

**Hearing before the 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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**I. Introduction**

Thank you Chairman Grassley, Ranking Member Leahy, and distinguished members of the Committee. I am honored to have this opportunity to appear before you to discuss the FISA Amendments Act (FAA) and, in particular, the Section 702 program.

As the former director of the National Counterterrorism Center, I can attest that the FAA has proven to be a vital authority for the collection of foreign intelligence to guard against terrorism and other threats to our national security. Section 702 has significantly contributed to our ability to prevent terrorist attacks inside the United States and around the world.

Moreover, as the former general counsel of NSA and as a former senior official in the Justice Department's National Security Division, I was responsible for helping to ensure that the government's implementation of the FAA complied with the law and protected privacy and the civil liberties of Americans. As the Committee is aware, the FAA is subject to in-depth oversight and review by all three branches of government, as well as independent reviews by the Privacy and Civil Liberties Oversight Board (PCLOB). These reviews have universally concluded that the government is properly using its authority under the FAA to conduct foreign intelligence collection.

Congress enacted the FAA in 2008 and reauthorized the statute in 2012. Since the passage of the FAA, and through its extension, this Committee has played an essential role in overseeing the government's use of these surveillance authorities. I appreciate the Committee's decision to hold this hearing today to consider the renewal of this authority, well in advance of its expiration next year, and hope to contribute to the Committee's efforts.

I also am pleased to join with colleagues who bring significant experience and a range of perspectives to the issues surrounding the FAA. For my part, I will focus on the operational aspects of 702, and will begin by describing the complex threat landscape facing the country today. I then will address the value of the FAA and Section 702 to our counterterrorism activities. Finally, I will describe the comprehensive compliance and oversight structure in place to protect civil liberties and privacy.

## II. Threat Landscape

Our discussion of FAA-authorized intelligence collection takes place in the context of a persistent and complex threat environment. Thus, to appreciate the value of Section 702 collection, it is important to describe briefly the threats the United States faces from terrorist groups and operatives.

Over the past several years, the United States has made significant progress against core al-Qaida leadership, but the range of threats we face from al-Qaida linked groups has become increasingly diverse and geographically expansive. The continuing appeal of the jihadist narrative and the adaptive nature of these groups pose substantial challenges to the efforts of our counterterrorism community.

By any measure, the so-called Islamic State, or ISIS, presents the most urgent threat to our security today. The group has exploited the conflict in Syria and sectarian tensions in Iraq to entrench itself in both countries, now spanning the geographic center of the Middle East. Using both terrorist and insurgent tactics, the group has seized and is governing territory, while at the same time securing the allegiance of allied terrorist groups across the Middle East and North Africa. ISIS's sanctuary enables it to recruit, train, and execute external attacks, as we have now seen in Europe, and to incite assailants around the world. It has recruited thousands of militants to join its fight in the region and uses its propaganda campaign to radicalize countless others in the West. And at the same time, we continue to face an enduring threat from al Qaida and its affiliates, who maintain the intent and capacity to carry out attacks in the West.

Most concerning, the recent attacks in Brussels and Paris demonstrate that ISIS now has both the intent and capability to direct and execute sophisticated attacks in Western Europe. These attacks reflect an alarming trend. Over the past year, ISIS has increased the complexity, severity, and pace of its external attacks. The Brussels and Paris attacks were not simply inspired by ISIS, but rather they were ISIS-planned and directed. And they were conducted as part of a coordinated effort to maximize casualties by striking highly vulnerable targets. Further, recent reports that ISIS has used chemical weapons in Syria, and that it conducted surveillance of Belgium nuclear facilities, raise the specter that the group is intent on using weapons of mass destruction.

In the United States, the threat from ISIS is on a smaller scale but persistent. We have experienced attacks that ISIS has inspired—including the attacks in San Bernardino and in Garland, Texas—and there has been an overall uptick over the past year in the number of moderate-to-small scale plots. Lone actors or insular groups—often self-directed or inspired by overseas groups, like ISIS—pose the most serious threat to carry out attacks here. Homegrown violent extremists will likely continue gravitating to simpler plots that do not require advanced skills, outside training, or communication with others. The online environment serves a critical role in radicalizing and mobilizing homegrown extremists towards violence. Highlighting the challenge this presents, the FBI Director said last year that the FBI has homegrown violent extremist cases, totaling about 900, in every state. Most of these cases are connected to ISIS.

