

**Statement for the Record**

**United States Senate**

**Committee on the Judiciary**

**“Continued Oversight of the Foreign Intelligence Surveillance Act”**

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## Introduction

Mr. Chairman, Ranking Member Grassley, members of the Committee, thank you for this opportunity to share my views on the important issue of continued oversight of intelligence activities conducted under the Foreign Intelligence Surveillance Act (FISA). I am honored to be here with you today, and so pleased to share the panel today with my colleague at Georgetown Law, Professor Laura Donohue, as well as with Professor Edward Felten of Princeton.

I am currently the Director of National Security Studies and an Adjunct Professor of Law at Georgetown University Law Center, where, among other things, I teach a course on Intelligence Reform. The views presented in this statement and at this hearing are my own, and should not be construed to reflect the views of any employer, current or former. This statement was reviewed by the government for classification purposes.

Prior to joining Georgetown Law in November 2011, I spent my career as a practicing national security lawyer in the Executive Branch. In 2009, I served as Counsel to the Assistant Attorney General for National Security at the United States Department of Justice, where I co-chaired an interagency group created by the Director of National Intelligence (DNI) to improve FISA processes. From 2007-2009, I served in a joint duty capacity as a Senior Associate General Counsel at the Office of the Director of National Intelligence, where I worked behind the scenes on matters relating to the legislative efforts that resulted in the FISA Amendments Act of 2008. Once that law was passed, I was involved in many aspects of implementing the FISA Amendments Act, as well as standing up the internal executive branch interagency oversight structure. Prior to my tour at ODNI, I served for several years as an attorney in the office now called the Office of Intelligence, which is part of the National Security Division at the Department of Justice, and appeared frequently before the Foreign Intelligence Surveillance Court (FISC). I handled both counterterrorism and counterintelligence national security investigations. Later, I became involved in policy matters, including contributing to the development of the Attorney General's Guidelines for FBI Domestic Operations and updated FISA minimization procedures. I also did a short stint as a Special Assistant United States Attorney in the Northern District of Texas. Early in my career, I spent considerable time preparing information that was reported to both the Intelligence and Judiciary Committees of Congress as part of the annual public reports on FISA as well as the comprehensive semi-annual reports on FISA. In short, I am one of a very small handful of attorneys currently outside of government who has direct experience with the operational, legislative, policy, and oversight aspects of FISA, as it was practiced from 2000-2010. More recently, I have had the added benefit of having spent the past three years outside of government to reflect, and to engage with the academic community, and to some extent the public, regarding some of the issues this Committee is considering today.

In addition, there is another aspect of my experience that may not be readily apparent, but that significantly impacts my views on FISA reform: I started working in the national security component of the Justice Department in January 2000. Later that year, I supported investigative efforts after the bombing of the USS Cole. On the morning of September 11, 2001, I was dispatched to the FBI's Strategic Information Operations Center, or SIOC, to help stand up our office's base there for the days and months to come. I remember the moment that morning when

we thought it was possible that there could be as many as fifty to one hundred thousand people in the Twin Towers. I remember the announcement in SIOC that former FBI New York Special Agent John O'Neill had perished in the attack. And I remember the minutes when we were not sure whether there was an additional plane over Washington, D.C., only to learn later that it had been brought down in a field in Pennsylvania. I would also be remiss in recounting my memories from that morning if I did not mention perhaps the finest example of leadership I had ever seen, then, or, since: that of former FBI Director Mueller walking the floor of SIOC, just over a week into the job, alongside the rest of us: visible, present, reassuring.

But I remember other things, too, from that morning, and the hours and days that followed. I recall senior leaders of the Department of Justice racing to obtain the signatures of the Attorney General and the FBI Director on emergency FISA applications because, at that time, the law only provided 24 hours from the time of the Attorney General's oral authorization to the time the application had to be presented to a judge. I also remember being responsible for obtaining pages and pages of secure faxes, which we taped up onto the wall of our small, overcrowded office in SIOC. The faxes contained the signatures of federal prosecutors and analysts who were on the criminal side of the so-called "wall" that had been erected between law enforcement and intelligence investigators as a result of cautious interpretations of FISA that had developed, and then cemented, over time. In accordance with the FISC's orders, we had to obtain their signatures before passing them intelligence information that would assist the FBI's investigation of the attacks. We were tripping over process, but dutifully following court orders, even then.

