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House of Representatives

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April 3, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing about two disturbing recent revelations concerning the actions and inactions by the Department of Justice and the federal government to combat terrorism. These include a public statement by you that appears to suggest a fundamental misunderstanding of the federal government's existing surveillance authority to combat terrorism, as well as possible malfeasance by the government prior to 9/11, and the partial disclosure of the contents of a secret Department memorandum concerning Executive Branch authority to combat terrorism, which has been previously requested to be provided to Congress. We ask that you promptly provide that memorandum and that you clarify your public statement in accordance with the questions below.

First, according to press reports, in response to questions at a March 27 speech, you defended Administration wiretapping programs and proposals to change the Foreign Intelligence Surveillance Act (FISA) by referring to a pre-9/11 incident. Before the 9/11 terrorist attacks, you stated, "we knew that there had been a call from someplace that was known to be a safe house in Afghanistan and we knew that it came to the United States. We didn't know precisely where it went. You've got 3,000 people who went to work that day, and didn't come home, to show for that."[1]

This statement is very disturbing for several reasons. Initially, despite extensive inquiries after 9/11, I am aware of no previous reference, in the 9/11 Commission report or elsewhere, to a call from a known terrorist safe house in Afghanistan to the United States which, if it had been

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[1] Bob Egelko, *Mukasey Backs Bush Efforts on Wiretapping,* San Francisco Chronicle (March 28, 2008) at B-1.

intercepted, could have helped prevent the 9/11 attacks. In addition, if the Administration had known of such communications from suspected terrorists, they could and should have been intercepted based on existing FISA law. For example, even assuming that a FISA warrant was required to intercept such calls, as of 9/11 FISA specifically authorized such surveillance on an emergency basis without a warrant for a 48 hour period.[2] If such calls were known about and not intercepted, serious additional concerns would be raised about the government's failure to take appropriate action before 9/11.

Accordingly, we ask that you promptly answer the following questions:

1. Were you referring to an actual pre-9/11 incident in the portion of your statement quoted above? If not, what were you referring to?

2. Do you believe that a FISA warrant would have been required to intercept a telephone call from a known terrorist safe house in Afghanistan to the United States in 2001? If so, please explain.

3. Even assuming that such a warrant would have been required, do you agree that even before 9/11, FISA authorized emergency interception without a warrant for a 48-hour period of phone calls from a known terrorist safe house in Afghanistan to the United States?

4. Assuming that you were referring to an actual pre-9/11 incident in your statement, please explain why such phone calls were not intercepted and appropriately utilized by federal government authorities in seeking to prevent terrorist attacks.

Second, in the March, 2003 Office of Legal Counsel (OLC) memorandum publicly released on April 1, 2008, the contents of a secret October, 2001 OLC memorandum were partially disclosed. Specifically, the 2003 memorandum explains that in an October 23, 2001 memorandum, OLC "concluded that the Fourth Amendment had no application to domestic military operations."[3] On two prior occasions – in letters of February 12 and February 20, 2008,

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[2] 50 U.S.C. 1805(f)(2001). Congress subsequently approved an Administration request to extend the emergency period to 72 hours.

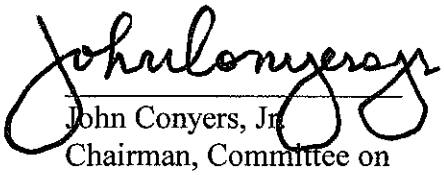
[3] See Memorandum for William J. Haynes, II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Department of Justice, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, (Mar. 14, 2003), p. 8 at fn. 10, referring to Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel Department of Defense, from John C.

– Chairman Conyers requested that the Administration publicly release the October 23, 2001, memorandum .[4] The memorandum has not been received despite these specific requests.

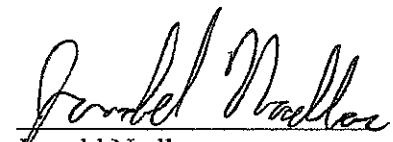
Based on the title of the October 23, 2001 memorandum, and based on what has been disclosed and the contents of similar memoranda issued at roughly the same time, it is clear that a substantial portion of this memorandum provides a legal analysis and conclusions as to the nature and scope of the Presidential Commander in Chief power to accomplish specific acts within the United States. The people of the United States are entitled to know the Justice Department's interpretation of the President's constitutional powers to wage war in the United States. There can be no actual basis in national security for keeping secret the remainder of a legal memorandum that addresses this issue of Constitutional interpretation. The notion that the President can claim to operate under "secret" powers known only to the President and a select few subordinates is antithetical to the core principles of this democracy. We ask that you promptly release the October 23, 2001, memorandum.

Please provide your responses and direct any questions to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel:202-225-3951; fax: 202-225-7680). Thank you for your cooperation.

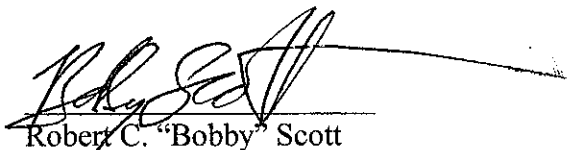
Sincerely,



John Conyers, Jr.
Chairman, Committee on the Judiciary



Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties



Robert C. "Bobby" Scott
Chairman, Subcommittee on Crime, Terrorism and Homeland Security

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Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* (Oct. 23, 2001).

[4] The February 12 and February 20 letters were sent to White House counsel Fred Fielling, with copies to you.

cc: Hon. Lamar S. Smith
Hon. Trent Franks
Hon. Louie Gohmert
Hon. Brian Benczkowski