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 Ranking Member 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 understand the wisdom of including a sunset clause in certain circumstances for new investigative authorities. However, given the maturity of the programs conducted under the authority of Title VII and the ample oversight provided by congressional committees, the FISA Court, the Department of Justice, and the relevant agency heads and Inspectors General, a sunset clause serves little purpose at this point and may only add uncertainty to the Executive Branch's operation of Title VII programs.

Ken Wainstein, Matthew Olsen, and Rachel Brand

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. Under Section 702, only non-U.S. persons reasonably believed to be located outside the United States may be targeted for collection. Section 702 targets cannot intentionally include U.S. persons or anyone located in the United States.

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: Yes. Incidental collection of U.S. person communications occurs under Section 702 when a U.S. person is communicating with a non-U.S. person abroad who has been targeted pursuant to targeting requirements designed to ensure that the non-U.S. person abroad was targeted for a court-authorized foreign intelligence purpose.

Incidental collection of U.S. person communications also may occur as part of the "upstream" collection of Internet communications under Section 702. This incidental collection may occur in one of two ways.

First, the incidental collection of U.S. person communications may occur when communications "about" a valid Section 702 target are acquired. "About" communications are those where the name, email address, or other identifier associated with a valid Section 702 target is located within the body of a communication. These "about" communications could be between U.S. persons and, as such, could involve the incidental collection of U.S. person communications even when a U.S. person is not communicating with a Section 702 target.

Second, the incidental collection of U.S. person communications may occur through upstream collection under Section 702 when U.S. person communications are embedded within an email chain that contains a communication to, from, or about a valid Section 702 target. Currently, the government collects the entire chain. The PCLOB 702 report states that the government has been unable to design a filter that would acquire only the single discrete communication within the chain that pertains to the valid Section 702 target.

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: Yes. If a U.S. person communicates with a valid Section 702 target, the incidental collection of that U.S. person's communications is limited to only those communications the U.S. person has with the valid Section 702 target.

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?

Ken Wainstein, Matthew Olsen, and Rachel Brand

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: Under the NSA's 2011 minimization procedures discussed in the PCLOB 702 report (pp. 128-29), deletion of a U.S. person communication is not required until the "earliest practicable point in the processing cycle" and 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." Because "NSA analysts do not review all or even most communications acquired under Section 702"—and thus do not determine them to be "clearly" not relevant—those communications involving U.S. persons are rarely deleted.

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: Correct. According to the PCLOB report, un-minimized data collected under Section 702 must be aged-off of NSA systems no later than five years after the expiration of the Section 702 certification under which the data was acquired. Un-minimized data acquired through upstream collection must be aged-off no later than two years after the expiration of the Section 702 certification under which the data was acquired. Extensions may be sought from a high-level agency official. Data still being decrypted, however, need not be aged-off within the five or two-year period.

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"?