

From: Hamilton, Brandy (OIG)
Subject: Draft OIG Report - A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data
To: DOJExecSec (JMD)
Cc: Whitaker, Matthew (OAG); Hur, Robert (ODAG); Terwilliger, Zachary (ODAG); Schools, Scott (ODAG); Sheehan, Matthew (ODAG)
Sent: December 28, 2017 7:56 PM (UTC-05:00)
Attached: OIG E2013011 - Draft Report to AG_DAG (12-28-2017).docx.pdf

The Office of the Inspector General (OIG) has completed a draft report reviewing three programs in which the Drug Enforcement Administration (DEA) has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the attached report to the Department for comment, including whether anything in the draft report is factually inaccurate.

If Department staff has any questions about this memorandum or the report, please have them contact Assistant Inspector General Daniel Beckhard at (b) (6), or Investigative Counsel (b)(6) per OIG at (b) (6).

Oversight and Review Division
Office of the Inspector General
(b) (6)



U.S. Department of Justice

Office of the Inspector General

December 28, 2017

MEMORANDUM FOR THE ATTORNEY GENERAL

THE DEPUTY ATTORNEY GENERAL

FROM:

ROBERT P. STORCH 
DEPUTY INSPECTOR GENERAL

SUBJECT:

Draft OIG Report entitled "A Review of the Drug
Enforcement Administration's Use of Administrative
Subpoenas to Collect or Exploit Bulk Data"

The Office of the Inspector General (OIG) has completed a draft report reviewing three programs in which the Drug Enforcement Administration (DEA) has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the attached report to the Department for comment, including whether anything in the draft report is factually inaccurate, and have sent copies of the draft report by separate transmittal memoranda to the DEA, the Federal Bureau of Investigation, and the Criminal Division. We note for your particular attention that Chapter Three addresses the Office of Attorney General and the Office of the Deputy Attorney General's historical involvement in the programs discussed in that chapter.

We are not requesting a sensitivity review of the report at this time. We are preparing a separate public version or summary of this report that we will provide for a sensitivity review following receipt of any comments you have on this draft.

We request the results of the Department's factual accuracy review by January 19, 2018. In addition, because this is a draft report, we request that it not be disseminated to or discussed with Department staff other than those individuals identified by your offices, the DEA, the FBI, or the Criminal Division to provide comments or to review the draft report for factual accuracy.

If Department staff has any questions about this memorandum or the report, please have them contact Assistant Inspector General Daniel Beckhard at (b) (6), or Investigative Counsel (b)(6) per OIG at (b) (6).

Thank you for your cooperation in this matter.

Attachment

cc: Matthew Whitaker
Chief of Staff and Senior Counselor to the Attorney General

Robert K. Hur
Principal Associate Deputy Attorney General

Zachary G. Terwilliger
Chief of Staff and Associate Deputy Attorney General

Scott N. Schools
Associate Deputy Attorney General

Matthew J. Sheehan
Counsel to the Deputy Attorney General

From: Gauhar, Tashina \ (ODAG\
Subject: FW: FISC Order Jan. 5, 2018 Misc. 13-08
To: Hur, Robert \ (ODAG\
Sent: January 8, 2018 7:21 PM (UTC-05:00)
Attached: Misc 13 08 Certification Order with Attached En Banc Decision.pdf, ATT00001.htm

FYI - Please see below and the attached. Of note, this is the first time the FISC has certified a question to the FISC Court of Review (FISC-R). The question at issue is: "[w]hether Movants have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions."

This procedural option was added in the FREEDOM ACT (enacted in 2015).

From: Evans, Stuart (NSD)
Sent: Monday, January 8, 2018 8:45 AM
To: Gauhar, Tashina (ODAG) <(b) (6)>; Tucker, Rachael (OAG) <(b) (6)>
Cc: Wiegmann, Brad (NSD) <(b) (6)>
Subject: FW: FISC Order Jan. 5, 2018 Misc. 13-08

Just fysa, see below and attached. No action required.

From: Evans, Stuart (NSD)
Sent: Monday, January 08, 2018 8:43 AM
To: 'Bradley A Brooker' <(b)(3) per ODNI>; Gerstell, Glenn S <(b)(3) per NSA>; Baker, James A. (OGC) (FBI) <(b)(6), (7)(C), (7)(E) per FBI>; (b) (6) <(b)(6), (7)(C), (7)(E) per FBI>; (OGC) (FBI)' <(b)(6), (7)(C), (7)(E) per FBI>; Anthony, Teisha <(b)(3) per NSA>; Morris, Paul F. <(b)(3) per NSA>; (b)(3), (b)(6) per ODNI <(b)(3), (b)(6) per ODNI>
Cc: Wiegmann, Brad (NSD) <(b) (6)>
Subject: FW: FISC Order Jan. 5, 2018 Misc. 13-08

All, you may recall that in November the FISC issued a 6-5 *en banc* decision concluding that certain outside movants had standing to bring a First Amendment right of access case regarding FISC opinions. There had been no further action in that particular litigation since the Court ruling. On Friday, and apparently in light of the very closely divided *en banc* decision, the Court *sua sponte* issued the attached order certifying to the FISC-R the underlying question of "[w]hether Movants have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions."

Although FISC-R proceedings are exceedingly rare, we expect the next step will likely be a scheduling order or other procedural order from the FISC-R. We will keep you apprised of further developments before the FISC-R.

Stu

JAN 05 2018

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

LeeAnn Flynn Hall, Clerk of Court

IN RE OPINIONS & ORDERS OF THIS COURT
ADDRESSING BULK COLLECTION OF DATA
UNDER THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT.

Docket No. Misc. 13-08

**CERTIFICATION OF QUESTIONS OF LAW TO THE
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW**

Pursuant to 50 U.S.C. § 1803(j), the Court hereby certifies to the Foreign Intelligence Surveillance Court of Review ("FISCR") a question of law concerning whether the Foreign Intelligence Surveillance Court ("FISC") has jurisdiction to consider the merits of a motion filed by the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic (collectively the "Movants"). Movants' motion invokes the qualified First Amendment right of public access to request that the FISC "unseal" and release information redacted from four declassified FISC judicial opinions. *See* Mot. of the Am. Civil Liberties Union, the Am. Civil Liberties Union of the Nation's Capital, and the Media Freedom and Info. Access Clinic for the Release of Ct. Rs. 1, *available at* <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf>.¹ The

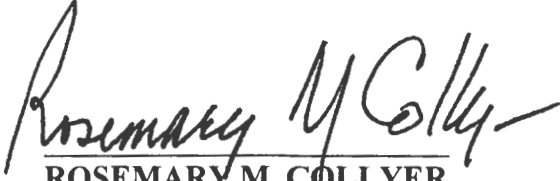
¹ Although cited web addresses in this document might continue from one line of text to the next line of text it should be noted that there is no formatted spacing in the web address where a line break appears in this document.

Executive Branch redacted the information at issue during classification reviews that resulted in determinations that the information was classified national security information. *See* United States' Opp'n to the Mot. of the Am. Civil Liberties Union, Et Al., for the Release of Ct. Rs. 1, *available at* <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opposition-1.pdf>; Op. 4-5, 27 (Jan. 25, 2017), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf. The opinions were publicly released in redacted form in 2014. Op. 1 (Jan. 25, 2017). No sealing or other discretionary orders were issued by the FISC to impede public access to the judicial opinions. Op. 28 (Jan. 25, 2017).

