Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Feinstein
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) Pursuant to the USA FREEDOM Act of 2015 (H.R. 2048, P.L. 114-23), the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISC-R) are authorized to appoint qualified attorneys to serve as amicus curiae "in any instance as such the court deems appropriate." In November 2015, when the FISC approved the government's proposed Section 702 certifications, the court invited the participation of an outside counsel to serve as an amicus curiae, to provide the court with arguments relating to the constitutionality of the government's proposed use of Section 702. I was glad to see the FISA court using this provision, and I think the court benefited from the insights and advocacy of the outside counsel.

Question 1: Does the Department of Justice believe it would be helpful to require the FISC to appoint an amicus to participate in the court's proceedings whenever the government seeks court approval of an annual certification? If not, why not?

Answer:

(U) The USA FREEDOM Act of 2015 granted the FISC and FISC-R the authority to appoint amici curiae to present those courts with the views of individuals outside of government. In a number of FISA matters, including during its review of the 2015 Section 702 certifications, the FISC has exercised its authority to appoint an amicus curiae. We believe that vesting the discretion of whether to appoint an amicus curiae with the FISC and FISC-R strikes the appropriate balance. Indeed, absent a written finding that such appointment is not appropriate, FISA already requires the FISC or FISC-R to appoint an amicus curiae in cases that present a "novel or significant interpretation of the law." 50 U.S.C. § 1803(i)(2)(A). In all other matters, those courts may appoint an amicus curiae, "including to provide technical expertise, in any instance as such court deems appropriate." *Id.* § 1803(i)(2)(B).

(U) The appointment of an amicus curiae is not without effect. Notably, it is likely to increase the time needed for the government to obtain the authorities it is seeking. For instance, in 2015 when the FISC appointed an amicus curiae in connection with its review of the Section 702 certifications, the Court ultimately extended the time for its consideration of the 2015 Section 702 certifications by 90 days, issuing an opinion and order approving those certifications more than two months after the statute otherwise would have required. As the government noted at that time, such a delay could be harmful to national security under certain scenarios, for instance if the government were to submit an additional certification or make an important time sensitive change in the Section 702 targeting or minimization procedures.

(U) Separately, when submitting renewal certifications, there may be few, if any, changes to those certifications or accompanying procedures compared to prior years. Indeed, renewal certifications submitted by the government often look substantially the same as the certifications they are renewing, and have often been accompanied by at least some sets of targeting or minimization procedures that are identical, or virtually identical, to those previously approved by the Court. In cases where renewal certifications essentially keep the status quo, the mandatory appointment of an amicus curiae would add little value to the FISC's deliberations.

(U) In sum, the government believes that FISA's current approach with respect to the appointment of amici curiae is appropriately deferential to the FISC and FISC-R, and grants those courts proper discretion to determine whether such appointment is appropriate or informative to the Court's consideration. Were the FISC stripped of that discretion, there would, at best, be delays and unnecessary expenditures of time and resources and, at worst, harm to the national security.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Feinstein
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The following questions are directed to the NSA and the FBI; please answer separately as it pertains to Section 702 collection:

Question 1: Who can request that your agency unmask a U.S. person identifier?

Answer:

(U) For Senator Feinstein and Senator Blunt's questions, we understand the term "unmasking" to mean the dissemination of U.S. person identifying information in response to a request from a recipient of an intelligence product that did not originally contain such identifying information.

(U) At NSA, any authorized recipient of a particular NSA SIGINT report can make a request to receive identifying U.S. person information that was not originally included in the report.

(U) Similarly, at FBI, any authorized recipient of an FBI report may request that FBI provide identifying information that was not originally included in the report.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Feinstein
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The following questions are directed to the NSA and the FBI; please answer separately as it pertains to Section 702 collection:

Question 2: What is the process for unmasking a U.S. person identifier?

Answer:

(U) Each agency's court-approved Section 702 minimization procedures establish the legal requirements for disseminating identifying U.S. person information acquired through Section 702 collection, whether in a report in the first instance or in response to a request from a recipient of a report that did not originally contain that identifying information. U.S person information acquired through Section 702 may not be disseminated unless it satisfies the requirements of the court-approved minimization procedures. Therefore, if U.S person information can be disseminated under the minimization procedures, whether the agency continues to mask that information is a matter of internal policy and practice.

