

Central Intelligence Agency



Washington, D.C. 20505

6 October 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Barr Huefner

Dear Mr. Chairman:

Enclosed please find the responses to your 2 August 2006 letter regarding follow-up questions from my testimony before your Committee at the "FISA for the 21st Century" hearing. Please note that this is a partial response and the remaining inquiries will be answered as soon as possible. Given that I testified under the auspices of my former capacity as Director of the National Security Agency, rather than my current position, I am coordinating the remaining responses with the appropriate agencies.

As always, I appreciate the interest Congress takes in the Intelligence Community and was pleased to have the opportunity to testify before your Committee.

Sincerely,

A handwritten signature in cursive script that reads "Michael V. Hayden".

Michael V. Hayden
General, USAF
Director

Enclosures

Questions for the Record
FISA for the 21st Century -- July 26, 2006 Hearing
U.S. Senate Judiciary Committee

Responses to Questions from Chairman Arlen Specter (R-PA)
to
Director of the CIA, General Michael Hayden

QUESTION: 1. Is it feasible for the FISA Court to make the type of determinations and issue the type of program-wide warrants that my bill envisions?

ANSWER: (U) Yes. The types of findings that the bill calls for the Foreign Intelligence Surveillance Court ("FISC") to make in authorizing electronic surveillance programs are comparable to the determinations that the court has made for years in authorizing surveillance orders under the Foreign Intelligence Surveillance Act of 1978 ("FISA"). Indeed, many of the "necessary findings" set forth in Section 6 of the bill that the FISC would have to make before authorizing surveillance mirror those contained in section 105 of FISA, 50 U.S.C. § 1805(a).

QUESTION: 2. Under my bill, the Administration is required to submit certain information about the so-called Terrorist Surveillance Program. Is this information sufficient to allow a FISA Court judge to determine the NSA program's constitutionality?

ANSWER: (U) We believe the information is sufficient to allow the FISC to determine the constitutionality of an electronic surveillance program, including the Terrorist Surveillance Program described by the President. The bill requires any application for an order authorizing an electronic surveillance program to include detailed information on a number of subjects, including "an explanation of how the electronic surveillance program is reasonably designed to ensure that the communications to be intercepted are communications of or with . . . a foreign power . . . [or] an agent of a foreign power that is engaged in international terrorism activities or in preparation therefore; or . . . a person reasonably believed to have communication with or be associated with a foreign power that is engaged in international terrorism activities or in preparation therefore or an agent of [such] a foreign power." *See* § 5. The bill would also require any application submitted to include a statement of the means and operational procedures by which the electronic tracking will be executed and affected, a statement of proposed minimization procedures, and, for programs that are being reauthorized, a statement of facts concerning the implementation of the program. *Id.* Moreover, in the event that the court concludes it lacks sufficient information on which to make a determination, the bill specifically provides that the FISC "may require the Attorney General to furnish such other information as be necessary to make a determination" (*id.*) that, among other things, "approval of the electronic surveillance program in the application is consistent with the Constitution of the United States." *Id.* § 6.

QUESTION: 3a. Technology has changed tremendously since 1978. What are some of the technological hurdles that make FISA obsolete today?

ANSWER: (U) FISA was written in 1978 in a manner that took into account then-current technology, making the necessity to obtain a court order dependent in part on the means of communication and the location in which the Government sought to acquire it. While we believe the intent of the 1978 law was to protect the private communications of people in the United States by imposing a judicial process when such persons were the targets of surveillance, the law does not accomplish this well in today's technological environment. The principal differences between the 1978 telecommunications environment and that of today result from both the evolution of the internet and the changed circumstances in which particular communications technologies are used. Because FISA is technology-specific, the result of these changes is that the FISA frequently requires judicial authority to collect the communications of non-U.S. persons outside the United States. This clogs the FISA process with applications for court orders that have little to do with protecting U.S. privacy rights. The FISA should be amended so that it is technology-neutral. This would return it to its original purpose of focusing privacy protections on Americans in the United States.

