United States Senate

Committee on the Judiciary

"Continued Oversight of the Foreign Intelligence Surveillance Act"

on October 2, 2013

Responses to Questions for the Record

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Questions for the Record from Ranking Member Charles E. Grassley

1. **As this Committee considers changes to the FISC process, including the possibility of creating some kind of independent advocate to appear before the Court, what important operational considerations would you urge the Committee to consider?**

   There are important operational considerations that come into play with respect to the proposals to create an independent advocate to appear before the Court. With respect to consideration of adding adversarial process before a request for surveillance, physical search or foreign intelligence acquisition is granted and conducted, this additional process could delay important foreign intelligence gathering. Bringing an outside advocate up-to-speed would take time. Particularly if the special advocate is an entity outside the existing interagency group of Intelligence Community and Department of Justice personnel involved in preparing requests to the Foreign Intelligence Surveillance Court (FISC), then the special advocate would have to request documents, briefings, and any additional information it requires in order to develop an informed view and prepare its presentation to the FISC. In order to be effective, the special advocate would likely need to continually be kept up-to-date regarding the technologies involved in collection, as well as targeting and minimization rules and guidelines. Creating a special advocate may turn out to be far more extensive than simply appointing an outside or inside lawyer to challenge government proposals: it could potentially mean creating an entire new office of lawyers, paralegals, support, security personnel and facilities accommodations to support the advocate's work.

   In addition to the time this would add to the FISC's consideration of the collection request, this process would also necessarily take Intelligence Community personnel, such as NSA operators, analysts, oversight personnel and attorneys off-mission because it is often these same personnel who would need to be involved in informing the special advocate. These Intelligence Community operators and experts are likely already involved in providing extensive briefings and information to the existing oversight personnel at the Department of Justice, the Office of the Director of National Intelligence, and Congress.

2. **What would be the effect of a change in the law that would require prosecutors to obtain a search warrant in order to obtain materials, such as phone records, that are in the possession of third parties, instead of obtaining them through a subpoena?**

   A change in the law imposing a warrant requirement for the production of records would bring criminal prosecutions and investigations to a screeching halt. It has long been established under existing Supreme Court precedent that records voluntarily turned over to a third party are not subject to an expectation of privacy and therefore law enforcement authorities do not need to secure a warrant to obtain them. Every day, criminal prosecutors and investigators use legal process such as grand jury subpoenas and administrative subpoenas to obtain records relevant to investigations across the wide range of criminal activity. In addition, third party records are also a daily part of civil proceedings such as document requests in civil litigation and administrative inquiries.

3. **Why shouldn't there be specific criminal sanctions against those who intentionally or knowingly misuse the phone metadata that is collected?**

   As the NSA Inspector General's letter to the Ranking Member dated September 11, 2013 provides, there have been 12 instances of NSA personnel improperly misusing signals intelligence information maintained by NSA since January 1, 2003. It does not appear, based on the letter, that any of those instances pertain to information acquired pursuant to FISA. Therefore, the current public record does not suggest that NSA personnel have misused the phone metadata collected pursuant to Section 215 of the USA Patriot Act, calling in to question the need for any such sanction in the law. In my view, the types of incidents that did occur as stated in the Inspector General's letter are best handled administratively, through re-training, discipline or termination, depending on the facts and circumstances of the particular case, similar to the way that professional responsibility matters in other contexts are handled across Executive Branch agencies.

"Continued Oversight of the Foreign Intelligence Surveillance Act" Hearing

Senator Franken Questions for the Record

1. **Professor CORDERO, in your written testimony you criticized what you called, quote, "the ad hoc nature of the recent government declassification releases." You said you thought that these disclosures weren't helping the Intelligence Community as much as they might think. And you suggested that Congress could amend the reporting provisions in FISA to require additional public information at regular intervals. What specific information do you think these reports should include?**

A key area that would benefit from further attention is expanding the quality of information publicly available regarding the oversight and compliance process of surveillance activities under FISA. In August 2013, the Office of the Director of National Intelligence released a declassified version of the Attorney General and Director of National Intelligence's joint compliance assessment concerning acquisition under Section 702 of FISA. This document contained valuable information regarding how the oversight and compliance process takes place, and the results of the compliance reviews. However, this was also a somewhat heavily redacted document. It would be more useful to the public, as well as to Members of Congress beyond the Intelligence and Judiciary Committees, to have a summary, written-for-release version of the compliance assessment that is made publicly available at some regular interval, perhaps semi-annually, for example. In addition, it may better inform the public and broader Congress if there were, perhaps annually, a report that describes the oversight and compliance structure and activities for FISA activities beyond just section 702 collection.

A second area that would benefit from a regularized process is the release of FISC opinions. It may be helpful for Congress to work with the Department of Justice, the Office of the Director of National Intelligence and the Foreign Intelligence Surveillance Court (FISC) to evaluate options that are available to release FISC opinions that are in the public's interest. For example, should opinions be released as soon as they are issued and have undergone declassification review? Or, would it be better to have them released on a regular schedule, quarterly, for example? If releasing such opinions is going to happen on a more frequent basis going forward, then it may cut down on the novelty if they were released on a schedule, than on any given day which then generates several days' worth of hurried media attention directed at the Intelligence Community. A quarterly release of significant opinions could also, because it would be done in a deliberate way, provide opportunity for the FISC or Executive Branch to prepare a summary of the opinion(s). A summary document might be useful so that these releases have a broader distribution and better inform the public, beyond just the national security

legal or academic communities which are more likely to read and digest the full opinions themselves.

Third, I would suggest that there is value in working with the Department of Justice, FISC and the Intelligence Community to determine if there is additional information regarding the cooperation of the private sector that can be released publicly, in a way that is protective of national security information. The private sector has important interests in maintaining the trust of their customers and investors while complying with lawful requests from the government to assist in both criminal investigations and national security matters. While I would imagine that publicly disclosing numbers of persons or facilities targeted for collection under FISA would likely be of concern to the Intelligence Community, perhaps enabling release of information regarding numbers of requests broken down by federal, state, and local requests, and within the federal category, criminal investigatory versus national security requests, could be one path for discussions. Facilitating the companies' abilities to put the national security requests in a broader context of how it cooperates with national security and law enforcement, both within the United States and with foreign governments, is a worthwhile endeavor in order to maintain the important role that the private sector plays in supporting national security and law enforcement activities.