(U//FOUO) NSA's Section 702 minimization procedures allow NSA to disseminate U.S. person information acquired from Section 702 only if doing so meets one of the specified reasons listed in NSA's minimization procedures, including that the U.S. person consented to the dissemination, the U.S. person information was already publicly available, the U.S. person identity was necessary to understand foreign intelligence information, or the communication contained evidence of a crime and is being disseminated to law enforcement authorities. As a matter of internal policy, even if NSA would be allowed to disseminate the U.S. person identity pursuant to its minimization procedures, NSA frequently masks the U.S. person identity when issuing the report and only unmasks the identity if an intelligence consumer makes a request that satisfies the requirements of the Section 702 minimization procedures.

(U) Similar to the NSA, the FBI's Section 702 minimization procedures allow the FBI to disseminate non-publicly available information regarding unconsenting U.S. persons acquired under Section 702 only when the information is foreign intelligence information, necessary to understand foreign intelligence information or assess its importance, or evidence of a crime. However, the FBI's internal policies regarding "unmasking" differ from NSA's, largely due to the FBI's dual mission as both a domestic intelligence and law enforcement agency.

(U) The FBI's mission, authorities, and investigative interests are almost entirely U.S. person focused and involve domestic operations. As a result, when consistent with the minimization procedures, the FBI regularly disseminates intelligence with U.S. person information provided – and not "masked" – in order to protect the United States against national security and criminal threats. For example, the FBI may disseminate to a city's police department the identity of a city official where the FBI has observed indications that a terrorist group poses a threat to that official. The identity of the city official can be disseminated under the FBI's minimization procedures because it is necessary to understand foreign intelligence information, *see* 50 U.S.C. § 1801(e)(1)(A) ("information that . . . is necessary to[] the ability of the United States to protect against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power"). Disseminating such information, moreover, is at the core of the FBI's mission: protecting the American people. When the FBI disseminates a U.S. person identity, such as this one, it does not do so broadly. The FBI only disseminates U.S. person information to the relevant national security or law enforcement entity, or entities, with responsibility for addressing the threat.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Feinstein
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The following questions are directed to the NSA and the FBI; please answer separately as it pertains to Section 702 collection:

Question 3: Who at your agency has the authority to unmask U.S. person identifiers?

Answer:

(U) Pursuant to NSA's internal policies, and subsequent delegations made by the director of the NSA (DIRNSA), there are a total of 20 individuals serving in 12 positions across the Agency who possess authority to approve the unmasking and dissemination of U.S. person identity information for foreign intelligence purposes. Those individuals include DIRNSA and senior officials in the National Security Operations Center. The circumstances under which each of these individuals may approve a dissemination varies based on the U.S. person identity in question and the facts surrounding the request. Only DIRNSA or the General Counsel may approve the dissemination of evidence of a crime solely for a law enforcement purpose.

(U) The FBI does not restrict the decision to disseminate U.S. person information to select positions. Rather, the decision whether to disseminate U.S. person information typically resides with the FBI agent and analysts conducting the fully predicated investigation in which the FBI acquires the Section 702 information. This level of decision making comports with the FBI's domestic-focused mission, as discussed above in the answer to Question 2. A sampling of those decisions to disseminate U.S. person information are subsequently reviewed by the Department of Justice to determine whether those dissemination decision were consistent with the FBI's Section 702 minimization procedures.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) During the Committee's open hearing, Director Coats stated that "I would be asking trained NSA analysts to conduct intense identity verification research on potential U.S. persons who are not targets of an investigation. From a privacy and civil liberties perspective, I find this unpalatable."

Question 2: Have the privacy and civil liberties implications of providing an estimate or "relevant metric" for the number of U.S. persons or persons inside the United States subject to incidental collection under Section 702 been formally analyzed by the Privacy and Civil Liberties Oversight Board (PCLOB); the ODNI's Office of Civil Liberties, Privacy and Transparency; or any other relevant entity within the U.S. government? If so, please provide that analysis to the Committee.

