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United States Senate

SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

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September 13, 1994

The Honorable Don Edwards
U.S. House of Representatives
Washington, D.C.

SEP 15 1994

Dear Congressman Edwards:

At issue in conference on this year's Intelligence Authorization Bill will be a provision in the Senate bill to bring physical searches conducted for intelligence purposes under the court order procedure of the Foreign Intelligence Surveillance Act. Since 1978, this Act has required court orders for electronic surveillances done for intelligence purposes. Physical searches, on the other hand, have continued to be undertaken on the basis of Attorney General approval without judicial intervention of any kind. There has never been an authoritative Supreme Court opinion upholding the constitutionality of conducting these physical searches in this manner.

The Clinton Administration requested this legislation to require court orders for physical searches under much the same standards and procedures as currently required for electronic surveillances. The proposal was personally approved by the President and the Attorney General.

We are aware that the House Permanent Select Committee on Intelligence held a hearing on this legislation in June. Undoubtedly, the need for the legislation was explored thoroughly at that time. We thought it desirable, however, in advance of conference, to be precise in terms of our position on this matter.

Frankly, our concern stems directly from the Ames case. Last year, in the course of the prolonged investigation of convicted spy, Aldrich H. Ames, the FBI had gathered circumstantial evidence indicating that Ames may have been responsible for passing highly classified information to the Russians. But this evidence was not sufficient to establish probable cause, under the Fourth Amendment, that Ames had committed espionage. The FBI wanted to search his

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residence for such evidence and obtained the approval of the Attorney General. The search produced substantial corroborating evidence which eventually led to the arrest of Ames and his wife.

Had the Ames case gone to trial, the legality of the non-judicial search, although authorized by the Attorney General, would undoubtedly have been challenged by the defendant. Had a judge held the search to be illegal, the entire prosecution might have been blocked, and the most egregious spy in the CIA's history might have gotten away.

We believe that subjecting physical searches conducted for intelligence purposes to a court order requirement would limit the basis for successful challenges to national security searches in the future. The court order procedure enacted into law in 1978 to govern electronic surveillances for foreign intelligence purposes has been found to meet the requirements of the Fourth Amendment by every federal court which has considered the issue. The Committee's objective with respect to the physical search legislation is to parallel the judicially affirmed procedures followed in electronic surveillance cases.

We recognize that this proposed legislation is not supported by the American Civil Liberties Union. Frankly, we are perplexed by the ACLU's position. It seems far more desirable from the standpoint of civil liberties to have a federal judge authorize physical searches than to leave this function solely to an Executive branch official with no judicial intervention whatsoever. Let's be clear. If this statutory procedure is not enacted for physical searches, they will continue to be conducted under the authority of the Attorney General. For security reasons as well as for evidentiary reasons, no Administration will seek criminal search warrants for these kinds of searches, as the ACLU advocates.

In criminal cases, the government must show probable cause that a crime has been committed before a search warrant can be obtained. In intelligence searches, there is typically insufficient information to establish probable cause that a crime has been committed. Where such information is developed, it comes very late in the investigative process. Our national security interests cannot be put at risk for these prolonged periods. While the legislation proposed in the Senate bill does not require that probable cause of a crime be established to

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conduct a search, it does require the government to have sufficient evidence showing probable cause that the target of the search is an agent of a foreign power. This is not an easy standard to meet. It took several years of investigation for the FBI and the CIA to establish that Ames was acting as an agent of the Russians.

In conclusion, we simply seek your support in conference for this proposed legislation. Clearly, it will bring greater legal certainty to an essential national security activity. It will also give increased protection to potential targets of espionage investigations, while at the same time preserving the ability of the government to pursue cases which are often crucial to the nation's survival. It would be highly regrettable if we did not take this opportunity to enact this important legislation.

Sincerely,

A handwritten signature in black ink that reads "Dennis DeConcini". The signature is written in a cursive style with a long, sweeping underline.

Dennis DeConcini
Chairman

A handwritten signature in black ink that reads "John Warner". The signature is written in a cursive style with a large, looping initial "J".

John W. Warner
Vice Chairman