As a result, I had an up-front view regarding how the USA Patriot Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and later the FISA Amendments Act of 2008, all vastly improved the Intelligence Community's ability to protect the nation from another attack on the scale of September 11<sup>th</sup>.

Which brings me to where we are today. From my perspective, the challenge for members of this Committee is to identify whether there are actual problems with either the law or process, and then craft remedies that address those specific issues. I am here to urge caution in implementing "quick fixes" that may sound appealing based on public or media-driven pressure, but that could have lasting consequences at a practical level that could negatively impact Intelligence Community operations and the nation's security for years to come.

On that point, it is worth noting that the FISA process, for approximately the preceding fifteen years, was subject to the exact *opposite* criticism that it seems to be today: the Department of Justice was accused of being too reticent, too cautious, too unwilling to be aggressive under the law in order to protect the national security. This Committee is very familiar with this history. To provide just a few examples: in May 2000, the Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation was issued.<sup>1</sup> That report concerned the handling of the Wen Ho Lee case, a counterintelligence investigation, and included a critical analysis of the interaction between, and

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<sup>1</sup> *Final Report, Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* (AGRT Report, also known as the Bellows report). (available at://www.justice.gov/ag/readingroom/bellows.htm).

the legal judgment of, the FBI and the Department of Justice concerning their interpretations of FISA standards, such as probable cause, in the late 1990s.<sup>2</sup> In a separate review of the FISA process, this Committee issued a report in February 2003 on FISA Implementation Failures. That report focused primarily on deficiencies in FBI operations, but focused in significant part on problems that prevented the FBI from “aggressively pursuing FISA applications...”<sup>3</sup>

A third example arose five years later. In an exchange of letters in October 2008, New York City Police Commissioner Raymond Kelly criticized the Department of Justice under Attorney General Michael Mukasey’s tenure of being unwilling to present close or borderline cases to the FISC for consideration.<sup>4</sup> Attorney General Mukasey strongly rejected the NYPD’s claims and defended the Department’s practice before the Court, stating in part, “[o]ur successful advocacy before the Court depends on the accuracy of our factual representations and the reliability of our assessments of those facts...”<sup>5</sup> Although today’s criticisms of FISA operations have now shifted from targeting one agency (FBI) to another (NSA), for those, like me, who worked in national security operational law components during these years, it is an ironic twist to hear today’s criticisms that the Department of Justice attorneys in this process may not be adequately representing both the national security as well as civil liberties interests of Americans in their presentations made to the Court; that we need more lawyers scrutinizing already well-scrubbed applications; and that the government should be putting forth more cautious interpretations of the law.

So let’s turn to what may or may not need fixing in FISA as it currently stands. Based on the public and legislative debate since the unauthorized disclosures by Edward Snowden in the *Guardian* and *Washington Post* beginning earlier this summer, I have observed three main critiques. These include: (i) that collection under section 702 of FISA and/or Section 215 of the USA Patriot Act are illegal; (ii) that there is a crisis of public confidence in NSA, the Intelligence Community, and activities conducted under FISA, and that this confidence could be restored by opening FISA practice to some form of adversarial process; and (iii) that FISA activities and legal rulings should be more transparent. Let me take each of those three critiques and some of the proposed reforms one-by-one.

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<sup>2</sup> See, eg. Chapter 11, AGRT Report.

<sup>3</sup> *Interim Report on FBI Oversight in the 107<sup>th</sup> Congress by the Senate Judiciary Committee: FISA Implementation Failures*, February 2003 (available at [www.fas.org/irp/congress/2003\\_rpt/fisa.html](http://www.fas.org/irp/congress/2003_rpt/fisa.html)). The report criticized, in particular, FBI and DOJ’s “too high” standard to establish probable cause, among other statutory requirements.

<sup>4</sup> *Letter from NYPD Police Commissioner Raymond W. Kelly to Attorney General Michael Mukasey*, October 27, 2008 (available at <http://online.wsj.com/public/resources/documents/Mukasey111908.pdf>).

<sup>5</sup> *Letter from Attorney General Michael Mukasey to NYPD Police Commissioner Raymond W. Kelly*, October 31, 2008 (available at [http://online.wsj.com/public/resources/documents/WSJ\\_200811202Kelly.pdf](http://online.wsj.com/public/resources/documents/WSJ_200811202Kelly.pdf)). In response to the NYPD’s request that the Department lower the legal standard of submitting matters to the Court, the Attorney General stood firm, stating:

“We are acutely aware of the stakes, and, as a result, already try to be as aggressive in our approach as we can within the bounds of reason and the law. If we were to lower the standard, the risk would not be limited, as you suggest, to a few more rejected applications. Rather, as should be apparent...the result would be counterproductive and would impair our ability to seek FISA coverage on worthy targets around the country. This I cannot, and will not, do.”

