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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

Honorable Alberto R. Gonzales
 Attorney General
 United States Department of Justice
 Washington, DC

Dear Attorney General *AG* Gonzales:

I write to let you know some of the subjects which I would like you to address in your opening statement on the Judiciary Committee hearing scheduled for February 6, 2006 on "Wartime Executive Power and the NSA's Surveillance Authority."

- (1) In interpreting whether Congress intended to amend the Foreign Intelligence Surveillance Act (FISA) by the September 14, 2001 Resolution (Resolution), would it be relevant on the issue of Congressional intent that the Administration did not specifically ask for an expansion for Executive powers under FISA? Was it because you thought you couldn't get such an expansion as when you said: "That was not something that we could likely get?"
- (2) If Congress had intended to amend FISA by the Resolution, wouldn't Congress have specifically acted to as Congress did in passing the Patriot Act giving the Executive expanded powers and greater flexibility in using "roving" wiretaps?
- (3) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what is the impact of the rule of statutory construction that repeals or changes by implication are disfavored?
- (4) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what would be the impact of the rule of statutory construction that specific statutory language, like that in FISA, trumps or takes precedence over more general pronouncements like those of the Resolution?
- (5) Why did the Executive not ask for the authority to conduct electronic surveillance when Congress passed the Patriot Act and was predisposed, to the maximum extent likely, to grant the Executive additional powers which the Executive thought necessary?
- (6) Wasn't President Carter's signature on FISA in 1978, together with his signing statement, an explicit renunciation of any claim to inherent Executive authority under Article II of the Constitution to conduct warrantless domestic surveillance when the Act provided the exclusive procedures for such surveillance?

- (7) Why didn't the President seek a warrant from the Foreign Intelligence Surveillance Court authorizing in advance the electronic surveillance in issue? (The FISA Court has the experience and authority to issue such a warrant. The FISA Court has a record establishing its reliability for non-disclosure or leaking contrasted with concerns that disclosures to many members of Congress involved a high risk of disclosure or leaking. The FISA Court is at least as reliable, if not more so, than the Executive Branch on avoiding disclosure or leaks.)
- (8) Why did the Executive Branch not seek after-the-fact authorization from the FISA Court within the 72 hours as provided by the Act? At a minimum, shouldn't the Executive have sought authorization from the FISA Court for law enforcement individuals to listen to a reduced number of conversations which were selected out from a larger number of conversations from the mechanical surveillance?
- (9) Was consideration given to the dichotomy between conversations by mechanical surveillance from conversations listened to by law enforcement personnel with the contention that the former was non-invasive and only the latter was invasive? Would this distinction have made it practical to obtain Court approval before the conversations were subject to human surveillance or after-the-fact approval within 72 hours?
- (10) Would you consider seeking approval from the FISA Court at this time for the ongoing surveillance program at issue?
- (11) How can the Executive justify disclosure to only the so-called "Gang of Eight" instead of the full intelligence committees when Title V of the National Security Act of 1947 provides:

SEC. 501. [50 U.S.C. 413] (a)(1) The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.
(Emphasis added)

(2)(e) Nothing in this Act shall be construed as authority to withhold information from the congressional intelligence committees on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.
(Emphasis added)

- (12) To the extent that it can be disclosed in a public hearing (or to be provided in a closed executive session), what are the facts upon which the Executive relies to assert Article II wartime authority over Congress' Article I authority to establish public policy on these issues especially where legislation is approved by the President as contrasted to being enacted over a Presidential veto as was the case with the War Powers Act?
- (13) What case law does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?
- (14) What academic or expert opinions does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?
- (15) When foreign calls (whether between the caller and the recipient both being on foreign soil or one of the callers or recipients being on foreign soil and the other in the U.S.) were routed through switches which were physically located on U.S. soil, would that constitute a violation of law or regulation restricting NSA from conducting surveillance inside the United States, absent a claim of unconstitutionality on encroaching on Executive powers under Article II?

This letter will further confirm our staffs' discussions that the Committee will require, at a minimum, the full day on February 6th for your testimony.

Sincerely,



Arlen Specter

AS/ph

Via Facsimile