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October 29, 2008

The Honorable Colleen Kollar-Kotelly
Presiding Judge
Foreign Intelligence Surveillance Court
Department of Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable J.M. McConnell
Director of National Intelligence
Washington, DC 20511

The Honorable Bruce M. Selya
Presiding Judge
Foreign Intelligence Surveillance
Court of Review
Department of Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Judge Kollar-Kotelly, Director McConnell, Attorney General Mukasey, and Judge Selya:

Ensuring proper oversight of important national intelligence programs has been a significant policy challenge for decades. The Foreign Intelligence Surveillance Court was created to address a part of this challenge, and for thirty years it has played an indispensable role in construing the Foreign Intelligence Surveillance Act and providing judicial oversight for some of our nation's most sensitive intelligence activities. Although it has been called on only occasionally to rule on appeals, the Foreign Intelligence Surveillance Court of Review is an essential part of this system of judicial interpretation and oversight.

The question that we would like to pose to you, and the joint effort that we believe is warranted, concerns public access to those portions of the decisions of these courts that involve rulings on important matters of law. We are addressing this letter to each of you – the presiding judges of these vitally important courts, the Nation's chief law officer who represents the United States before them, and the Nation's chief intelligence officer who has ultimate responsibility within the Intelligence Community for the conduct of the surveillance activities that are the subject of the proceedings in them, because the appropriate and successful resolution of the question requires your joint consideration and action.

As members of the Senate Select Committee on Intelligence, we are familiar with the need to balance public transparency and accountability with the secrecy that national security sometimes requires. We accordingly understand why many foreign intelligence surveillance decisions are classified and must remain so. But we also are aware of a cost of the secrecy that surrounds these decisions: members of the public, and even many policymakers, often do not understand how the Foreign Intelligence Surveillance Act is interpreted by the

The Honorable Judge Colleen Kollar-Kotelly, Director J.M. McConnell, Attorney General
Mukasey, and Judge Selya
October 29, 2009
Page Two

Judicial branch, or how the Judicial branch balances constitutional concerns with the Executive branch's need to collect foreign intelligence information. This lack of knowledge makes it challenging for members of Congress and the public to determine whether the law adequately protects both national security and the privacy rights of law-abiding Americans.

Those decisions that contain important rulings of law are, we believe, a minority of all decisions. Their public release, in a form in which sensitive national security information is redacted, would greatly inform the public debate over federal surveillance laws, such as the recent revisions of the Foreign Intelligence Surveillance Act, or those FISA provisions enacted as part of the PATRIOT Act that are currently set to expire at the end of next year. Such public release might also limit the potential for confusion or uncertainty, and promote compliance, on the part of private parties who encounter an order from the Foreign Intelligence Surveillance Court for the first time. Additionally, making the substance of the legal analysis and interpretations of those opinions public would help reduce the spread of misleading or inaccurate information relating to this topic.

We are therefore interested in hearing your respective and, if possible, common views regarding the creation of a process under which important decisions of law in key decisions of these courts could be publicly released in an unclassified form. As we understand it, the Foreign Intelligence Surveillance Court's own rules describe how individual opinions may be published by the Presiding Judge on the request of a Judge of the Court after consulting with the other Judges of the Court. The rules provide that before publication the opinion must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected. To our knowledge, during the past thirty years, only a few opinions of the Court and the Court of Review have been publicly released, and the only motion on the subject made by an outside party was denied. We believe that the establishment of a more regularized process for reviewing, redacting and publishing the key opinions of the Court and the Court of Review (including both future opinions and those from the past several years) would be in the public interest. Accordingly, we are writing to all of you to ask for your thoughts and proposals for the establishment of a regular process of this nature.

Thank you for your attention to this important matter. We look forward to your early response.



Ron Wyden
U.S. Senator

Sincerely,



John D. Rockefeller IV
Chairman