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ONE HUNDRED TENTH CONGRESS

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House of Representatives

COMMITTEE ON THE JUDICIARY

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September 11, 2007

The Honorable Michael "Mike" McConnell
Director of National Intelligence
Office of the Director of National Intelligence
Washington, DC 20511

Dear Director McConnell:

At the hearing held in our Committee last week, a number of serious concerns were raised by several members about your recent interview with the El Paso Times, in which you revealed "previously classified details of government surveillance" activities. K. Shrader, "Spy chief reveals classified details about surveillance."¹ Especially in light of the Administration's previous refusal to provide such information to Congress, this selective disclosure of information raises troubling questions that we ask you to address prior to your scheduled appearance before the Committee next week to discuss proposed changes to the Foreign Intelligence Surveillance Act (FISA).²

Previously, when the Judiciary Committee has attempted to obtain this and similar information about Administration surveillance programs, the response has been that information about surveillance programs is "classified and sensitive, and therefore cannot be discussed" in

¹ El Paso Times (Aug. 22, 2007).

² According to the transcript of your El Paso interview, posted online at http://www.elpasotimes.com/news/ci_6685679, you claimed that the recently-enacted short-term FISA revisions were needed to deal with a backlog caused by resources needed to prepare applications for FISA warrants, asserting that hundreds of man-hours were needed to obtain each warrant. You discussed the number of Americans whose communications have been targeted for direct interception as "100 or less", apparently in an attempt to rebut the concern that significant numbers of U.S. persons' communications would be caught in a dragnet under the new law, although the number of Americans targeted (as opposed to the number overheard) does not address that concern. You discussed the mechanics of FISA applications and court review, including changes in FISC caselaw since the beginning of 2007. You confirmed that "private sector" telecommunications companies "assisted" in warrantless government surveillance in arguing for retroactive immunity for such companies. You also suggested that the public and Congressional reporting and debate over FISA and intelligence-gathering methods "means that some Americans are going to die."

responding to Committee questions.³ In a public affidavit submitted earlier this year as part of *In re National Security Agency Telecommunications Records Litigation*,⁴ moreover, you asserted the state secrets doctrine to seek dismissal of a case concerning foreign intelligence surveillance, attempting to prevent even confirmation as to whether U.S. companies were involved in surveillance activities. During the very week you disclosed the involvement of private companies in your El Paso interview, the Justice Department continued to make that argument before the Ninth Circuit Court of Appeals.⁵

In light of these concerns, we ask that you answer the following questions in writing prior to your testimony next week::

1. Was a specific decision made to declassify any previously-classified information contained in the El Paso Times interview and, if so, when, by whom, and under what authority? Please provide the background and a specific explanation for any such decision.
2. In light of your public confirmation of the involvement of "private sector" telecommunications companies in the Administration's surveillance programs, what is the specific justification for your claim a few months earlier in litigation that confirmation of such involvement cannot be permitted under the state secrets doctrine? What steps have been or will be taken by you or by the Justice Department with respect to the earlier assertions, now contradicted by the El Paso Times interview, that participation of private companies in Administration surveillance programs cannot be confirmed?
3. The Administration's report to Congress states that 2,181 FISA applications were filed in 2006. If each application takes 200 man-hours, as you suggested in the El Paso interview, this would require at least 218 attorneys and analysts working full-time for more than 436,000 hours on nothing but warrant applications. Do you continue to stand by your assertion to the El Paso Times that "[i]t takes about 200 hours" to do the application for each phone number?
4. According to an article in today's New York Times, you made another selective disclosure of classified information when you claimed yesterday to a Senate committee in public session that the temporary FISA law just passed by Congress

³See, e.g., Letter of Assistant Attorney General William Moschella in response to Judiciary Committee questions concerning the Terrorist Surveillance Program (March 24, 2006); Letter of Principal Deputy Assistant Attorney General Richard Hertling in response to Judiciary Committee questions concerning Foreign Intelligence Surveillance Act and Court Orders (June 21, 2007).

⁴ MDL Dkt. No. 06-1791-VRW (ND CA 2007).

⁵See, e.g., Washington Post, "Judges Skeptical of State-Secrets Claim" (August 16, 2007).

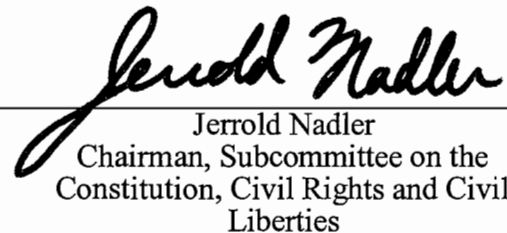
helped lead to the arrests last week of three Islamic militants accused of planning bomb attacks in Germany. The article also states, however, that another official stated that you may have misspoken and that the intercepts in question were obtained under the old law.⁶ Please state whether a specific decision was made to de-classify the information you provided to the Senate Committee and, if so, when, by whom, under what authority, and what was the specific background and explanation. In addition, please clarify whether the intercepts in question were foreign-to-foreign, as your statement implied, and whether they were in fact obtained under the old FISA law or the new FISA law.

We look forward to your prompt reply to these questions and to your continued cooperation as Congress considers FISA's future. Responses and questions should be directed to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel: 202-225-3951; fax: 202-225-7680). It would be of the utmost assistance to the Committee if your responses to the above questions were provided to us by no later than 2 PM on Monday, September 17, 2004, in advance of your testimony before us the following day. Thank you for your assistance.

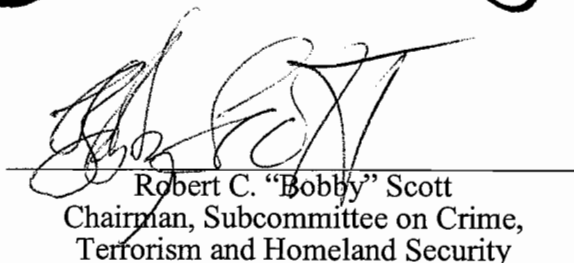
Sincerely,



John Conyers, Jr.
Chairman



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



Robert C. "Bobby" Scott
Chairman, Subcommittee on Crime,
Terrorism and Homeland Security

cc: Hon. Lamar S. Smith
Hon. Trent Franks
Hon. J. Randy Forbes

⁶New York Times, "New U.S. Law Credited in Arrests Abroad" (Sept. 11, 2007)