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United States Senate

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August 29, 2007

The Honorable J.M. McConnell
 Director of National Intelligence
 Washington, D.C. 20511

Dear Director McConnell:

I am writing to seek clarification on representations that you made to me and other members of Congress during our discussions on passing a temporary Foreign Intelligence Surveillance Act (FISA) fix that could garner strong bipartisan support prior to the August congressional recess.

Allow me to be direct and to the point: at a critical juncture in our negotiations, you gave assurances that were not fulfilled, and made agreements that were not kept. No explanation has ever been provided to me then or since as to why you did not carry out these commitments. As a result, I and others involved in these important and intense FISA negotiations are left to question whether the negotiations were carried out in good faith or whether your commitments were overruled by others at the White House or within the Administration.

The net result is that a realistic opportunity to pass the stop-gap authorities the Intelligence Community needed with overwhelming bipartisan support was lost. Until these discrepancies are resolved, a dark cloud will continue to linger over the events preceding the Senate votes of Friday, August 3rd. Looking ahead, as the Committee plans to consider a more lasting FISA bill, I need to be assured that there will not be a repeat of the past. Too much is at stake for our collective efforts to be undercut by doubt and suspicion.

I do not raise this matter lightly. But each of us must have confidence in what the other one says and commits to, especially on matters of national security. I know that you are strongly committed to carrying out your duties as Director of National Intelligence. I have been a vocal supporter of yours and have publicly lauded your qualifications to lead the Intelligence Community. And I share your view that FISA needs to be reformed and brought up to date.

As you know, I along with Vice Chairman Bond wrote to you and others in the Administration on March 23rd of this year requesting a FISA bill and the Committee held numerous hearings on the proposed legislation with the hope of passing modernization legislation before we adjourned for the year. I even agreed to hold these hearings despite the Administration's continued stonewalling in providing the Committee long-overdue documents critical to our understanding and oversight of the President's warrantless surveillance program. In late June, I personally called the Vice President offering a compromise agreement to break the impasse over documents and access so that we could proceed to an expeditious markup FISA and carrier liability legislation.

In order that we may move forward on FISA legislation in a constructive and collaborative manner, it is important that I receive from you a detailed and responsive explanation to the discrepancies contained in the following chronology:

On Thursday, August 2nd, at approximately 12:00 noon, my staff sent your staff a revised FISA bill reflecting DNI input to the July 31st version of my proposed bill. Later that day, at about 2:00 pm, you and I spoke by phone to discuss the bill. I asked you directly what specific changes to the bill would have to be made in order to make the bill acceptable, if not ideal, to you and a bill that you could publicly endorse. You responded by saying that three changes were required before you could endorse the proposal: (1) clarity that no individualized court warrants are required for foreign targeting; (2) drop the "terrorism" limitation on the foreign intelligence collection authority; and (3) eliminate the provision that would require the Attorney General to submit to the Foreign Intelligence Surveillance Court (FISC) his guidelines for when "significant contacts" between a targeted foreigner and a U.S. person would necessitate an individualized court warrant against the U.S. person. You described this third issue as a "poison pill."

During our conversation, you said you would, using my latest FISA bill proposal as a baseline, send back to me a revised version of the bill making these three changes and, furthermore, that you would agree to the six month sunset included in the bill. You also agreed to the point I made during our conversation that it was essential for you to publicly endorse the agreement as sufficient in giving the Intelligence Community the interim authorities needed, even if it is not your entirely preferred legislative formulation, in order for the bill to pass on the Senate floor with broad support.

House Intelligence Committee Chairman Reyes informed me that you had an almost identical conversation with him just before and after our call in which you listed the three changes needed to gain your endorsement.

Later in the day, at approximately 5:30 pm, a meeting was convened in Speaker Pelosi's office attended by the Speaker, House Majority Leader Hoyer, Chairman Reyes, Senate Majority Leader Reid, Senator Levin and myself. In a speaker phone call with the members, you reiterated the same points made earlier in separate phone calls to me and Chairman Reyes and that with these limited changes you would agree to support the revised bill along with a six month sunset provision.

During this conversation, you also assured the assembled members that you were independent of the White House's direction on this matter and that you were authorized to negotiate the deal you felt would give the Intelligence Community the required authorities to address collection shortfalls while a more lasting bill was crafted and passed into law.

You stated in the conversation that you realized that the collection order must come from the FISC and not the Attorney General, a concession you were making to the reality that the companies may not promptly cooperate without a court order given concerns over pending litigation.

You also told members that if they dropped the "significant contacts" guidelines provision your concern that the FISC may feel it is obligated to issue individualized warrants rather than a one-time order based on the reasonableness of the guidelines for determining targets are foreign would go away. In other words, your three needed changes were actually two.

You specifically stated to the members that you could agree to the latest congressional FISA bill offer if the "terrorism" only limitation and the provision requiring that the "significant contacts" guidelines be part of the submission to the FISC were removed.