On January 25, 2017, Presiding Judge Rosemary Collyer dismissed Movants' motion after holding that they failed to establish constitutional standing sufficient to confer FISC jurisdiction. Order 1 (Jan. 25, 2017), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf. A majority of FISC judges thereafter voted in favor of en banc reconsideration and, after entertaining additional legal briefing from the parties, the en banc court issued closely-divided majority and dissenting opinions on November 9, 2017. Ops. (Nov. 9, 2017), *available at* <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf> (copies attached). The majority opinion, which was joined by six of the eleven FISC judges, held that Movants asserted a sufficient injury-in-fact, vacated the January 25, 2017 decision, and remanded for further proceedings. Majority Op. 18 (Nov. 9, 2017). Ten of eleven FISC judges subsequently agreed that the question of law should be certified to the FISCR pursuant to 50 U.S.C. § 1803(j) because review by the FISCR would serve the interests of justice, a dispositive issue about standing was involved, and the split among the FISC Judges was very close and involved a difference of opinion about the law to apply, among other considerations.

Accordingly, it hereby is ORDERED that the following question of law be certified to the FISCR: Whether Movants have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions.

SO ORDERED this 5th day of January, 2018.


ROSEMARY M. COLLYER
Presiding Judge, United States Foreign
Intelligence Surveillance Court

NOV 09 2017

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

Joseph P. Flynn Hall, Clerk of Court

IN RE OPINIONS & ORDERS OF THIS COURT
ADDRESSING BULK COLLECTION OF DATA
UNDER THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT.

Docket No. Misc. 13-08

BOASBERG, J., writing for the Court and joined by JJ. SAYLOR, DEARIE, RUSSELL, JONES, and CONTRERAS:

Figuring out whether a plaintiff has standing to bring a novel legal claim can feel a bit like trying to distinguish a black cat in a coal cellar. “Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to filing suit, while the underlying merits of a claim . . . determine whether the plaintiff is entitled to relief.” Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008). The Initial Opinion in this action decided that Movants – the American Civil Liberties Union and Yale Law School’s Media Freedom and Information Access Clinic – had suffered no injury-in-fact and thus lacked standing to bring their First Amendment claim for access to redacted portions of certain of this Court’s opinions. Sitting *en banc* for the first time in our history, we now vacate that decision. Whatever the merits of Movants’ suit, we conclude that they have asserted a sufficient injury-in-fact to pursue it.

I. Background

By necessity, this Court conducts much of its work in secrecy. But it does so within a judicial system wedded to transparency and deeply rooted in the ideal that “justice must satisfy the appearance of justice.” Levine v. United States, 362 U.S. 610, 616 (1960).

It comes as no surprise, then, that members of the public may at times seek to challenge whether certain controversies merit our continued secrecy or, instead, require some degree of transparency. The matter before us was born from two such challenges. On June 6, 2013, two newspapers released certain classified information about a surveillance program run by the Government since 2006. Within a day, the Director of National Intelligence declassified further details about this bulk-data-collection program, acknowledging for the first time that this Court had approved much of it under Section 215 – the “business records” provision – of the Patriot Act, 50 U.S.C. § 1861.

Very shortly thereafter, Movants filed a motion in this Court asking that we unseal our “opinions evaluating the meaning, scope, and constitutionality of Section 215.” FISC No. Misc. 13-02, Motion of June 2, 2013. They argued that, because officials had now “revealed the essential details of the program,” there was no legitimate interest in continuing to withhold its legal justification. Id. at 18. Movants thus contended that their First Amendment right of access to court proceedings and documents, as recognized by the Supreme Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), now compelled the release of these rulings. Id. at 6-15. They alternatively asked that we invoke FISC Rule of Procedure 62(a) to request that the Government review the opinions’ classification and publish any declassified portions. Id. at 15-18.

Judge Saylor opted for the latter discretionary route in this first action. In re Orders of this Court Interpreting Sec. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064 (Foreign Intel. Surv. Ct. Sept. 13, 2013). Before doing so, however, he concluded that Movant ACLU had established Article III standing to pursue its First Amendment challenge, as its asserted injury satisfied the familiar tripartite standing requirement – *i.e.*, it was “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” Id. at *2 (quoting Clapper v. Amnesty Int’l USA, 568 U.S. 398, 409 (2013)). More specifically, he reasoned that, because the ACLU had alleged that the continued withholding of our opinions violated its First Amendment right of access to them, its claimed injury was 1) “actual,” as the opinions were not available, 2) “traceable” to the Government’s decision not to make them public, and 3) redressable by “this Court’s directing that those opinions be published.” Id. Judge Saylor also determined that the injury was sufficiently particularized because Movants were “active particip[ants] in the legislative and public debates about the proper scope of Section 215,” and the withheld information would assist them in these conversations. Id. at *4. Ultimately, however, he did not reach the merits of their First Amendment claim, choosing instead to order the Executive Branch under Rule 62(a) to conduct a declassification review of certain of our prior opinions. Id. at *8.

Around the same time, the Government released more details about the bulk-data-collection program, including a white paper that explained how FISC Judges had periodically approved the directives to telecommunications providers to produce bulk telephonic metadata for use in the Government’s counterterrorism efforts. See Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act (Aug. 9, 2013). This Court, too, took steps to make more information available to the public. In particular, we

asked the Executive Branch to review several of our opinions, and we released redacted versions of two about the collection of bulk telephony metadata under Section 215. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 427591, at *2-3 (FISC Jan. 25, 2017).

While these revelations may have slaked some of Movants' thirst for information, they also opened up new lines of inquiry. Movants thus filed another motion – which kicked off the current action – on November 7, 2013, asking us to unseal classified sections of our opinions laying out the legal basis for the data collection. See Movants' Motion of Nov. 7, 2013, available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf>. Here, again, they claimed that these passages were “subject to the public’s First Amendment right of access” and should be released because “no proper basis exists to keep the legal discussions in [them] secret.” Id. at 1. They further contended that we should once more exercise our discretion under Rule 62(a) to ask for a second classification review by the Government and then verify that its response complied with the dictates of the First Amendment. Id. at 24-27.

On November 18, 2013, however, while briefing was ongoing on this issue, the Government published two more redacted opinions by this Court. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *3. Including the previous pair we had already released, these four opinions constituted all of our rulings that were responsive to Movants' second Motion. In other words, before the Government had even filed an Opposition, the relevant opinions had been “subjected to classification review and the unclassified portions released” with – according to the Government – “as much information . . . as possible consistent with national security.” Opp. of Dec. 6, 2013, at 2.

Given such release, the Government's subsequent Opposition argued that the Court should now dismiss Movants' second action. Any further review, it maintained, would merely "duplicate the[se] result[s]," and there was "no basis for th[is] Court to order [it]." Id. The Government also contended that Movants lacked standing to seek such relief because Rule 62(a) allowed only a party to the proceeding that generated the opinion to move for publication, and Movants had not been involved in the underlying actions. Id. at 2-3. Finally, the Government urged this Court not to order yet another review since Movants could challenge the classification decisions through a Freedom of Information Act case in federal district court. Id. at 3-4.

On January 25, 2017, in a lengthy and thoughtful Opinion, Presiding Judge Collyer determined that Movants had no standing to press their case, and she thus dismissed it. See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *1. Her Opinion focused in particular on a potential standing problem that the parties had not previously identified – namely, whether Movants had alleged the invasion of a "legally and judicially cognizable" interest sufficient to establish the injury-in-fact prong of the standing analysis. Id. at *7. The Court first took the position that an interest was not legally protected "when its asserted legal source – whether constitutional, statutory, common law or otherwise – does not apply or does not exist." Id. at *8.