Several factors are driving this trend toward the increasing pace and scale of terrorist violence. First, the sheer number of number of Europeans and other Westerners who have gone to Syria to fight in the conflict and to join ISIS is supplying a steady flow of operatives to the group. More than 6,000 Europeans—including many French, German, British, and Belgian nationals—have travelled to Syria to join the fight. This is part of the total of approximately 40,000 foreign fighters in the region. Among the Europeans who have left for Syria, several hundred fighters have returned to their home countries, typically battle-hardened, trained, and further radicalized. The number of Americans who have travelled to Syria or Iraq, or have tried to, exceeds 250.

We should also recognize the potential for an ISIS-directed attack in the United States. While the principal threat from ISIS in the United States is from homegrown, ISIS-inspired actors, the fact that so many Americans have travelled to Syria and Iraq to fight, along with thousands more from visa waiver countries in Europe, raises the real danger that these individuals could be deployed here to conduct attacks similar to the attacks in Paris and Brussels.

Second, ISIS has developed more advanced tactics in planning and executing these attacks. In both Brussels and Paris, the operatives staged coordinated attacks at multiple sites, effectively hampering police responses. The militants exploited weaknesses in Europe's border controls in order to move relatively freely from Syria to France and Belgium. The group has also moved away from previous efforts to attack symbolically significant targets—such as the 2014 attack on a Jewish museum in Brussels—and appears to have adopted the guidance of a senior ISIS operative in the group's online magazine, who directed followers “to stop looking for specific targets” and to “hit everyone and everything.” Further, the explosives used in Paris and likely in Brussels indicate the terrorists have achieved a level of proficiency in bomb making.

Third, existing networks of extremists in Europe are providing the infrastructure to support the execution of attacks there. The investigations of the Paris and Belgium attacks have revealed embedded radical networks that supply foreign fighters to ISIS in Syria and operatives and logistical support for the terrorist attacks in those cities. While such entrenched and isolated networks are not present in the United States, ISIS continues to target Americans for recruitment, including through the use of focused social media, in order to identify and mobilize operatives here.

Looking more broadly, the rise of ISIS should be viewed as a manifestation of the transformation of the global jihadist movement over the past several years. We have seen this movement diversify and expand in the aftermath of the upheaval and political chaos in the Arab world since 2010. Instability and unrest in large parts of the Middle East and North Africa have led to a lack of security, border control, and effective governance. In the last few years, four states—Iraq, Syria, Libya, and Yemen—have effectively collapsed. ISIS and other terrorist groups exploit these conditions to expand their reach and establish safe havens.

As a result, the threat now comes from a decentralized array of organizations and networks. Specifically, al-Qaida core continues to support attacking the West and is vying with ISIS to be the recognized leader of the global jihad. There is no doubt that sustained U.S. counterterrorism pressure has led to the steady elimination of al-Qaida's senior leaders and limited the group's ability to operate, train, and recruit operatives. At the same time, the core leadership of al-Qaida continues to wield substantial influence over affiliated and allied groups, such as Yemen-based al-Qaida in the Arabian Peninsula. On three occasions over the past several years, AQAP has sought to bring down an airliner bound for the United States. And there is reason to believe it still harbors the intent and substantial capability to carry out such a plot.

In Syria, veteran al-Qaida fighters have traveled from Pakistan to take advantage of the permissive operating environment and access to foreign fighters. They are focused on plotting against the West. Al-Shabaab also maintains a safe haven in Somalia and threatens U.S. interests in the region, asserting the aim of creating a caliphate across east Africa. The group has reportedly increased its recruitment in Kenya and aims to destabilize parts of Kenya. Finally, AQIM (and its splinter groups) and Boko Haram—now an official branch of ISIS—continue to maintain their base of operations in North and West Africa and have demonstrated sustained capabilities to carry out deadly attacks against civilian targets.