QUESTION: 3b. Do you agree with how S.2453 deals with emerging technological issues?

ANSWER: (U) The revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could ever have anticipated in 1978. At present, the requirement for a court order is determined in part by the location at which surveillance is conducted, and the particular communications technology employed. Neither of these factors is selected by a communicant, yet the Government's obligation to obtain a court order turns on these and similar factors that do not go to the essence of the issue: what kind of protection from Governmental intrusion ought to be provided to people in the United States, and to U.S. persons abroad? The intent of S.2453 as we understand it is to return the statute to its original intent. While I agree with this goal, it is necessary that we review the legislation to determine how the proposed language will impact the operational effectiveness of each of the intelligence agencies that rely on the authorities set out in the FISA.

QUESTION: 4. What recommendations do you have to improve my legislation?

ANSWER: (U) The Administration is proud to have worked closely with you on this bill, and we already have given you numerous comments on earlier drafts. We look forward to working further with you and Congress as we move this bill through the legislative process. Because of the importance of FISA reform, we hope that Congress will move expeditiously. All suggestions we had for improving the draft legislation have already been made in the informal process of consultation.

QUESTION: 5. In your opinion, would the President continue the Terrorist Surveillance Program if the Foreign Intelligence Surveillance Court or the Court of Review concluded that the program is unconstitutional?

ANSWER: (U) Subject, of course, to ordinary appellate review of such a decision, I am confident that the President would terminate the Terrorist Surveillance Program if there were a final judgment of the FISC or the Foreign Intelligence Surveillance Court of Review concluding that the Program is unconstitutional. I am also confident, however, that the Terrorist Surveillance Program is lawful and that the courts will come to the same conclusion.

Questions for the Record

FISA for the 21st Century -- July 26, 2006 hearing
U.S. Senate Judiciary Committee

Responses to Questions posed by Senator Charles E. Schumer
to
Director of the CIA, General Michael Hayden

QUESTION: 1.a. On July 13, Senator Specter announced that he had reached a deal with the White House on his legislation to authorize the Terrorist Surveillance Program and rewrite much of the Foreign Intelligence Surveillance Act (FISA). This was just two weeks after the Supreme Court's decision in *Hamdan*, which many have characterized as a rebuke of the Administration's legal defense of the President's warrantless surveillance program. Do you continue to believe that the NSA Surveillance Program is legal and Constitutional and that it would survive any legal challenge in the FISA Court?

ANSWER: (U) Yes. As Assistant Attorney General Moschella explained in his detailed response to your June 30 letter, it is our considered legal judgment that Supreme Court's decision in *Hamdan v. Rumsfeld* does not affect the analysis set forth in the Department's January 19th *Legal Authorities* memorandum outlining the legal basis for the Terrorist Surveillance Program. As the Moschella letter explains, there are many reasons to support that conclusion, but at bottom, the relevant statutory scheme at issue in *Hamdan* is fundamentally different from the one implicated by the Terrorist Surveillance Program. FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending FISA. See 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"). The primary provision at issue in *Hamdan*, Article 21 of the Uniform Code of Military Justice ("UCMJ"), has no analogous provision. Moreover, the Supreme Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004), that the Force Resolution satisfies a statute similar to FISA prohibiting detention of U.S. citizens "exception pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Because the Terrorist Surveillance Program implicates a statutory regime analogous to the one at issue in *Hamdi*, we believe that the reasoning of that decision is far more relevant to the Program than *Hamdan*. Because of that, we believe that the Program would survive a legal challenge.

QUESTION: 1.b. If the [A]dministration has "the authority, both from the Constitution and the Congress, to undertake this vital program," as President Bush asserted in January, what need is there to legislate on this issue from your perspective?