Answer:

(U) ODNI and NSA considered the privacy and civil liberties implications associated with efforts to generate an estimate or relevant metric for the number of U.S. persons or persons inside the United States subject to incidental collection under Section 702. More specifically, over the course of many months, NSA's Civil Liberties and Privacy Office (CLPO) thoroughly examined the different approaches for developing a meaningful and reliable estimate of the number of U.S. person communications incidentally collected under Section 702. These efforts were documented in a letter shared with the Committee on July 17, 2017. A copy of the letter is attached, which sets forth our analysis. As discussed in the letter, this effort was done in close collaboration with ODNI's Office of Civil Liberties, Privacy and Transparency (CLPT). In addition, guidance was sought from the PCLOB and civil society.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) During the open hearing, Director Coats referred to "scores of analysts that would have to be shifted from key focus areas such as counterterrorism, counterintelligence, counterproliferation, issues with nations in which, such as North Korea, we need – and Iran- we need continuous and critical intelligence missions." He added "I can't justify such a diversion of critical resources and the mass of critical resources that we would need to try to attempt to reach this, even without the ability to reach a definite number."

Question 3: Has the IC conducted a formal assessment of the resources, including the number and time of personnel, needed to produce an estimate, range or "relevant metric" for the number of U.S. persons or persons inside the United States subject to incidental collection under Section 702? If so, please provide that assessment to the Committee.

Answer:

(U) Yes, as provided to the committee in the in the 17 July 2017 letter to the House Judiciary Committee, a copy of which was provided to the appropriate oversight committees.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) During the open hearing, Director Coats stated "I want to provide one final example that I have, for the purposes of today's hearing, chosen to declassify using my authority as the Director of National Intelligence to further illustrate the value of Section 702."

Question 4: How does this declassification process differ from the consideration of whether to declassify information related to Section 702 collection in the context of criminal proceedings?

Answer:

(U) Under section 3.1(d) of Executive Order 13526, the Director of National Intelligence may declassify information if he determines that the "public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure." After consulting with the relevant agency heads, Director Coats relied on this authority to declassify a carefully worded description of how Section 702 collection contributed to the successful removal of Islamic State of Iraq and the Levant operative Hajji Iman from the battlefield. The IC undertook this process in response to numerous requests from Congress for a declassified example of how Section 702 makes Americans safer.

(U) Similarly, in the context of criminal proceedings involving classified information, consistent with E.O. 13526, the relevant agency official has a responsibility to properly protect classified information and must determine "whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure." E.O. 13526 § 3.1(d). Based on a variety of factors, the IC agency official assesses whether the declassification of information, at any given time, may lead to an unacceptable risk of compromising ongoing investigations or operations, and whether it may lead to an unacceptable risk of compromising sensitive techniques, sources, methods, techniques, or information.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The declassified version of the April 26, 2017, Memorandum and Opinion and Order of the FISC (p. 19) states: "At the October 26, 2016 hearing, the Court ascribed the government's failure to disclose those IG and OCO reviews at the October 4, 2016 hearing to an institutional 'lack of candor' on NSA's part and emphasized that 'this is a very serious Fourth Amendment issue.'" The court's concerns about the government's failure to provide prompt notification is further described on page 68, footnote 57, of the opinion.

Question 5: Please explain the reason for the failure to disclose and any remedial or institutional reform measures the government has taken in response to the court's concerns.

Answer:

(U) The National Security Agency takes its duty of candor to the Foreign Intelligence Surveillance Court and other oversight bodies with the utmost seriousness.

(U//FOUO) The NSA representatives at the 4 October hearing did not know the status of the compliance review that was being conducted by the NSA Office of Inspector General or of the existence of the compliance review that was being conducted by the Office of Compliance. NSA promptly reported the results of both compliance reviews to the Court once they became available. While the Court was surprised to learn the results of the compliance reviews three weeks after the 4 October hearing, no NSA personnel had intended to withhold information from the Court. In fact, the Agency employs a formal process that is designed to provide the Court with accurate and fully verified information in its filings to the Court.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) FISA requires that individuals must be provided prior notification whenever the government intends to "use or disclose" information "obtained or derived from" electronic surveillance of that person in "any trial, hearing, or other proceeding" against him or her before a court or other authority.

