

**TO: Interested parties**  
**FR: House Intelligence Committee Staff**  
**RE: The case of the 10<sup>th</sup> Mountain Soldiers and FISA**

## **Bush Administration Bungling Slows Search for Soldiers**

### **Background information**

- In a cynical and transparent attempt to use the lives of American servicemembers for partisan political gain, Republican operatives are once again hawking the now-debunked story that the Foreign Intelligence Surveillance Act caused a delay in surveillance intended to help locate missing soldiers from the 10<sup>th</sup> Mountain Division in Iraq. This is simply not the case.
- The RESTORE Act, HR 3733, will eliminate the requirement to obtain an individual warrant, based on probable cause, for targets outside the U.S. The RESTORE Act will solve the problems identified by the soldiers' case.
- Any delay in the search for our missing soldiers is inexcusable. But, in this case, the delay was not caused by the FISA statute. The delay was caused by the Administration's own internal legal wrangling, and by the failure of the Administration to prepare for and take seriously such a contingency.
- For hours when surveillance should have been up and running, the Administration did not respond, and the intelligence officers ready to start surveillance sat and waited for the political appointees to sign off.
- At the request of Chairman Reyes, the Director of National Intelligence issued an unclassified timeline on the case. This timeline makes clear that the inexcusable delays in the collection intended to save Specialist Alex Jimenez, Private First Class Joseph Anzak, and Private Byron W. Fouty was the fault of internal bureaucratic bungling by the Bush Administration, not the law.

### **Here are the facts (Released by the DNI on Sept 27, 2007):**

- On May 12, 2007, after a coordinated attack on their position south of Baghdad, three U.S. soldiers were reported missing and believed to have been captured by Iraqi insurgents. Immediately upon learning of the attack, theater-based and national SIGINT assets responded by dedicating all available resources to obtaining intelligence concerning the attack.
- On May 13 and 14, 2007, the Intelligence Community began to develop additional leads concerning the communications of insurgents claiming responsibility for the attack, including approaching the FISA Court on May 14 for an amendment to a then-current order with some bearing on the hostage situation. The amendment was granted that day.

- As soon as specific leads had been identified, analysts began to compile all the necessary information to establish the factual basis for issuance of a FISA court order as required by the emergency authorization provision of the statute.
- On May 15, 2007:
  - At 10:00 a.m., key U.S. agencies met to discuss and develop various options for collecting additional intelligence relating to the kidnapping by accessing certain communications
  - At 10:52 a.m., the NSA notified the Department of Justice (DOJ) of its desire to collect some communications that require a FISA order. It was determined that some FISA coverage already existed.
  - At 12:53 p.m., the NSA General Counsel agreed that all of the requirements for an emergency FISA authorization had been met for the remaining collection of the communications inside the U.S.

*Collection could have started immediately – the requirements of the statute were satisfied. As James Baker, head of the FISA office has testified to Congress, emergency authorization can take place in minutes and can be granted orally.*

- From 12:53 p.m. to 5:15 p.m. Administration lawyers and intelligence officials discussed various legal and operational issues associated the surveillance.

*NSA, ready to begin surveillance, waited for Bush Administration approval. Why were they engaging in legal wrangling for more than 5 hours?*

- At 5:15 p.m., the DOJ's FISA office – the Office of Intelligence Policy and Review (OIPR) – received a call formally requesting emergency authority to conduct surveillance.

*NSA, ready to begin surveillance, continued to wait for Bush Administration approval.*

- At 5:30 p.m., the OIPR attorney on duty attempted to reach the Solicitor General who was the Acting Attorney General while Attorney General Gonzales was addressing a United States Attorney's Conference in Texas. However, the Solicitor General had left for the day and the decision was made to attempt to reach Attorney General in Texas.

*The law allows four officials to grant authority to conduct emergency surveillance: the AG, the Acting AG, the Deputy AG, and the Assistant AG.*

*The AG was out of town. The Acting AG had left the building. The Deputy AG (Paul McNulty) had resigned the day before. As for the Assistant AG, Congress*

*had authorized the Assistant Attorney General in charge of the National Security Division to grant authorizations – but the Justice Department had not yet altered its own internal regulations to allow him to do so. DOJ did not alter its internal guidelines until June 12 – a month later.*

*After striking out with all four DOJ officials, the decision was made to try to call AG Gonzales in Texas.*

- The OIPR attorney then contacted the Justice Department Command Center and requested that the Command Center locate the Attorney General in Texas. After several telephone calls with the staff accompanying the Attorney General, the OIPR lawyers were able to speak directly with the Attorney General and brief him on the facts of the emergency request.

*Why didn't he grant oral approval at that time?*

- At 7:18 p.m., the Attorney General authorized the requested surveillance. The Justice Department attorneys immediately notified the FBI.

*Why did it take him two hours to call back?*

- At 7:28 p.m., the FBI noticed key intelligence agencies and personnel of the approval.
- At 7:38 p.m., surveillance began.

*In September, the Committee took testimony from Jim Baker, former head Office of Intelligence Policy and Review at DOJ – the office responsible for FISA. Baker testified that in true emergencies, FISA surveillance could be approved in minutes. Because of the Bush Administration's bungling, minutes turned to hours. And during those hours, the Intelligence Community waited for information on the three missing soldiers.*

*For 6.5 hours – from 12:53 pm until 7:38 pm – NSA waited. Now, the Republicans want to lay this at the feet of Congress?*

*The RESTORE Act would solve this issue. But even the RESTORE Act cannot mandate leadership and common sense in a time of crisis.*