All of the assembled members agreed to accept these changes and felt they reached an agreement with you on the scope and content of the FISA bill. You told members that you would need 30 minutes or so for your staff to make these two changes and again agreed to use the latest congressional offer as the baseline document.

In response to separate remarks made by Leader Hoyer, Chairman Reyes, and me, you stated that you could publicly endorse the bill as modified, and in response to the question from Leader Hoyer you said that the modified bill would be a "7" on a scale of 1-10, with "10" representing ideal.

After a half-hour passed without receiving either the revision to the bill text or a call from you, the assembled members called you and were told that you were on the phone with the White House. When you returned their call, in the vicinity of 7:00 pm, you stated that you were "under enormous pressure from the other side" not to negotiate any concessions from your latest offer. You assured members that you would hold firm however, but that you needed additional time to work on the language that would be passed back to members.

The revised bill forwarded by your office later in the evening of August 2nd was not what you promised to members. Specifically:

- the bill passed back to members used the earlier DNI bill as the baseline for changes, not the most recent congressional proposal as promised;
- the bill did not include a six month sunset provision as promised;
- the bill allowed for a lengthy emergency collection prior to the Attorney General's submission to the FISC of his foreign targeting guidelines (for 90 days vice the 15 days included in the congressional bill) and allowed the collection to continue ostensibly for the entire six months contemplated while a denial of the court was under appeal;
- the bill dropped the requirement on the Attorney General to have any guidelines on "significant contacts" between foreign targets and U.S. persons;
- the bill dropped the Inspector General review provision;
- the bill changed the definition of "electronic surveillance in the FISA; and
- the bill included a number of other language changes of concern to members.

I and other members were left with deflating realization that either the negotiations were not carried out in good faith or that the agreement you had reached with congressional leaders a mere three hours earlier had been overturned by pressure from the White House and/or others.

- Why did the bill you sent back on the evening of August 2nd not comport with what you promised members by phone?

- Why did the bill not use the most recent congressional proposal as a baseline for the two agreed-to changes as you promised?
- Why did the bill include other changes beyond the scope of those discussed with members?
- Why did the bill not include a six month sunset provision as you promised?
- To what extent did you submit the agreement you reached with the members to the White House, other Administration officials, and Republican members of Congress for their concurrence?
- In what respect was the agreement you reached with the members altered or overruled by these subsequent discussions?
- Why did you or a senior member of your staff not contact the members with whom you reached the agreement and provide them with an explanation as to why the bill sent back was not what was promised three hours earlier? To the best of my knowledge, none of the members who participated in the discussions were called by you or a member of your staff on August 2nd, or since then, with an explanation for these discrepancies.

The next morning, Friday, August 3rd, I joined with Senator Levin and others to take the bill you sent the evening before and make the changes, such as adding the six month sunset provision, that we believed were agreed to the previous evening. Our hope was to use the bill you provided and modify it in a way that was consistent with our discussions with you and that could garner broad bipartisan support.

An agreement was reached between the Senate leaders on Friday to hold separate votes on the (Senator) McConnell-Bond FISA bill and the Rockefeller-Levin FISA bill. The McConnell-Bond bill had been filed on August 1st and was not the proposal you forwarded on the evening of August 2nd. And, to reiterate, the Rockefeller-Levin bill was your August 2nd bill, modified to incorporate the tenets of the agreement reached but not carried out less than 24 hours before.

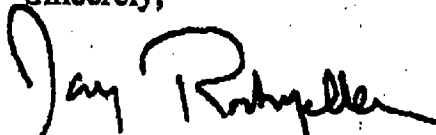
At 4:39 pm on Friday, *your office issued a public statement* urging that the Senate support the legislation you provided the night before; in other words, *your August 2nd bill*, not the August 1st McConnell-Bond bill.

Later that evening, you arrived off the Senate floor during the debate of the two bills and you issued a second statement, amending your 4:39 statement, saying that you could not support the Rockefeller-Levin modified DNI bill and urging Senators to support the bill sponsored by Senators McConnell and Bond.

- Why did your statements of August 3rd change from initially calling on members to support your August 2nd bill to then calling on members to support the August 1st bill sponsored by Senators McConnell and Bond?
- In what specific respects was the Rockefeller-Levin modified DNI bill inconsistent with the agreement you reached with members by phone on August 2nd?
- In what specific ways was the Rockefeller-Levin modified DNI bill unacceptable to you?
- Were you requested or directed by any official to publicly urge the defeat of the Rockefeller-Levin modified DNI bill? If so, by whom?

We both share a common goal of improving our intelligence capabilities in ways that will strengthen our Nation's security. Achieving this goal requires close cooperation between the executive and legislative branches of government that is built upon trust. We can ill-afford an environment where commitments made are not kept. I look forward to your response to the questions I've posed in a timely fashion so that we can clear the air and move on in a constructive manner.

Sincerely,



John D. Rockefeller IV
Chairman