### **III. The Value of FAA Section 702**

Against this backdrop of a dynamic and lethal terrorism threat, the ability of the United States to conduct surveillance under Section 702 is vital to our security. Through the surveillance of communications under this authority, the government gains information about the identities of terrorists, their networks, and their plans and capabilities. This surveillance allows the government to peer inside highly secretive terrorist organizations and to obtain unvarnished intelligence about how these groups operate and seek to carry out attacks, often long before plots are executed.

As the Director of NCTC from 2011 to 2014, I relied on a daily basis on intelligence collected under Section 702. NCTC serves as the hub of terrorism information, analysis, and operational planning for the federal government. Section 702 collection was instrumental to our efforts to discern the intentions and capabilities of our terrorist adversaries, contributing both to our strategic judgments and tactical insights. In the NCTC morning briefings, analysts frequently reported that a critical piece of intelligence was obtained through FAA collection. And I often relied on FAA collection in my briefings and updates to other government officials and to the National Security Council.

The Intelligence Community as a whole consistently has emphasized the critical value of Section 702 collection. In a congressional hearing in February, intelligence officials reaffirmed the importance of this authority. Director of National Intelligence James Clapper testified that Section 702 represents a “vital intelligence capability for all of us.” Similarly, CIA Director John Brennan called Section 702 “a critical tool for CIA

for the collection of foreign intelligence as well as our operational activities,” and said that there “have been numerous instances over the years where 702 has been instrumental in our ability to uncover and also help disrupt activities that are a threat to our national security interests.” Director Brennan cited one example, from late 2014, in which Section 702 information contributed to the ability of European authorities to arrest a long-time Libyan extremist, who had made several trips to Syria and Libya to meet with senior operatives.

The PCLOB’s comprehensive review of the Section 702 program also emphasized the value of this collection. The PCLOB concluded:

[Section 702] has helped the United States learn more about the membership, leadership structure, priorities, tactics, and plans of international terrorist organizations. It has enabled the discovery of previously unknown terrorist operatives as well as the locations and movements of suspects already known to the government. It has led to the discovery of previously unknown terrorist plots directed against the United States and foreign countries, enabling the disruption of those plots.

According to the PCLOB, since 2008 the number of signals intelligence reports based in whole or in part on Section 702 has increased exponentially, and the NSA disseminates hundreds of reports per month concerning terrorism that include information derived from Section 702. As of 2014, over a quarter of the NSA’s reports concerning international terrorism included information based in whole or in part on Section 702 collection, and this percentage has increased every year since the statute was enacted. Moreover, the flexibility of Section 702 collection, according to the PCLOB, enables the government to maintain coverage on particular individuals as they add or switch their modes of communications.

Based on its review of classified information, the PCLOB identified approximately 30 specific cases in which Section 702 information was the initial catalyst that identified previously unknown terrorist operatives or plots. In the typical case, Section 702 information was based on targeted surveillance of a specific foreign individual overseas based on the government’s reasonable belief the individual was involved with terrorist activities. This narrowly focused surveillance led to the discovery of a specific plot. The government next engaged in a short, intensive period of further investigation, leading to the identification of associates and the arrest of the plotters. As a result, Section 702 led to the arrest of more than 100 individuals on terrorism-related offenses. These paradigmatic cases demonstrate the critical importance of the authority Congress established under Section 702.

Two specific cases, now declassified, highlight the value of Section 702.

- In September 2009, NSA analysts relied on Section 702 to target an email address used by a suspected al-Qaida courier in Pakistan. Based on this surveillance, NSA discovered a message sent to an individual

in the United States, subsequently identified as Najibullah Zazi, who was urgently seeking advice on how to make explosives. Further investigation revealed that Zazi and a group of operative had imminent plans to detonate explosives in the New York City subway. The FBI and local law enforcement officials arrested Zazi and his confederates and stopped the attack before it could be executed.

