

**BACKGROUND CONFERENCE CALL WITH SENIOR ADMINISTRATION
OFFICIALS ON THE CONSEQUENCES OF ALLOWING THE PROTECT AMERICA
ACT TO EXPIRE**

February 22, 2008 - 6:00 P.M.

MR. ROEHRKASSE (Department of Justice): This is Brian. Thank you for joining us late in the evening. We figured it might be helpful to hold this conference call to provide you with additional background information and respond to your questions in regards to the letter that was sent out by the Attorney General and the Director of National Intelligence.

Again, this call will be on background, so anything you hear on this call can be attributed to a Senior Administration Official. So I would ask that you identify yourself before you ask a question and when you're not asking a question if you could keep your phones on mute since we're on an open line here. I know you've all read the letter so why don't we don't we just go ahead and begin with questions.

QUESTION: Brian?

MR. ROEHRKASSE: Yes.

QUESTION: I suppose the first question is what can you do to help us understand the nature of the gaps and missed intelligence, which prompted the letter in the first place.

(Interruption to proceedings.)

SENIOR ADMINISTRATION OFFICIAL: Once the act expired -- before the act had expired, we were concerned that we would have problems in gaining the same level of cooperation that we had before while the act was in effect. And the Attorney General and the Director of National Intelligence had written, I believe that letter's on February 5th, raising those concerns.

When the act expired, it turns out that some of the private companies either delayed or refused to comply with our request to initiate new surveillances under existing directives. So these are directives that were issued prior to the act's expiration. These were the directives that in all the public discussion everyone had talked about, well, you could just go up on new terrorists who come to your attention, if there's a new phone number, if there's an existing directive you could just add to that because they continue on past the expiration of the act.

While as we said, and Senior Administration Official have both testified too, we think we had strong arguments on those points and we've made those strong arguments. Private companies are very concerned about the expiration of the act. Not all of them see it the way that we do. Therefore, that has prevented us from initiating those new surveillances over the past week.

QUESTION: More than one carrier has refused to comply in the past six days?

SENIOR ADMINISTRATION OFFICIAL: We've had issues with more than one over the past week. We are trying to mitigate the problem and we're hopeful that we'll get to a place where we don't have a problem anymore, so, Senior Administration Official, do you have anything to add on that?

SENIOR ADMINISTRATION OFFICIAL: Just to say that we have acted back and forth with the providers. As that said, before the expiration of the Protect America Act, we expressed that there would be that providers would have grave concerns on a number of different products.

If you look at the letter that went out today, we Cite sort of four different areas of uncertainty and these are areas of uncertainty that, I think, are self- evident to anybody if they're looking ahead at what might happen after the PAA expires; but also areas of uncertainty that were about which carriers expressed serious concerns. And sure enough, since the expiration we've been talking to a number of the carriers and they have expressed all these concerns and others. And, as a result of the expiration as the letter lays out, our requests for new surveillances, some have been delayed and some have just not been complied with because of the fact that the legislation expired.

QUESTION: This is Pam Hess with AP. It seems that the simple remedy to this is to agree to an extension of the Protect America Act, which you guys have sort of resolutely blocked. Why not do that if this is so grave, why not put the band-aid on that's needed?

SENIOR ADMINISTRATION OFFICIAL: I mean, the director has spoken to this and so has the Attorney General and I think that the President has also. We are looking at this with a flashlight that under, you know, this problem with this act on this issue, of course what the director has spoken about is the fact that our capabilities have been impaired in a number of areas as a result of the failure to address the retroactive liability protection.

As you know this has been going on for over two years. The House actually passed its FISA modernization bill for the first time in 2006. There's been discussions for two years. We had six months under the Protect America Act. We had a 15 day extension. So while we're very concerned about this as the letter lays out, the director is also very concerned about the fact that this has not been addressed in over two years. You can go back to 2006 and give you all the sites. So everyone -- this seems to be treated in the public discussion as this is a new 15 day problem or something. The concern about our need for the private sector to help protect the nation goes beyond just the Protect America Act.

QUESTION: The calculation that you guys are making right now is that you would rather have this law expire and shoulder the burden of whatever this intelligence problem is than allow Congress to sort of get away with doing whatever it is they're doing. It seems that -- I have had a hard time taking it really seriously if you guys are willing to have this gap when you can stop it.