## Proposals to Restrict Foreign Intelligence Collection Under FISA

From my perspective, the arguments that these programs – and I am referring to both the section 702<sup>6</sup> collection and the section 215<sup>7</sup> collection – are illegal are mostly arguments about what the law *should be*, not what the law *is*. I note that the analysis under each of these sections is a different one, and, I would submit that the government’s interpretation of section 215 is a more forward-leaning interpretation of the law than is its implementation of section 702. But generally, the arguments that either or both of these programs may be unlawful focus on the changes to technology, the differences in how our information is retained and how we communicate today versus decades ago, and on the Fourth Amendment concept concerning what constitutes a reasonable expectation of privacy.

Section 702 collection is targeted against non-U.S. persons reasonably believed to be outside the United States. These are not individuals with Constitutional protections, and the collection against them is conducted in accordance with the statutory framework passed by Congress in the FISA Amendments Act of 2008. The FISA Amendments Act enhanced protections for U.S. persons worldwide by requiring that an individual probable cause-based order be obtained from the FISC for electronic surveillance or physical search no matter where in the world that U.S. person is located. The minimization procedures governing 702 collection have now been declassified, and demonstrate the detailed procedures with which the NSA handles U.S. person information. The 702 framework was debated extensively and publicly, and members of this Committee have been kept informed of its implementation in accordance with the reporting provisions of FISA.

With respect to the metadata collection under section 215, it is a fair characterization that this program is large in scale. And reasonable minds can and do disagree about whether its interpretations of relevance under the statute, or reasonableness under the Fourth Amendment, are overly broad. But I would submit that the Government’s arguments in this case are consistent with existing precedent, no matter what direction the courts may go in the future. Current Supreme Court precedent still holds that there is no expectation of privacy in our telephone metadata, that is, the numbers we dial or the numbers that dial us. A warrant is not required to obtain this information.<sup>8</sup> Likewise, Supreme Court precedent also still holds that we do not have a reasonable expectation of privacy in records voluntarily turned over to a third party.<sup>9</sup> The legal justification, both statutory and constitutional, is outlined in the Administration’s White Paper dated August 9, 2013.<sup>10</sup>

In addition, the recently declassified opinion and order by FISC Judge Claire Eagan dated August 29, 2013, approving continuation of the business records metadata program, offers a straightforward analysis of the law. Judge Eagan wrote:

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<sup>6</sup> Section 702 of FISA was added to FISA by the FISA Amendments Act of 2008.

<sup>7</sup> Section 215 refers to Section 215 of the USA Patriot Act, which can be found in section 501 of FISA.

<sup>8</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>9</sup> *United States v. Miller*, 425 U.S. 435 (1976).

<sup>10</sup> *Administration White Paper on Bulk Collection of Telephony Metadata Under Section 215 of the USA Patriot Act*, August 9, 2013 (available at <http://www.scribd.com/doc/159211491/Obama-administration-white-paper-on-NSA-surveillance-oversight>)

In conducting its review of the government's application, the Court considered whether the Fourth Amendment to the U.S. Constitution imposed any impediment to the government's proposed collection. Having found none in accord with U.S. Supreme Court precedent, the Court turned to Section 215 to determine if the proposed collection was lawful and that Orders requested from this Court should issue. The Court found that under the terms of Section 215 and under operation of the canons of statutory construction such Orders were lawful and required, and the requested Orders were therefore issued.<sup>11</sup>

I do not mean to suggest that, over the course of the next several years or longer, that courts, including the Supreme Court, may come to different conclusions about expectation of privacy that may impact intelligence collection under FISA. They very well may. But I do suggest that the current collection activities, based on the FISC opinions and accompanying materials that have been declassified by the government, are consistent with *current* precedent and *existing* interpretations of the laws.

Moreover, with respect to 215 in particular and intelligence programs generally, I believe that they should be regularly reviewed and evaluated to determine whether they continue to be necessary and valuable. It is wholly appropriate to end a collection program that has outlived its usefulness, or perhaps is no longer necessary based on new technologies or methods of collecting intelligence that may be more efficient or productive. But, based on what senior leaders of the Intelligence Community are advising today, the 215 program remains a valuable part of the protective infrastructure that was implemented after September 11<sup>th</sup>. Therefore, in my view, it would be premature for Congress to end it altogether, abruptly through legislation.

