

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

March 23, 2006

(202) 354-3460
FAX (202) 354-3468

The Honorable Arlen Specter
United States Senate
711 Senate Hart Office Building
Washington, DC 20510-0001

Dear Senator Specter:

Thank you for soliciting my views on your proposal, which I support, to give approval authority over the Administration's electronic surveillance program to the Foreign Intelligence Surveillance Court. Seeking judicial approval for government activities that implicate Constitutional protections is, of course, the American way, but prudence in the handling of sensitive classified material suggests that only a limited number of judges should have the job. The Foreign Intelligence Surveillance Court is best situated to review the surveillance program. Its judges are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record.

I have reviewed the bill and Judge Baker's thoughtful remarks and submit these comments for your consideration.

- The surveillance program in question (and other programs that may be developed over time) should be presented to the FISC, not for general review, but in the form of applications for approval for some period of time, say 45 or 90 days. Such applications would presumably not "fit" the FISA process as it now exists, but that process is easily adjustable.
- An appropriate new standard would have to be crafted, as your proposal recognizes. My view is that probable cause to believe that the program will intercept communications of a foreign power or agent or a person who has had such communication (your section 6(a)(3)) is too low a threshold. I suggest something like "probable cause to believe that operation of the

The Honorable Arlen Specter
March 23, 2006
Page 2

program will identify or assist in the detection of terrorist activity."

- I agree with Judge Baker that Congress needs to clarify the concept of minimization. Depending on what is actually collected by the Administration's surveillance program, this could be the most difficult part of the approval process.
- I do not agree that the FISC should evaluate the effectiveness of the Administration's program or, in Judge Baker's words, that it should "determin[e] that the purpose of a surveillance fulfills the need for foreign intelligence." The Court of Review concluded, I believe correctly, that that is not a judicial function. FISC judges would nevertheless have the returns from previous approvals and other information about the results of the program as part of the record they consider when deciding whether there is probable cause for successive approvals.
- FISC judges now sit individually, and not in panels or en banc. The statute should be amended to require that, for approvals of surveillance program applications, the Court sit in panels of three.

Sincerely yours,



cc: The Honorable Harold A. Baker