Question 7: Please provide any policies or guidelines defining "derived from" in this context.

Answer:

(U) As we have publicly stated previously, the Department has concluded that in determining whether information is "derived from" FISA-authorized surveillance, including Section 702, the appropriate standards and analyses are similar to those applied in the context of surveillance conducted pursuant to the criminal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522. As such, the "derived from" standard incorporates a "fruit of the poisonous tree" analysis analogous to that conducted under the Fourth Amendment exclusionary rule context. The general question under a "fruits" analysis is whether the evidence was acquired as an indirect result of the surveillance, taking into account doctrines such as independent source, inevitable discovery, and attenuation.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) In February 2015, then-General Counsel for the ODNI Robert Litt stated that "the Government will use information acquired under Section 702 as evidence against a person in a criminal case only in cases related to national security or for certain other enumerated serious crimes." Mr. Litt listed eight types of crimes, other than those related to national security, one of which was "transnational crimes."

Question 8: Is this the policy of the current administration? If not, please describe any changes.

Answer:

(U) Yes, the policy announced by Mr. Litt remains in effect without any changes and has been memorialized in the attached Department of Justice memorandum.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) In February 2015, then-General Counsel for the ODNI Robert Litt stated that "the Government will use information acquired under Section 702 as evidence against a person in a criminal case only in cases related to national security or for certain other enumerated serious crimes." Mr. Litt listed eight types of crimes, other than those related to national security, one of which was "transnational crimes."

Question 9: Please provide a further description of "transnational crimes" in this context.

Answer:

(U) To date, the only criminal cases in which information obtained or derived from Section 702 collection has been used against an aggrieved person have all been prosecutions for terrorism-related offenses. In the event the government seeks to use such information in a prosecution for a non-terrorism-related offense, a determination will be made at that time regarding the types of specific offenses that fall within the listed category. No such determination has yet been made regarding "transnational crime." As a general point of reference, please note that transnational crime was extensively discussed in the 2011 Presidential Strategy to Combat Transnational Organized Crime.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The USA FREEDOM Act requires the DNI to make publicly available for the preceding 12-month period a good faith estimate of the number of queries concerning a known U.S. person of unminimized non-content information obtained through acquisition authorized under Section 702. The DNI has reported that one IC element remains currently unable to provide that number.

Question 10: What IC element is that, and why is it currently unable to provide that number?

Answer:

(U) CIA does not currently have the technical capability to track its metadata-only queries. However, CIA is currently working to develop the capability to track these queries as it refines internal processes for data management. As reflected in the DNI's certification accompanying the ODNI's Annual Transparency Report, based on information provided by CIA, we anticipate that the CIA will have the capability to track its metadata-only queries by the end of calendar year 2018.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The USA FREEDOM Act requires the DNI to make publicly available for the preceding 12-month period a good faith estimate of the number of queries concerning a known U.S. person of unminimized non-content information obtained through acquisition authorized under Section 702. The DNI has reported that one IC element remains currently unable to provide that number.

Question 11: In calendar year 2016, how many times did FBI personnel receive and review Section 702-acquired information based on a query concerning a known U.S. person (not limited to queries designed to return evidence of a crime unrelated to foreign intelligence)?

Answer:

(U) As noted in the legislative history for the USA FREEDOM Act, the FBI lacks the capacity to provide a reportable number of the times the FBI queries unminimized Section 702-acquired information using a U.S. person identifier. *See* H. Rep. 114-109, part 1, at 26 (2015).

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The ODNI's April2017 "FISA Amendments Act: Q&A" Fact Sheet states: "Generally, queries of raw content are only permitted if they are reasonably designed to identify foreign intelligence information, although the FBI also may conduct such queries to identify evidence of a crime." The Fact Sheet also states that "queries can assist the IC in identifying situations where a U.S. person may be the subject of an imminent threat with the goal of protecting the U.S. person from harm."