SENIOR ADMINISTRATION OFFICIAL: Well, I guess I would say that's ultimately decisions above my grade to weigh this gap versus the impairment that we suffered and the continuing degradation that we suffered over the past two years to try to get this addressed and I'll probably

just pass on whose fault it is and all those things. That's more a policy and issue for the Hill and the President. But we've expressed over and over again since 2006 the need to address this. You can read the director's statement of, I think, August 2nd or August 3rd about his need to have this addressed in the summer; and the fact that it wasn't addressed and his understanding that it was going to be addressed in September of 2007 because of the urgent need to address it. And here we are discussing it, yet again, in February of 2008. So we've always said that it was urgent and so that's kind of where we are and we hope that -- we don't see the reason why things can't move forward at this point.

QUESTION: Rob Hendin with CBS. Can you tell us about what kind of protections these companies got under the Protect America Act? And can you give an overt of how many companies we're talking about are helping in general? Is it dozens or hundreds?

SENIOR ADMINISTRATION OFFICIAL: Well, I'll answer the first part of that. In terms of the Protect America Act immunity provisions, you can look at the statute and it makes it clear that any company that renders assistance to the government pursuant to the authority of the Protect America Act is immune from liability for lawsuits (inaudible.) The concern, however, is that a concern on the part of some of the providers is that maybe that immunity is no longer viable now the PAA is expired. We don't believe that's the case. We believe that there's a very strong legal argument that it does continue, but that's something that the attorneys for various companies that are assisting us are looking closely at because they have (inaudible). Their (inaudible) is to make sure they dot every "i" and cross every "t" and don't subject themselves to liability, especially given the backdrop of the fact that there are a number of companies out there facing potentially crushing liability in these lawsuits that continue to exist.

QUESTION: This is Siobhan Gorman with the Wall Street Journal. What concerns are you hearing from them specifically? Why would they be worried about lawsuits? I mean, what it is that you're asking them to do that would raise these concerns because in speaking with others it sounds like the nature of their interests is what they're concerned about, not necessarily the fact that there's no liability for protection of their (inaudible.) Why are they worried about liability?

SENIOR ADMINISTRATION OFFICIAL: First, on the nature of the requests, the nature of the requests are directly what is specified in the statute, so if there's some suggestion that -- I've never heard any suggestion that we're making some request that is abnormal or outside the statute or those types of things. I mean, the statute lays out very directly what we can request in a directive in terms of assistance and in terms of the procedures; and we're following the procedures that have been approved for foreign targeting. Those procedures were approved in January by the FISA court. So I've not heard that request that something is outside the statute or novel.

QUESTION: Why would they be concerned about liability at all?

SENIOR ADMINISTRATION OFFICIAL: Well, I guess first hand, they have seen companies who were assured of legality by the Attorney General of the United States be sued for billions of dollars. So even though everyone seems to agree that our requests can continue after the expiration of the act and that seems to be the view of many people, certainly presented in

Congress, and you've seen the transcripts of those discussions that there's no problem because things can just continue on, they have a different perspective given what they see happening out there and the way it works in terms of the ability to sue and what that would mean for them.

QUESTION: And why can't you just compel them? I mean, you should have the same ability to compel them because it's in compliance with a (inaudible) order as you mentioned?

SENIOR ADMINISTRATION OFFICIAL: Yes, keep in mind that there is a mechanism to compel. There's a mechanism in the PAA. Now there is a question as to whether that compulsion mechanism remains viable after the expiration of the PAA. Once again, we think that it does and we think that the right argument is that that mechanism continues to apply even after the expiration of the statute. But keep in mind what compulsion means. It means we have to litigate that issue. It means we have to go to FISA court and go back and forth in pleadings and litigation. That takes time; and during the time that we're going through that litigation we're not doing the surveillance that we think we need to do.

QUESTION: Why can't you just get a warrant from the FISA court if there's such, sort of, clear continuation (inaudible) you were doing before? I mean, everybody has said that can be done within minutes. Why is that? What's the hold-up there?

SENIOR ADMINISTRATION OFFICIAL: Actually that's laid out pretty clearly in the letter; that being the reason why that's not a sufficient substitute for the PAA authority.

