

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
201 S. VINE STREET
URBANA, ILLINOIS 61802

HAROLD A. BAKER
SENIOR JUDGE

PHONE: 217-373-5835
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By Facsimile Transmission 202-224-9102

April 12, 2006

Barr Huefner
Hearing Clerk
United States Senate
Committee on the Judiciary

Re: Additional Questions submitted by Senator Russell D. Feingold in connection with the hearing on March 28, 2006

Here are my responses to the above questions:

Question: There has been some dispute in the media about your testimony regarding the legality or illegality of the President's program. Is it accurate to characterize your testimony as saying that the program the President authorized was legal?

Answer: I gave no opinion as to the legality or illegality of the President's program. I explained that I did not know what the President's program was and could not give an opinion.

Question: Do you think it is important for Congress to understand the facts about the President's program and to hear the Administration's case for why the current FISA law is inadequate before we attempt to draft a new law?

Answer: Naturally it is important for Congress to be fully informed on facts touching new legislation, but in this case I do not believe it is necessary before improvements could be made in the existing FISA. I attach a copy of my letter of March 7, 2006, to Senator Specter in response to his request for comments on the proposed legislation. There are things that could be accomplished now that would improve the oversight function of the FISA Court.

Question: Are you aware of any President since FISA was enacted, other than the current President, who has authorized a wiretap outside of FISA?

Answer: Yes. Foreign intelligence surveillances not covered by FISA have been authorized.

Question: Many believe that ultimately the judicial branch should assess the constitutionality of the NSA program that the President has authorized. However, the FISA court operates in secret, and does not have an adversarial process. As you well know, only the government makes

arguments before the court. The only way for a decision to be appealed to the Supreme Court is if the government loses in the FISA court of review. If the government wins, there is no appeal, and the Supreme Court would never have the opportunity to review the case.

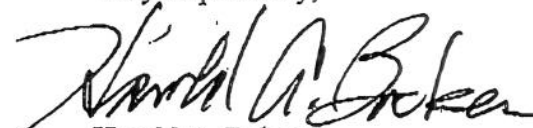
a. Do you agree that any legislation designed to ensure judicial review of the President's program should also provide for an adversary process and Supreme Court review?

Answer: Yes. See my attached letter to Senator Specter. The legal advisors to the FISA court are experienced lawyers and have the necessary security clearances to handle such matters and to represent the position taken in the FISA court's ruling. I do believe that *In Re Sealed Case* the ACLU filed a petition for certiorari in the Supreme Court that was denied..

b. Do you have any reason to believe, based on your experience as both a FISA judge and a federal judge, that the federal courts, including the Supreme Court, could not appropriately handle any classified information that might be part of a constitutional challenge to this program?

Answer: I certainly know the FISA judges can and do handle highly classified materials appropriately. I have no doubt that the Supreme Court would also handle the materials appropriately. However, my observations and knowledge of history tell me that when you disseminate materials to a wide audience, the chances for compromise advance exponentially.

Very respectfully,



Harold A. Baker

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March 7, 2006

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

Re: Draft FISA Bill

Dear Senator Specter:

Thank you for inviting me to comment on your proposed amendments to the FISA. I think the amendments may provide a means to restore the FISA Court to a meaningful function of oversight, although I confess I am ignorant if political realities will permit that. I have these observations about the draft that you sent to me with the hope of strengthening its purpose:

1. It is clear, without the necessity of citing authority, that the Congress has the power to create a court with jurisdiction to grant surveillance orders involving sensitive matters of national security. The members have top secret clearances and are attuned to the intelligence community needs and the necessity of protecting intelligence sources and methods. At the same time, they have the duty to guard against violations of the Fourth Amendment. The existence of the FISA Court for 25 years supports that observation. The proposed legislation would buttress that aim.
2. If the Congress intended the FISA Court to be an instrument for oversight of the actions of the Executive in surveillance within the United States, and especially of United States persons, and the Congress surely must have intended that, then some language additions are needed.
3. The singular FISA Court of Review opinion, *In re Sealed Case*, 310 F.3d 717 (2002) severely limited the FISA Court's ability to review and order changes in the Attorney General's minimization procedures for intercepts of communications by United States persons. The Congress needs to make clear what its intention was with regard to the ability of the FISA Court to review and set minimization standards.
4. The same opinion ruled that the FISA Court could not, except for clear error, look behind the declaration of the Executive that the purpose of a surveillance was to gather foreign intelligence. That position makes the FISA Court a rubber stamp on the question of a foreign intelligence purpose. The Congress needs to make clear its intention that the FISA Court is to fulfill an oversight role in determining that the purpose of a surveillance fulfills the need for foreign intelligence.

5. The Congress should declare that the FISA Court has the authority to sit *en banc* on questions of particular import when it deems it necessary to do so. The court did so *In Re All Matters Submitted to The Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (2002), although the court of review observed that it had no power to do so.

6. To stay clear of Fourth Amendment questions, the Congress should declare that its intention in using the term "significant foreign intelligence purpose" in the Patriot Act Amendments was not to authorize the use of FISA for criminal investigation purposes. The collection of foreign intelligence in some cases will also lead to the collection of evidence of criminal activity. It frequently does and certainly will in counterintelligence cases. There should be no prohibition of sharing information among the various branches of the intelligence community and the Justice Department. Sharing was never prohibited by the FISA Court. Holding information closely was cultural within the intelligence community. The twenty-five year policy developed between the court and the Department was against initiation and control of a FISA operation by the criminal division of the Department.

7. The proposed legislation should make clear that the emergency application provisions of the FISA apply to the programs that the Executive must now submit for review. That would give the Executive the needed ability to act immediately and not wait for a prior determination by the court.

8. The statute should spell out the method of appeal from an order of the FISA Court passing on the constitutionality of a program proposed by the Executive. There needs to be some means of establishing an adversary proceeding in that appeal (for example, by allowing the FISA Court's legal advisors, who have top secret clearances, to appear in support of the court's rulings).

9. In Title VII Sec. 1. Definitions.

(3) In line 4, I would substitute for the words, "a reasonable possibility" the words, "probable cause to believe".

(4)(A) In line 3 following the words, electronic communications, I would add, "where there is probable cause to believe they were" sent by, etc.

[These changes would track the language of the Fourth Amendment and allow the FISA Court to determine the existence of probable cause. The probable cause additions also track the language in Sec. 704(a)(3). I have found that both Justice and the intelligence agencies have a very restrictive and erroneous view of what is required to find probable cause. Consequently they are uncomfortable with the term probable cause and shy away from it. I have attached excerpts from *Illinois v. Gates*, the Supreme Court controlling decision on probable cause. It is well to remember that in an intelligence operation probable cause is a much lighter burden than in a criminal investigation.]

In (4)(B), for clarity, I would add the word, "technically" before the word, "feasible" in line 1.

In (7), for clarity, I would add the words, "symbols, sounds" before the word, "purport".

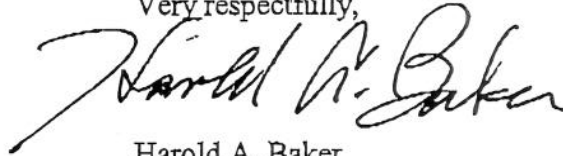
10. In Sec. 702;

In (d)(1) line 4, I would strike the words, "there is a reasonable possibility that". It seems redundant to modify a reasonable expectation of privacy with the words, "reasonable possibility that there is" that reasonable expectation.

In (d)(2), I would substitute the word, "captured" for the word, "obtained". I believe that is a more accurate reference to an electronic communication.

I hope these remarks will be of some assistance. I, of course, will be glad to speak with you at any time you choose and will make myself available to you in Washington if you wish.

Very respectfully,

A handwritten signature in cursive script, reading "Harold A. Baker". The signature is written in dark ink and is positioned below the typed name.

Harold A. Baker