On this basis, the Court then engaged in a lengthy merits analysis of Movants' claim under the Richmond Newspapers "experience and logic" test to determine whether such a First Amendment right existed in the unique context of FISC judicial proceedings. Id. at *16-21. Although the Constitution does not expressly provide for access to judicial records, in Richmond Newspapers, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." Globe Newspaper Co. v. Superior

Court, 457 U.S. 596, 603 (1982). Since then, it has extended this right to other judicial processes, but has also recognized that such a First Amendment right of access is not absolute. Id. at 607. Rather, to determine whether the public has a right of access to particular judicial proceedings, courts must ask two questions: “whether the place and process have historically been open to the press and general public” (the experience inquiry) and “whether public access plays a significant positive role in the functioning of the particular process in question” (the logic inquiry). Press-Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8 (1986). Applying this test, Judge Collyer in this case ultimately answered both prongs in the negative, and she therefore concluded that the right of access did not extend to FISC judicial proceedings. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *16-21. For this reason alone, the Court then held that Movants had not alleged a sufficient injury-in-fact and thus lacked standing to bring their claim. Id. at *21.

Movants quickly moved for reconsideration. As the resolution of the first and second actions had created an intra-court split on the standing issue, we *sua sponte* granted *en banc* review to reconsider the narrow question of whether Movants have asserted a sufficient injury-in-fact for standing purposes. See 50 U.S.C. § 1803(a)(2)(A); FISC R. P. 45 (allowing the Court to order a hearing or rehearing *en banc* if “necessary to secure and maintain uniformity of the Court’s decisions”). After substantial and reasoned debate and discussion among all eleven judges of this Court, we now answer that inquiry in the affirmative.

II. Analysis

Article III of the Constitution limits the jurisdiction of federal courts to actual “Cases” and “Controversies.” U.S. Const., art. III, § 2. But not just any dispute will do. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-61 (1992). The Constitution instead confines the judiciary to deciding

contests that are “appropriately resolved through the judicial process,” as distinguished from those better left to the legislative or executive branches in a democratic government. Id. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Standing doctrine helps police this boundary by requiring, as an “irreducible constitutional minimum,” that a plaintiff establish three elements to proceed with a claim: 1) an injury-in-fact that is 2) caused by the conduct complained of and 3) “likely” to be “redressed by a favorable decision.” Id. at 560-61 (quotations omitted).

The focus here is on the first prong. A term of art, an injury-in-fact is the “invasion of a legally protected interest which is both (a) concrete and particularized; and (b) actual or imminent, not conjectural, or hypothetical.” Id. at 560 (footnote, internal citations, and quotation omitted). For the purposes of evaluating whether a plaintiff has made this showing, though, “we must assume [Movants’] claim has legal validity.” Cooksey v. Futrell, 721 F.3d 226, 239 (4th Cir. 2013) (quotation omitted). Put another way, in deciding whether Movants have alleged a sufficient injury-in-fact for standing purposes, we “must be careful not to decide the question on the merits for or against [Movants], and must therefore assume that on the merits the [Movants] would be successful in their claims.” City of Waukesha v. EPA, 320 F.3d 228, 235 (D.C. Cir. 2003); see also Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014) (same); Parker v. District of Columbia, 478 F.3d 370, 377 (D.C. Cir. 2007) (“The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.”), aff’d sub nom. District of Columbia v. Heller, 554 U.S. 570 (2008); see also Warth v. Seldin, 422 U.S. 490, 501-02 (1975) (assuming validity of legal theory for purposes of standing analysis).

Starting from the premise that Movants’ claim is meritorious means that we must assume that withholding our classified opinions violates their First Amendment right of access to judicial

proceedings under the Richmond Newspapers test. From this base, we can readily conclude that this injury is “concrete,” as well as “actual,” because the opinions are currently not available to them. For at least the reasons articulated by Judge Saylor, moreover, it is sufficiently “particularized” from that of the public because of Movants’ active participation in ongoing debates about the legal validity of the bulk-data-collection program.

The Initial Opinion, of course, did not quibble with these conclusions, but instead homed in on the prefatory language of the definition of what constitutes an injury-in-fact. While not every Supreme Court decision even specifies that an alleged injury-in-fact must be to a “legally protected interest,” see, e.g., Clapper, 568 U.S. at 409, the Opinion correctly pointed out that some cases have treated this as an independent requirement to establish standing in appropriate circumstances. But from this starting point, the Initial Opinion faltered in concluding that Movants had alleged no legally protected interest because the First Amendment’s right of access to court proceedings “did not apply” to FISC Opinions. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *21.

As courts have repeatedly affirmed, “For purposes of standing, the question [simply] cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff’s asserted right or interest.” Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) (*en banc*) (emphasis added). “If that were the test, every losing claim would be dismissed for want of standing.” Id.; see also Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 & n.1 (2003) (admonishing against use of “legal interest” test as part of standing analysis when it goes to merits of claim). We must instead assume that Movants are correct that they have a constitutional right of access, Waukesha, 320 F.3d at 235 – so long as that right is cognizable. That is, we ask only whether courts are capable of knowing or recognizing such an

interest. See Black's Law Dictionary (10th ed. 2014) (defining "cognizable" as "[c]apable of being known or recognized"); see also Judicial Watch, Inc. v. U.S. Senate, 432 F.3d 359, 364 (D.C. Cir. 2005) (Williams, J., concurring) (explaining Supreme Court uses terms "legally protected" and "judicially cognizable" interchangeably "(1) to encompass the other conventionally stated requirements (that the injury be concrete and particularized, and actual or imminent) and (2) possibly to serve as a screen (perhaps open-ended) against interests that it would make little sense to treat as adequate").

A plaintiff, for instance, might lack standing "to complain about his inability to commit crimes because no one has a right to a commit a crime," and no Court could recognize such an interest. Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014). On the other hand, he would have standing to bring colorable First Amendment claims, even if he would ultimately lose on the merits. Take the seminal example of Buckley v. Valeo, 424 U.S. 1 (1976). There, the Supreme Court allowed plaintiffs to attack campaign-finance laws as unconstitutional, even though, as it turned out, there is no specific "First Amendment right to make unlimited campaign contributions." Initiative & Referendum Inst., 450 F.3d at 1092-93 (citing Buckley, 424 U.S. at 96). As the Tenth Circuit noted, "We could use any unsuccessful constitutional claim to illustrate the point." Id. at 1092. Indeed, were we to define rights with any greater level of specificity, no plaintiff would have standing to challenge established First Amendment precedent. This is certainly not the case. See, e.g., Citizens United v. FEC, 558 U.S. 310, 365-66 (2010) (overturning precedent that upheld restrictions on corporate independent expenditures).

At bottom, the legally-protected-interest test is not concerned with determining the proper scope of the First Amendment right or whether a plaintiff is correct that such right has in fact been invaded; that is a merits inquiry. Waukesha, 320 F.3d at 235. The test instead seeks only to assess

whether the interest asserted by the plaintiff is of the type that “deserve[s] protection against injury.” 13 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal Practice & Procedure § 3531.4 (3d ed. 2008).

Against this backdrop, the sufficiency of Movants’ allegation of such a legally protected interest appears clear. They identify the invasion of an interest – the First Amendment right to access judicial proceedings – that courts have repeatedly held is capable of “being known or recognized.” The Supreme Court first acknowledged that this interest is one the Constitution protects against wrongful invasion in Richmond Newspapers, 448 U.S. 555, when a plurality held that the public’s “right to attend criminal trials is implicit in the guarantees of the First Amendment.” *Id.* at 580 (footnote omitted). Since then, that Court has also held that this right safeguards the public’s qualified access to other criminal proceedings, including witness testimony, Globe Newspaper, 457 U.S. at 603-11, *voir dire*, Press-Enterprise Co. v. Superior Court (Press Enterprise I), 464 U.S. 501, 505-10 (1984), and preliminary hearings. Press Enterprise II, 478 U.S. at 10-15.

