ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE JOHN D. BATES
Director

WASHINGTON, D.C. 20544

January 13, 2014

Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Chairman Feinstein:

To better address the continuing interest from several Congressional committees in the views of the Judiciary regarding potential changes to foreign intelligence surveillance law and practice, I am writing to provide the following perspectives on certain proposals currently under consideration.

Traditionally, the views of the Judiciary on legislative matters are expressed through the Judicial Conference of the United States, for which I serve as Secretary. However, because the matters at issue here relate to special expertise and experience of only a small number of judges on two specialized courts, the Conference has not at this time been engaged to deliberate on them. In my capacity as Director of the Administrative Office of the United States Courts, I have responsibility for facilitating the administration of the federal courts and, furthermore, the Chief Justice of the United States has requested that I act as a liaison for the Judiciary on matters concerning the Foreign Intelligence Surveillance Act (FISA). In considering such matters, I benefit from having served as Presiding Judge of the Foreign Intelligence Surveillance Court (FISC).

Enclosed is a document setting forth the Judiciary's comments concerning certain potential changes to FISA and proceedings before the FISC and the Foreign Intelligence Surveillance Court of Review. In preparing this document, I have consulted with the current Presiding Judges of the FISC and the Court of Review, as well as with other judges who serve or have served on those courts. For the sake of convenience, throughout the enclosed document (and in the summary below) I use the terms "we" and "our" to describe the Judiciary's institutional perspectives.

Our comments focus on the operational impact on the Courts from certain proposed changes, but we do not express views on the policy choices that the political branches are considering. We are hopeful, of course, that any changes will both enhance our national security and provide appropriate respect and protection for privacy and civil-liberties interests. Achieving that goal undoubtedly will require great attention to the details of any adjustments that are undertaken. For example, it may not be important whether an outside participant in certain matters before the Courts is labeled an *amicus curiae* or public advocate; what matters is the specific structure and role of such a participant.

The following is a summary of our key comments:

- It is imperative that any significant increase in workload for the Courts be accompanied by a commensurate increase in resources.
- Some proposed changes would profoundly increase the Courts' workload. Even if additional financial, personnel, and physical resources were provided, any substantial increase in workload could nonetheless prove disruptive to the Courts' ability to perform their duties, including responsibilities under FISA and the Constitution to ensure that the privacy interests of United States citizens and others are adequately protected.
- The participation of a privacy advocate is unnecessary—and could prove counterproductive—in the vast majority of FISA matters, which involve the application of a probable cause or other factual standard to case-specific facts and typically implicate the privacy interests of few persons other than the specified target. Given the nature of FISA proceedings, the participation of an advocate would neither create a truly adversarial process nor constructively assist the Courts in assessing the facts, as the advocate would be unable to communicate with the target or conduct an independent investigation. Advocate involvement in run-of-the-mill FISA matters would substantially hamper the work of the Courts without providing any countervailing benefit in terms of privacy protection or otherwise; indeed, such pervasive participation could actually undermine the Courts' ability to receive complete and accurate information on the matters before them.
- In those matters in which an outside voice could be helpful, it is critical that the participation of an advocate be structured in a manner that maximizes assistance to the Courts and minimizes disruption to their work. An advocate appointed at the discretion of the Courts is likely to be helpful, whereas a standing advocate with independent authority to intervene at will could actually be counterproductive.

- Drastically expanding the FISC's caseload by assigning to it in excess of 20,000 administrative subpoena-type cases (i.e., NSLs) per year – even with a corresponding injection of resources and personnel – would fundamentally transform the nature of the FISC to the detriment of its current responsibilities.
- It is important that the process for selection of FISC and Court of Review judges remain both expeditious and fully confidential; the Chief Justice is uniquely positioned to select qualified judges for those Courts.
- In many cases, public disclosure of Court decisions is not likely to enhance the public's understanding of FISA implementation if the discussion of classified information within those opinions is withheld. Releasing freestanding summaries of Court opinions is likely to promote confusion and misunderstanding.
- Care should be taken not to place the Courts in an "oversight" role that exceeds their constitutional responsibility to decide cases and controversies.

Thank you for your previously expressed interest in the perspectives of the Judiciary on these matters. Although these comments are not intended as expressions of support or opposition to particular introduced bills, I hope they are helpful to Congress in its deliberations on potential legislation. We have also provided these comments to the Administration. If we can be of further assistance to you, please do not hesitate to contact me at 202-502-3000 or our Office of Legislative Affairs at 202-502-1700.

Sincerely,

John D. Bates
Director

Enclosure

Identical letter sent to:
Honorable Saxby Chambliss
Honorable Patrick J. Leahy
Honorable Charles E. Grassley
Honorable Bob Goodlatte
Honorable John Conyers, Jr.
Honorable Mike Rogers
Honorable C.A. Dutch Ruppersberger