objection to the FISC orders being provided to Congress. We are mindful and respectful of your concerns regarding the sensitive information contained in these documents. However, just as you have created a way for the Intelligence Committees to review them, so too must the same avenue exist for Judiciary Committee review. All members of the House Judiciary Committee have executed an oath, pursuant to House Rule XXIII, clause 13, not to disclose classified information received in the course of their duties. Judiciary Committee members, like those of the Intelligence Committees, could agree to additional strict access limitations with respect to the requested documents and information.

Important questions regarding FISA and the domestic wiretapping program remain unanswered, and access to the requested information is essential in order for the entire Judiciary Committee to carry out its legislative responsibilities. It is up to Congress, not the Executive Branch acting unilaterally, to determine how and by what committees oversight should be undertaken of judicial and executive branch functions, but your position would effectively eliminate meaningful Judiciary Committee oversight and legislative activity in this important area. We ask that you respond personally to this letter and to each of the specific points above and work with us to provide the information requested as soon as possible.

Sincerely,

John Conyers, Jr.
Chairman

Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties

Enclosure

cc: Hon. Richard A. Hertling
Hon. Lamar S. Smith
Hon. Trent Franks