

**Nomination of Aditya Bamzai to be a
Member of the Privacy and Civil Liberties Oversight
Board Questions for the Record
February 6, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. One of the most contentious issues in the recent debate over reauthorization of Section 702 was the issue of U.S. person queries. Please respond with your views on U.S. person queries under Section 702.

a. What can the Board do to better inform the public's understanding of U.S. person queries under Section 702?

I believe that the Board should continue its oversight of the Section 702 program, including oversight over U.S. person queries of the Section 702 database. By statute, Congress has imposed a set of required procedures and access limitations on the 702 program. First, the Attorney General must “adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States.” 50 U.S.C. § 1881a(f)(1)(A). Second, the Attorney General must “ensure that the procedures adopted . . . include a technical procedure whereby a record is kept of each United States person query term used for a query.” *Id.* § 1881a(f)(1)(B). Third, except in certain specified circumstances, “the Federal Bureau of Investigation may not access the contents of communications . . . that were retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence.” *Id.* § 1881a(f)(2)(A).

If confirmed, I would work with other Board members to conduct oversight over the Section 702 program. Through appropriate oversight, the Board can ensure that the intelligence community has complied with statutory and constitutional requirements and struck the appropriate balance between privacy, civil liberties, and national security.

b. Can the Board, in your view, help determine the total number of U.S. persons' information collected under 702?

While I do not have access to the classified information that might be informative on this issue, determining the number of U.S. persons' information collected under Section 702 is an important topic. In its 2016 Recommendations Assessment Report, the Board noted that the NSA “seeks to work with Board staff to develop such measures.” If confirmed, along with other Board members, I would work to continue the Board's oversight work on this matter and, if appropriate, to provide a public report to the greatest extent that is consistent with the demands of national security and the protection of classified information.

c. Can the Board, in your view, help determine the number of U.S. person queries conducted by the FBI on an annual basis?

As part of the Board's ongoing oversight of the Section 702 program, the Board could lend its assistance to the FBI to help formulate the FBI's calculations and to help release them to the greatest extent consistent with the demands of national security and the protection of classified information. If operational, technical, or policy impediments have forestalled release of these calculations, the Board can help analyze mechanisms for overcoming these impediments or articulate these impediments so that Congress is aware of them as Congress conducts its own oversight over the FBI.

2. In 2016, the Foreign Intelligence Surveillance Court (FISC) rejected the NSA's 702 certification because of "ongoing compliance problems" in the "abouts collection" program. The issues reported to the FISC regarding "abouts collection" were so significant that the court would not certify that 702 was operating consistent with the Fourth Amendment. (FISC's Order Extending the 2016 Certification dated October 26, 2016, Pg. 2)

The recent 702 reauthorization bill that was signed into law included a provision that will require Congress to review any proposal by the NSA to restart "abouts collection" in the future. (S. 139, FISA Amendments Act of 2017) **What could the Board do to help the public and the Congress better understand both the benefits and "compliance problems" associated with "abouts collection?"**

If the NSA were to resume "abouts" collection after obtaining the required approval from the Foreign Intelligence Surveillance Court and completing the congressional review procedures, I believe that the collection could be an appropriate subject of Board oversight. If appropriate, the Board could provide a public report to the greatest extent that is consistent with the demands of national security and the protection of classified information.

Questions for the Record for
Aditya Bamzai
From Senator Mazie Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

- b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. Many Americans are concerned about the volume of electronic information collected by our intelligence community, and what it means for their privacy. While Section 702 of the Foreign Intelligence Surveillance Act is designed to allow the intelligence community to target and surveil non-U.S. citizens, privacy advocates are rightfully concerned that U.S. citizens can get caught up as well. These concerns were exacerbated by last year's reauthorization of Section 702, which allowed authorities to access communications that are "about" a target, even if the target is not a participant in the communication.

What will you do—should you be confirmed—to strengthen the public trust that civil rights and liberties are being protected in the face of so much intelligence collection?

If confirmed, along with other members of the Board, I would seek to strengthen public trust by ensuring that privacy and civil liberties are properly considered in the intelligence community's national security efforts. In general, the Board can ensure that information is conveyed and transparency is achieved, to the greatest extent consistent with the demands of national security and the protection of classified information, so that Congress and the public can be comfortable that important national security decisions are being made in the light of the best available evidence.