#### Proposals Regarding a FISA Special Advocate and Efforts to Restore Public Confidence

A second critique of FISA is that it is a one-sided enterprise that only permits the government to argue its case to the FISC. That, of course, was by design in the original 1978 law, both in alignment with the manner in which federal criminal electronic surveillance applications and search warrants are presented to judges for review, as well as in order to protect the classified information, sources and methods that are involved in conducting national security electronic surveillance or search activities.

Two themes emerge in proposals to add a special advocate, or public interest advocate, to the FISA process. One view, suggested separately by two different two former FISC judges, is that the Court would benefit from an additional view, particularly in cases involving technical complexity and/or novel legal issues.<sup>12</sup> A second view is that a special advocate would go a long

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<sup>11</sup> *Amended Memorandum Opinion, In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, BR 13-109, dated August 29, 2013, at p.3 (available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>).

<sup>12</sup> James G. Carr, *A Better Secret Court*, N.Y. Times, July 22, 2013 (available at <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html>). Former FISC Judge James Robertson similarly endorsed the idea of an adversary in public remarks. Charlie Savage, *Nation Will Gain by Discussing*

way in restoring public confidence in the FISA process. I have concerns about both proposals, both as a matter of principle as well as a practical matter.

To begin, it would truly be a sea change to start *litigating* foreign intelligence collection *before* it takes place. There are already lawyers in the government who view it as their job to work in the public interest. In particular, the lawyers in the National Security Division in the Department of Justice work in the best tradition of *ex parte in camera* practice, where they present both supportive and derogatory information to the Court, when presenting a matter that raises factual or other issues. There are also legal advisors who work for the court who are an additional layer of independent review. And then there are the judges themselves, who are independent Article III federal district court judges.<sup>13</sup>

This is one area where the proposals put forth in Congress may not quite match the desired objective. In this case, if what the Court seeks – and it would be helpful to hear from the current Court on this issue – is simply an additional view beyond that which is presented by the Justice Department on behalf of the Intelligence Community, then I would submit that empowering the existing Civil Liberties Protection Officer (CLPO)<sup>14</sup> to present his views directly to the FISC would serve that purpose. The CLPO is a statutory-based position created by the Intelligence Reform and Terrorism Prevention Act, which amended the National Security Act of 1947. While this proposal would not provide the optic some may desire to add an outside government component, it certainly would address the substantive concern that the Court could benefit from an additional view when considering particularly complex issues that impact privacy and civil liberties. And it would do so without adding substantial layers of additional bureaucracy.

On the public confidence point, I would suggest that an outside advocate would not carry the weight that is hoped it might provide with the public in the longer term. If done in a manner protective of classified information, the advocate would necessarily work in secret, alongside the Executive Branch. On that count, with the passage of time, outside observers will just see the advocate as another participant in a secret process. As a practical matter, an outside advocate would require a tremendous amount of start-up time, effort and money in order to perform effectively. By start-up time and effort, what I am referring to is, in significant part, the knowledge and expertise that government participants in the FISA process maintain on an ongoing basis. For example, the recently declassified report of the 702 joint interagency oversight team reveals how frequently the interagency participants meet, discuss and are briefed

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*Surveillance, Expert Tells Privacy Board*, N.Y. Times, July 9, 2013 ([http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html?\\_r=0](http://www.nytimes.com/2013/07/10/us/nation-will-gain-by-discussing-surveillance-expert-tells-privacy-board.html?_r=0)).

<sup>13</sup> Judge Walton, Presiding Judge of the FISC, provided a detailed accounting of the interaction between the government and the Court, and the Court's consideration of matters before it, in a letter to Chairman Leahy on July 29, 2013 (available at <http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf>).

<sup>14</sup> The CLPO reports directly to the Director of National Intelligence and, by law, is responsible for ensuring "that the protection of civil liberties and privacy is appropriately incorporated into the policies and procedures developed for and implemented by the Office of the Director of National Intelligence and the elements of the intelligence community within the National Intelligence Program," among other duties. Section 103D of the National Security Act of 1947, as amended (50 U.S.C. § 403-3d).

on ongoing implementation matters.<sup>15</sup> It would be very difficult for an outsider to enter a proceeding on a complex issue, and meaningfully participate, without this substantial background and expertise. It would take time for the outside advocate to become sufficiently knowledgeable for the proceedings to begin. Accordingly, the start-up efforts likely would not provide an environment for the advocate to work expeditiously when important national security collection objectives may be at stake.

