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August 18, 1994

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MAJORITY—225-3851

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The Honorable Dan Glickman
Chairman
Permanent Select Committee on Intelligence
H 405, The Capital
Washington, D.C. 20515

Dear Chairman *Dan* Glickman:

I am writing with regard to the Administration's proposal to give jurisdiction to the Foreign Intelligence Surveillance Court to approve so-called "black-bag jobs" -- secret searches of the homes and offices of U.S. citizens and foreign nationals in the name of national security. I commend you for holding a public hearing on this sensitive and important issue.

This proposal dates back at least to the Bush Administration. It became clear at that time that any serious reform of the status quo would have been unacceptable to the Executive Branch, and the Bush proposal was not pursued.

Since the issue is now before the conference on the intelligence authorization bill, I want to explain why I believe it would be a serious mistake to give authority to the FISA court to approve secret searches under the terms of the Senate bill.

As you well know, there is no constitutional, legislative or judicial basis for secret physical searches. This Administration is following an Executive Order issued by Ronald Reagan, under which secret searches are carried out in a very few cases upon the approval of the Attorney General. These searches pose three primary concerns: (1) who approves the searches; (2) what is the standard for approval; and (3) what is the nature of the searches being conducted.

The Senate provision only addresses the first issue: it would transfer approval authority from the Attorney General to the Foreign Intelligence Surveillance Court. But transferring authority from an Executive Branch official to a Judicial Branch official will not cure the other two problems posed by secret searches, and in my view, it is those unresolved issues that are the most important.

First, the Senate provision would not change the current standard for black-bag jobs, since the Reagan Executive Order uses the FISA standard. The FISA standard is a hybrid, otherwise unknown under our Constitution and quite different from the standard usually followed by courts in approving searches under our system. It does not require probable cause to believe that the target of the search is involved in criminal activity or that the search will produce evidence of a crime. This criminal standard is the best protection against unfocused government searches, since it is tied to specific conduct defined by Congress in the criminal laws.

In contrast, the FISA standard is based on the status of the individual to be searched. It requires only probable cause to believe that the target of the search is an "agent of a foreign power." This term is very broadly defined. While it includes spies and terrorists, it also includes representatives of any "foreign-based political organization." "Agent of a foreign power" therefore has covered U.S.-based supporters of Palestinian groups, Nicaraguan contras, and the African National Congress, among others. And the definition of "foreign intelligence information" allows the most serious type of privacy invasion -- a search of a private home -- to obtain any information "that relates to . . . the conduct of the foreign affairs of the United States."

Secondly, the nature of the black-bag search is also totally unprecedented in our system, in that it is secret. These searches do not have the normal protections associated with searches under our system of law, namely the requirements of knock, notice and inventory. Those Fourth Amendment protections ensure that the person in the best position to challenge the search knows that it took place. After all, warrant applications are almost never turned down by judges in criminal cases. The most effective means of ensuring that constitutional standards are adhered to comes from the fact that the person who is the subject of the search knows that it has been conducted and can seek post-search redress. This protection against abuse would not be available under the Senate proposal.

I have long been concerned that the Justice Department prefers to use secret searches in what should be criminal investigations of espionage and terrorism because it does not want to be constrained by the requirements of the criminal justice system. However, the assertions of the Justice Department notwithstanding, espionage and terrorism cases are not sufficiently different from other cases to justify departure from the Fourth Amendment. Every day in criminal investigations involving great importance to the national well-being, the FBI

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must choose between continuing to investigate a suspect covertly to identify his contacts and sources versus conducting a Fourth Amendment search and alerting the target to the existence of the investigation.

This is no time to codify the practices of the Cold War. I hope you will conclude, as I have, that secret searches of the homes and offices of Americans should not be authorized under a FISA standard. The problems with black bag jobs are not primarily due to their being approved by the Attorney General instead of a judge. The problems are much more fundamental, and will not be resolved by the Senate provision.

I would be happy to work with you to address all these issues, although I am not sure that a conference on the intelligence authorization bill is the best place to do so, given the significance of the issue and what I suspect will be the Executive Branch's unwillingness to accept true reform.

Sincerely,



Don Edwards
Chairman
Subcommittee on Civil and
Constitutional Rights