

**United States Senate
Committee on the Judiciary**

Hearing on Confirmations, May 23, 2017

Responses of Edward W. Felten (PCLOB Nominee) to
Questions for the Record

Senator Feinstein Questions for the Record

1. *The Privacy and Civil Liberties Oversight Board's (PCLOB) reports on Section 702 of the Foreign Intelligence Surveillance Act (FISA) and Section 215 of the PATRIOT Act remain the most comprehensive and informative reports on these two programs available in the public record.*

If confirmed, what are your priorities for the future activities of the board? What specific issues would you direct the board to consider?

Immediate priorities would include reviewing the oversight projects that were in progress when the Board lost its quorum, and bringing those projects to appropriate conclusions, including issuing public reports to the extent consistent with the protection of classified information, and to resuming the semi-annual reports required by the Board's statute.

Initiating new oversight and advice projects would require the approval of the Board. Appropriate subjects for Board oversight could include the status of past Board recommendations that were not fully implemented at the time of the Board's last public Recommendations Assessment Report; Section 702, including the implementation of changes made by the recent reauthorization; the implementation of the USA FREEDOM Act; information sharing programs within the Board's jurisdiction; and other programs within the Board's jurisdiction that result in the collection of large amounts of data about U.S. persons, or that otherwise affect privacy and civil liberties. It should also be a priority for the Board to consult with stakeholders inside and outside of government, including its congressional oversight committees, as it develops its agenda.

2. *One of the most contentious issues in the recent debate over reauthorization of Section 702 of FISA was the issue of U.S. person queries.*
 - a. ***If confirmed, what would you suggest the Board do to better inform public's understanding of U.S. person queries under Section 702?***

In 2014, the Board's report on Section 702 examined this issue in detail and made two recommendations to enhance protection of privacy and civil liberties with respect to U.S. person queries. In its February 2016 Recommendations Assessment Report, the Board found that those recommendations were "being implemented" and "substantially implemented," respectively. However, because the Board lost a quorum in early 2017, it has not provided a public update on whether these recommendations have been fully implemented.

Given the importance of this issue and the Board's past work on it, encouraging responsible transparency about U.S. person queries of data collected under Section 702 would remain an appropriate and important subject for continued Board oversight.

b. If confirmed, what would you suggest the Board do to help determine the total number of U.S. persons' information collected under 702?

Encouraging responsible statistical transparency about the effects of programs within the Board's jurisdiction on U.S. persons' privacy, including Section 702, has been, and should remain, an important element of the Board's work.

Given this issue's importance, the Board's past work on it, and NSA's expression of interest, described in the Board's February 2016 Recommendations Assessment Report, in "work[ing] with Board staff to develop ... measures" for U.S. person communications collected under Section 702, this would be an appropriate and important subject for continued Board oversight.

c. If confirmed, would you suggest the Board do to help determine the number of U.S. person queries annually conducted by the FBI?

Given this issue's importance, and the Board's past work on it, encouraging responsible transparency about U.S. person queries of data collected under Section 702 would remain an appropriate and important subject for continued Board oversight. The DOJ Inspector General report recently mandated by the passage of the FISA Amendments Reauthorization Act of 2017 should provide additional information about potential approaches and identify "any impediments, including operational, technical, or policy impediments" to a count of the number of such queries the FBI conducts each year.

- 3. In 2016, the Foreign Intelligence Surveillance Court (FISC) rejected the National Security Agency's Section 702 certification because of reported compliance problems associated with collection of communications that were not to or from a target. Specifically, the court stated that "without further information about these*

compliance problems and the government's remedial efforts, the Court is not in a position to assess whether the proposed minimization procedures accompanying the 2016 Certifications comply with statutory standards and are consistent with the requirements of the Fourth Amendment" (FISC's Order Extending the 2016 Certification dated October 26, 2016, at 2).

If confirmed, what could the Board do to better inform the public and the Congress on the compliance problems associated with, and the intelligence value of, NSA collections that are not to or from a target?

In response to a serious compliance problem reported to the Foreign Intelligence Surveillance Court in late 2016, and after unsuccessful attempts to remedy that problem, NSA announced in April 2017 that it would cease "about" collection. Resuming this practice would require FISC approval, followed by a congressional review procedure recently mandated by Congress.