Many federal Courts of Appeals have likewise held this legally protected interest invaded when the public is walled off from other aspects of criminal trials, such as bail, plea, or sentencing hearings. *See, e.g.*, N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); In re Wash. Post Co., 807 F.2d 383, 388-89 (4th Cir. 1986) (plea and sentencing hearings); In re Hearst Newspapers, LLC, 641 F.3d 168, 175-86 (5th Cir. 2011) (sentencing). Finally, at least six Circuits have concluded that the First Amendment qualified right of access also extends to “civil trials and to their related proceedings and records.” N.Y. Civil Liberties Union, 684 F.3d at 298 (emphasis added) (so holding and collecting cases from the Third, Fourth, Seventh, Eighth, and Eleventh Circuits).

These cases all demonstrate that Movants, in asserting a First Amendment right of access to judicial processes, are seeking to vindicate “the sort of interest that the law protects when it is wrongfully invaded.” Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006) (emphases modified). No more than this is necessary for standing purposes, even if Movants ultimately fail to prove that the precise scope of the First Amendment right extends to redacted portions of our judicial opinions under the Richmond Newspapers test. The dissent, by contrast, would require Plaintiffs to make that more specific showing at the standing stage – an inquiry that would swallow any merits determination on the First Amendment’s contours. It is erroneous to understand the cognizable-interest requirement as “beg[ging] the question of the legal validity of the[ir] claim.” Initiative & Referendum Inst., 450 F.3d at 1093 n.3. Rather, as the Tenth Circuit sitting *en banc* has instructed, courts must avoid any such “mischief” inherent in “us[ing] standing concepts to address the question whether the plaintiff has stated a claim.” Id. (quoting 13 Wright & Miller, § 3531.4 (2d ed. Supp. 2005)).

Our conclusion that Movants have met this cognizable-interest requirement is also consistent with the approach adopted by every Circuit to consider a similar claim. As far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings. That is so no matter how novel or meritless the claim may be. Some courts have stretched the right-of-access even farther for standing purposes. In Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), for example, journalists creatively contended that they had a First Amendment right of access to travel with military-combat units to cover the war in Afghanistan. Id. at 698. Although the D.C. Circuit ultimately held that “no such constitutional right exists” – in fact, having deemed Richmond Newspapers entirely inapplicable – it nevertheless easily concluded that plaintiffs had standing to bring their

suit. Id. at 698, 702-04. This was the case even though the journalists' desire to embed with troops was much farther afield from the core Richmond Newspapers right than the one Movants hope to establish today. Here, they ask only to extend the public's right of access to another Article III context – *i.e.*, FISC judicial proceedings.

The dissent criticizes the Court of Appeals' analysis in Flynt, *see post* at 20, but its dislike of the decision does not diminish its import. In any event, the D.C. Circuit does not stand alone in its approach. The Seventh Circuit, for example, has considered a historian's standing to bring a common-law right-of-access claim to sealed grand-jury materials. *See Carlson v. United States*, 837 F.3d 753, 757-61 (7th Cir. 2016). The plaintiff, it reasoned, "need[ed] only a 'colorable claim' to a right to access these documents, because '[w]ere we to require more than a colorable claim, we would decide the merits of the case before satisfying ourselves of standing.'" Id. at 758 (internal citation omitted); *see also Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1321-22, 1325 (W.D. Okla. 2014) (holding plaintiffs had standing to bring First Amendment right-of-access claim to view executions, but dismissing suit as right did "not extend to the circumstances existing here"); United States v. Ring, 47 F. Supp. 3d 38, 41-42 (D.D.C. 2014) (holding criminal defendant had standing to sue for public access to PowerPoint presentation used during proffer session despite holding on merits that "neither a common law nor First Amendment right of access" attached to the record).

Many courts – including the Supreme Court – have not even felt it necessary to address standing in dealing with tenuous right-of-access claims, despite judges' obligation to raise *sua sponte* any jurisdictional defects. Indeed, courts have routinely ignored what the dissent would believe is a serious question, even while expressly addressing their jurisdiction in other respects. For example, the Fourth and Sixth Circuits rejected mootness challenges to suits asserting a First

Amendment right of access to search-warrant proceedings, despite ultimately deciding that the plaintiffs had no such right to these sealed records under the Richmond Newspapers test. See In re Search of Fair Finance, 692 F.3d 424, 428-29, 433 (6th Cir. 2012) (finding claim not moot); Balt. Sun Co. v. Goetz, 886 F.2d 60, 63-65 (4th Cir. 1989) (same). Mootness, of course, shares a common undergirding with standing: “[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997)). To survive a mootness challenge, then, the plaintiffs must have necessarily demonstrated that the requisite personal injury existed at least in the first instance. Even more recently, in Phillips v. DeWine, 841 F.3d 405 (6th Cir. 2016), the Sixth Circuit rejected a much more farfetched challenge by inmates to the constitutionality of Ohio’s “statutory scheme concerning the confidentiality of information related to lethal injection.” Id. at 410, 419-20. At the outset, the court concluded that the plaintiffs lacked standing to bring their free-speech and prior-restraint causes of action, as their asserted injuries were too hypothetical. But it apparently had no similar concern as to their First Amendment right-of-access claim, holding instead on the merits that no such right existed. Id. at 417-20.

A long list of courts have acted in this fashion. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 7-15 (1978) (holding First Amendment provides the media no right of access to county jail, but never questioning standing); Dhiab v. Trump, 852 F.3d 1087, 1096 (D.C. Cir. 2017) (holding plaintiffs have no “right under the First Amendment to receive properly classified national security information filed” in habeas action, but not questioning standing); Wood v. Ryan, 759 F.3d 1076, 1088 (9th Cir. 2014) (Bybee, J., dissenting) (criticizing “majority’s newfound right of access” for

death row inmate seeking information on method of his execution as “dramatic extension of anything” previously recognized, but never questioning standing), vacated, 135 S. Ct. 21 (mem.) (summarily vacated on merits, not standing); In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291-92 (4th Cir. 2013) (holding no First Amendment right under Richmond Newspapers to court orders and proceedings pursuant to Stored Communications Act, but never questioning standing); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d 401, 409-11 (2d Cir. 2009) (rejecting, under Richmond Newspapers, newspaper’s request to unseal wiretap applications and related materials, but not questioning standing to bring novel claim); Calder v. IRS, 890 F.2d 781, 783-84 (5th Cir. 1989) (applying Richmond Newspapers and holding plaintiff had no First Amendment or statutory right of access to IRS records, but never questioning standing). Although we do not directly rely on any of these cases, we find the uniformity is telling.

Similarly, two former judges of this Court also found it unnecessary to call standing into doubt when rejecting claims premised on the public’s right of access to FISC records, see In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008, No. 08-01, 2008 WL 9487946 (FISC Aug. 27, 2008) (McLaughlin, J.); In re Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISC 2007) (Bates, J.), and, as explained above, Judge Saylor expressly held that plaintiffs did have standing to bring such claims under the First Amendment in Movants’ first action. See In re Orders of this Court Interpreting Section 215 of the Patriot Act, No. 13-02, 2013 WL 5460064, at *2-4 (FISC Sept. 13, 2013).

The Initial Opinion, by contrast, relies on no case that concludes that a plaintiff lacks a legally cognizable interest, and thus standing, simply because that party cannot show a First Amendment right of access applies or exists in the context of the judicial proceeding at issue. The best it could muster is a single case where the plaintiff sought a common-law right of access to

discovery materials. Bond v. Utreras, 585 F.3d 1061, 1074 (7th Cir. 2009). The Seventh Circuit held that these discovery files – exchanged between parties – “had never been filed with the court and [had] never influenced the outcome of a judicial proceeding.” Id. Whatever the merits of that decision, it provides no guidance here, where Plaintiffs seek material far more rooted in judicial proceedings: our opinions. Perhaps recognizing Bond as thin support, the dissent relegates that case to a footnote. Otherwise, no case appears throughout its 25 pages in which any court declined to find standing in like circumstances. This lack of precedential support speaks volumes.