3. I am concerned that Section 702 surveillance and use of data collected under Section 702 may impact vulnerable communities such as communities of color, immigrant communities, and the Muslim community at significantly higher rates than it affects Caucasian or non-immigrant communities.
 - a. Do you believe that an individual's race, religion, ethnicity, or nation of origin is

a factor that should be weighed into a decision to target someone for foreign intelligence information? Why or why not?

I believe it is wrong for the government to invidiously use an individual's race, religion, ethnicity, or nation of origin to target someone for foreign intelligence information. The Equal Protection Clause and statutory provisions enacted by Congress prohibit the invidious use of such factors. I believe that the Board could, in appropriate circumstances and within the scope of its jurisdiction, provide oversight to ensure that the Section 702 program operates consistent with these constitutional and statutory provisions and with our Nation's values.

- b. Should you be confirmed, do you commit to undertaking a quantitative study to determine whether surveillance targeting under Section 702 disparately impacts vulnerable communities? Any such study should include a qualitative analysis of whether the intelligence community's targeting decisions are based—even in part—on an individual or community's racial, religious, or ethnic makeup, or on the country where they reside, rather than wholly on objective indicators that a target possesses foreign intelligence information.

If confirmed as a member of the Board, I would work with other members of the Board to develop the Board's agenda on issues within the Board's jurisdiction. Whether the government's targeting decisions under section 702 are based on invidious, rather than appropriate, factors could be a subject of Board oversight.

4. In December 2016, then-Director of National Intelligence Clapper committed to providing Congress with an estimate of the number of Americans whose communications have been incidentally collected under Section 702. The Trump Administration reversed course and has refused to provide Congress with this estimate.

Should you be confirmed, do you commit to reviewing the Trump Administration's claims about the feasibility of obtaining such an estimate and work with the Office of the Director of National Intelligence to determine a way to obtain a meaningful estimate? Do you further commit to providing a public report describing your findings?

As noted immediately above, if confirmed as a member of the Board, I would work with other members of the Board to develop the Board's agenda. One aspect of the Board's agenda, in my view, should be ensuring that, to the greatest extent consistent with the demands of national security and the protection of classified information, Congress and the public have the information necessary to assess the consequences of the Nation's national security efforts. In this regard, it could be appropriate to consider the possibility of releasing estimates of the number of Americans whose communications are incidentally collected under section 702.

5. Pursuant to the USA Freedom Act of 2015, the National Security Agency (NSA) instituted the call data records (CDR) program in which it collects communications records that are within "two hops" of a target. In June 2018, it came to light that the NSA had received some records it was not authorized to receive and, to comply with the USA Freedom Act, deleted

all the records it had received since 2015. To date, the NSA has failed to provide basic information about its improper access of CDRs, including how the issue occurred, how many people it affected, why it took the NSA years to discover the issue, and how the NSA plans to ensure that it will not reoccur.

Should you be confirmed, do you commit to investigating the issue to ensure proper oversight and to bolster public confidence?

In my view, any compliance issues are a subject of concern and could be the subject of Board oversight. If confirmed, I would work with other Board members to investigate this issue.

Nomination of Aditya Bamzai
Privacy and Civil Liberties Oversight Board
Questions for the Record Submitted February 6, 2019

QUESTIONS FROM SENATOR BOOKER

1. The Privacy and Civil Liberties Oversight Board is charged with conducting oversight for Executive Branch policies, procedures, regulations, and information sharing practices relating to the government's efforts to protect our nation from terrorism. This oversight function is critical because it helps ensure that Americans' privacy and civil liberties are protected.

If confirmed to serve on the Privacy and Civil Liberties Oversight Board, what would be your oversight priorities?

If confirmed, my immediate priorities would be to review the oversight projects that the Board already has in progress and to bring those projects to appropriate conclusions. In addition, along with other Board members, I would seek to prepare a public report, to the greatest extent consistent with the demands of national security and the protection of classified information, that might inform Congress's consideration of the reauthorization of the USA FREEDOM Act by the end of this year. Another ongoing Board oversight project that I would seek to continue involves the "Section 702" program.

2. What experience do you have that you believe is relevant to the issues you would be presented with on the Privacy and Civil Liberties Oversight Board?

From 2005 to 2007, I was an attorney at the Office of Legal Counsel of the U.S. Department of Justice, where I provided legal advice on an array of separation of powers and national security matters. From 2013 to 2016, I was an appellate attorney in the National Security Division of the U.S. Department of Justice, where I argued cases relating to national security in the federal courts of appeals and the Foreign Intelligence Surveillance Court of Review. Finally, since joining the academy, I have thrice taught a class on "Computer Crime Law," which addresses Fourth Amendment and statutory limitations on government surveillance.