In the past, the Board's work has enhanced public understanding of the implications of this type of collection for Americans' privacy and civil liberties. If NSA seeks to resume such collection, and if both the FISC and Congress approve, the attendant privacy and civil liberties concerns would be an appropriate and important subject for the Board's continued oversight.

Senator Hirono Questions for the Record

Responses of Edward W. Felten (PCLOB Nominee)

1. *Chief Justice John Roberts has recognized that “the judicial branch is not immune” from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.*

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline or entered into a settlement related to this kind of conduct?

No.

2. ***Since no changes were made to the law during this latest reauthorization, what will you do, if confirmed as Chairman, to strengthen the public trust that civil rights and liberties are being protected in the face of so much intelligence collection?***

If confirmed as a member of the Board, I would work to continue the Board’s mission of ensuring that the government’s actions to protect the Nation from terrorism balance the need for such actions with the need to protect privacy and civil liberties.

The effectiveness of the Board depends on the integrity, rigor, and diligence of its work; on making wise choices about which projects to pursue and prioritize; and on the Board reporting clearly and in detail to the public, consistent with the need to protect classified information.

3. ***I’d like to know more about your priorities. Do you believe it is important for the PCLOB to conduct oversight of, and release public records on, programs that raise real risks of threats to privacy and civil liberties? Or would you prioritize the PCLOB’s advice function, under which it provides advice behind closed doors as programs developed?***

The Board’s oversight role and its advice role are both important. The decisions to pursue some projects and not others should be made by the Board on the basis of which projects best serve the Board’s mission. In some cases the Board may decide that a specific oversight project is more important because of its current impact on the public. In other cases the board may decide that a specific advice project can inform decisions of an agency or Congress about a nascent government program could have a large future impact on the public. In my view, these are inherently case-by-case decisions, which should be motivated by the Board’s mission.

4. *There is concern that Section 702 surveillance and use of data collected under Section 702 may impact vulnerable communities such as communities of color, immigrant communities, and the Muslim community at significantly higher rates than it affects Caucasian or non-immigrant communities.*

a. *Do you believe that an individual's race, religion, ethnicity, or nation of origin is a factor that should be weighed into a decision to target someone for foreign intelligence information?*

No.

b. *Will you conduct a quantitative study to determine whether surveillance targeting under Section 702 disparately impacts these communities? Such a study should also include a qualitative analysis of whether the intelligence communities' targeting decisions are based, even in part, on an individual or community's racial, religious, or ethnic makeup, or on the country where they reside, instead of based wholly on indicators that they possess foreign intelligence information.*

Targeting decisions that were based on discriminatory factors would raise concerns. If confirmed, I would be interested as a Board Member in learning of any such practices and assessing their impact on civil liberties.

c. *Will you also conduct a study to determine whether the intelligence community agencies that conduct warrantless US-person queries engage in conduct related to those queries that impacts communities of color, immigrant communities, and Muslim communities more than Caucasian communities?*

Any conduct that had a disparate impact on specific communities, particularly vulnerable communities, would also raise concerns. If confirmed, I would be interested as a Board Member in learning of any such conduct and assessing its impact on civil liberties.

5. *The Office of the Director of National Intelligence committed to providing Americans and the Congress with an estimate of the number of Americans whose communications are incidentally collected under Section 702, only to renege on this commitment after the new Administration took over. Will you commit to reviewing the ODNI's claims about the feasibility of obtaining such an estimate, helping ODNI determine a way to obtain a meaningful estimate, and providing a public report describing your findings.*

Encouraging responsible statistical transparency about the effects of programs within the Board's jurisdiction on U.S. persons' privacy, including Section 702, has been, and should remain, an important element of the Board's work.

Given this issue's importance, the Board's past work on it, and NSA's expression of interest, described in the Board's February 2016 Recommendations Assessment Report, in "work[ing] with Board staff to develop ... measures" for U.S. person communications collected under Section 702, this would be an appropriate and important subject for continued Board oversight. Such oversight would likely include inquiries about, and detailed evaluation of, any specific impediments to feasibility that might be identified by ODNI or other agencies, and consideration of whether and how such impediments might be responsibly overcome.