Senate Committee on the Judiciary

"Oversight and Reauthorization of the FISA Amendments Act: The Balance Between National Security, Privacy and Civil Liberties"

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Questions for the Record from Ranking Member Charles E. Grassley

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1. Section 702 Sunset Provision

As you know, the FISA Amendments Act Reauthorization Act of 2012 reauthorized Title VII, or Section 702, of the FISA Amendments Act until December 31, 2017. As you also know, the Privacy and Civil Liberties Oversight Board ("PCLOB") conducted an extensive review of Section 702 surveillance and its oversight and compliance processes. The PCLOB concluded that the program was authorized by the FISA statute, was constitutional under the Fourth Amendment, and that the information collected under this authority "has been valuable and effective in protecting the nation's security and producing useful foreign intelligence." Following its extensive review, the PCLOB further explained that "the Board has found no evidence of intentional abuse" of the program. And the Section 702 program is subject to a substantial compliance and oversight regime from all three branches of the government, including the U.S. Intelligence Community and Department of justice, as well as Foreign Intelligence Surveillance Court and the congressional intelligence and judiciary committees.

a. Given all of the above, do you believe Title VII of the FISA Amendments Act should be made permanent?

Yes. I support permanent reauthorization of Section 702 of FISA. Congress enacted Section 702 eight years ago and reauthorized the program without amendment. The program is subject to strict oversight and legal and policy constraints that protect privacy and civil liberties, and it has proven to be an extremely valuable source of foreign intelligence. Under some circumstances, sunset provisions may be appropriate, particularly to ensure that new authorities are effective and properly implemented. At this point, however, the authority is well-established, and maintaining a sunset provision may only add uncertainty to the Executive Branch's operation of the program and potentially undermine its effectiveness. Congress, of course, could still amend Section 702, if it became necessary in the future

2. U.S. Person Queries and U.S. Persons' Personal Life

In his Prepared Statement, Chairman Medine asserted that U.S. persons' communications incidentally acquired pursuant to Section 702 "can include family photographs, love letters, personal financial matters, discussions of physical and mental health, and political and religious

exchanges. U.S. person queries [of that information] are, therefore, capable of revealing a significant slice of an American's personal life."

a. U.S. persons cannot be targeted, or "reverse targeted," for Section 702 collection, correct?

Correct. The statute expressly prohibits reverse targeting.

b. Is it accurate to state that the way the government may incidentally acquire U.S. person communications through Section 702 collection is when U.S. persons communicate with a non-U.S. person abroad who has been targeted pursuant to targeting requirements? And those targeting requirements ensure that the non-U.S. person abroad was targeted for a court-authorized foreign intelligence purpose, correct?

The only persons who may be targeted under Section 702 are non-U.S. persons located outside the United States who are expected to communicate foreign intelligence information concerning a topics certified by the FISA Court. The FISA Court reviews the targeting procedures that enforce these statutory limitations.

Generally, incidental collection of U.S. person communications occurs when a U.S. person is communicating with a non-U.S. person abroad, who has been targeted pursuant to these targeting procedures.

Incidental collection of U.S. person communications also may occur as part of the "upstream" collection of Internet communications. First, the incidental collection of U.S. person communications may occur when communications "about" a valid Section 702 target are acquired. "About" communications are those where the name, email address, or other identifier associated with a valid Section 702 target is located within the body of a communication. Second, the incidental collection of U.S. person communications may occur through upstream collection when U.S. person communications are embedded within an email chain that contains a communication to, from, or about a valid Section 702 target.

c. Further, U.S. person communications that are acquired through Section 702 only include those obtained *while* communicating with a valid foreign intelligence target, correct? In other words, just because a U.S. person has communicated with a valid foreign intelligence target on one occasion doesn't mean the U.S. government thereafter has access to any and all of that U.S. person's communications, correct?

Correct. If a targeted non-U.S. person located abroad communicates with a U.S. person, that discrete communication will be collected. Of course, this does not mean that all of that U.S. person's communications will be collected. As noted above, Section 702 prohibits "reverse targeting" – that is, targeting a non-U.S. person in order to collect communications with a U.S. person.

d. **To Rachel Brand:** During the PCLOB's review of the Section 702 program, did you ever encounter an instance in which *U.S. person queries* of collected 702 data revealed a "significant slice" of a specific American's personal life?

3. Deletion of U.S. Persons' Irrelevant Communications

Also in his Prepared Statement, Chairman Medine explained that "NSA's minimization procedures further require the destruction of irrelevant U.S. person communications . . . only where the communication can be identified as 'clearly' not relevant to the purpose under which it was acquired or containing evidence of a crime," yet he asserted that "[i]n practice, this destruction rarely happens." He also separately asserted in his Prepared Statement that "[i]n theory . . . innocent communications will be deleted by the intelligence agencies. But in practice, as the Board's Section 702 report notes, they rarely are deleted." Finally, in response to a question during the hearing, he stated that some U.S. person information "is never deleted. It sits in the databases for five years or sometimes longer."

a. As the PCLOB's Section 702 report explains, isn't the reason why NSA doesn't immediately delete many U.S. person communications because most U.S. person communications are never analyzed or reviewed by NSA analysts?

Generally, communications collected under Section 702 are subject to a five-year retention period and are deleted automatically from NSA's systems at the end of that period. Under the NSA's minimization procedures, as discussed in the PCLOB 702 report, deletion of a U.S. person communication is required at the "earliest practicable point in the processing cycle" and only "where the communication can be identified as 'clearly' not relevant to the foreign intelligence purpose under which it was acquired or containing evidence of a crime."

In many instances, it may be difficult for an analyst to determine that a communication is not foreign intelligence. As the PCLOB explained, "communications that appear innocuous at first may later take on deeper significance as more contextual information is learned, and it can be difficult for one analyst to be certain that a communication has no intelligence value to any other analyst." (PCLOB Report at 129.) If an analyst reviews a communication and is uncertain whether it constitutes foreign intelligence or evidence of a crime, he or she may leave it in the database for the remainder of the retention period.

In addition, NSA analysts do not review all or even most of the communications collected under Section 702. Consequently, communications are rarely affirmatively deleted under the minimization procedures prior to the expiration of the general five-year retention period.

b. And isn't it correct that all U.S. person communications not reviewed or analyzed by the NSA will be aged-off and deleted within defined periods?

Correct. According to the PCLOB report, communications that have not been minimized generally are deleted from NSA systems no later than five years after the expiration of the Section 702 certification under which the data was acquired. Unminimized communications acquired through upstream collection generally are deleted no later than two years after the expiration of the Section 702 certification under which the data was acquired.

c. **To Rachel Brand:** During the PCLOB's review of the Section 702 program, did you ever encounter a situation in which the NSA did *not* delete an identified U.S. person communication it had (1) reviewed and (2) determined was "innocent" – i.e., "'clearly' not relevant to the purpose under which it was acquired or containing evidence of a crime"?