Senate Committee on the Judiciary

**"Strengthening Privacy Rights and National Security:
Oversight of FISA Surveillance Programs"**

July 31, 2013

Questions for the Record from Ranking Member Charles E. Grassley

to

Sr. U.S. District Judge James G. Carr

ANSWERS

QUESTION ONE:

You testified that in very rare instances – perhaps five or fewer during your years on the FISC -- you would have benefitted from the analysis of an independent attorney regarding a novel question of statutory or constitutional interpretation. In your view, would the appointment of a permanent office of independent attorneys tasked with reviewing all of the government's applications before the FISC help strike the correct balance between privacy and national security? Why or why not?

ANSWER TO QUESTION ONE:

I do not believe that having independent counsel review all government's applications before the FISC would be necessary or desirable. This is so for at least two reasons.

First: the FISC has a cadre of highly experienced and thoroughly knowledgeable Legal Advisors who review all applications before the government presents them formally to the FISC duty Judge.[1] Those attorneys often raise questions with the Justice Department attorney who prepared the application. It was my practice, in consultation with a Legal Advisor, to do likewise. Thus, "vetting" of the sort which the question suggests already occurs.

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[1] **The FISC Rules of Procedure require the Department to submit a copy of a proposed application and order at least seven days before formal filing with the Court. FISC R. Proc. 9(a). The proposed application is called the "read copy." Rule 9(a) ensures that the Legal Advisors and duty Judge have sufficient time to review the application and order and raise questions before formal submission for judicial review.**

FISC Presiding Judge Reggie Walton attached a copy of the FISC Rules to his letter of July 29, 2013, to the Committee ("Walton Letter").

Second: the FISA probable cause standard is considerably lower than that which the Fourth Amendment requires with regard to a conventional search warrant application. With a Fourth Amendment warrant (or a Title III law enforcement electronic surveillance order), the government must show probable cause with regard to criminal activity. That can sometimes be difficult.

With a FISA application, in contrast, the government need only show probable cause to believe that the target is connected with a foreign government or a foreign-based terrorist organization.[2] In the vast majority of cases, the government readily meets this standard.

Moreover, almost all applications are fact based; *i.e.*, involve only whether the government has shown such connection. Novel issues of law – the situation to which I addressed my New York Tiimes op-ed and my prepared remarks and testimony before the Committee on July 31, 2013 – arise very infrequently. It is only in some (and not necessarily all) of those instances that, despite the review by and comments of the FISC Legal Advisors that a FISC Judge might desire to have independent counsel speak to some or all of the issues in such an application. In other words, the instances when independent counsel might serve a meaningful and usful role before the FISC are likely to be quite infrequent.

Thus, creating an independent office to review *all* applications (where most simply do not raise new issues of constitutional or statutory law) would be redundant and, in my view, unnecessary.

I note, as the Committee no doubt is aware, that Sen. Richard Blumenthal has submitted proposed legislation to create an Office of Special Advocate. His proposal, like that contained in a July 26, 2013, *Boston Globe* op-ed by former Chief Judge Mark L. Wolf of the District of Massachusetts,[3] is considerably more substantial and substantive than my modest suggestion that Congress amend the FISA to give express authority to FISC Judges to appoint outside counsel where the government has submitted an application which raises new or novel issues of constitutional or statutory law.

While both Sen. Blumenthal's and Judge Wolf's proposals provide for more extensive independent review and involvement on the part of outside counsel, my proposal, should, I

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[2] **As is the case with a Title III application in an ordinary criminal investigation, FISC applications are very lengthy and detailed. The requirement of submission of the read copy provides both the Legal Advisor and duty Judge the necessary opportunity to take the necessary time to review the applications in close detail.**

[3] **Judge Wolf proposes creation of a Cabinet level "Secretary of Civil Liberties."** *See* http://www.bostonglobe.com/opinion/2013/07/26/acting-judicially/T3ryyd01MqdOVc223aMPeJ/story.html

believe, be in any event adopted (as, in effect, it would be if Congress enacted Sen. Blumenthal's proposed legislation or the Executive created, as Judge Wolf suggests, a Cabinet level Secretary of Civil Liberties).

QUESTION TWO:

Under your proposal, would the independent attorney be required to argue against the government's position in every instance, or would the attorney be permitted to agree with the government if he or she felt that that position was the required outcome under the law?

ANSWER TO QUESTION TWO:

The indepent atorney could, and should reach an independent judgment with regard to the issues – and inform the FISC of his or her views without raising artificial or baseless arguments.

Sometimes this would lead the independent attorney to disagree with the government; other times independent counsel might inform the FISC that the government's assessment of the lawfulness of its request was, in his or her view, entirely correct. Thus, the independent attorney would function as does counsel in a conventional civil or criminal case, where the lawyer does not raise challenges that have no basis simply because the opponent is asking the court to do something in its favor.

Even in that circumstance the independent counsel would be of use to the FISC Judge.