Question 12: Other than that example, is it necessary for a U.S. person to be suspected of wrongdoing before he or she can be the subject of a query of Section 702-acquired content or non-content?

Answer:

(U) The agencies' Court-approved Section 702 minimization procedures permit authorized personnel to conduct queries of Section 702 information, including queries using U.S. person identifiers, only if reasonably designed to return foreign intelligence information or, in the case of FBI, evidence of a crime. Queries for purposes other than identifying foreign intelligence information or evidence of a crime—for example for political, personal, or financial interest—are strictly prohibited.

(U) In the fall of 2015, the Foreign Intelligence Surveillance Court appointed an amicus curiae to closely examine the query provisions of the minimization procedures, including FBI's ability to query to identify evidence of a crime. After careful consideration, the FISC concluded in an opinion released to the public in April 2016 that the existing query provisions comport with both the Foreign Intelligence Surveillance Act and the Fourth Amendment.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) The ODNI's April 2017 "FISA Amendments Act: Q&A" Fact Sheet states: "Generally, queries of raw content are only permitted if they are reasonably designed to identify foreign intelligence information, although the FBI also may conduct such queries to identify evidence of a crime." The Fact Sheet also states that "queries can assist the IC in identifying situations where a U.S. person may be the subject of an imminent threat with the goal of protecting the U.S. person from harm."

Question 13: If yes, what is the standard for establishing that suspicion? If not, what restrictions apply to these queries?

Answer:

(U) As noted above, the Court-approved minimization procedures only permit queries that are reasonably designed to return foreign intelligence information or, in the case of FBI, evidence of a crime. Under the minimization procedures, the Department of Justice and Office of the Director of National Intelligence are required to conduct strict oversight over agencies' querying of Section 702 data to ensure that the queries comply with that standard. As part of the bimonthly audits, DOJ reviews all U.S. person identifiers approved by NSA for querying unminimized Section 702-acquired information, and all of CIA and NCTC's U.S. person queries with accompanying justification statements. ODNI reviews a portion of these queries. As part of its regular field office reviews (approximately 27-30 a year), DOJ reviews a random sample of field office personnel queries to assess whether these queries meet the standard articulated in the procedures.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator Wyden
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

(U) Under Section 702, the government may direct an electronic communication service provider to provide "assistance" necessary to accomplish acquisition.

Question 16: Does Section 702 provide authority to direct a provider to circumvent or weaken the encryption in a service or app that it offers and, if so, has that occurred?

Answer:

(U) Section 702(h) provides that, with respect to an authorization pursuant to section 702(a), the Attorney General and Director of National Intelligence may direct, in the form of a written directive, an electronic communication service provider to "provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition." 50 U.S.C. § 1881a(h)(1)(A). To the extent that a provider does not fully provide such information, facilities, or assistance, FISA provides a means for the government to require the provider's compliance. Specifically, "the Attorney General may file a petition for an order to compel the electronic communications service provider to comply with the directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition." 50 U.S.C. § 1881a(h)(5). The nature of the "information, facilities, or assistance necessary to accomplish the acquisition" may vary among providers, services, and technologies. The government has not to date sought an order pursuant to Section 702(h)(5) seeking to compel an electronic communication service provider to alter the encryption afforded by a service or product it offers.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 1: What is the difference between a Fourth Amendment "search" and a "query" of unminimized Section 702-acquired information using a U.S. person identifier?

Answer:

(U) The use of U.S. person identifiers to conduct queries of information lawfully acquired pursuant to Section 702 is an important foreign intelligence and law enforcement capability. A query is a means to identify previously acquired data in U.S. government systems using terms such as names, email addresses, and phone numbers. Unlike a Fourth Amendment search, a query of Section 702 data does not collect any additional data, but rather only returns a subset of communications from a larger set that has already been lawfully acquired by the government from the targeting of non-U.S. persons located overseas. The Fourth Amendment does not require that a probable cause warrant or other court approval be obtained to query information that has already been lawfully collected and in government possession pursuant to Section 702 of FISA. In fact, a complete review of all data lawfully collected would clearly be constitutional, and so a more limited, focused review of a subset of data returned by a query is also constitutional.