At times, the dissent suggests a variant justification for dismissing the suit: it sees “no legal basis to find that Movants present a colorable claim.” *Post* at 13 (emphasis added); see also id. at 17 n.16 (“In the instant matter, the question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified.”). This alternative argument seems decidedly weaker to us. Courts have repeatedly set an exceedingly low bar to establish colorability. See Kennedy v. Conn. Gen. Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) (holding only if claim is “frivolous is jurisdiction lacking”); Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 790 (7th Cir. 1996) (describing the requirement as “not . . . stringent”). Under this colorability standard, only “a plaintiff whose claimed legal right is so preposterous as to be legally frivolous may lack standing on the ground that the right is not ‘legally protected.’” Initiative & Referendum Inst., 450 F.3d at 1093. Whatever the merits of Movants’ First Amendment right-of-access claim, it finds its basis in well-established law. The right to access, even in its more narrow formulation, at least covers “a right of access to certain criminal [and civil] proceedings and the documents filed in those proceedings.” Phillips, 841 F.3d at 418. Movants merely allege that those “certain” documents include our FISC opinions – *i.e.*, opinions filed in an Article III judicial proceeding. This asserted right is certainly more analogous

to the historical right than – for example – a claim that the First Amendment also grants access to travel with troop battalions on a foreign battlefield. Yet, in Flynt, 355 F.3d 697, the D.C. Circuit never mentioned that it might be frivolous to consider such an extension. In fact, the dissent points to no federal court that has ever dismissed as frivolous a novel claim seeking to extend the First Amendment right of access to a new judicial process. We decline to be the first.

The dissent also suggests our analysis should differ because Plaintiffs seek “classified information.” *Post* at 24 (internal quotation marks omitted). It is true that courts rarely presume to review the Executive Branch’s decisionmaking, at least without a statutory hook. See Dep’t of Navy v. Egan, 484 U.S. 518, 538 (1988). Yet the classified information here is not housed in the Executive Branch; instead, it arises within an Article III proceeding, and Plaintiffs seek access to portions of judicial opinions. As explained above, the right to access judicial proceedings is well established. Courts have thus not hesitated to review claims involving secret court proceedings, even when they ultimately find good reason to deny them. See In re Search of Fair Finance, 692 F.3d at 428-29, 433 (sealed search warrants); Goetz, 886 F.2d at 63-65 (same); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d at 409-11 (sealed wiretap applications).

Nor do we agree with the dissent that we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch. See *post* at 23-25. Even if the Supreme Court applies an “especially rigorous” standing analysis in this context, Raines v. Byrd, 521 U.S. 811, 819-20 (1997), it has never suggested such an analysis would involve jumping to the merits of the dispute. More to the point, the dissent cites Clapper v. Amnesty International, 568 U.S. 398 (2013), which noted that courts have declined to find standing when reviewing “actions of the political branches in the fields of intelligence gathering and foreign affairs.” *Post*

at 23-24 (quoting Clapper, 568 U.S. at 469). Although that decision admittedly contains some broad language, none offers much insight into the standing question posed here.

In Clapper, the Supreme Court considered a separate facet of the injury-in-fact test – namely, whether the plaintiffs’ theory of future injury was too speculative to be “certainly impending.” Id. at 409. In fact, Clapper’s definition of what constitutes an injury-in-fact did not even include the requirement of a “legally protected” interest upon which the Initial Opinion relies here. Id. at 409 (“To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’”) (citation omitted). Clapper, then, does not impose any special standing requirement on this score; in fact, it might be better read to impose no such showing at all. Schuchardt v. President of the United States, 839 F.3d 336, 348 n.8 (3d Cir. 2016) (“Despite Clapper’s observation that the standing inquiry is especially rigorous in matters touching on intelligence gathering and foreign affairs,” no court has held that “‘Article III imposes [a] heightened standing requirement for the often difficult cases that involve constitutional claims against the executive involving surveillance.’”) (quoting Jewel v. NSA, 673 F.3d 902, 913 (9th Cir. 2011)) (internal quotations from Clapper omitted)). In any event, the claim presented here survives because the injury is a lack of access to the proceedings of a court, rather than one directly traceable to the activities of the political branches in intelligence gathering or foreign affairs.

* * *

At the end of the day, the question that the Initial Opinion asked and answered is not one of standing. It instead goes to the merits of Movants’ legal claim – *i.e.*, whether they have a qualified right of access under the First Amendment to portions of our opinions redacted by the Executive Branch under its classification authority. See Arreola, 546 F.3d at 794-95 (“Although

the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing.”). As that is not what concerns us today, we hold that Movants have sufficiently alleged the invasion of a legally cognizable interest as necessary to establish an injury-in-fact. Whether or not they will ultimately succeed in establishing that the Richmond Newspapers experience-and-logic test entitles them to relief, we believe that they should not be barred at this threshold procedural stage. We further offer no opinion on whether other jurisdictional impediments exist to this challenge, but hold only that Movants have established a sufficient injury-in-fact.

III. Conclusion

Because we hold that Movants have the requisite cognizable interest to pursue their constitutional claim, we vacate the Initial Opinion in this action and remand the matter to Judge Collyer for further consideration of Movants’ Motion.

COLLYER, *Presiding Judge*, joined by EAGAN, MOSMAN, CONWAY and KUGLER, *Judges*, dissenting:

In law as in life, the answer depends upon the question. Only by framing the question before us in its most general terms can the Majority answer with the unremarkable proposition that some courts – but not the Supreme Court – have found a First Amendment right of access to some federal court proceedings in civil cases when the place and process historically have been public. But the question the Majority poses is not the one presented by the motion in this case. I respectfully dissent and would affirm the decision in In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the FISA [hereinafter In re Opinions of This Court], No. Misc. 13-08, 2017 WL 427591 (FISA Ct. 2017).

The Foreign Intelligence Surveillance Court (“FISC”) is a special court with a special and discreet mission: to protect the rights of U.S. persons while reviewing surveillance measures to protect national security. FISC proceedings are classified and the Court operates under specific congressional direction that everything it does must respect and protect the secrecy of those classifications. No member of the public would have any “right” under the First Amendment to ask to observe a hearing in the FISC courtroom. Still less should we be inventing such a “right” in the present circumstances.

To be precise, what Movants seek is not “access to judicial proceedings,” as the Majority would have it. Rather, their current request is more limited and specific: having already received this Court’s opinions and orders addressing bulk collection of data with classified material redacted, Movants want us to rule that they have a “right” of access to the information classified by the Executive Branch and that Executive Branch agencies must defend each redaction in the face of Movants’ challenges.

The effect of the Court’s decision today is to displace Congress’s judgment that access to classified and ex parte FISC judicial opinions shall be resolved through the procedures set forth in Section 402 of the USA FREEDOM Act, which, as relevantly titled, governs the “[d]eclassification of significant decisions, orders, and opinions” of the FISC. Just as in the days of John Marshall, it is imperative that the Judiciary avoid the appearance of eroding the very principles intended to maintain the careful balance of powers set forth in the Constitution.¹ The Court’s decision today unfortunately fails in that effort.

One last introductory comment is due. FISC judges come from district courts around the country. Few of us knew each other before our appointments to the FISC. In our work on the FISC, as with our work in our home courts, we decide alone. The occasion of this en banc review of the In re Opinions of This Court decision has given us a rare and wonderful opportunity to wrestle together over some weighty legal principles and issues. This dissent is written in the same spirit.

I.