ANSWER: (U) Although the Administration has made it clear that no additional legislation is needed to authorize the Terrorist Surveillance Program, the Administration

has been interested in working with Congress on electronic surveillance issues, including legislation addressing the Terrorist Surveillance Program. Indeed, as the Attorney General noted, the Administration previously discussed the idea of seeking specific authorization of the Terrorist Surveillance Program, but a bipartisan group of legislators warned that it would be unlikely that such legislation could be enacted without compromising the Program by disclosing its existence. See Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act, available at <http://www.dhs.gov/dhspublic/display?content=5285>. The legislation proposed by Chairman Specter and Senator DeWine would confirm and supplement the President's authority in this area and would regularize the procedures for the review and reauthorization of the Program. In addition, the Chairman's legislation would make many long overdue amendments to update FISA to account for technological changes that have occurred during the past 30 years.

QUESTION: 1.c. Would you prefer that Congress not legislate in this area at all?

ANSWER: (U) No. As indicated above, the Administration wants to work with Congress on electronic surveillance issues, including legislation addressing the Terrorist Surveillance Program.

QUESTION: 1.d. Did the Supreme Court's recent ruling in *Hamdan* play any role in the Administration's decision to support Senator Specter's legislation?

ANSWER: (U) No. The Administration was working with Senator Specter on this legislative package before the *Hamdan* decision was announced.

QUESTION: 2. Senator Specter has characterized his bill as simply allowing the Court to decide the Constitutionality of the program, including whether the President has the authority to authorize the surveillance. It has been said that if kept in its precise current form, the President will submit the program to the FISA Court. Why doesn't the Administration just submit the program to the FISA Court now, without any legislation?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 3. If the Specter bill is passed in its current form, what signing statement do you anticipate the President issuing in connection with it?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 4. If the Specter bill is passed in its current form, and the Administration then voluntarily submitted the program to the FISC, would the Administration argue that the Specter bill authorized the NSA's Terrorist Surveillance Program?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 5. Do you believe that the portion of the Specter bill that allows the President to submit the NSA surveillance program to the FISA Court is constitutional? Specifically, do you believe this provision does not run afoul of the constitutional proscription against advisory opinions?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 6.a. The Specter bill provides that any cases pending right now – upon application by the Attorney General – must be transferred to the FISA Court of Review. The bill also provides that the decision of that FISA Court “shall be subject to certiorari review in the United States Supreme Court.” Is it your understanding that one who is challenging a FISA Court decision favorable to the government may obtain review before the Supreme Court under the bill?

ANSWER: The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 6.b. What are the arguments against allowing the constitutional review in a traditional Federal District Court, with expedited review, to the Supreme Court, so long as the court applies the procedures and standards of the Classified Information Procedures Act?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 7. During his February appearance before the Committee, Senator Biden asked Attorney General Gonzales what harm had been caused by public disclosure of the warrantless surveillance program. He responded: "You would assume that the enemy is presuming we are engaged in some kind of surveillance. But if they're not reminded about it all the time in the newspapers and in stories, they sometimes forget." When I asked him the same question in July, he deferred to the intelligence community.

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 7a. Do you have a better answer as to how the disclosure that wiretapping is going on harmed national security?

ANSWER: (U) Disclosure of this Program puts at risk efforts by the U.S. Government to prevent catastrophic al Qaeda-sponsored acts within the United States. Even the

smallest reduction in the effectiveness of the President's Program could be catastrophic in an environment in which we cannot afford to miss one plot, one event, one individual, or one movement that might have been discovered through this Program.

(U) In general, while it is impossible to assess the full impact of unauthorized disclosures on U.S. intelligence capabilities, the damage is staggering, with some of the losses being permanent and irreversible.

(U) Foreign intelligence services and non-state groups such as terrorists capitalize on this public hemorrhage of U.S. secrets, which becomes a serendipitous "bonus" enriching the unclassified open source collection activities many of our opponents already perform.

(U) These unauthorized disclosures also have a chilling effect on cooperation, affecting both friendly governments and individual clandestine sources. To put it starkly, if we cannot be trusted to keep our own secrets, why should others share sensitive information with us?