QUESTION: No, but in these specific instances, why has the FISA warrant not been an option?

SENIOR ADMINISTRATION OFFICIAL: Well, I'm going to take it out of the specifics of any particular situation, but the point is to get FISA we need to be able to show probable cause. That's a Fourth Amendment standard that we have to meet. And their surveillances of overseas targets are legitimate targets for surveillance in which we might not be able to reach the probable cause standard. And we shouldn't have to. That's the Constitutional standard that applies for the United States, not overseas. And so there will be surveillances that we'd want to get under the PAA that we couldn't get via FISA. Also, even though people say it takes just minutes to get emergency authority under FISA, that's not the case.

You've got to put together probable cause because the Attorney General, before he authorizes or actually grants emergency authority for FISA, has to find probable cause that the target of that surveillance is a foreign and (inaudible) to foreign power. Those facts have to be assembled. Analysts and attorneys in the National Security Division have to put together that showing; has to be given to the Attorney General or the Deputy Attorney General or to me, the Assistant Attorney General, and we personally have to find that that standard is met. That is not something that initially just happens in minutes. At times it can, but not necessarily. And for the -- to have the, sort of, agile, you know, type of surveillance program that we need to run down foreign terrorists, we don't want to have to rely on going through that process every time we want to go up on surveillance.

SENIOR ADMINISTRATION OFFICIAL: Yes, let me add; that's perhaps one of the greatest

red herrings that his out there. I think Representative Hoekstra in one of his letters actually released the full context of that quote that is quite often repeated about the matter of minutes; and I would refer people to that letter for the full context of exactly what was said.

But let's be really clear about this few minutes quote that is out there. I suppose there is a situation in the greatest life and limb danger to the nation where the DNI could pick up the phone to the Attorney General directly and get the Attorney General to approve an emergency authorization on a specific instance. I would not think that that is a daily process that is really the example of how the emergency authorization works, in fact, as a general matter. Nor is it a process that we can rely on to process all of these in the sense that we have lots of other FISA things to go and the more that we put into this emergency authorization, that pushes other FISAs to not get done. And Congress has been very critical of us about the fact that FISA's lower down in the priority list; never gets processed because there's always something ahead of them in queue. There's always emergency authorizations that have to get done.

So I know that there's this quote out there about a few minutes. That doesn't recognize the fact that just this morning I was sitting with the DNI, with him personally signing stack after stack after stack of papers. So it's not quite the process that it's portrayed to make it from the analyst identifying something that's an emergency, making it up through their chain of command over the to the Department of Justice. The other part of this that everyone does not mention is this is a very serious thing for Senior Administration Official to authorize this. If we get the probable cause wrong; if it is a U.S. person, there are things under the statute that kick in in terms of notification and other processes. Now those may not apply to a foreign terrorist overseas, but it is not something that is done lightly to just guess at the probable cause. That showing has to be made up front and the Department of Justice, I can assure you, takes it very seriously.

SENIOR ADMINISTRATION OFFICIAL: I think it's important to also sort of bring this back to the debate that we went through at all the hearings last year and the concern about the intelligence (inaudible) that was addressed by the PAA; and that intelligence gap was a direct result of trying to use FISA to use satisfy our surveillance needs again foreign intelligence targets overseas. And if we go back to relying on FISA we can expect to see that same intelligence gap.

SENIOR ADMINISTRATION OFFICIAL: And from the intelligence perspective, we have to pull our operators and linguists off task because within 72 hours, we have to put together the FISA probable cause package. So this gets right back to the debate this summer: Do you want us to pull our operators off lines to prepare FISA probable cause packages to meet Fourth Amendment standards that should not apply overseas?

QUESTION: (Inaudible) applied for any types of warrants this week; how many?

SENIOR ADMINISTRATION OFFICIAL: Sorry, I didn't hear the question. What was that?

QUESTION: How many FISA warrants have you guys applied for this week?

SENIOR ADMINISTRATION OFFICIAL: That's classified. We come out with aggregate

numbers at the end of year, the year after. But I think that's about as specific as we get. The number of FISAs in any given week is not something that we disclose.

QUESTION: Well, can you at least say whether you applied for any in this week's period?

