United States Senate

Committee on the Judiciary

"Continued Oversight of U.S. Government Surveillance Authorities"

on December 11, 2013

Responses to Questions for the Record

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Questions for the Record from Ranking Member Charles E. Grassley

1. **Based on your experience, what would the day to day operational effect be on the government's ability to keep the country safe if we recognized new legal rights that would protect foreign terrorists abroad from "unwanted surveillance."?**

   Since the unauthorized disclosures, the public debate has included suggestions that U.S. national security surveillance activities should recognize the "privacy" rights of foreigners. There are a number of reasons why the U.S. Government should not go down this path. First, existing Supreme Court precedent maintains that non-U.S. persons outside the United States are not subject to constitutional protection. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Second, as described in my written statement for the record, the U.S. Intelligence Community already has experience with what extending FISA probable cause protections to foreigners looks like, and the result was a FISA process stretched to its limits. Third, the issue of what is the proper extent of national security surveillance against foreign leaders or other sensitive targets belongs in the realm of foreign policy considerations, and should be therefore be addressed as a policy matter, not as a legal one.

   With respect to the operational impact more specifically, my written statement for the record describes the pre-2008 history of the FISA process which included seeking FISC approval for targeting certain terrorist targets overseas based on a finding of probable cause that the target was an agent of a foreign power. As a number of senior intelligence officials have previously testified before Congress, this resulted in a gap in foreign intelligence collection in support of the counterterrorism mission, both because of the heightened legal standard as well as because of the burden on the FISA process administratively. Future consideration of affording so-called privacy protections to foreign targets should take this recent history into account. Finally, I would submit that more time spent by U.S. Government operational and oversight personnel focusing on the legal rights of foreign targets could have the effect of diverting or diluting their attention to matters affecting U.S. persons or other persons inside the United States who are afforded constitutional protections.

2. Please further elaborate and explain why you believe the amicus proposal contained in the Senate Intelligence Committee's FISA reform bill is a more advisable approach to making the FISA Court process more adversarial than the advocate proposal contained in the USA Freedom Act.

As referenced in my two statements for the record submitted to this Committee for the October 2, 2013 and December 11, 2013 hearings, and responses to questions for the record related to the October 2, 2013 hearing, my view is that there are a variety of factors that weigh against creating an office of special advocate.

Operationally, a permanent office of special advocate has the potential to slow down intelligence activities by adding an additional layer of review on top of an already multi-layered legal and management process within the Executive Branch. An office of special advocate is likely redundant with existing bureaucratic processes. As FISC Judge Reggie Walton's letter of July 29, 2013 to the Chairman explains, there is also extensive review by and interaction between the Executive Branch and the FISC's legal advisors and judges. The existing levels of review include legal review within the requesting agencies, by the Department of Justice's National Security Division (and likely additional senior executives in the Department of Justice if a particular request is complex or novel), by the FISC's professional legal advisors, and finally by the judges themselves, who are independent federal district court judges. Adding an additional office of review duplicates work currently performed by Department of Justice attorneys (who are outside of the Intelligence Community) whose job it is to review applications for legal sufficiency, including conformity with the requirements of the Act as well as the protection of constitutional rights.

From a policy perspective, adding an office of special advocate also raises the possibility that the result will be less-well developed and considered requests for national security surveillance authority. At the Committee's December 11, 2013 hearing, in response to a question from Senator Blumenthal regarding the proposals for an office of special advocate, I stated that over time there has been a relationship "of trust" that has developed between the Executive Branch and the FISC. To further explain this perspective, what I was referring to by describing the relationship of trust is, in particular, the *credibility* that the Executive Branch, and the Department of Justice, in particular, has with the FISC. As described in my October 2, 2013 statement for the record, it has previously been suggested by outside observers and reviews that, at times, the Department of Justice has been cautious, perhaps to a fault, in presenting matters to the FISC. Current FISA practice consists of Department of Justice attorneys who present matters to the FISC conduct business according to the high standards of disclosure demanded by the ethics of *ex parte* procedure. By adding an institutional adversarial opponent, the proceedings would no longer be *ex parte*, therefore, there is the potential for the Executive Branch, and the Court, to, over time, become overly reliant on the special advocate to challenge requests for surveillance. This could have the unintended effect of actually reducing the scrutiny and care the Executive Branch gives to its applications. This outcome would be bad for national security and bad for civil liberties, because the FISC, over time, could potentially lose confidence in the Executive Branch's commitment to disclosing unfavorable facts and circumstances. It is not in the interests of U.S. national security to produce an adversarial process that could have the effect of eroding the confidence of the FISC that the Executive Branch is presenting matters

under a historical practice of full disclosure and the highest degree of candor as required by *ex parte* practice.

Accordingly, between the two options, the office of special advocate versus providing an avenue for the FISA Court to appoint an *amicus* in circumstance that raise novel issues of law or technology, I believe the *amicus* is preferable because it will likely only be invoked in rare circumstances, and will not run the risk of institutionalizing adversarial proceedings in the FISA process. It is worth nothing that in the criminal investigative context, requests for surveillance or search are similarly conducted *ex parte*. However, I do believe that the current FISA system is preferable to both, as I do not believe that either proposal will necessarily achieve what is likely the intended long-term objective of raising public confidence in activities conducted under FISA. This is because FISC deliberations will continue to (rightfully) be conducted in a classified setting, and so much of the criticism since the recent unauthorized disclosures have focused on the transparency of the FISA process and legal interpretations.