Center for a New American Security

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Responses to Questions for the Record

Senate Committee on the Judiciary, Hearing on *The FISA Amendments Act: Reauthorizing America's Vital National Security Authority and Protecting Privacy and Civil Liberties* (June 27, 2017)

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RESPONSES TO QUESTIONS FOR THE RECORD FROM SENATOR HIRONO

1) Why did the FISA Court not appoint an amicus curiae in its most recent series of hearings on Section 702? If Congress were to require an amicus in major FISA Court proceedings, what benefits would accrue to the public?

Appointment of amici is governed by 50 U.S.C. § 1803(i), which was added to FISA by the USA FREEDOM Act of 2015.[1] Section 1803(i)(2) describes the circumstances under which the court either must or may appoint an amicus:

> **(2) Authorization**
> A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other statutory requirement that the court act expeditiously or within a stated time—
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> **(A)** shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; and
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> **(B)** may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.

Under paragraph (A), appointment is mandatory where a case presents "a novel or significant interpretation of the law," unless the court finds that the appointment would not be

[1] Pub. L. No. 114-23, § 401 (2015).

appropriate. Under paragraph (B), the court has discretion to appoint an amicus "in any instance as [it] deems appropriate."

Importantly, both mandatory and discretionary appointments must be "consistent with" any applicable requirements "that the court act expeditiously or within a stated time." Here, that would include:

- 50 U.S.C. § 1803(c), which requires that "[p]roceedings under [FISA] shall be conducted as expeditiously as possible," and
- 50 U.S.C. § 1881a(i)(1)(B), which requires the court to complete its review of certifications and minimization and targeting procedures submitted by the Attorney General and Director of National Intelligence under Section 702 "not later than 30 days after the date on which such certification and such procedures are submitted."

The court did not explain in its April 2017 opinion why it declined to appoint an amicus. Given the statutory requirements, there are two possible explanations.

First, the court may have determined that the case did not "present[] a novel or significant interpretation of the law." Reasonable minds can disagree on this, given the serious issues facing the court (the NSA compliance incidents involving inadvertent U.S.-person queries of upstream data, among others). The court may have taken the view, however, that these compliance incidents, while serious, presented primarily factual questions rather than issues of *legal interpretation*, the statutory criterion. Ultimately, the statute provides that "the opinion of the court" determines whether novel or significant legal issues compel either the appointment of an amicus or a finding explaining why it would not be appropriate. The text thus confers on the presiding judge substantial discretion to determine whether an amicus is required. An implicit finding that this case presented no "novel or significant interpretation of the law" would likely have been within that discretion, even if others might have reached a different judgment.

Second, the court may have taken the view that it would not have been possible to appoint and receive briefing and argument from an amicus "consistent with" the compressed timetable required by Section 702 and FISA's general requirement of expedition. The opinion discloses that the most recent certifications were approved only after a challenging and apparently frenetic process: the government's initial certifications last September, its disclosure a month later of serious compliance problems, two extensions issued by the court, the government's submission of amended certifications, revisions to the targeting and minimization procedures, an explanatory memorandum prepared by the Department of Justice, and finally the court's opinion reauthorizing the program in light of the amendments.[2] Against this hectic backdrop, it is possible that the court felt that an

[2] *See* Memorandum Opinion and Order 2-6 (F.I.S.C. Apr. 26, 2017) (Collyer, J.).

amicus appointment would not have been "consistent with" the timing requirements described above.

In short, the court's decision not to appoint an amicus was likely within the discretion afforded by the statute. It is a separate question, however, whether the statute strikes the right balance in providing such broad discretion on amicus appointments—at least in the context of the court's annual review of Section 702.

In my view, Congress should amend the statute to require an amicus appointment in every review of annual certifications and minimization and targeting procedures under Section 702. Because judicial oversight of Section 702 is programmatic, every annual approval is systemically significant. Judicial review of 702 certifications and the associated procedures is thus qualitatively different from the individualized orders issued under other provisions of FISA. Guaranteeing that an amicus will be appointed in this very narrow, but very important, category of cases would strengthen the public credibility of Section 702's programmatic judicial oversight. Just as importantly, it would not hamper the government's ability to use 702 to nimbly confront security threats. Finally, a mandatory amicus for the FISA Court's annual programmatic review of 702 would not affect its handling of the more than 1,700 other applications it receives each year.[3]

2) What is your view on a statutory bar on "about" collection?

Recently declassified documents revealed serious, albeit inadvertent, compliance issues implicating "about" collection. Because collection under the program's upstream component, including "about" collection, had a higher chance of pulling in some wholly domestic messages, the NSA's court-approved minimization procedures for Section 702 prohibited analysts from using U.S.-person identifiers to query data collected under upstream. A recently declassified NSA Inspector General Report revealed, however, that NSA analysts were including upstream in such queries around 5% of the time.[4] The cause was apparently a system design that "automatically defaulted" to include upstream data, requiring analysts to manually remove it from their search criteria.[5]

After attempting to remedy these compliance problems through other means, NSA ultimately opted to end "about" collection, thus limiting upstream collection "to internet communications that are sent directly to or from a foreign target."[6] This change "should reduce the

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3 *Report of the Director of the Administrative Office of the U.S. Courts on Activities of the Foreign Intelligence Surveillance Courts for 2016*, at 1 (Apr. 2017).

4 NSA/CSS Inspector General Report 7 (Jan. 7, 2016), *available at* https://www.dni.gov/files/documents/icotr/51117/NSA_IG_Report_1_7_16_ST-15-0002.pdf.

5 *Id.* at 8.

6 NSA Press Release, *NSA Stops Certain Foreign Intelligence Collection Activities Under Section 702* (Apr. 28, 2017), *at* https://www.nsa.gov/news-features/press-room/press-releases/2017/nsa-stops-certain-702-activites.shtml.

number of communications acquired under Section 702 to which a U.S. person or a person in the United States is a party."[7]

Importantly, however, "about" collection remains "necessary to acquire even some communications that are 'to' and 'from' a tasked selector."[8] NSA confirmed this in its recent announcement about the end of "about" collection:

> NSA previously reported that, because of the limits of its current technology, it is unable to completely eliminate "about" communications from its upstream 702 collection without also excluding some of the relevant communications directly "to or from" its foreign intelligence targets. That limitation remains even today.[9]

Amending the statute to codify NSA's recent change would freeze NSA's methods in place based on the current limitations of its technology. This would prevent NSA from ever resuming collection of those communications to or from a target that, for technical reasons, can only be gathered through "about" collection—even if it eventually finds a technological solution enabling it to do so without the attendant privacy concerns.

Even without a statutory bar, reinstating "about" collection would require the FISA Court to approve an amendment to NSA's Targeting Procedures. The court's scrutiny of the recent compliance incidents and willingness to reauthorize the program only after NSA ended "about" collection suggest that obtaining court approval of such an amendment would be difficult, absent an extraordinarily persuasive showing. The court thus appears capable of managing this issue flexibly as technology evolves, without the rigidity of a statutory bar. Congress can always revisit this question in the future, however, should circumstances change.

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7 Memorandum Opinion and Order, at 62 n.51 (F.I.S.C. Apr. 26, 2017).

8 *Id.* at 38.

9 NSA Press Release, *NSA Stops Certain Foreign Intelligence Collection Activities Under Section 702* (Apr. 28, 2017), *at* https://www.nsa.gov/news-features/press-room/press-releases/2017/nsa-stops-certain-702-activites.shtml.