QUESTION: 8. Do you have legal or constitutional concerns about the use of warrantless physical searches in the United States?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 9. To your knowledge, has the Administration ever used its commander-in-chief powers or the AUMF to justify warrantless physical searches?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

Questions for the Record

**FISA for the 21st Century -- July 26, 2006 hearing
U.S. Senate Judiciary Committee**

**Responses to Questions posed by Senator Dianne Feinstein
to
Director of the CIA, General Michael Hayden**

QUESTION: 1.a. Are there any intelligence programs carried out by your agencies, or otherwise within the intelligence community that you know of, that have not been briefed to the Congressional intelligence committees?

ANSWER: (U) Consistent with long-standing practice and the notification provisions of the National Security Act of 1947, CIA keeps the Congressional intelligence committees fully and currently informed of CIA intelligence activities through appropriate briefings. I defer to the Office of the Director of National Intelligence and the heads of the other elements of the intelligence community on whether there are any intelligence programs outside of CIA that have not been briefed to the intelligence committees.

QUESTION: 1.b. Did anyone in the Administration offer, grant, or otherwise provide in any way some sort of promise of immunity or offer of protection against civil or criminal liability to telecommunications or internet service providers or financial entities or any other company for their cooperation in any of the surveillance programs? If yes, under what legal authority?

ANSWER: (U) Operational information about the Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists' attempts to evade it. Accordingly, we cannot confirm or deny operational details of the Program in this setting. As you are aware, the operational details of the Program have been and continue to be reviewed by the oversight committees and, in certain circumstances, congressional leadership.

Questions for the Record

**FISA for the 21st Century -- July 26, 2006 hearing
U.S. Senate Judiciary Committee**

**Responses to Questions posed by Senator Patrick Leahy
to
Director of the CIA, General Michael Hayden**

QUESTION: 1.a. You and the President have talked about listening to phone calls involving suspected al Qaeda terrorists where one party to the conversation is overseas. Let's say the suspected al Qaeda terrorist is overseas, in Yemen, say, or Iraq, and the government is targeting his phone calls. That does not require a warrant under FISA or any other law, does it, even when he calls someone in the United States?

ANSWER: (U) In the mid-1970's, several federal circuit courts of appeals held that the President possesses the authority under the constitution to engage in warrantless searches and seizures – to include electronic surveillance – for the purpose of obtaining foreign intelligence information. The FISA in 1978 imposed a statutory requirement on the President to obtain a court order to conduct electronic surveillance in some situations unless he was otherwise authorized to do so by law. Those situations, as noted above, are dependent on factors such as the location from which the surveillance is carried out and the particular communications technology in question.

(U) Therefore, turning to the specific example in the question, the appropriate answer is: "It depends." While it is true that the constitution does not require a "warrant" to target the calls of a foreign terrorist overseas, the FISA may require the Government to obtain a court order. Whether it would depends on factors that we think are not relevant to the heart of the issue, such as the location from which the Government seeks to acquire the communications and the technology employed to complete the call.

QUESTION: 1.b. At least some of the time, what the President is talking about can already be carried out legally under FISA as written, isn't that correct?

ANSWER: (U) It is true that with respect to a single communication traversing the global communications infrastructure, the terms of Title I of the FISA would require the Government to obtain a court order to acquire it at some times and in some locations, and not at other times and locations.

(U) Current law is not agile enough to handle the threat posed by sophisticated international terrorist organizations like al Qaeda. This is because the FISA has not kept

pace with communication technology and was not designed for the types of threats we now face. As the failed UK airplane bombing plot shows, terrorism is still a real threat and FISA should be modernized to improve its effectiveness as a counterterrorism tool.

QUESTION: 2.a. You said at your press conference on December 19, 2005, that surveillance under the so-called Terrorist Surveillance Program is generally for “far shorter periods of time” than surveillance under FISA, and is “not designed to collect reams of intelligence, but to detect and warn...about attacks.” At our hearing on July 26, you indicated that the Terrorist Surveillance Program is used “when we are in hot pursuit of” international communications involving al Qaeda. Does warrantless surveillance under this program cease once the “pursuit” is no longer “hot” and if not, why not?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 2.b. What is the longest period of time that communications have been monitored under this program?