(U) Courts agree that once data has been lawfully acquired, an additional warrant or other court approval is not required to review or re-review the information. That is why all courts to consider the matter—including, but not limited to, the FISC—have concluded that "subsequent querying of a [Section] 702 collection, even if U.S. person identifiers are used, *is not a separate search* and does not make [Section] 702 surveillance unreasonable under the Fourth Amendment." *United States v. Mohamud*, 2014 WL 2866749, at *24 (D. Or. June 24, 2014) (emphasis added); *see also United States v. Hasbajrami*, 2016 WL 1029500, at *12 n. 20 (E.D.N.Y. March 8, 2016) ("I agree with the government that '[i]t would be perverse to authorize the unrestricted review of lawfully collected information but then [] restrict the targeted review of the same information in response to tailored inquiries."); *see also* [Redacted] Memorandum Op. and Order, (FISC Nov. 6, 2015) at 24-36 and 39-45, *available in redacted form at* https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf (hereinafter, "FISC Op.")

(U) Even though a warrant is not required to review already lawfully collected information, the Section 702 program—including querying—must still be conducted in a manner that is reasonable under the Fourth Amendment. To ensure that U.S. persons' information is handled in a manner that is reasonable under the Fourth Amendment, each agency that receives Section 702 information must comply with rules—referred to as "minimization procedures"—that restrict how Section 702 information is acquired, accessed, queried, retained, or disseminated to others. These minimization procedures are approved by the Attorney General, in consultation with the Director of National

Intelligence, and reviewed and approved for use by the FISC. The FISC, on an annual basis, approves the procedures only after determining that the procedures are consistent with FISA and the Fourth Amendment. These procedures permit queries of Section 702 information using U.S. person identifiers only if reasonably designed to return foreign intelligence information or, in case of the FBI, evidence of a crime. Queries for purposes other than identifying foreign intelligence information or evidence of a crime—for example for political, personal, or financial interests—are strictly prohibited.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 2: What is the difference between a "query" and a "database check" under Section 702?

Answer:

(U) The term "database check" refers to instances when FBI personnel run a term (*e.g.*, name, telephone number, email address, etc.) through FBI data holdings in order to identify and isolate records containing that term. These checks are fundamental to the mission of the FBI, as they allow investigators to quickly determine whether information already exists in the FBI's data holdings that may contain investigative leads and other important information. FBI personnel can then analyze the results of the database check in an effort to identify threats to national security and criminal activity. A "query" as defined in the FBI's Section 702 minimization procedures is a type of database check that is capable of returning unminimized Section 702-acquired information for review. The term "query" does not include a database check where the FBI personnel conducting the check does not receive unminimized Section 702-acquired information in response because either the personnel has not been granted access to the unminimized information or because the personnel who has been granted such access has limited the query such that it cannot return uminimized Section 702-acquired information. The FBI's Section 702 minimization procedures are available on IContheRecord.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 3: Annex A of the PCLOB's July 2014 report on Section 702 includes a statement from Chairman David Medine and Board Member Patricia Wald recommending that each U.S. person identifier be submitted to the FISC for approval before the identifier may be used to query data collected under Section 702 for a foreign intelligence purpose, other than in exigent circumstances or where otherwise required by law. What would be the effect of implementing such a requirement?

Answer:

(U) Imposing a statutory requirement that the government establish probable cause and/or seek judicial approval before conducting a query of Section 702 information using a U.S. person identifier would impede, and in some cases, preclude the Intelligence Community's ability to protect the nation against international terrorism and other threats. As discussed above in response to Question 1, such a requirement is not required by the Fourth Amendment. It would also be impractical. It is rare that the Intelligence Community begins an investigation having already developed probable cause. Instead, in many criminal or national security cases, probable cause is developed by first looking at information already in the government's possession, as well as other investigative techniques that are less intrusive than obtaining a traditional FISA warrant to build investigators' understanding of the threat. Over the last 15 years, several commissions have investigated a variety of terrorism incidents, including 9/11, Fort Hood, the "Underwear Bomber," the Navy Yard, and the Boston Marathon Bombing. Each one of those commissions concluded that removing barriers to appropriate identification and use of the information already lawfully in the Intelligence Community's possession is essential to better protecting the nation.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 4: How many queries of unminimized Section 702-acquired information using a U.S. person identifier did NSA conduct in 2016?