The question pending before the en banc Court is whether Movants have shown an injury in fact sufficient to establish constitutional standing and this Court’s jurisdiction. There is no dispute between the parties or the members of the Court that Article III of the Constitution limits the judicial power to the adjudication of cases or controversies in which a party seeking relief demonstrates standing for each asserted claim. There likewise is no dispute that the prevailing

¹ “Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101 (1998).

legal standard is set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and requires that Movants “must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” Id. at 560 (internal quotation marks and citations omitted).

The Supreme Court has never abandoned the requirement of a “legally protected interest” for the purpose of establishing Article III standing.² See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (confirming that “a plaintiff must show that he or she suffered an ‘invasion of a legally protected interest’” (quoting Lujan, 504 U.S. at 560)); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2663 (2015) (same); United States v. Windsor, 133 S. Ct. 2675, 2685 (2013) (same). Furthermore, the Supreme Court has signaled that the phrase “legally protected interest” has meaning independent of the requirement that the alleged invasion be concrete and particularized as well as actual or imminent. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 211 (1995) (stating “Adarand’s claim that the Government’s use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, *and* it does so in a manner that is ‘particularized’ as to Adarand” (emphasis added)).

To determine whether Movants asserted a legally protected interest, “we do not consider the merits in connection with standing, [but] we do consider whether the plaintiffs have a legal right to do what is allegedly being impeded.” Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th

² Even when the Supreme Court used the phrase “cognizable interests” for the purpose of evaluating standing it “stressed” that the injury must be both “*legally* and judicially cognizable.” Raines v. Byrd, 521 U.S. 811, 819 (1997) (emphasis added). Movants agree that “[t]he injury alleged must also be one that is ‘legally and judicially cognizable.’” Movants’ En Banc Opening Br. 6, available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Movants%27%20En%20Banc%20Opening%20Brief.pdf>.

Cir. 2014). In other words, we consider whether there is some law that at least arguably could be deemed to protect Movants' legal interest such that they can be said to have advanced a colorable claim *to the asserted right*. Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006). As the Seventh Circuit has explained:

The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit. It is that he must have a colorable claim to such a right. It is not enough that he claims to have been injured by the defendant's conduct. "The alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest.'"

Id. (quoting Raines, *supra* note 2, at 819 (quoting Lujan, 504 U.S. at 560)). To be clear, "[w]hile standing does not depend on the merits of the party's contention that certain conduct is illegal, standing does require an injury to the party arising out of a violation of a constitutional or statutory provision or other legal right." Fed. Deposit Ins. Corp. v. Grella, 553 F.2d 258, 261 (2d Cir. 1977). Accord Cox Cable Commc'ns, Inc. v. United States, 992 F.2d 1178, 1182 (11th Cir. 1993) ("No legally cognizable injury arises unless an interest is protected by statute or otherwise."). "The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 772 (2000).

II.

A.

Applying these legal standards, the Supreme Court has directed that "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). Indeed, the Supreme Court has agreed unanimously that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." Int'l Primate Prot.

League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). “Typically . . . the standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to adjudication *of the particular claims asserted*.” Id. (internal quotation marks omitted, emphasis in original).

Accordingly, to determine whether Movants have a legally protected interest the first step is to examine the specific constitutional claims Movants present. Id. Movants assert a First Amendment-protected interest to access information in certain FISC judicial opinions that the Executive Branch determined is classified national security information. Movants further assert a First Amendment-protected interest to require the Executive Branch to explain its rationale for classification and respond to Movants’ challenges to their constitutionality, and for the FISC to decide between them.³ Movants’ Mot. 1, 24. They invoke no other source of right for their claims.

The Majority Opinion strays from Movants’ “particular claims” and recasts their legal interest as broadly as possible into “access to judicial proceedings,” Majority Op. 10. By doing so, the Majority scrambles the scope of an interest recognized under the qualified First Amendment right of public access and the scope of an interest recognized under the common law

³ Specifically, Movants seek access to classified information that was redacted from four FISC judicial opinions that were declassified, in part, and made public in 2013. Now that the opinions are public, Movants ask the Court to compel the Executive Branch to conduct a second declassification review and “require the government to justify its proposed redactions, permit Movants an opportunity to respond, and then make findings on the record about whether the proposed redactions are narrowly tailored to avert a substantial risk of harm to a compelling governmental interest.” Movants’ Reply Br. 2, available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply-1.pdf>. Movants claim the qualified First Amendment right of public access mandates these procedures as a matter of right, although they concede that “much of this Court’s work may not be subject to a constitutional right of access” Movants’ Reply Br. 1.

right of access. The result is a legal analysis that ignores the Supreme Court’s direction to examine the nature and source of Movants’ claims and gauge their standing by the specific constitutional claims they present. This confusion has consequences because the First Amendment and the common law are analyzed differently.

The First Amendment provides no general right of access to government proceedings. Houchins v. KOED, Inc., 438 U.S. 1, 15 (1978) (plurality) (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act” and “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”). Accord Phillips v. DeWine, 841 F.3d 405, 419 (6th Cir. 2016) (rejecting a broad assertion of a First Amendment right to government information that pertains to a government proceeding and noting that “[n]either this court nor the Supreme Court has ever recognized a right so broad”). Nor does the First Amendment provide a presumptive⁴ or general right of access to “judicial proceedings” as a subset of government proceedings. See, e.g., id. (noting that Houchins “sets the baseline principle for First Amendment claims seeking access to information held by the government”). Richmond Newspapers and its progeny offer an “exception” to the Houchins rule that there is no First Amendment right to access government proceedings, id. at 418, but that exception is limited to judicial proceedings that satisfy what has come to be known as the “experience” and “logic” tests

⁴ When courts refer to a “presumptive First Amendment right of access,” see, e.g., N.Y. Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 296 (2d Cir. 2012), that “presumption” only comes into play after the First Amendment actually applies or attaches. There is, however, no “presumption” that the First Amendment applies or attaches to any particular judicial proceeding or document; instead, the Supreme Court established the non-presumptive test set forth in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), and its progeny.

set forth by the Supreme Court to determine when the First Amendment applies to a particular judicial proceeding to which access is sought, see Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (“Press-Enterprise II”) (“If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”).

The D.C. Circuit observed in Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), that the Supreme Court has found that a qualified First Amendment right of public access applies to *criminal* judicial proceedings only when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. 355 F.3d at 704. Lower courts have extended the Richmond Newspapers exception to certain trial-like civil proceedings found to satisfy the same experience and logic tests, but the Supreme Court has never ratified that approach. Id.

Again, standing must be “gauged by the specific . . . constitutional claims that a party presents.” Int’l Primate Prot. League, 500 U.S. at 77. The “specific” constitutional claims Movants present are claims under the First Amendment to access information in FISC judicial opinions that the Executive Branch has determined is classified national security information. The FISC issued those opinions in ex parte proceedings that are unique to its jurisdiction under 50 U.S.C. §§ 1842(b) and 1861(b)(1). Movants also assert a concomitant right to challenge the constitutionality of each of those classification decisions, to require the Executive Branch to defend them, and to obtain FISC rulings on it all. Because the unclassified portions of the FISC opinions at issue have already been made public, Movants’ alleged interest can only be described as accessing “classified information in FISC judicial opinions”⁵ and not the broader universe of

⁵ This framing of the interest is consistent with the Court’s prior precedent addressing whether the qualified First Amendment right of public access applies to classified FISC judicial proceedings. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484, 491-97 (FISA

“access to judicial proceedings” generally, as perceived by the Majority Opinion.⁶ See, e.g., Doe, 749 at 266 (limiting the First Amendment to “secur[ing] a right of access only to *particular* judicial records and documents” and not to “all judicial documents and records”).

