Senate Committee on the Judiciary

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

May 10, 2016

Questions for the Record from Chairman Charles E. Grassley

Kenneth Wainstein, Matthew Olsen, and Rachel Brand

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?

ANSWER: *Yes. I support permanent reauthorization of Section 702 of FISA without amendment. Congress has often enacted a sunset for a new authority and, after the passage of time, permanently reauthorized the authority when Congress determined that it was valuable and incorporated appropriate protections. Congress should follow that model here. Section 702 was enacted eight years ago. Congress has already reauthorized it once without amendment. Experience with the program operated under Section 702 – as explained by the PCLOB Report – shows that it is legal, operates within strict constraints that protect privacy and civil liberties, and is an extremely valuable source of foreign intelligence. Congress should now permanently reauthorize Section 702. Eliminating the sunset would not prevent Congress from amending Section 702 if it became necessary in the future, but no such need has become evident in the first eight years of the 702 program's operation.*

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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?

ANSWER: *Correct. Reverse targeting is expressly prohibited by the statute.*

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?

ANSWER: *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 list of topics certified by the FISA Court. These statutory limitations are enforced through strict targeting procedures that must be approved by the FISA Court. This does not mean that no U.S. person's communications will ever be collected; if, for example, a U.S. person communicates with a targeted non-U.S. person located abroad, then those communications will be "incidentally" collected. In the context of "upstream" collection, which accounts for about 9% of Internet collection under Section 702, there are certain circumstances in which a U.S. person communication could be collected where the U.S. person was not necessarily communicating with a target. This occurs because of the technical method for collecting communications from the Internet backbone (by scanning Internet transactions for the "selectors" (such as e-mail addresses) used by targets). If, for example, a target's e-mail address appeared in the body of an email between two non-targets, that email would be collected.*

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?

ANSWER: *Correct. If a targeted non-U.S. person located abroad communicates with a U.S. person, that communication will be collected. This does not open up all of that U.S. person's communications to collection under Section 702. Section*

702 does not allow the government to use the fact of a U.S. person's communication with a target as a reason to target the U.S. person, nor does it allow "reverse targeting" (targeting a non-U.S. person in order to collect communications with a U.S. person). Under Section 702, the government may only target the communications of specific non-U.S. persons located outside the United States.

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?

ANSWER:

No. It is extremely unlikely that a U.S. person query of 702 data could reveal a significant slice of a U.S. person's life. First, it is important to remember that queries are conducted of information that has already been collected under Section 702. Queries do not collect any new data. Second, a U.S. person can never be a target of collection under Section 702. The only U.S. person communications that could respond to a U.S. person query under 702 are those that were incidentally collected because, for example, a U.S. person sent a communication to a targeted non-U.S. person outside the United States. As noted above, the fact that a particular communication to or from a U.S. person was incidentally collected does not mean that all – or even a "significant slice" – of that U.S. person's communications were collected.

The likelihood of a U.S. person query of 702 data revealing a significant slice of a U.S. person's life is especially remote in the context of queries by the FBI. Chairman Medine's written testimony suggested that a U.S. person query at the FBI could "search through years of a U.S. person's communications," leaving the impression that the 702-collected communications held by the FBI could contain the entirety of a particular U.S. person's communications over a period of years. However, as noted above, the FBI can only query the communications it possesses. And the FBI receives only a small subset of the data collected by the NSA under PRISM and receives no information collected upstream. It is almost impossible to imagine that years' worth of any U.S. person's communications would be both incidentally collected and contained within the small subset of 702 PRISM data that is provided to the FBI.

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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?

ANSWER: *Yes. Communications collected under Section 702 are subject to a five-year retention period. With narrow exceptions, they "age off" NSA's systems – that is, they are automatically deleted – at the end of the retention period unless they are reviewed. This is true for all communications, including U.S. person communications collected incidentally. As the PCLOB's Report explained: "NSA analysts do not review all or even most communications acquired under Section 702 as they arrive at the agency. Instead, those communications often remain in the agency's databases unreviewed until they are retrieved in response to a database query, or until they are deleted upon expiration of their retention period, without ever having been reviewed." (PCLOB Report at 128-29.)*

The program's minimization procedures require that, if a communication is reviewed by an analyst – because it is responsive to a query, for example – and is determined to be a U.S. person communication, it must be deleted if the reviewing analyst determines that it does not contain either foreign intelligence information or evidence of a crime. Chairman Medine and others have pointed out that communications are rarely deleted in response to this requirement. This is not because NSA analysts fail to comply with the rule, but because it is very difficult for an individual analyst to review an individual communication and determine that it is not foreign intelligence. This is because, as the PCLOB Report on Section 702 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 does not know 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. These communications will still be subject to the retention period and related limitations.

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?

ANSWER: *Yes.*

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"?

ANSWER: *No.*