QUESTION THREE:

Do you believe that the FISC is a rubber stamp for the government? If not, what explains the government's high success rate before it? Is that success rate in part the product of a "give and take" process by which the Court reviews the government's applications and provides feedback?

ANSWER TO QUESTION THREE:

I disagree that the Judges of the FISC "rubber stamp" orders. I know that I was not, and, during my years on the FISC (2002-08), the other Judges (whom I came to know well), never struck me as having any inclination to act in that manner.

Like almost all FISC Judges, my rate of approval of *formal applications* was 100%. This was so because, as indicated in Answer to Question One, almost all the applications were simply fact based, and the government readily met the lower FISA standard of probable cause.

The FISA, moreover, properly does not give the FISC Judges discretion to second-guess the usefulness of a particular surveillance. This is as it should be, in view of the unique role the

FISC plays in the President's exercise of his Article II powers and responsibility to conduct our nation's foreign affairs and protect our country from foreign-based dangers. Thus, once the government meets the FISA probable cause standard, as it invariably does in the formal applications, the Judge is duty-bound to issue the order.

In addition, the small number of formally reported denials understates the work and role of the FISC Judges and Legal Advisors. According to my understanding, a "denial" "for the record" occurs only where the government has formally filed and presented an application to a FISC Judge, and the Judge has declined to issue the requested order. For the reasons just stated, denial of a *formal application* is a rare event.

But – and this is very important – there are many other instances where the read copy of an application encounters question from either a Legal Advisor or the FISC duty Judge to whom the government will be submitting the formal application. This can, and does from time to time lead to a decision by the government not to file a formal application before the FISC Judge.[4]

In those instances where no formal denial, and thus no reportable denial occurs, the FISC has acted institutionally to cause the government not to proceed with presentation of a formal application to the FISC duty Judge.

I would recommend, accordingly, that instances where the government, following submission of a read copy, thereafter has not presented a formal application, be reported publicly.

If such reporting occurred (perhaps as "Applications Submitted for Initial Review, But Not Formally Presented"), Congress and the public would have a more accurate view of the effectiveness of the FISC review and deliberation process.

QUESTION FOUR:

In your experience, is there a difference in the way Republican-appointed judges on the FISC have discharged their duties, as compared with Democrat-appointed judges?

ANSWER TO QUESTION FOUR:

I do not know the answer to that question.

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[4] **I cannot say, for many reasons, not the least of which is faded memory, how common these instances are. But I note the Walton Letter (pg. 2, ¶ 1) alludes to this practice (*i.e.*, submission of the read copy of the application, questions to the government from a Legal Advisor or the FISC duty Judge, and withdrawal or non-submission of the final application.**

This is so for two reasons.

First, as noted in the Walton Letter (pg. 1, ¶ 2), duty Judges sit singly. Even if I was aware of who my predecessor had been, rarely, if ever would I know what the applications he or she considered contained or the issues those applications raised. Nor would I know what questions the Legal Advisor or prior duty Judge may have had or how the Judge handled the read copy or final application.

Second, during my tenure, the entire Court would meet semi-annually to discuss various issues.[5] While I may have known who appointed some of my FISC colleagues, that was not something that appeared to me to affect the positions various Judges expressed during those sessions on any particular topic.

QUESTION FIVE:

On how many occasions during your tenure on the FISC were you informed about an instance of non-compliance with the court's orders by the government? How many, if any, of these occasions involved intentional non-compliance? In each case, did the government remedy the situation satisfactorily?

ANSWER TO QUESTION FIVE:

While I can recall learning of instances of non-compliance with an order, I cannot say exactly how many times that occurred. It was, in any event, quite rare – somewhere between a couple and a few times.

As best I can recall, none of those instances involved deliberate non-compliance with an order. When noncompliance with one of my orders occurred, the government's explanation always struck me as being forthright and candid. To the best of my recollection, the government also explained its corrective actions.

[As I was preparing my responses to Sen. Grassley's Questions, the press reported numerous instances of NSA noncompliance with FISC orders since my term on the FISC ended. I do not know either the extent to which agencies have reported noncompliance or how the FISC has handled such reports since I left the Court in May of 2008.

I would note, however, that, were my proposal that Congress give FISC Judges discretion to appoint outside counsel, such appointment could occur not just prior to initial review (and possible appeal) of applications and orders raising new or novel legal issues, but where the government, as required by FISC R. Proc. has notified the FISC of noncompliance with an

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[5] **When I was a member of the FISC, the Court did not have, as it now does, *en banc* authority.**

order. Adoption of either Judge Wolf's "Civil Liberties" Cabinet position or Sen. Blumenthal's Special Advocate proposal would potentially bring about more extensive monitoring of compliance and more effective responses to notices of noncompliance with FISC orders or rules.]

Respectfully submitted,

James G. Carr
Sr. U.S. District Judge

Toledo, Ohio
August 19, 2013