

Written Questions for Assistant Attorney General Nominee David Kris from Senator Specter

1. On August 22, 2008, the Foreign Intelligence Surveillance Court of Review (the FISA Court of Review) upheld a Foreign Intelligence Surveillance Court decision compelling an unnamed communications service provider to comply with surveillance directives issued by the Attorney General or Director of National Intelligence under the Protect America Act (which has since been replaced by the FISA Amendments Act). In its decision, the FISA Court of Review applied the “special needs” line of cases (e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding pat-frisk for weapons to protect officer safety)) that create an exception to the Warrant Clause. Under this analysis, the FISA Court of Review held, “a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.” Slip Op. at 17.

- a. Do you agree with this decision?

Answer: I agree that the special needs doctrine supports an exception to the Fourth Amendment’s Warrant Clause with respect to at least certain forms of foreign intelligence surveillance directed at foreign powers and agents of foreign powers located abroad. Although I have not seen the redacted portions of the Court of Review’s opinion, and must reserve judgment on the impact of those portions, I am on record agreeing with other courts that have ruled similarly. See, e.g., *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277 (SDNY 2000) (adopting the foreign intelligence exception to the warrant requirement for searches targeting foreign powers (or their agents) which are conducted abroad). As I explained in the book I co-wrote, prior to the Protect America Act and the FISA Amendments Act, the decision in *Bin Laden* is “very thoughtful” and “[t]his part of [its] reasoning and result ... is sound.” *National Security Investigations and Prosecutions* at 16-4 to 16-5. As the book further explains, “there is very little doubt that the President has authority to conduct warrantless foreign intelligence surveillance of U.S. persons abroad. At least until Congress creates a warrant procedure by statute, and invests extraterritorial jurisdiction in some neutral and detached magistrate, the government will continue its long-standing historical practice of conducting searches and surveillance of U.S. persons abroad without a warrant.” *Id.* at 16-5.

- b. If not, do you believe that this kind of surveillance is still constitutional based on other reasoning? (E.g., the border exception from *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985))

Answer: Please see answer above.

2. Last year, in passing the FISA Amendments Act of 2008, Congress approved retroactive immunity for telephone companies that *may* have broken the law by assisting the government in conducting warrantless surveillance. President Obama initially opposed retroactive immunity for telephone companies, although he ultimately voted in favor of the FISA Amendments Act. Plaintiffs have now challenged the immunity provision.

- i. Do you believe providing retroactive immunity to the telephone companies is constitutional?

Answer: I have not studied this question sufficiently to have an informed opinion, and as pointed out in the question, the constitutionality of the retroactive immunity provisions is currently pending in litigation. In light of those factors, I would want to consult with career staff and experts at the Department before taking a position on the constitutional question posed.

- ii. Do you agree with Congress that providing retroactive immunity was the best solution? If not, what solution would you propose?

Answer: Please see answer above.

- iii. If the courts do not uphold the immunity provision, what actions do you think the executive branch should take, if any, going forward?

Answer: Subject to the caveats in my answer to Part i of this question, I believe the government generally would appeal a lower-court decision striking down the immunity provision. I agree with Dean Elena Kagan, who testified before this Committee on February 10, 2009, that there are only two rare exceptions to the general rule that the government will defend a duly enacted federal statute: the first is where there is simply no basis to do so, and the second is where the statute infringes improperly on the powers of the President. I do not anticipate either exception applying here. If the Supreme Court were to strike down the statute, I would need to study the basis for the Court's decision and consult with career professionals within the Department of Justice to consider viable options.

3. In response to my question at your hearing as to whether warrantless wiretapping, which violates the Foreign Intelligence Surveillance Act, is nevertheless constitutional based on the President's authority as Commander in Chief under Article II, you responded that you would have to see the facts of the particular case. I agreed with that assessment. In your opinion, what facts would weigh in favor of constitutionality and what facts would weigh against when determining whether the President could violate a statute pursuant to his Article II powers under part three of Justice Robert Jackson's three-part analysis in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)?

Answer: While I am unable to compile a complete list of factors, particularly in the absence of specific facts, among the factors, I believe, would be at least two operational questions. The first concerns the need to obtain the information sought (and the importance of the information as compared to the invasion of privacy involved in obtaining it). The second question concerns the reasons for eschewing the use of FISA (or another governing statute) in obtaining the information. There could be other factors that would be relevant to the issue as well.

4. In *Youngstown*, Justice Jackson said: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that

he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.” Last year, Sen. Kennedy and I introduced the State Secrets Privilege Act, a bill just reintroduced with Chairman Leahy. Our bill seeks to codify the standard for evaluating privilege claims, standardize the means for asserting the privilege, and require courts to examine the evidence subject to a claim of privilege.

- a. Do you recognize the authority of Congress to legislate in this area?

Answer: I do believe that Congress has general authority to legislate in this area. See *United States v. Reynolds*, 345 U.S. 1 (1953) (addressing Fed. R. Civ. P. 34); Fed. R. Evid. 501. There may, of course, be limits on that authority as applied in particular situations, based on the Constitutional prerogatives of the other two branches of the federal government.

- b. Do you agree there is a great benefit in having a uniform standard – including classified procedures – to allow for the evaluation of the state secrets privilege?

Answer: I have not studied this issue in sufficient detail to form an opinion. I recognize that there is a great deal of expertise on this issue both in the Committee and in the Department of Justice. If confirmed, I would look forward to working with both the Committee and the career professionals at the Department of Justice.

5. I recently met with representatives of the Markle Foundation, including former Senator and 9/11 Commissioner Slade Gorton, about a forthcoming report on the progress and shortcomings of information sharing within the Intelligence Community. If confirmed, what will you do to ensure continued improvements in information sharing, especially as it concerns Justice Department components like the FBI?

Answer: As I testified in my opening statement before the Committee, if confirmed I hope in the short run to focus on the very positive evolution of the National Security Division’s working relationship with the FBI, particularly in operational matters. I believe that continuing evolution will yield many benefits, including improved information sharing. In addition, as the Department of Justice’s primary liaison to the Director of National Intelligence (see 28 U.S.C. § 507A(b)(2)), if confirmed I hope to foster strong relationships between DOJ – including the FBI – and the rest of the U.S. Intelligence Community.