

ANSWERS TO QFRs FROM SENATOR SESSIONS

1. Mr. Wainstein and I were colleagues for years, and we are teaching a class together at Georgetown University Law Center. One of the class sessions is devoted to the modernization of the Foreign Intelligence Surveillance Act (FISA). Mr. Wainstein and I agreed that FISA needed to be modernized, but in explaining the reasons for that need, I believe I tended to put more emphasis on the problem posed by foreign-to-foreign e-mail (50 U.S.C. § 1801(f)(4)), while Mr. Wainstein tended to put more emphasis on the problem posed by the migration from satellite to fiber optic cable for carriage of transoceanic communications (50 U.S.C. § 1801(f)(2)-(3)). In part, that difference in emphasis may have reflected Mr. Wainstein's access to classified information as a Department of Justice employee at the relevant time. However, the gist of my testimony was not to highlight specific disagreements with Mr. Wainstein, but rather to point out that even when we differ, we work well together because of our common respect and appreciation for professionalism and serious legal argument.

2. When Congress was considering the Protect America Act and the FISA Amendments Act, I worked with bipartisan Congressional staff on many aspects of the legislation in my individual capacity, but I did not take a final position on the immunity provisions. I understand that the Justice Department has made clear its intent in litigation to support the retroactive immunity provided for in the FISA Amendments Act.

3. As a nominee who is not currently an employee of the Department of Justice, I do not have access to classified and other sensitive information regarding the use of the three authorities you cite. My general impression of them, based on public information, is that they are important investigative authorities that can, if subject to appropriate oversight and safeguards, be exercised in a manner protective of privacy and civil liberties. I note that the Attorney General testified before the Senate Judiciary Committee in his confirmation hearing that he "would probably be supportive of them" but that he would "examine how those provisions have worked, talk to . . . investigators and lawyers and get a sense of what they think has worked well with regard to these provisions, what perhaps needs to be changed." Similarly, if I am confirmed, I will consult with career employees in the Department of Justice and elsewhere in government familiar with the exercise of these authorities in an effort to better understand how they have been used. In particular, in deciding whether to support renewal of the three sunseting Patriot Act provisions, among other things, I would want to consider any actual and possible use (and/or misuse) of the provisions in question since they were enacted; the relationship between the provisions and any recent amendments to FISA (e.g., in the FISA Amendments Act); the operational environment in which the provisions function and the continuing need or lack of need for them; and perhaps other factors. More generally, I would want to consult with career professionals in the government and consider the possible benefits of any legislative changes improving the statute against the possible costs in the form of disruption or uncertainty resulting from such changes.