SENIOR ADMINISTRATION OFFICIAL: I think what you can look at are the numbers for the last year, which I guess is 2006, and I want to say it was somewhere in the range of 2,300 or something. Don't quote me on that. But I think if you look at that number for that year and there's been no indication of the level of activity with the FISA court has greatly reduced, I think you can assume that there have been some FISAs this week.

QUESTION: Again, so if this is so onerous why wouldn't it be worth it to just extend the Protect America Act for a couple weeks because it's not like there aren't people working on a new bill, it's just that it isn't done yet. So I still don't understand why if this is so important, why, at this point, if you're seeing a problem why there wouldn't be support for extending the Protect America Act for a couple more weeks.

SENIOR ADMINISTRATION OFFICIAL: Keep in mind a couple things: One, there is a bill. There's a very strong bill that passed with a strong, bipartisan majority; well-thought through with a very thoughtfully written report by the Senate Intelligence Committee and that was really the result of months of back and forth between the different committees up there with the engagement of the intelligence community; and I think a very strong piece of legislation. You know, from our perspective, not perfect, but very strong and balanced. That's there. That's to be considered and the House can act on that. And also, let's not forget, the House, itself, voted down a proposed 21 day extension.

QUESTION: But that still doesn't explain why the administration wouldn't support an extension of the Protect America Act if you guys are really running into these big problems.

SENIOR ADMINISTRATION OFFICIAL: Well, don't forget that we already did. I believe the President agreed to, it was a 15 day extension back at the beginning of this month, and so we've already done it once.

QUESTION: But why not do it again if it's really creating these critical problems?

SENIOR ADMINISTRATION OFFICIAL: Well, I think our concern is we're just going to be, sort of, going into the same pattern over and over again. And this is not good for us. It's not good for us to be operating with this uncertainty and we have a lot of people at various levels of our operations whose operations or routines all depend on the current regulatory and legal scheme. And the longer that this is temporary the more disruptive that is to our operations. So we have a strong interest not just the providers who are suffering from these uncertainties, but the operators themselves. We definitely want to have some certainty so we can start putting the training in place, the regulations in place, and the procedures in place to make this a fully effective program. And the longer that we're just operating on temporary authorities, the harder it is for us to do our jobs and the longer it's going to be before we get to where we're really up and humming with this new authority.

QUESTION: It's Pete Williams with NBC. Other than sending this letter, what is the administration doing to try to persuade the House to turn around on this? Are you guys working the phones constantly? Is the Attorney General doing that? Is there a full court press? What's being done there?

SENIOR ADMINISTRATION OFFICIAL: You know, I'm hesitating because I'm not sure of the exact state of play of everything that's being done over here, but I can tell you that we have been reaching out. The Attorney General has been reaching out over the last few weeks and talking to members. We have been working with staff; answering questions; providing guidance. So I think that at a number of different levels we have been working with Congress on this and we certainly stand ready to assist in any way possible and we've done that throughout this process.

QUESTION: And why didn't a representative office from either the DNI's office or DOJ's office go to the meetings this week that were being held in Congress?

SENIOR ADMINISTRATION OFFICIAL: I think there was one meeting that we were invited to today. I think it was a Congressional only meeting yesterday. I saw some press releases on it. I think there was one meeting this morning and it was portrayed, at least in some of the press releases that we saw, as some type of pre-staff conference discussion to reach discussions on FISA reform and compromises on FISA reform. Obviously you know there's intense disagreement on the Hill in terms of how to proceed and whether a conference is necessary and which way to go.

So from an intelligence community perspective, while we're always happy to engage in technical discussions, answer questions, and we've done that for many, many months we engaged in hundreds, if not thousands of hours of discussions with the Senate every single day almost in the six month period, in a particularly intense period in the last three or four months, today's discussion was there's just a huge process disagreement about this morning's meeting and whether there should be these type of pre-conference staff discussions on a conference that hasn't been agreed to. So we were kind of in the middle of that process disagreement up there and that process needs to work itself out. I mean, we stand ready to assist but we certainly didn't want to be perceived as engaging in conference discussions that hadn't been agreed to.

MR. ROEHRKASSE: We'll take two more questions.

QUESTION: One thing on the nature of this lack of cooperation (inaudible) that you're hopeful that you'll be able to work it out. So, I mean, is this a temporary issue or you can you give us a better sense for what the challenge is here with the level of cooperation from providers?