3. The USA Freedom Act enacted a number of reforms to Foreign Intelligence Surveillance Court proceedings, including requiring the appointment of at least five individuals to be *amici curiae* who are charged with helping to protect individual privacy and civil liberties.

What is your position on an outside amicus arguing against the government in Foreign Intelligence Surveillance Court proceedings?

In 50 U.S.C. § 1803(i), Congress has authorized the Foreign Intelligence Surveillance Court (and the Surveillance Court of Review) to appoint *amici* to assist the courts in their proceedings. In my judgment, the appointment of such *amici* can assist the courts to resolve important legal questions in appropriate circumstances. The appointment of such *amici* is, of course, a task properly vested in the courts themselves.

4. The Privacy and Civil Liberties Oversight Board plays a role in recommending individuals to be selected as an *amicus curiae*.

What experiences and qualities would you look for in recommending individuals to serve as an amicus curiae in Foreign Intelligence Surveillance Court proceedings?

Pursuant to 50 U.S.C. § 1803(i)(1), the presiding judges of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review “shall . . . jointly designate” the individuals to serve as *amicus curiae*. The statute provides that, “[i]n designating such individuals, the presiding judges may consider individuals recommended by any source, including members of the Privacy and Civil Liberties Oversight Board, the judges determine appropriate.” *Id.*

Should the judges seek the advice of the Board in making designations, I would first turn to the factors that Congress has listed as requirements for *amici*: “expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise” to the court. 50 U.S.C. § 1803(i)(3)(A); *see id.* § 1803(i)(3)(B) (requiring that *amici* must “be eligible for access to classified information” in appropriate cases). Beyond those requirements, I would seek out individuals who would help provide the Court a full, fair, and impartial airing of all the legal and factual issues relevant to the important cases that the Court decides.

5. Are there any ways you would want to see the amicus role changed?

As part of the Board’s oversight functions, it would be appropriate for the Board to consider whether Congress could improve the statutory provisions authorizing judicial review in the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review. As a member of the Board, I would hope to assess whether the courts’ experience with *amici* over the past several years prompts any recommendations for changes.

Written Questions for Aditya Bamzai
Submitted by Senator Patrick Leahy
February 6, 2019

Role of PCLOB:

PCLOB is uniquely poised to ensure that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties.

1. How does the role of the PCLOB differ from what is expected of the intelligence community?

The Board is tasked by statute with "ensuring that the need for [] actions" "to protect the Nation from terrorism" "is balanced with the need to protect privacy and civil liberties" and that "liberty concerns are appropriately considered in the development and implementation of" the Nation's antiterrorism laws, regulations, and policies. 42 U.S.C. §§ 2000ee(c)(1)-(2). The Board's statutory mandate gives it a unique role in ensuring that civil liberties and privacy are considered in formulating national security policy. As part of that mandate, the Board can ensure that values such as privacy, accountability, and transparency are properly considered by the intelligence community.

2. If the courts have ruled that a program is consistent with the Fourth Amendment, do you believe that the PCLOB has an independent responsibility to consider whether the program adequately protects civil liberties, including Fourth Amendment rights?

Yes.

USA FREEDOM Act

Certain surveillance authorities authorized under the USA FREEDOM Act are set to sunset later this year.

1. What is your understanding of how effective the reforms contained in USA FREEDOM have been to date?

An appropriate assessment of the reforms contained in the USA FREEDOM Act would require a sense of the benefits that the reforms in the statute have produced (or are anticipated to produce) and the costs that the statute imposed, including any legal violations under the Constitution or other statutory authorities or other violations of civil liberties. As some of the information about the USA FREEDOM Act's benefits and costs is unavailable to me, my understanding of the reforms' effectiveness is currently incomplete. If confirmed, along with other members of the Board, I am committed to understanding the costs and benefits and to preparing a neutral and objective assessment so that the Board can assist Congress in its consideration of reauthorization of the statute.

2. What additional reforms or changes to these authorities, if any, do you believe are appropriate for Congress to consider?

See answer immediately above.

3. What role would you like the PCLOB to play in evaluating these authorities as Congress considers reauthorization?

As noted above, I would like the PCLOB to prepare a neutral and objective report that assesses the costs and benefits of these authorities, the authorities' compliance with the applicable legal framework, and any compliance issues. My hope is that the report can assist Congress as it considers reauthorization.