To be sure, one can find broad statements about a right of the public to access judicial proceedings more generally. But those statements concern the common law right of access, which is a right that was not invoked by Movants and is analytically distinct from the First Amendment right they claimed. As the Fourth Circuit cogently explained, “[t]he common-law presumptive right of access extends to all judicial documents and records” whereas “[b]y *contrast*, the First Amendment secures a right of access only to *particular* judicial records and documents” when it applies. See Doe v. Pub. Citizen, 749 F.3d 246, 265-66 (4th Cir. 2014) (internal quotation marks and citation omitted, emphases added).⁷ The Sixth Circuit echoed this

Ct. 2007) (concluding that the First Amendment provides no public right of access to FISC judicial records).

⁶ Movants contend their interest is in “opinions containing significant legal interpretation of the Constitution and statutory law” and they argue that “[f]or those sorts of opinions, at least, the First Amendment has always required courts to operate openly” Movants’ Reply Br. 1. This argument is clearly erroneous. For example, the Supreme Court has implied, and federal circuit courts of appeal have expressly held, that the qualified First Amendment right of public access does not apply to grand jury proceedings where significant opinions are frequently made. See, e.g., Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218-21 (1979) (making clear that grand jury proceedings historically have been closed to the public and public access would hinder the efficient functioning of those proceedings so such proceedings impliedly would not satisfy the test of experience and logic set forth in Richmond Newspapers); In re Motions of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998) (“A settled proposition, one the press does not contest, is this: there is no First Amendment right of access to grand jury proceedings.”); United States v. Smith, 123 F.3d 140, 148 (3d Cir. 1997) (“Not only are grand jury proceedings not subject to any First Amendment right of access, but third parties can gain access to grand jury matters only under limited circumstances.”).

⁷ Accord In re U.S. for an Order Pursuant to 18 U.S.C. § 2703(D), 707 F.3d 283, 291 n.8 (4th Cir. 2013) (rejecting plaintiffs’ contention that the First Amendment protects a general right to access judicial orders and proceedings because “[t]his interpretation of the First Amendment

sentiment when it stated that the First Amendment covers only “*certain* proceedings and documents filed therein and nothing more.” Phillips, 841 F.3d at 419 (internal quotation marks omitted, emphasis added).

In describing the right of access to judicial records under the common law, the Supreme Court has stated that “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 (1978). That right, however, is not sacrosanct and yields when, for example, “Congress has created an administrative procedure for processing and releasing to the public” the material sought by a litigant, id. at 603, which arguably is the case here. Section 402 of the USA FREEDOM Act of 2015⁸—fittingly titled “Declassification of significant decisions, orders, and opinions”—now provides procedures for making FISC judicial opinions publicly available. In addition, the Freedom of Information Act (“FOIA”) dictates what “[e]ach agency shall make available to the public” 5 U.S.C. § 552(a). Moreover, this Court previously held that, with respect to FISC proceedings, the common law right of access is preempted by the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) (“FISA”). In re Motion for Release of Court Records, 526 F. Supp. 2d at 490-91 (rejecting the ACLU’s claim of a common law right of access because, among other reasons, “[t]he requested records are being maintained under a comprehensive statutory scheme designed to protect FISC records from routine public

right of access is too broad, and directly contrary to our holding that this right extends only to particular judicial records and documents”).

⁸ Pub. L. No. 114-23, 129 Stat. 268 (2015), as codified at 50 U.S.C. § 1872.

disclosure”). The essential point, however, is that Movants have not claimed a violation of the common law right of access.

B.

After properly framing Movants’ interest as an interest in accessing classified information in FISC judicial opinions rather than the expansion adopted by the Majority, it is necessary to decide whether that interest is protected by law. Movants cite the qualified First Amendment right of public access as their only legally protected interest.⁹ The only interest protected by the qualified First Amendment right of public access, however, is an interest in access to trial-like judicial proceedings¹⁰ and related documents when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. See, e.g., Press-Enterprise II, 478 U.S. at 9 (stating that the “particular proceeding” in question must pass the tests of experience and logic for the qualified First Amendment right of access to attach); Cincinnati Gas & Electric Co. v.

⁹ In re Opinions of This Court, No. Misc. 13-08, 2017 WL 427591, at *21.

¹⁰ As discussed supra page 7, the Supreme Court has never extended the qualified First Amendment right of public access to non-criminal proceedings and the D.C. Circuit continues to adhere to the Supreme Court’s application. See, e.g., Flynt, 355 F.3d 697 at 704 (“To summarize, neither this Court nor the Supreme Court has ever applied Richmond Newspapers outside the context of criminal proceedings, and we will not do so today.”). Other courts, though, have extended the right to certain trial-like civil and administrative proceedings. See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012). While we all recognize this contrary authority, it remains true that, “[b]olstered by the Sixth Amendment’s express right for a ‘public trial’ in ‘all criminal prosecutions,’ public access to criminal trials forms the core of this First Amendment constitutional right.” In re Application of WP Co. LLC, 201 F. Supp. 3d 109, 117 (D.D.C. 2016) (internal citations omitted). See also United States v. Doe, 63 F.3d 121, 127 (2d Cir. 1995) (reciting history of open criminal trials and noting “[i]n Gannett [Co., Inc. v. DePasquale], 443 U.S. 368] 379-81, the Supreme Court, striking the balance in favor of the criminal defendant, determined that the Sixth Amendment guarantee of a public trial was personal to the accused and did not grant the press and general public an independent right of access, at least to pretrial suppression hearings”).

Gen. Electric Co., 854 F.2d 900, 903 (6th Cir. 1988) (applying the same tests to a civil proceeding). To distill this point to its essence for our purposes, it is fair to say that the qualified First Amendment right of public access protects only an interest in judicial proceedings and related documents involving places and processes that have been historically public.¹¹ That rubric patently does not apply to the FISC, FISC proceedings or FISC judicial opinions, or to information classified by the Executive Branch and redacted in declassified versions of FISC judicial opinions.

Working in secrecy at the FISC is not simply a matter of “necessity.” Majority Op. 2. It is a legislative imperative under FISA. See, e.g., 50 U.S.C. §§ 1803(c) (stating that “[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security procedures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence”), 1805(a) (mandating that, “[u]pon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified” if certain specified findings are made), 1842(d)(1) (same), 1861(c)(1) (same). The FISC has twice emphasized this congressional mandate. See In re Opinions & Orders of This Court, No. Misc. 13-08, 2017 WL 427591, at *15; In re Motion for Release of Court Records, 526 F. Supp. 2d at 488-90. And at least twice the FISC has emphasized that its proceedings have never been public, it has never held a public hearing, and the number of opinions released to the public is statistically minor relative to the thousands of classified decisions it has issued. See In re Opinions & Orders of This Court, 2017 WL 427591,

¹¹ The Majority agrees. Majority Op. 6 (admitting that “to determine whether the public has a right of access to particular judicial proceedings, courts must ask . . . whether the place and process historically have been open to the press and general public” (internal quotation marks omitted)).

at *17-20; In re Motion for Release of Court Records, 526 F. Supp. 2d at 487-88, 492-93.

Notably, too, in this matter no sealing order or other discretionary action has been taken by the Court to impede public access to its classified opinions or the classified information redacted from its declassified and public opinions.¹² The point is not just that FISC proceedings and judicial documents have never been historically public, but, importantly, the FISC does not exercise discretionary decision making about whether to conduct its proceedings in a non-public fashion—it is required to do so by statute.

This history of non-public proceedings weighs heavily against Movant’s asserted First Amendment right of access to information classified by the Executive Branch. Even “[m]ore significant is that from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information” Dhiab v. Trump, 852 F.3d 1087, 1094 (D.C. Cir. 2017). “The tradition is exactly the opposite.” Id.