Answer:

(U//FOUO) NSA does not track the total number of actual queries of content that are made using approved U.S. person query terms, as the same U.S. person query term may be used to query more than once after it has been approved. In 2016, 2,280 U.S. person query terms were approved for use by NSA analysts to query into Section 702 content. During the same period, NSA analysts conducted 30,355 queries using U.S. person query terms into Section 702 metadata.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 5: How many queries of unminimized Section 702-acquired information using a U.S. person identifier did CIA conduct in 2016?

Answer:

(U) In calendar year 2016, CIA conducted 2,352 unique U.S. person queries.

Hearing Date: June 7, 2017
Committee: SSCI
Member: Senator King
Witnesses: Director Coats, DNI
Mr. Rosenstein, DAG/FBI
Mr. McCabe, Acting D/FBI
ADM Rogers, D/NSA
Info Current as of: July 14, 2017

Question 6: How many queries of unminimized Section 702-acquired information using a U.S. person identifier did FBI conduct in 2016?

Answer:

(U) As noted in the legislative history for the USA FREEDOM Act, the FBI lacks the capacity to provide a reportable number of the times the FBI queries unminimized Section 702-acquired information using a U.S. person identifier.

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

JUL 17 2017

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

(U) Thank you for your June 27, 2017, letter asking for additional information regarding the Intelligence Community's efforts to quantify the number of U.S. person communications incidentally acquired under Section 702 of the Foreign Intelligence Surveillance Act (FISA). We take seriously our obligation to respond to Congressional oversight requests and regret the delay in responding to your original inquiry. To be clear, this delay was not the result of inaction; rather, it is a reflection of how difficult this question is to answer. Let me also be clear that the Intelligence Community (IC) and I fully appreciate the importance of understanding the impact of Section 702 on U.S. person privacy.

(U) Indeed, as I explained in my June 13 letter to Chairman Goodlatte, the IC has provided a large volume of information about Section 702 through numerous congressional briefings and reports and has publicly released thousands of pages of legal and policy documents. NSA in particular has undertaken, in good faith, to assess the impact of its implementation of Section 702 on U.S. person privacy and to provide relevant information to the Committee and, as appropriate, the public. This information includes key statistics that provide insight on Section 702's potential impact on U.S. person privacy, including numbers of U.S. person queries and disseminations. For ease of reference, I am including below the summary I provided in the June 13 letter:

- **U.S. Person Targets under Titles I and III, and Sections 703 and 704.** A key safeguard in Section 702 is the prohibition against intentionally targeting a U.S. person anywhere in the world. In order to intentionally target a U.S. person to collect that person's non-public communications, with limited exceptions (e.g., an emergency), the government must obtain an individualized court order under FISA, based on the court's finding that there is probable cause to believe that the U.S. person is an agent of a foreign power. As reported in the most recent Annual Statistical Transparency Report (ASTR), in 2016 the government targeted 336 U.S. persons under Titles I and III and Sections 703 and 704 of FISA. These U.S. persons

comprised 19.9% of the total number of targets under those orders (note that Titles I and III also apply to intentionally targeting any person, regardless of nationality, who is located inside the United States).

- **Section 702 Non-U.S. Person Targets.** Focusing on Section 702, the government has released the total number of targets under Section 702 collection. Recall that these are non-U.S. persons outside the United States. For 2016, there were 106,469 Section 702 targets. As previously discussed, these foreign targets may well have been in communication with some number of U.S. person communicants. While we do not believe that the number of U.S. person communicants can be accurately estimated as further discussed in this letter, the number of targets provides some sense of the scope of 702 collection. Note that public reports estimate that there are hundreds of millions of Internet users around the world.