ANSWER: (U) Operational information about the Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists’ attempts to evade it. Accordingly, we cannot confirm or deny operational details of the Program in this setting, including the longest period of time that communications have been monitored under the Program. As you are aware, the operational details of the Program have been and continue to be reviewed by the oversight committees and, in certain circumstances, congressional leadership.

QUESTION: 2.c. What is the average time?

ANSWER: (U) Operational information about the Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists’ attempts to evade it. Accordingly, we cannot confirm or deny operational details of the Program in this setting, including the average length of time that communications have been monitored under the Program. As you are aware, the operational details of the Program have been and continue to be reviewed by the oversight committees and, in certain circumstances, congressional leadership.

QUESTION: 2.d. What if anything prevents the government from seeking an individualized warrant when surveillance continues beyond the “hot pursuit” stage?

ANSWER: (U) After September 11th, speed and agility were especially crucial in fulfilling the President’s constitutional obligation of protecting the Nation from further attacks. The Terrorist Surveillance Program targets communications only where one party is outside the United States and there is probable cause to believe that at least one

party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. FISA itself uses a "probable cause" standard.

Questions for the Record

**FISA for the 21st Century -- July 26, 2006 hearing
U.S. Senate Judiciary Committee**

**Responses to Questions posed by Senator Edward M. Kennedy
to
Director of the CIA, General Michael Hayden**

QUESTION: 1. Is the standard used by the NSA reasonableness or probable cause, in determining the targets for wiretapping under the NSA's warrantless wiretapping program? Has the standard ever changed from "probable cause" at any time, for any reasonable period, since September 11th?

ANSWER: (U) The Terrorist Surveillance Program is narrowly tailored to target for interception only communications where one party is outside the United States and there are reasonable grounds to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization. The "reasonable grounds to believe" standard is a "probable cause" standard of proof, *see Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("We have stated . . . that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'"). The Program has consistently employed this standard.

QUESTION: 2.a. What is the justification for a standard that is even broader than the current standard, which requires probable cause that one person involved in the communication is directly "affiliated with al Qaeda" or associated with al Qaeda." [The standard most recently articulated by General Hayden at the July 26, 2006 hearing before the Senate Judiciary Committee]?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 2.b. What would be the basis and legal standard to conclude that a U.S. person is "associated with" al Qaeda or an organization determined to be affiliated with al Qaeda under the proposed legislation?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 3.a. Members of the Administration have repeatedly claimed that the publicly announced program has saved an untold number of American lives. Why

did the Administration insist on a bill that would allow the authorization of a program that spies on even more Americans?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 3.b. Is this just another attempt to expand Executive authority even further, or does the Administration have specific, documented need to spy on far larger numbers of innocent Americans than are at risk under the current program?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 3.c. What are the Administration's justifications for such a broad program that far exceed [sic] the program described publicly by each of you in past statements and in testimony before this Committee?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 4.a. What is the legal definition of an "affiliate terrorist organization?"

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 4.b. Who makes the determination that an organization is one that is an "affiliate terrorist organization" to al Qaeda? What criteria are used?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 4.c. How quickly is such a determination made?

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 5. Will the Administration agree to report on the legal standards being used now? Obviously, the standards provided to Congress in 2000 have become outdated and, perhaps, obsolete.

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 6. The procedures required by FISA are often blamed for the Administration's difficulties in predicting and responding to 9/11. However, as has

been widely reported, the NSA intercepted statements on September 10th referring to the September 11th attacks, but these warnings were not translated until September 12th - too late to provide any warning of the devastation planned for New York and Washington, DC. In the five years since September 11th, the media has continued to report that intelligence agencies, including the NSA, do not have the ability to keep up with the translation demands of the war on terror.

QUESTION: 6.a. In your tenure at the NSA, what did you and others do to hire more translators of Arabic and other languages that are critical to fighting terrorism?

