UNITED STATES FOREIGN
INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.

Honorable Reggie B. Walton
Presiding Judge

March 27, 2013

Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

I am writing in response to your letter dated February 13, 2013, addressed to then-Presiding Judge John D. Bates, in which you requested that the Foreign Intelligence Surveillance Court (FISC) consider providing written summaries of its significant opinions in a manner that permits declassification by separating the classified facts from the legal analysis. I share your view that the FISC plays a crucial role in construing the Foreign Intelligence Surveillance Act (FISA), and believe that it is essential that Congress be kept informed of significant opinions of the FISC that interpret the FISA provisions.

I understand that the Executive Branch provides the Intelligence and Judiciary Committees with all significant FISC opinions, albeit in classified form. I also recognize the potential benefit of better informing the public about how the FISC applies and interprets FISA - for example, by enhancing public participation in congressional deliberations. There are, however, serious obstacles that must be considered regarding your request for summaries of FISC opinions.

In some circumstances, a federal court through its staff may prepare a summary of an opinion for the convenience of the public, such as a syllabus that accompanies a Supreme Court opinion. But where this practice is common, the full opinion is made equally available as well. The summary is merely a guide to the full opinion, not a means of disclosing some parts of that opinion while concealing other parts. If a summary is to be offered as a substitute for the full opinion, then several special concerns arise. Summarizing a judicial opinion of any length or complexity entails losing more nuanced or technical points of a court's analysis. This loss does not involve a serious risk of confusing or misleading a reader if the full opinion is also available. Without the full opinion, however, the summary is much more likely to result in misunderstanding or confusion regarding the court's decision or reasoning.

For FISC opinions specifically, there is also the very real problem of separating the classified facts from the legal analysis. While classification determinations are made by the Executive Branch in the first instance, the facts presented in applications to the FISC always or almost always involve classified intelligence activities, the disclosure of which could be harmful to the nation's security. As members of Congress who have seen the opinions know, most FISC opinions rest heavily on the facts presented in the particular matter before the court. Thus, in most cases, the facts and the legal analysis are so inextricably intertwined that excising the classified information from the FISC's analysis would result in a remnant void of much or any useful meaning. Consequently, the summaries you request are unlikely, as a general matter, to serve the purpose of meaningfully informing the public about the FISC's determinations.

Your request that the FISC prepare summaries of significant interpretations of the law would present additional concerns for previously issued opinions. Article III courts cannot issue advisory opinions. For a court to revisit and reformulate its prior reasoning outside the context of a matter actively before the court may implicate that prohibition. There are also practical considerations with a *post hoc* summary. For example, if the original opinion had been issued by a judge who is no longer serving on the FISC, another judge would be responsible for preparing the interpretive summary. Insofar as different judges may view particular points of the analysis as more or less important to an opinion as a whole, the summary may be an amalgam of the views of the issuing judge and the summarizing judge. Such procedural complications may lead to further confusion and distortion in the summaries, and imply a lack of finality to FISC opinions. Finally, there are resource considerations. The small number of judges, attorneys, and staff that comprise the FISC are fully occupied by its current caseload. Given the difficulties noted above, the effort to draft summaries of previously issued opinions would have a detrimental impact on the FISC's ability to address matters currently before the court.

Rather than summaries, in a few exceptional cases FISC opinions that have contained no classified information, or a small amount of readily excisable classified information, have been made available to the public. Those matters involved the rare circumstance where a FISC decision relied either solely on an interpretation of law or where the classified facts were not inextricably intertwined with the court's analysis, so that the FISC was able to make its decisions publicly available. In fact, the FISC's Rules of Procedure provide a mechanism for a judge to request the publication of an order, opinion, or other decision. *See* FISC Rule 62.(a). This procedure, where appropriate, contemplates a review by the Executive Branch for the redaction of classified information. Indeed, as you mention, the Executive Branch has indicated that it will seek to provide declassified opinions to the extent it may become feasible to do so.

Recognizing the importance of this issue and your concerns, I have provided a copy of your letter to all of the current judges of the FISC, as well as the Foreign Intelligence Surveillance Court of Review (FISCR), and will ensure that any new judges appointed to the FISC also receive a copy of your letter. In addition, at the FISC's upcoming semi-annual meeting in May, I will ensure that all of the judges are aware of the procedures that are available under Rule 62.(a) and encourage them to avail themselves of these procedures when appropriate. I will also encourage them to consider structuring opinions to facilitate declassification, if they believe doing so is warranted in a particular case. Realistically, however, I would not anticipate many such cases given the fact-intensive nature of FISC opinions, as described above. Of course, the FISC is also prepared to carry out its responsibilities with respect to the review process currently underway by the Executive Branch that has been detailed to you in previous correspondence.

Sincerely,

Reggie B. Walton
Presiding Judge, U.S. Foreign
Intelligence Surveillance Court

cc: Honorable Morris S. Arnold
Presiding Judge, U.S. Foreign Intelligence
Surveillance Court of Review

The Honorable James Clapper
Director of National Intelligence

The Honorable Eric H. Holder, Jr.
Attorney General

Identical letter sent to: Honorable Ron Wyden
Honorable Mark Udall
Honorable Jeff Merkley