It is also useful to think about just what would the advocate's role be with respect to representing the public interest? Thinking back to the example of the wall that was corrected by the change to FISA's purpose standard by the USA Patriot Act in 2001 and the subsequent decision by the Foreign Intelligence Surveillance Court of Review in 2002,<sup>16</sup> the perpetuation of the wall was probably the most significant incorrect legal interpretation regarding FISA ever made by the Department of Justice and the FISC. According to the Foreign Intelligence Surveillance Court of Review in 2002, the conventional interpretation of the purpose requirement turned out to be a false premise.<sup>17</sup> Would an outside special advocate, had it existed back then, have argued for a *lessening* of restrictions that had been imposed by the Justice Department and later the FISC? In hindsight, *that* probably would have been in the public interest. Current conceptions of the public interest advocate seem only to focus on the public interest in terms of protecting the public's privacy and civil liberties. But acting in the public interest can sometimes mean making fulsome or even aggressive arguments under the law in order to protect the public from terrorist attacks and other threats to the national security.

So what would enhance public confidence? Perhaps the most frustrating part of the reaction to the leaks from my perspective has been the nearly complete lack of confidence in or comfort by the existing oversight mechanisms, particularly with respect to 702 collection. This oversight structure includes oversight internally at NSA, through its Office of the Director of Compliance, General Counsel's office, and Inspector General's office; by the Department of Justice and the Office of the Director of National Intelligence; by the FISC; and by Congress. The oversight is extensive, and exhaustive. The results of the oversight reviews are reported to the Intelligence and Judiciary Committees. The recently declassified report issued in August 2013<sup>18</sup> provides insight into the granularity of how this oversight process takes place, as well as into the nature of the compliance incidents themselves. Assuming that we intend to keep the basic framework of internal executive branch oversight and Congressional oversight through the committee structure,<sup>19</sup> then an area that requires focus is achieving a place where the

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<sup>15</sup> *Semiannual Assessment of Compliance With Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence*, covering the period June 1, 2012-November 30, 2012, August 2013 (available at <http://www.scribd.com/doc/159211491/Obama-administration-white-paper-on-NSA-surveillance-oversight>).

<sup>16</sup> *In Re Sealed Case*, 310 F.3d 717, 743 (For.Intel.Surv.Rev. 2002).

<sup>17</sup> *Id.* at 743.

<sup>18</sup> *Semiannual Assessment of Compliance With Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence*, covering the period June 1, 2012-November 30, 2012, August 2013 (available at <http://www.scribd.com/doc/159211491/Obama-administration-white-paper-on-NSA-surveillance-oversight>).

<sup>19</sup> Prepared statement of Benjamin Wittes before the Senate Select Committee on Intelligence, "Legislative Changes to the Foreign Intelligence Surveillance Court," September 26, 2013 (available at



Congressional oversight committees can both gain, and then communicate to the public, their satisfaction with the oversight process and the underlying activities themselves. Here are a few suggestions for what might be steps in the right direction:

First, Congress can ensure that the offices conducting oversight, including the Office of the Director of Compliance at NSA, the Oversight Section in the Office of Intelligence, National Security Division, and the Office of General Counsel and Civil Liberties Protection Office, in the Office of the Director of National Intelligence, and any other offices involved in the compliance process at these or other Intelligence Community elements, are staffed and funded appropriately to their responsibilities. The internal Executive Branch oversight process that has been built requires a lot of man-hours to do right. The quality of oversight will suffer if any of these offices are stretched beyond their capabilities.

Second, Congress could consider requiring an annual or semi-annual public report that produces information currently contained in the classified joint compliance assessment in a summary fashion, instead of relying on the heavily redacted lengthy report. This report might help better inform Members of Congress beyond the Judiciary and Intelligence Committees regarding the oversight and compliance process.

Third, Congress should focus its oversight efforts in working with the NSA, the Justice Department, and other components of the Intelligence Community to *reduce* the complexity of internal procedures.<sup>20</sup> I recognize that this recommendation may sound counterintuitive, and may also be, perhaps, a role more appropriate for the Intelligence committees. But I will expand briefly, nonetheless. One aspect of reducing compliance incidents is reducing the complexity of internal operating procedures to ensure that operators at the working level have a clear understanding of what rules they are operating under. Several years ago, the Department of Justice had success in this area by reducing several sets of FBI investigative guidelines into one set of rules, and similarly redesigning several different sets of minimization procedures into clearer, more streamlined rules.