ANSWER: (U) The counterterrorism crisis and continuing military campaign have placed an enormous burden on NSA's population of civilian and military language and intelligence analysts. Supplemental funding has helped to expand the contract linguist population in several low-density crisis languages, increase analytic training across the extended SIGINT enterprise, immediately activate a civilian Cryptologic Reserve Program, and significantly expand the Military Reserve program. The Agency continues to need skilled linguists and analysts, and is aggressively pursuing qualified applicants.

QUESTION: 6.b. During your time at the NSA, was there a backlog in translating intelligence information? If so, what was the average amount of time between an interception that took place under surveillance and its translation?

ANSWER: (U) Yes, depending on the source of the information there could be time lags between when it was intercepted and when it was available for a linguist to review at NSA Headquarters. Given the wide differences in targets and the methods of communicating, it is very difficult to derive an estimate of an average time lag.

QUESTION: 6.c. To your knowledge, has there been an improvement in the translation backlog?

ANSWER: (U) As Former Director of the NSA, I appreciate the Senator's interest in improvement of the translation backlog. However, this question is most appropriately answered by the current NSA leadership. I will forward your question to the NSA and ask them to respond to you directly.

QUESTION: 6.d. If there was a backlog in translation, what impact did this have on your ability to protect America from future terrorist attacks?

ANSWER: (U) There is no reason to think the translation backlog had any effect on NSA's ability to help protect America from terrorist attacks. First, it is important to bear in mind that SIGINT is only one component of America's defense and it is highly unlikely, given the vague and fragmentary nature of terrorist communications, that a single piece of SIGINT will ever be able to prevent a terrorist attack. What SIGINT can do is work hand in glove with other intelligence agencies, the military, and law enforcement to enable key takedowns, as occurred recently in the UK, so that the details

of a plot can be uncovered through interrogation and forensics exploitation. That being said, the translation backlog can prevent the timely delivery of key information to NSA's customers and stall development efforts against new targets.

QUESTION: 6.e. What resources do you believe are required for the NSA to increase its translation efficiency to a level at which translation will not be an impediment to protecting America?

ANSWER: (U) NSA must have a robust hiring and contracting program for GWOT languages, with a particular focus on the identification and recruitment of high-caliber, clearable native speakers, and the agility to adapt to the constantly-changing needs of the terrorist target set. NSA will also need Human Language Tools to help focus efforts on the most lucrative leads, since it will never be possible to fully exploit all of the material that we have the capacity to collect. Finally, NSA needs a high-quality GWOT language training program to help our current linguists acquire the necessary skills to address this challenging target set.

Questions for the Record

**FISA for the 21st Century -- July 26, 2006 hearing
U.S. Senate Judiciary Committee**

**Responses to Questions posed by Senator Dick Durbin
to
Director of the CIA, General Michael Hayden**

QUESTION: 1. In your testimony you state:

The revolution in telecommunications technology has extended the actual impact of the FISA regime far beyond what Congress could have ever anticipated in 1978. And I don't think that anyone could make the claim that the FISA statute is optimized to deal with a 9/11 or to deal with a lethal enemy who likely already had combatants in the United States.

If the Foreign Intelligence Surveillance Act is not "optimized to deal with a 9/11," as you testified, why, almost five years after 9/11 and after we enacted and reauthorized the PATRIOT Act, has the Administration not previously requested changes in the law to "optimize" FISA?

ANSWER: (U) The consensus view in the discussions with Members of Congress was that it was unlikely, if not impossible, that more specific legislation could be enacted without compromising the Terrorist Surveillance Program by disclosing operational details, limitations, and capabilities to our enemies. Such disclosures would necessarily have compromised our national security.

QUESTION: 2. On January 25, 2006, over six months ago, Senators Reid, Kennedy and Feingold and I [sic] sent a letter to President Buss asking what changes in the law he believes are necessary to permit effective surveillance of suspected terrorists, and why these changes are needed. We still have not received a response to this letter, which I have attached to these questions. Please respond to the questions raised in our letter.

ANSWER: (U) The answer to this question is being coordinated with the appropriate entities within the Executive Branch and will be provided separately.

