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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

MICHAEL O'NEILL, *Chief Counsel and Staff Director*
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June 7, 2006

The Honorable Richard B. Cheney
The Vice President
Washington, DC

Dear Mr. Vice President:

I am taking this unusual step in writing to you to establish a public record. It is neither pleasant nor easy to raise these issues with the Administration of my own party, but I do so because of their importance.

No one has been more supportive of a strong national defense and tough action against terrorism than I. However, the Administration's continuing position on the NSA electronic surveillance program rejects the historical constitutional practice of judicial approval of warrants before wiretapping and denigrates the constitutional authority and responsibility of the Congress and specifically the Judiciary Committee to conduct oversight on constitutional issues.

On March 16, 2006, I introduced legislation to authorize the Foreign Intelligence Surveillance Court to rule on the constitutionality of the Administration's electronic surveillance program. Expert witnesses, including four former judges of the FISA Court, supported the legislation as an effective way to preserve the secrecy of the program and protect civil rights. The FISA Court has an unblemished record for keeping secrets and it has the obvious expertise to rule on the issue. The FISA Court judges and other experts concluded that the legislation satisfied the case-in-controversy requirement and was not a prohibited advisory opinion. Notwithstanding my repeated efforts to get the Administration's position on this legislation, I have been unable to get any response, including a "no".

The Administration's obligation to provide sufficient information to the Judiciary Committee to allow the Committee to perform its constitutional oversight is not satisfied by the briefings to the Congressional Intelligence Committees. On that subject, it should be noted that this Administration, as well as previous Administrations, has failed to comply with the requirements of the National Security Act of 1947 to keep the House and Senate Intelligence Committees fully informed. That statute has been ignored for decades when Presidents have only informed the so-called "Gang of Eight," the Leaders of both Houses and the Chairmen and Ranking on the Intelligence Committees. From my experience as a member of the "Gang of Eight" when I chaired the Intelligence Committee of the 104th Congress, even that group gets very little information. It was only in the face of pressure from the Senate Judiciary Committee that the Administration reluctantly informed subcommittees of the House and Senate Intelligence

Committees and then agreed to inform the full Intelligence Committee members in order to get General Hayden confirmed.

When there were public disclosures about the telephone companies turning over millions of customer records involving allegedly billions of telephone calls, the Judiciary Committee scheduled a hearing of the chief executive officers of the four telephone companies involved. When some of the companies requested subpoenas so they would not be volunteers, we responded that we would honor that request. Later, the companies indicated that if the hearing were closed to the public, they would not need subpoenas.

I then sought Committee approval, which is necessary under our rules, to have a closed session to protect the confidentiality of any classified information and scheduled a Judiciary Committee Executive Session for 2:30 P.M. yesterday to get that approval.

I was advised yesterday that you had called Republican members of the Judiciary Committee lobbying them to oppose any Judiciary Committee hearing, even a closed one, with the telephone companies. I was further advised that you told those Republican members that the telephone companies had been instructed not to provide any information to the Committee as they were prohibited from disclosing classified information.

I was surprised, to say the least, that you sought to influence, really determine, the action of the Committee without calling me first, or at least calling me at some point. This was especially perplexing since we both attended the Republican Senators caucus lunch yesterday and I walked directly in front of you on at least two occasions enroute from the buffet to my table.

At the request of Republican Committee members, I scheduled a Republican members meeting at 2:00 P.M. yesterday in advance of the 2:30 P.M. full Committee meeting. At that time, I announced my plan to proceed with the hearing and to invite the chief executive officers of the telephone companies who would not be subject to the embarrassment of being subpoenaed because that was no longer needed. I emphasized my preference to have a closed hearing providing a majority of the Committee agreed.

Senator Hatch then urged me to defer action on the telephone companies hearing, saying that he would get Administration support for my bill which he had long supported. In the context of the doubt as to whether there were the votes necessary for a closed hearing or to proceed in any manner as to the telephone companies, I agreed to Senator Hatch's proposal for a brief delay on the telephone companies hearing to give him an opportunity to secure the Administration's approval of the bill which he thought could be done. When I announced this course of action at the full Committee Executive Session, there was a very contentious discussion which is available on the public record.

It has been my hope that there could be an accommodation between Congress's Article I authority on oversight and the President's constitutional authority under Article II. There is no doubt that the NSA program violates the Foreign Intelligence Surveillance Act which sets forth the exclusive procedure for domestic wiretaps which requires the approval of the FISA Court. It may be that the President has inherent authority under Article II to trump that statute but the President does not have a blank check and the determination on whether the President has such Article II power calls for a balancing test which requires knowing what the surveillance program constitutes.

If an accommodation cannot be reached with the Administration, the Judiciary Committee will consider confronting the issue with subpoenas and enforcement of that compulsory process if it appears that a majority vote will be forthcoming. The Committee would obviously have a much easier time making our case for enforcement of subpoenas against the telephone companies which do not have the plea of executive privilege. That may ultimately be the course of least resistance.

We press this issue in the context of repeated stances by the Administration on expansion of Article II power, frequently at the expense of Congress's Article I authority. There are the Presidential signing statements where the President seeks to cherry-pick which parts of the statute he will follow. There has been the refusal of the Department of Justice to provide the necessary clearances to permit its Office of Professional Responsibility to determine the propriety of the legal advice given by the Department of Justice on the electronic surveillance program. There is the recent Executive Branch search and seizure of Congressman Jefferson's office. There are recent and repeated assertions by the Department of Justice that it has the authority to criminally prosecute newspapers and reporters under highly questionable criminal statutes.

All of this is occurring in the context where the Administration is continuing warrantless wiretaps in violation of the Foreign Intelligence Surveillance Act and is preventing the Senate Judiciary Committee from carrying out its constitutional responsibility for Congressional oversight on constitutional issues. I am available to try to work this out with the Administration without the necessity of a constitutional confrontation between Congress and the President.

Sincerely,



Arlen Specter

AS/ph

Via Facsimile

cc: Senate Leadership
Judiciary Committee Members