- In another example, NSA conducted surveillance under Section 702 of an email address used by a suspected extremist in Yemen. This surveillance led NSA to discover a connection between the extremist and an unknown person in Kansas City, Missouri, who was then identified as Khalid Ouazzani. The follow-up investigation revealed that Ouazzani was connected to other al-Qaida associates in the United States, who were part of an earlier plot to bomb the New York Stock Exchange. All of these individuals were prosecuted and pled guilty to terrorism offenses.

In the context of the Zazi and Ouazzani examples, it is worth emphasizing the role of “incidental collection” under Section 702. Section 702 prohibits the government from targeting a U.S. person anywhere in the world, and prohibits deliberately acquiring even a single communication that is known to be solely among people located within the United States. Congress, in enacting Section 702, however, authorized the government to acquire and, when appropriate, to retain and use communications in which a U.S. person is in contact with a foreign target located overseas. This is often referred to as “incidental collection,” because it is not accidental or inadvertent, but rather an anticipated consequence of monitoring an overseas target: a person targeted for surveillance who speaks on the phone or communicates over the Internet may often be communicating with someone else who is not a target. In the Zazi and Ouazzani cases, the government’s ability to collect the communications of operatives inside the United States, as a consequence of their contacts with Section 702 targets located overseas, was critical to the disruption of plots and to the arrest of al-Qaida operatives here. “Incidental collection” under Section 702 led to the initial identification of Zazi and Ouazzani and enabled the government to use other investigative tools, including traditional FISA authority, to advance its investigations.

Beyond the United States, Section 702 has proven to be invaluable in supporting the counterterrorism efforts of our allies around the world. Among the specific cases the PCLOB reviewed, in which Section 702 assisted in ongoing terrorism investigations or provided warnings about continuing threats, the vast majority of these cases involved operatives and plots in foreign countries, including many in Europe. In these cases, the United States shared Section 702 information with our foreign counterparts to support their efforts. Given the increasing reach of ISIS and the transnational nature of jihadist groups, the ability of the United States collect and share intelligence collected under Section 702 has proven to be essential.

Finally, in describing the value of Section 702, it is important to explain why this authority is uniquely important. Since 1978, when the Foreign Intelligence Surveillance Act was first enacted, through the late 1990s, the government was able to conduct the vast majority of its overseas-focused intelligence collection without the need to obtain individualized court orders. However, technological changes in the 1990s—primarily the shift of long-haul communications from satellites to undersea cables—and the way the FISA statute’s technology-dependent definitions meant that the government was often forced to seek individualized court orders from the Foreign Intelligence Surveillance Court (FISC) to acquire the communications of foreign terrorists or other foreign intelligence targets overseas. This technological change turned nearly 20 years of foreign intelligence collection practice under FISA on its head, and this trend continued to accelerate through the early 2000s. In the aftermath of the 9/11 attacks, it became clear that this approach to foreign intelligence collection was becoming untenable, even as the terrorist threat to our nation was growing.

As the Deputy Assistant Attorney General from 2006 to 2009 overseeing DOJ’s foreign intelligence surveillance programs, I experienced first-hand the adverse consequences of this pre-FAA approach. In some cases, it simply was not possible to demonstrate probable cause that a proposed target overseas was a “foreign power” or an “agent of a foreign power,” as required under FISA’s Title I provisions, which were designed to protect U.S. persons. Of course, as courts repeatedly have held, non-U.S. persons outside the United States are not entitled to the protections of the Fourth Amendment. Second, as the number of foreign intelligence targets overseas increased due to the growing terrorist threat, it was not practical to obtain individualized court orders on a routine basis. And this is true today more than ever, as the terrorist threat has diversified and expanded, including with the recruitment by ISIS of individuals to wage jihad around the globe. This was a significant burden on the Executive and Judicial Branches before the FAA was enacted in 2008—diverting finite resources to cases where Fourth Amendment protections simply did not apply—and would overwhelm the system now.