QUESTION: 3. It is somewhat unusual for the Director of the Central Intelligence Agency to testify at a hearing on warrantless surveillance of Americans in the United States. Did you appear at this hearing solely because of your role in the

development of the NSA's warrantless surveillance program? Can you assure me that the CIA is not engaged in any surveillance of Americans inside the United States?

ANSWER: (U) I came at the invitation of the Committee Chairman. Regarding whether or not CIA is engaged in any surveillance of Americans inside the United States, Section 2.4 of Executive Order 12333 prohibits the CIA from engaging in electronic surveillance inside the United States except as a countermeasure to hostile electronic surveillance or for training and testing purposes, which are done under rules approved by the Attorney General. The CIA operates in conformance with this Executive Order prohibition and does not pursue electronic surveillance inside the U.S.

QUESTION: 4. We met in my office in May 10, 2006. At the time, you told me that Chairman Specter's National Security Surveillance Act was considerably broader than the President's warrantless surveillance program. Is that still your opinion?

ANSWER: (U) Yes, because S. 2453 defines electronic surveillance program as a program to engage in electronic surveillance to gather foreign intelligence information or to protect against international terrorism or clandestine intelligence activities by obtaining the substance of or information regarding electronic communications sent by, received by, or intended to be received by a foreign power, an agent or agents of a foreign power, or a person or persons who have had communication with a foreign power seeking to commit an act of international terrorism or clandestine intelligence activities against the United States. This makes S. 2453 broader than TSP because it covers many types of electronic surveillance.

QUESTION: 5. On January 23, 2006, you gave a speech at the National Press Club on the NSA's warrantless surveillance program. You said, "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States and we would have identified them as such."

QUESTION: 5.a. What is the basis for your conclusion?

ANSWER: (U) According to the 9-11 Joint Inquiry report, after the meeting of al-Qaeda operatives in Malaysia, Khalid al-Mihdhar entered the United States in January 2000. Thereafter, the Intelligence Community obtained information indicating that an individual named "Khaled" at an unknown location had contacted a suspected terrorist facility in the Middle East. It was not until after September 11, 2001 that the FBI determined from domestic toll records that these contacts had been made from future hijacker Khalid al-Mihdhar while he was living within the domestic United States. Because the Terrorist Surveillance Program is focused on precisely this type of communication, i.e., communications where at least one party is outside the United States and there are reasonable grounds (probable cause) to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization,

the Program would have identified a contact between a number in the United States with a suspected terrorist facility in the Middle East.

QUESTION: 5.b. Did the government have legal authority before 9/11 to conduct electronic surveillance on the calls and e-mails of suspected terrorists?

ANSWER: (U) Yes. On January 19, 2006, the Department of Justice released a 42-page paper setting out a comprehensive explanation of the legal authorities supporting the Program. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006). That paper reflects the substance of the Department's legal analysis of the Terrorist Surveillance Program. In addition, the Intelligence Community has conducted electronic surveillance for years under the authority of Executive Order 12333 and its predecessors. Executive Order 12333, which was issued by President Reagan in 1981 and is currently in effect, governs the conduct of intelligence activities applicable to all intelligence agencies, and also identifies specific responsibilities for each of the agencies. The overall scheme of the Order is premised upon the determination that the "[c]ollection of [foreign intelligence information] is a priority objective and will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable laws and respectful of the principles upon which the United States was founded." Primary among these principles is the need to respect the rights of U.S. persons.

QUESTION: 6. In your January 23rd speech, you said the NSA program "is not a drift net over Dearborn or Lackawanna or Freemont, grabbing conversations, that we then sort out by these alleged keyword searches or data-mining tools or other devices that so-called experts keep talking about." On the other hand, Homeland Security Secretary Michael Chertoff has said the NSA is "culling through literally thousands of phone numbers" and "trying to sift through an enormous amount of data very quickly." Moreover, USA Today reports that the NSA has collected the phone call records of tens of millions of Americans into what one source in the story called "the largest database ever assembled in the world."

QUESTION: 6.a. Does the NSA maintain such a database?