SENIOR ADMINISTRATION OFFICIAL: Hope it's temporary; trying to work it out; may get better; may get worse. As the letter says, we're hopeful that our efforts will be successful but others have indicated that they may cease. So this is a, there's no doubt about it, it's a fluid situation and the Department of Justice has done an incredible job working very long hours since the act's expiration, along with the intelligence community in supporting us to try to mitigate issues, to try to gain the cooperation that we need to give the assurances and other things. But

ultimately there are a lot of other factors which we depend on these folks to help us. While there is, I guess, a litigation option in our experience that turns out to be a very lengthy time period of litigation and at the end of the day it's usually helpful when people can reach a mutual agreement rather than litigate. I don't think people would wish litigation on anyone.

SENIOR ADMINISTRATION OFFICIAL: Just one thing I'd like to add, when we say that they're not cooperative, we're not trying to imply that there's any bad faith in anybody's part here; rather that attorneys for these companies are taking a look at very complicated issues that are high stake issues for them. Keep in mind, they're looking at this in the context of some serious lawsuits that are out there (inaudible) billions of dollars (inaudible) earlier (inaudible) FISA provided the government. So we're not implying that they're exercising bad faith. It's just that they are not complying at this point and just to make it very clear (inaudible) this call about what we're missing. And the bottom line is that there are -- we have made requests for surveillances since the expiration of the Protect America Act that as of this moment are not satisfied because of the uncertainty caused by the expiration of the act.

MR. ROEHRKASSE: One more question.

QUESTION: Keith Pruitt (inaudible.) You're talking about the way the attorneys of the companies are scrubbing these requests now and are mindful of the lawsuits, but didn't have those same concerns about existing laws for about five or six years after September 11th? What's changed in their posture that where (inaudible) used to be good enough but if another bill passed with prospective liability (inaudible) provision you think they wouldn't believe you and they would fight you in court rather than cooperate whereas in the first six years they cooperated with asking few questions along the way? What's the difference between then and now in terms of the companies' posture? What counts for the difference, I guess would be the question.

SENIOR ADMINISTRATION OFFICIAL: Well, I can't speak for the providers, but I would imagine just from looking at it as an observer that it's not (inaudible) that immunity has been a highly debated matter and (inaudible) they do not have immunity for those six years and I'm sure that if I were in their shoes as an attorney in a general counsel's office, that wouldn't be lost on me. And it wouldn't be lost on the objectives of the company that have to answer to the shareholders.

QUESTION: Was it hard to get them to cooperate for the first six years after the September 11th attacks (inaudible)?

SENIOR ADMINISTRATION OFFICIAL: I missed the question.

QUESTION: I'm just wondering what changed between the first several years of counterterrorism surveillance and now. You're describing the posture they have now but before when you came to them and said you need help, we need to surveil (inaudible) same shareholders and the same resistance from the companies to cooperate say in 2002, 2003, 2004, 2005?

SENIOR ADMINISTRATION OFFICIAL: Well, I think we're comparing two different things:

Protect America act, a newly passed statute by Congress and its recent expiration and the uncertainty associated with that in the context of, I don't know, I think it's 40 lawsuits, DoJ could give us the exact figure, and the context of all these being played out in a very public manner with people frankly seeking to sue people for various reasons. So I don't think that's lost on folks as Senior Administration Official says. I'm not sure I'm making the connection back to the other activity, but --

QUESTION: Just one other thing. Can you guys just give us anything on the quantity you're dealing here? This is Greg Miller with L.A. Times. You said you've made requests for surveillance that are being denied or (inaudible) companies. Can you give us anything on the number of companies or the number of requests that you've made, or the scope of this problem at this point?

SENIOR ADMINISTRATION OFFICIAL: I certainly haven't talked to anybody about declassifying any numbers. But, I mean, we're very --

QUESTION: We're sort of down the road now. You said more than one.

SENIOR ADMINISTRATION OFFICIAL: -- okay. But obviously if we don't solve the problem it is a backlog that will grow.

MR. ROEHRKASSE: Thank you very much for joining us. Again, for anyone who joined late, this call was on background so anything you heard can be attributed to a Senior Administration Official.

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