- **U.S. Person Queries.** Another safeguard involves queries for U.S. person communications once that information has been collected under Section 702. Under court-approved minimization procedures, the government may query 702 collection using a U.S. person identifier only if the queries are reasonably designed to identify foreign intelligence information (in addition, the FBI may query to identify evidence of a crime). The minimization procedures provide that such queries are subject to oversight by the Department of Justice and ODNI. The ASTR reported that in 2016, the NSA and CIA queried the contents of 702 collection using 5,288 identifiers (e.g., a telephone number or email address) associated with a known U.S. person.

- **U.S. Person Disseminations.** A critical safeguard involves dissemination, a subject which has received considerable public attention of late. Information that identifies a U.S. person may only be disseminated as permitted by court-approved minimization procedures. As reported in the ASTR, in 2016 the NSA disseminated 3,914 Section 702 reports that contained U.S. person information. The identifying information was originally masked in over half of those reports, and the NSA ultimately provided 1,934 U.S. person identities in response to unmasking requests.

- **FBI Receipt and Review of Non-FI Query Results.** The ASTR also reported the number of times in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a U.S. person in response to a query that is not designed to find and extract foreign intelligence information (i.e., a query for evidence of a crime that is not related to foreign intelligence). The ASTR reported that there was one such instance.

- **Compliance Assessments.** Implementation of Section 702 is subject to careful oversight. Compliance incidents are documented, investigated, and reported to the FISC and Congress. The Department of Justice and the ODNI assess compliance with Section 702, and prepare semiannual compliance assessments which are provided to the FISC and Congress in classified form. Many of these reports have been redacted and made available to the public. These reports include important statistical information. While absolute numbers remain classified, these assessments have released the compliance incident rate under Section 702, which has remained well below 1% (the rate was 0.53% as reported in the 15th semiannual assessment).

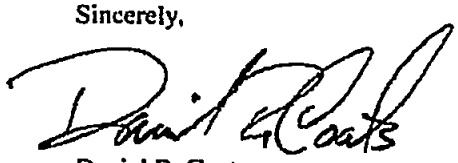
(U) One statistic that the IC has been unable to provide is a reliable and accurate estimate of the number of U.S. person communications incidentally collected under Section 702. For well over a year, my office has been consulting closely with the NSA to address requests to quantify the number of incidental U.S. person communications in Section 702 collection, including reviewing the approaches examined by the NSA to arrive at an accurate and reliable estimate or a meaningful alternative metric. In addition, within my first few weeks on the job, I made this a personal priority, and met with Admiral Mike Rogers and with the NSA's technical experts to better understand the challenges with quantifying the number of incidental U.S. person communications collected under Section 702. I found that the NSA had diligently and in good faith examined a range of approaches, applying its analytic tradecraft to address these requests.

(U) The core challenge is that the type of technical information that is needed to reliably identify the nationality and/or location of the parties that are in communication with an intelligence target does not exist. While the NSA conducts significant research on its intelligence targets, it does not do so with respect to communicants about whom it does not have an intelligence interest. Even with such additional research, a large number of communicants would remain unidentified, and thus any resulting number would not constitute an accurate estimate of U.S. person communications. Moreover, conducting such additional research would require significant resources and could involve problematic privacy intrusions.

(U) NSA has concluded that it is impossible to generate an accurate and reliable estimate, or to develop a meaningful alternative metric. I have personally reviewed all of these matters with the NSA and fully support their conclusions. The NSA's efforts are detailed in the attached Classified Annex, which includes specific information you requested in your June 27 letter. Because these efforts involve information that relates to particular intelligence methods and capabilities, the Annex is classified.

(U) As you know, Section 702 is vital to keeping our nation safe. It has generated critically important foreign intelligence information. We have provided both public and classified examples of Section 702's value to national security. The IC works diligently to implement this key authority in a manner that complies with Section 702's stringent privacy protections, to include multilayered oversight mechanisms by all three branches of government. We remain committed to providing Members of Congress with specific information about Section 702, as well as making information available to the public consistent with the Principles of Intelligence Transparency.

Sincerely,



Daniel R. Coats

The Honorable Bob Goodlatte
The Honorable John Conyers, Jr

Distribution:

House Permanent Select Committee on Intelligence
Senate Judiciary Committee
Senate Select Committee on Intelligence