In my experience, various elements of the Intelligence Community tend to have different philosophies and practices on this front. Some elements, through their offices of General Counsel, believe that it is better for the lawyers to be the primary readers and interpreters of certain procedures and court orders, and then produce summary documents and training materials that operators at the line level can read, understand and use on a daily basis. Other legal offices tend to provide the underlying documents themselves to the line operators, and expect them to read and understand them, in addition to training that is provided. This practice would be more akin to criminal practice where law enforcement officers executing a search warrant read and understand it, before executing a search. What may be happening in the FISA context, is that the court orders and underlying procedures are so complicated, so complex, that, in some cases,

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[http://www.lawfareblog.com/wp-content/uploads/2013/09/Wittes-SSCI-Hearing-Statement\\_Final-Draft\\_9.26.13.pdf](http://www.lawfareblog.com/wp-content/uploads/2013/09/Wittes-SSCI-Hearing-Statement_Final-Draft_9.26.13.pdf)

<sup>20</sup> See, eg., the recently declassified *Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended* (available at <http://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf>)

only the lawyers understand what they mean. That opens the door for internal summary documents for the workforce and training materials to inadvertently depart from what the procedures actually are. Or, the converse happens, where the procedures are written in language or format that has come to be expected, but something gets lost in translation from what the technical or operational personnel originally intended. Accordingly, my own view is that the better practice is to have clear, straightforward, comprehensible rules from the outset.

Note that I am not suggesting, in any way, a loosening of restrictions. Indeed, the FISC's approvals of the collection programs at issue are heavily reliant on the substance and rigor of the underlying procedures.<sup>21</sup> And I am also not suggesting that what I am describing is necessarily responsible for the specific compliance matters described in the documents that have recently been declassified. But, although the current compliance incident rate is very low, there is always value in continuing to find ways to improve compliance. The committees should know that undertaking work in this area is hard, time consuming and completely unglamorous. But it might go some distance in reducing the gap in translation between what the rules are, and what is actually happening at the ground level, thereby reducing compliance incidents and improving confidence.

### Proposals to Enhance Transparency

The third main critique is that the FISA process, both in terms of collection activities and legal interpretations, should be more transparent. There are a number of constituencies that have called for greater transparency for some time. The current Administration, in the post-Snowden environment, similarly seems to have embraced a level of transparency the Intelligence Community has not previously experienced.<sup>22</sup> On this point, I would suggest that there is room for Congress to act. My own view is that the seemingly ad hoc nature of the recent government declassification releases is not actually helping the Intelligence Community as much as they might think. To some extent, the periodic and sudden releases of significant legal opinions only continues to feed the media frenzy and keeps attention on the Intelligence Community. Congress needs to help the Intelligence Community get out of the news, and one way to do that would be to work with the Director of National Intelligence and Attorney General to determine what might be a more regularized and consistent method of releasing information. For example, Congress could amend the reporting provisions in FISA to provide additional public information—whether it is statistics, declassified legal opinions, summaries of implementation actions or reports on compliance matters—semi-annually, quarterly, or at some other appropriate regular interval. In my view, this would cut back on each release being an event unto itself.

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<sup>21</sup> See, e.g., *Amended Memorandum Opinion, In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, BR 13-109, dated August 29, 2013, at p.3 (available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>).

<sup>22</sup> Prepared remarks of DNI James Clapper before the Senate Select Committee on Intelligence, September 26, 2013 (available at <http://icontherecord.tumblr.com/tagged/testimony>).

## Conclusion

At the end of the day, the Committee will need to evaluate whether it seeks to scale back the actual intelligence activities that the Intelligence Community advises continues to provide important protection for our national security, or instead focus on measures that will substantively enhance the Congress' own confidence in the Intelligence Community, and subsequently, public confidence. As I have outlined above, my perspective is that the intelligence activities currently conducted under FISA are conducted lawfully, and with care. That said, there is substantial value in restoring public confidence in these activities through focusing oversight efforts on substantive areas that will achieve the intended results. I thank the Chairman, Ranking Member and Committee Members for providing me with this opportunity to share my views on current FISA reform proposals.