Written Questions of Senator Jeff Flake
"The Surveillance Transparency Act of 2013"
U.S. Senate Committee on the Judiciary
Subcommittee on Privacy, Technology, and the Law
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1. In your testimony before the subcommittee, you stated you supported having an advocate appear before the Foreign Intelligence Surveillance Courts, but only if it would not cause procedural difficulties, be adverse to national security, or result in time delays. Do you have any concern that S. 1467, one of the proposals to create a special advocate, could cause procedural difficulties, be adverse to national security, or result in time delays?

Thank you very much for the opportunity to answer additional questions relating to the Foreign Intelligence Surveillance Court ("FISC") and the proposal for an advocate to appear before the court. As I said at the hearing, I am generally supportive of such a proposal on theoretical grounds. My broad take on the idea is as follows:

We should look to create a standing team of attorneys to respond to and present a counter argument before the FISC to requests for permission to collect information against an individual or entity. This team of attorneys should either be from within the government (such as the DNI's Civil Liberties and Privacy Officer), and not a cadre of non-government attorney's with clearances.

There is much to be said in favor of this proposal. With regular criminal warrants the ex parte nature of the application for a warrant does not systematically create a lack of a check on overreaching because of the possibility for post-enforcement review during criminal prosecution with its adversarial process. By contrast, in intelligence investigations that post-execution checking function of adversarial contest is often missing -- few if any intelligence collection cases wind up before the courts. As a result there is no systematic way of constraining the authority of the United States government in this context. Providing for an adversarial advocate would give us the general benefits of adversarial presentation and provide a useful checking function on the overarching broad effect of FISA law on the public.

To be sure, this would be a novel process. We don't typically do pre-enforcement review of investigative techniques. And if poorly implemented, this sort of process risks slowing down critical time sensitive investigations. Perhaps most importantly, many worry (not without justification) that the adversarial advocate will in the end have an agenda that may distort legal developments.

On balance, this seems to be a positive idea – but only if it is implemented in a limited way for novel or unique questions of law. It should be is limited to situations where the FISA court itself requests adversarial presentation. That would limit the number or circumstances where the process was used to those few where new or seminal interpretations of law were being made. The adversarial advocate should not appear routinely and should not appear on his or her own motion. The court is, in my view, capable (and likely) to define when it can benefit from adversarial argument quite well.

This analysis gives you some idea of my thinking about the specifics of S. 1467. I had not read that particular bill prior to my testimony before the Subcommittee and I appreciate the opportunity to examine the matter in more detail. My conclusion is that the provisions of S. 1647, while aimed at a salutary purpose, would prove too intrusive and risk slowing down time-critical investigations. In particular:

- I do not think that a dedicated independent advocate is necessary to review every application to the FISC. Most such application will not pose issues of novel legal construction;
- I do not think that the advocate should have the right to request to participate in matters before the FISC. That decision is best left to the sound discretion of the court; and
- Most notably, I do not think that creating a dedicated issue-specific advocate will prove, in the end, advantageous. We have had experience with single-focused "independent" officers in the past, and it has not proven to be a successful model. *E.g. Morrison v. Olson,* 487 U.S. 654, 731-32 (1988) (Scalia, J., dissenting) ("isolation from the Executive Branch and the internal checks and balances it supplies … heighten[s] . . . the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests"). Rather, a cadre of government privacy attorneys would serve the function better.

My recommendation would be to modify S.1467 to be less intrusive in its approach, while preserving the important principle of creating a system of adversarial advocacy.