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# Congress of the United States

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August 9, 2013

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Holder:

As you know, we have a number of concerns about the collection and use of information under the extraordinary authority granted by the Foreign Intelligence Surveillance Act, the FISA Amendments Act, and the USA PATRIOT Act. Among those concerns is that the government may use this information for purposes wholly unrelated to counterterrorism or the collection of foreign intelligence. We are particularly alarmed by recent reports about what appears to be the routine use of foreign intelligence information in criminal trials.

On August 5, 2013, *Reuters* reported that the Special Operations Division of the Drug Enforcement Administration is "funneling information from intelligence intercepts, wiretaps, informants, and a massive database of telephone records to authorities across the nation to help them launch criminal investigations of Americans."<sup>1</sup>

The Special Operations Division includes representatives from the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency. The *Reuters* report suggests that the SOD obtains surveillance information from the NSA, then distributes that information to other DEA units for use in criminal cases.<sup>2</sup>

<sup>1</sup> John Shiffman and Kristina Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, REUTERS, Aug. 5, 2013.

<sup>2</sup> *Id.* See also Brian Fung, *The NSA is giving your phone records to the DEA. And the DEA is covering it up*. WASH. POST, Aug. 5, 2013.

The report alleges further that federal agents are trained in “parallel construction” techniques—i.e., fabricating an investigative trail to make it appear as if the agency obtained the information through routine criminal investigations techniques, rather than through the NSA’s national security apparatus.<sup>3</sup>

If this report is accurate, then it describes an unacceptable breakdown in the barrier between foreign intelligence surveillance and criminal process.

The types of information described in the *Reuters* report are consistent with what the public now knows about the acquisition of foreign intelligence information under Section 702 of the Foreign Intelligence Surveillance Act.<sup>4</sup> Over the past several weeks, the government has assured both Congress and the general public that this authority cannot be used to target United States citizens.<sup>5</sup> If the government has institutionalized the sharing of foreign intelligence information across agencies to aid in the routine criminal prosecution of U.S. persons, then we will be forced to take a closer look at those assurances.

The Foreign Intelligence Surveillance Act provides for the possibility that information acquired under Section 702 may be used in a criminal prosecution in certain circumstances. The statute expressly requires that, if the government intends to use such information in court, then it must provide advance notice of intent to do so, both to the court and to the criminal defendant.<sup>6</sup> The U.S. Supreme Court recently and explicitly affirmed this rule.<sup>7</sup> The idea that federal agents devise “parallel” storylines to avoid this disclosure is deeply troubling. It also raises constitutional questions. As a matter of due process, a criminal defendant has a right to know how the government has obtained the evidence used against him, and the government has an obligation to disclose those sources.<sup>8</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> 50 U.S.C. § 1881e(a).

<sup>5</sup> See, e.g., Statement of James R. Clapper, Director of National Intelligence, *DNI Statement on Recent Unauthorized Disclosures of Classified Information*, June 6, 2013.

<sup>6</sup> 50 U.S.C. §§ 1801(k), 1806(c), 1881e(a).

<sup>7</sup> *Clapper v. Amnesty Int’l USA*, 568 U.S. \_\_\_, 23 (2013). “[I]f the Government intends to use or disclose information obtained or derived from a §1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition. *Id.*

<sup>8</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963). See also FED. R. CRIM. P. 16(a).

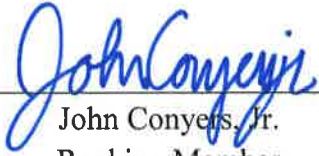
We do not believe that the practices described in this report are consistent with the requirements of the Foreign Intelligence Surveillance Act or with the manner in which this Administration has recently described its surveillance programs. Accordingly, please respond to the following questions by August 26, 2013:

1. Which components of the U.S. Department of Justice have access to information collected by the government under the Foreign Intelligence Surveillance Act?
2. Does the Drug Enforcement Administration, or any other component of the Department of Justice, use or give to any other federal, state, or local agency foreign intelligence surveillance information collected under FISA for the purpose of criminal investigation or criminal prosecution? If so, with what frequency? Under which authorities is such information collected?
3. Does the Drug Enforcement Administration, or any other component of the Department of Justice, use “parallel construction” or any other similar technique to obscure the source of evidence that may be used in a criminal investigation?
4. Has any component of the Department of Justice ever used or given to any other federal, state, or local agency for their use, foreign intelligence surveillance information in a judicial or administrative proceeding without providing the notices required by law?
5. Under the doctrine announced by the U.S. Supreme Court in *Brady v. Maryland*, an accused has a right to examine evidence that may be favorable to the defense. Under *Brady*, if the government has deliberately obscured the source of evidence used in a criminal trial—though “parallel construction” or any other technique—what remedies are available to the defendant?
6. Has the Department of Justice launched its own investigation of this revelation? If so, when can the House Judiciary Committee expect to receive your preliminary findings?

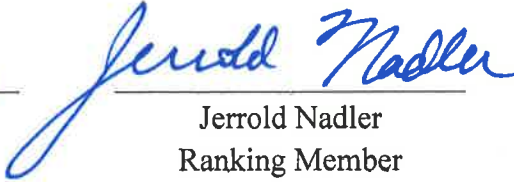
We appreciate the willingness of the Department to provide information about these programs in a classified setting, but we ask that you provide a written, unclassified response to this inquiry. The public deserves a full explanation of the use of these surveillance programs.

Thank you for your prompt and personal attention to this matter.

Sincerely,



John Conyers, Jr.  
Ranking Member



Jerrold Nadler  
Ranking Member  
Subcommittee on the  
Constitution and Civil  
Justice



Robert C. "Bobby" Scott  
Ranking Member  
Subcommittee on Crime,  
Terrorism, Homeland  
Security, and  
Investigations

cc: The Hon. Bob Goodlatte, Chairman, House Committee on the Judiciary  
The Hon. Trent Franks, Chairman, Subcommittee on the Constitution and Civil Justice  
The Hon. F. James Sensenbrenner, Chairman, Subcommittee on Crime, Terrorism,  
Homeland Security, and Investigations