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## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

July 31, 2002

The Honorable Colleen Kollar-Kotelly  
 Presiding Judge  
 U.S. Foreign Intelligence Surveillance Court  
 DOJ Building, Room 6725  
 10<sup>th</sup> & Constitution Avenue, N.W.  
 Washington, D.C. 20530

Dear Judge Kollar-Kotelly:

Thank you for your letter of July 24, 2002, providing a copy of the Rules of the Foreign Intelligence Surveillance Court (FISC). We appreciate your offer to respond to questions for clarification of the rules, and we are particularly interested in three rules that were recently amended or added.

First, Rule 8, amended May 2002, provides that the clerk of court "shall keep in such form as the court may prescribe a copy of each order and any memorandum opinion." The Foreign Intelligence Surveillance Act (FISA) does not include specific procedures for the issuance of memorandum opinions by the FISC. It is essential for Congressional oversight of the administration of FISA for such memorandum opinions to be made available, at a minimum, to the Judiciary and Intelligence Committees. In addition, any unclassified memorandum opinions should be made accessible to the public, as are judicial opinions in other matters that come before the courts. Therefore, we request that you clarify this rule to specify the procedures for making memorandum opinions available to the Judiciary and Intelligence Committees and, if unclassified, to the public. Classified opinions made available to the Judiciary Committee are stored by the Office of Senate Security, with access limited to Members and appropriately cleared staff. We are considering legislation to require the public reporting of unclassified aspects of FISA implementation including unclassified memorandum opinions of the Court and unclassified statements of the legal reasoning adopted by the Court and submitted by the Justice Department. Your thoughts on any advantages or disadvantages of such legislation would be appreciated.

Second, Rule 10, added November 2000, provides for "search warrant returns." The terms "warrant" and "return" do not appear in FISA, which instead uses the terms "court order" and "report to the court."

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We appreciate that "foreign intelligence information" sought under FISA may be evidence of a crime that will be used for law enforcement purposes to protect against international terrorism, sabotage, and clandestine intelligence activities by foreign powers.<sup>1</sup>

The Court's use of the terms "warrant" and "return" recognizes the legislative intent that FISA "orders" are warrants requiring probable cause to believe that the target meets reasonable statutory definitions of foreign power and agent of a foreign power. If the Justice Department has submitted to the Court any memoranda regarding this issue or this new rule, please make them available to the Committee or authorize the Department to do so.

Third, Rule 11, added April 2002, states, "All FISA applications shall include informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutors at the Department of Justice or a United States Attorney's Office." The statute does not require the inclusion of such information in FISA applications, and its use by the Court is unclear. We are especially concerned about the impact of this rule on Section 504 of the USA PATRIOT Act, which amended FISA to authorize Federal officers who conduct FISA surveillance or searches to consult with Federal law enforcement officers to coordinate efforts to investigate or protect against the threats of attack, sabotage, international terrorism, or clandestine intelligence activities. 50 U.S.C. §§ 1806 (k), 825(k) Coordination between FBI Agents and federal prosecutors is essential to ensure that the information sought and obtained under FISA contributes most effectively to protecting the national security against such threats. We are not aware of any case where the FBI has proposed the use of FISA in an investigation that was unrelated to protection against such national security threats from foreign powers. Please clarify the legal rationale for this rule, and the use to be made of this information by the Court.

Finally, we note your statement that the Court has no comments to offer on the procedures that

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<sup>1</sup>Indeed, the FISA legislative history makes this clear, stating, "Finally, the term 'foreign intelligence information,' especially as defined in subparagraphs (e)(1)(B) and (e)(1)(C), can include evidence of certain crimes relating to sabotage, international terrorism, or clandestine intelligence activities.... Information about a spy's espionage activities is within this definition, and it is most likely at the same time evidence of criminal activities.... Obviously, the use of 'foreign intelligence information' as evidence in a criminal trial is one way the Government can lawfully protect against clandestine intelligence activities, sabotage, and international terrorism. The bill, therefore, explicitly recognizes that information which is evidence of crimes involving clandestine intelligence activities, sabotage, and international terrorism can be sought, retained, and used pursuant to this bill." H. Rept. No. 95-1283, Pt 1, at 49 (FBI reprint).

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regulate the development and preparation of FISA applications. However, the Committee has learned that in March 2002, the Attorney General approved new procedures for coordination between the FBI and federal prosecutors to implement the changes made by the USA PATRIOT Act and that those procedures were subsequently revised at the direction of the FISC. Please provide, or authorize the Justice Department to provide, copies of those procedures as submitted and as revised, any memorandum opinion(s) of the Court that explain the rationale for those revisions, and any legal memoranda submitted on this matter by the Department of Justice.

We are grateful for your assistance to the Committee in exercising oversight of the administration of FISA and in considering the need for amendments.

Sincerely,

  
PATRICK LEAHY  
Chairman

  
CHARLES E. GRASSLEY  
United States Senator

  
ARLEN SPECTER  
United States Senator