Last, even where the government was able to demonstrate probable cause, the pre-FAA approach proved cumbersome and slow. The significantly more agile targeting requirements under Section 702 have contributed to the government’s ability to maintain coverage of terrorists who actively seek to evade surveillance and to rapidly move to collect intelligence about newly discovered targets. In short, Section 702 authorizes the government, consistent with the Constitution, to obtain critical intelligence about terrorists and other targets that it cannot obtain through any other practical means.

#### **IV. Compliance and Oversight**

When Congress enacted the FAA in 2008, it established an unprecedented and comprehensive compliance and oversight regime for Section 702. Under this regime, which has been enhanced over the past several years through both Congressional and executive branch action, all three branches of government exercise authority to ensure that the government’s use of 702 is consistent with the Constitution, the laws of the

United States, and the protection of privacy and civil liberties of Americans around the globe.

Executive Branch agencies that implement Section 702 play a central role in ensuring the authority is used properly. This begins with workforce training: NSA, CIA, and the FBI all require personnel involved in targeting decisions to complete training on applicable procedures and policies. At NSA, all Section 702 targeting decisions are reviewed at least twice before collection, and all such decisions are reviewed again by the Department of Justice and NSA compliance officers. Moreover, officials from DOJ's National Security Division and the Office of the Director of National Intelligence exercise broad oversight of NSA, FBI, and CIA activities under Section 702—including reviews of targeting and minimization decisions—generally conducting on-site reviews once every two months. Based on these reviews, the Attorney General and DNI conduct semi-annual compliance assessments, which are routinely provided to Congress and reviewed in detail by the relevant committees.

The Judicial Branch, through the FISC, is responsible for reviewing the certifications the Attorney General and DNI submit to ensure that the collection under Section 702 is properly aimed at non-U.S. persons located outside the United States for foreign intelligence purposes. The FISC conducts rigorous reviews of the government's targeting and minimization procedures for compliance with the requirements of the statute and the Fourth Amendment. Further, the FISC receives extensive reporting about the operation of Section 702 collection and any compliance incidents. The FISC, when it deems appropriate, requires the government to provide additional information and testimony to ensure that the court has a full understanding of the operation of the Section 702 program. Contrary to being a “rubber stamp,” as some have complained, based on my many years of experience as a federal prosecutor, I have found the FISC to be active and assertive in reviewing, evaluating, and conducting oversight on the surveillance cases it handles. The recently released 80-page opinion from Judge Hogan of the FISC—concluding that the government's proposed 702 certifications, including the associated targeting and minimization procedures, met all statutory requirements and were consistent with the Fourth Amendment—exemplifies the FISC's significant role in overseeing the government's use of Section 702.

Congress's oversight of Section 702 is an important component of the program's operation. Pursuant to the FAA, the Attorney General reports twice every year to this Committee and to the Intelligence Committees about the implementation of Section 702. These reports include copies of all certifications and significant pleadings and court orders, as well as descriptions of any compliance matters. These congressional committees also receive assessments from the Attorney General and DNI about the government's adherence to targeting and minimization procedures. Beyond these required submissions, the government engages in ongoing interaction with this Committee in the course of its active oversight of Section 702.

The government's careful implementation of Section 702 was confirmed in the PCLOB's landmark 2014 report. The PCLOB found no evidence of abuse of Section

702. The Board observed that it was “impressed with the rigor of the government’s efforts to ensure that it acquires only those communications it is authorized to collect, and that it targets only those persons it is authorized to target” and concluded that “the government has taken seriously its obligations to establish and adhere to a detailed set of rules regarding how it handles U.S. person communications that it acquires under the program.”

## **V. Conclusion**

In sum, the authority Congress established under Section 702 has played an indispensable role in protecting the nation from terrorist threats. The counterterrorism community, facing a diverse and complex threat landscape, has increasingly relied on the speed, agility, and effectiveness of surveillance conducted under Section 702. And in operating this program under a strict compliance and oversight regime, the government has demonstrated that it can collect vital intelligence in a manner that protects privacy and the civil liberties of Americans.

I urge the Committee to reauthorize Section 702 to ensure that our intelligence and law enforcement communities have the tools they need to defend the nation.