

QUESTION FOR THE RECORD – Ranking Member Leahy
May 10, 2016 FISA Amendments Act Hearing

Question for David Medine

1. *A significant amount of debate at the Committee's hearing focused on the feasibility of requiring the government to obtain judicial approval before querying Section 702 information using a U.S. person identifier. It was suggested at the hearing that requiring advance judicial approval would actually result in a greater intrusion of Americans' privacy rights and civil liberties than querying this information using a U.S. person identifier without any prior approval, as is currently the case.*
 - a. *Would requiring the government to obtain judicial approval before using a U.S. person identifier to query data collected under Section 702 represent a greater threat to Americans' privacy rights than the status quo?*

I do not believe that requiring the government to obtain judicial approval prior to using a U.S. person identifier to query Section 702 data would result in a greater intrusion into the privacy rights of Americans than is currently the case. Communications information collected under Section 702 may include deeply personal information, including details about personal financial matters, discussions of physical and mental health, and political and religious exchanges. If a court order is required to conduct a query using a U.S. person identifier, it is true that some personal information would have to be conveyed to the FISA Court to justify a query. But conveying a few details to an appointed, life-tenured judge is far less intrusive than having analysts regularly scrutinize years of a U.S. person's communications without an external approval requirement. Put differently, I believe any minor privacy intrusions associated with gathering evidence and submitting it to the FISA Court is warranted because it significantly reduces the risk that analysts will conduct queries that could result in significant intrusions into Americans' privacy.

Senator Sheldon Whitehouse
Written Questions for the Record
Hearing on “Oversight and Reauthorization of the FISA Amendments Act: The Balance
between National Security, Privacy, and Civil Liberties”

Questions for Elizabeth Goitein and the Honorable David Medine

1. *In your testimony, you expressed concern about so-called “back door searches” by law enforcement of data collected pursuant to Section 702. Do you believe there should be restrictions on the FBI’s ability to search Section 702 data for evidence in terrorism and national security investigations? And if, hypothetically, Section 702 were limited to terrorism and national security investigations, what should those restrictions be?*

Among the agencies that utilize Section 702 information, the FBI is the only one permitted to run queries for law enforcement purposes. These queries can be used to “find and extract . . . evidence of crime” when there is suspicion of wrongdoing or when an agent opens an assessment. The FBI can thus effectively search through years of a U.S. person’s communications for information that may lead to criminal charges without a warrant. This is concerning as both a legal and practical matter.

The FBI should not be able to review vast amounts of personal information on an unfounded suspicion, or even without any suspicion at all. Several approaches can be taken to remedy – or at least mitigate – this situation. In my testimony, I recommended that the Committee require the FBI to submit each U.S. person identifier to the FISA Court for approval before the identifier may be used to query Section 702 data, other than in exigent circumstances. For its part, the court should review documentation submitted by the government and make a determination about whether the use of the U.S. person identifier for Section 702 queries meets the minimum standard that the identifier is reasonably likely to return information relevant to an assessment or investigation of a crime. I would also be amenable to requiring the court to apply a higher standard, such as probable cause.

Finally, you raise the hypothetical question of whether Section 702 might be limited to terrorism and national security. Based on the Board’s investigation of Section 702, the counterterrorism certification has proven very valuable. Under Section 702, the Attorney General and the Director of National Intelligence can issue multiple certifications identifying categories of information to be collected under the Section 702 program subject to FISA Court approval. As the PCLOB report explained, certifications can be about categories such as international terrorism and the acquisition of weapons of mass destruction. In my testimony, I only addressed the certification allowing for the collection of information to be used in counterterrorism efforts. Since PCLOB’s jurisdiction is limited to counterterrorism, I have not had occasion to consider other potential uses of Section 702.