ANSWER: (U) The Administration has neither confirmed nor denied the accounts referenced in the USA Today story. My January 23, 2006 speech was referring to the TSP program discussed by the President in his December 17, 2005, statement.

QUESTION: 6.b. Are there other NSA programs, besides the warrantless surveillance program, that comb through phone calls and e-mails to pick out communications of interest?

ANSWER: (U) It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress

concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and congressional leadership.

QUESTION: 7. On July 7, 2006, Deputy Defense Secretary Gordon England issued a memo (the England memo) stating that all Defense Department personnel are required to abide by Common Article 3 of the Geneva Conventions. On July 18, 2006, when Attorney General Gonzales appeared before the Judiciary Committee, he said that all U.S. personnel, including intelligence personnel, are now required to abide by Common Article 3. Do you agree with Attorney General Gonzales?

ANSWER: (U) Yes.

QUESTION: 8. The England memo directs DoD leadership as follows: "You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices and procedures under your purview to ensure that they comply with the standards of Common Article 3?"

ANSWER: (U) A review at CIA of relevant directives, regulations, policies, practices and procedures began shortly after the *Hamdan* decision was announced without the need of a memo directing such a review.

QUESTION: 9. Are all CIA directives, regulations, policies, practices and procedures required to comply with the standards of Common Article 3?

ANSWER: (U) CIA directives, regulations, policies, practices and procedures required to comply with U.S. law. They therefore may not authorize conduct that would violate U.S. obligations under Common Article 3 of the Geneva Conventions.

QUESTION: 10. What steps have you taken to implement the *Hamdan v. Rumsfeld* ruling on Common Article 3? Have any specific interrogation techniques been prohibited as a result of the *Hamdan v. Rumsfeld* ruling on Common Article 3?

ANSWER: (U) I am not going to discuss any CIA interrogation techniques in an unclassified letter. I can confirm for you that CIA will comply with U.S. law, including U.S. obligations under Common Article 3 of the Geneva Conventions.

QUESTION: 11. What steps have you taken to implement the Detainee Treatment Act of 2005? Have any specific interrogation techniques been prohibited as a result of the Detainee Treatment Act?

ANSWER: (U) I am not going to discuss any CIA interrogation techniques in an unclassified letter. I can confirm for you that CIA will comply with U.S. law, including the Detainee Treatment Act.

QUESTION: 12. As a Senate Armed Services Committee [sic] on March 17, 2005, then-CIA Director Porter Goss described waterboarding (the use of a wet towel and dripping water to induce the misperception of drowning) as a “professional interrogation technique.” Do you agree with that characterization?

ANSWER: (U) I have read the transcript of then-Director Goss’s appearance before the Senate Armed Services Committee on March 17, 2005, and I believe interpreting the exchange between Director Goss and Senator McCain on page 14 of the transcript as Director Goss describing waterboarding as a professional interrogation technique is a misreading. Senator McCain had asked Director Goss whether the Director believed there were sufficient policy guidelines in place for interrogations. As Director Goss was answering, Senator McCain interjected, “Well, some of those policies at one time were to make one have the prisoner feel that they were drowning.” Director Goss responded, “You’re getting into, again, an area of what I will call professional interrogation techniques, and I would like. . .” Therefore, what Director Goss did was to advise the senator that he was not going to discuss professional interrogation techniques in an open session. That is, he was not going to respond to questions on techniques, including whether any specific method was an interrogation technique. I too will not discuss what CIA’s interrogation methods were or were not in an unclassified letter.

QUESTION: 13. Does waterboarding constitute torture or cruel, inhuman or degrading treatment?

ANSWER: (U) You are asking for a legal judgment, for which I respectfully refer you to the Department of Justice.

QUESTION: 14. Is waterboarding humane?

ANSWER: (U) You are asking for a legal judgment, for which I respectfully refer you to the Department of Justice.

QUESTION: 15. Is waterboarding consistent with Common Article 3 of the Geneva Conventions?

ANSWER: (U) You are asking for a legal judgment, for which I respectfully refer you to the Department of Justice.