Movants argue that this Court should not defer to the Executive Branch’s classification decisions but should review and potentially reject those decisions. Movants’ Reply Br. 2. This argument is considered only to determine whether Movants have identified a right that the First Amendment protects, not to rule on its merits. They have not identified such a First Amendment right to FISC review of Executive Branch classification decisions. Furthermore, this Court has

¹² In Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009), the Seventh Circuit noted that the common law offers a presumptive right of access to most documents filed in court based on the principle that courts “are public institutions that operate openly” and “judicially imposed limitations on this right are subject to the First Amendment.” Because the FISC issued no sealing order or protective order preventing Movants’ access to the classified information they seek, there has been no “judicially imposed limitation” that would be subject to the First Amendment. Furthermore, contrary to the Majority Opinion’s assertion that Bond is “thin support,” Majority Op. 15, it stands for the very proposition asserted in the January 25, 2017 Opinion, 2017 WL 427591, at *10, which is that when there is no law that applies to protect a plaintiff’s asserted interest, there is no legally protected interest sufficient to establish Article III standing.

previously said that “[u]nder FISA and the applicable Security Procedures, there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions” and, even “if the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself.” In re Motion for Release of Court Records, 526 F. Supp. 2d at 491.

The Majority Opinion fails to accord these principles the governing weight to which they are entitled. Richmond Newspapers specifically established a two-part test for determining when the qualified First Amendment right of access applies – and that standard requires both the place and the process to have been historically public.¹³ The Majority Opinion appears to accept this principle,¹⁴ even as it fails to apply it. There is no legal basis to find that Movants present a colorable claim the First Amendment protects their asserted interest in accessing a place and process that is distinctly not public and required by law to *not* be public.

III.

The Majority Opinion most strenuously decries the January 25, 2017 decision in In re Opinions of This Court because the Majority believes that deciding Movants have no legally protected interest necessarily, and improperly, involved deciding the merits of Movants’ cause of action. The Majority Opinion chastises the decision for having “engaged in a lengthy merits analysis of Movants’ claim under the Richmond Newspapers ‘experience and logic’ test,”

¹³ “The First Amendment guarantees the press and the public access to aspects of court proceedings, including documents, ‘if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct.’” United States v. El-Sayegh, 131 F.3d 158, 161 (D.C. Cir. 1997). Accord Press-Enterprise II, 478 U.S. at 9.

¹⁴ See note 11, supra.

Majority Op. 5. But the Majority fails to explain why it believes that addressing Richmond Newspapers constituted deciding the merits of the motion. Plainly an examination of the law invoked by Movants may be part of—even essential to—a proper analysis of standing. See Warth, 422 U.S. at 500 (“[S]tanding . . . often turns on the nature and source of the claim asserted.”); Int’l Primate Prot. League, 500 U.S. at 77 (“[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents.”). Because application of the experience and logic tests revealed that Movants have no right of public access to classified FISC judicial documents or proceedings, they failed to identify an interest that is legally protected and, thus, have no standing.

The Majority takes the mistaken and circular view that, because the Court must assume that on the merits Movants would be successful in their claims when it evaluates standing, it therefore follows that, “[f]rom this base,” the Court can conclude that Movants satisfy the requirements of Article III standing. Majority Op. 8. The Majority misinterprets the Supreme Court’s edict that consideration of Article III standing does not involve consideration of the merits. “Because a review of standing does not review the merits of a claim, but the parties and forum involved, our assumption during the standing inquiry that the plaintiff will eventually win the relief he seeks does not, on its own, assure that the litigant has satisfied *any element* of standing.” Fla. Audubon Soc’y v. Bentsen, 94 F.3d 658, 664 n.1 (D.C. Cir. 1996) (internal citations omitted, emphasis added). “Any assumption as to the outcome of the litigation simply does not resolve the issues critical to a standing inquiry.” Id. That is because, as the Second Circuit has noted, “[t]he standing question is distinct from whether [a litigant] *has a cause of action!*” Carver v. New York, 621 F.3d 221, 226 (2d Cir. 2010) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (emphasis added). Cf. Libertad v. Welch, 53 F.3d 428, 439 (1st Cir.

1995) (“Appellants need not establish the elements of their cause of action in order to sue, only to succeed on the merits.”).

“[W]hat has been traditionally referred to as the question of standing . . . involves analysis of ‘whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy’”¹⁵ DaCosta v. Laird, 471 F.2d 1146, 1152 (2d Cir. 1973) (quoting Sierra Club v. Morton, 405 U.S. 727, 731-732 (1972)) (emphasis omitted). The “merits analysis . . . determines whether a claim is one for which relief can be granted if factually true.” Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc). “A party’s injury in fact is distinct from its potential causes of action.” Am. Farm Bureau Fed’n v. U.S. Env’tl. Prot. Agency, 836 F.3d 963, 968 (8th Cir. 2016). As demonstrated below, whether Movants can establish the elements of their cause of action alleging that the Court improperly withheld information that the Executive Branch improperly determined was classified national security information requires consideration of factual and legal issues separate from the question of whether the First Amendment applies at all to certain FISC judicial opinions and proceedings. The Majority overlooks this important nuance in the Supreme Court’s legal standard that otherwise prohibits consideration of standing from reaching the merits of the cause of action.

The Majority’s error also represents a misreading of Richmond Newspapers and its progeny, as well as cases that find no standing when a plaintiff fails to identify a legally protected interest. The Majority Opinion notes the Tenth Circuit’s statement in Initiative &

¹⁵ “Although the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple—what kind of injuries are courts empowered to remedy and what kind are they powerless to address?” Schaffer v. Clinton, 240 F.3d 878, 883 (10th Cir. 2001).

Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) that, “[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff’s asserted right or interest.” Majority Op. 8 (quoting Walker, 450 F.3d at 1092). But the Majority misunderstands the import of the statement: its principle applies when, unlike this matter, there is an *applicable* constitutional provision and both standing and the merits involve the same question about the *scope* of that applicable constitutional provision. See Day v. Bond, 500 F.3d 1127, 1136-1138 (10th Cir. 2007) (“Critically, however, in Walker, the plaintiffs’ asserted injury and their claimed constitutional violation were one and the same.”). When standing and the merits require different legal analyses, standing can be, and must be, decided first and independently. Id. The Tenth Circuit explained:

[W]e did note [in Walker] that “the term ‘legally protected interest’ must do some work in the standing analysis . . . [and] has independent force and meaning without any need to open the door to merits considerations at the jurisdictional stage.” Id. at 1093. . . .

Practically speaking, Walker mandates that we assume, during the evaluation of the plaintiff’s standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law. See id. (“For purposes of standing, we must assume the [p]laintiffs’ claim has legal validity.”). But there is still work to be done by the standing requirement, and Supreme Court precedent bars us from assuming jurisdiction based upon a hypothetical legal injury. See Lujan, 504 U.S. at 560, 112 S. Ct. 2130. While Walker addressed an instance in which the merits of the plaintiffs’ claims mirrored the alleged standing injury, that is not always the case. *There are cases, such as the one before us here, where the alleged injury upon which the plaintiffs rely to establish standing is distinct from the merits of claims they assert. E.g., In re Special Grand Jury 89–2*, 450 F.3d 1159, 1172–73 (10th Cir.2006) (“[A] plaintiff can have standing despite losing on the merits—that is, even though the [asserted legally protected] interest would not be protected by the law in that case.”); see also Duke Power Co. v. Carolina Env’tl Study Grp., Inc., 438 U.S. 59, 78–79, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is whether K.S.A. § 76–731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private cause of action. Each of these issues is separate and independent,

and we may determine whether the Plaintiffs here have standing to assert a private cause of action under § 1623 without reaching the merits of whether § 1623 preempts § 76–731a. See DH2, Inc. v. U.S. Sec. & Exchange Comm’n, 422 F.3d 591, 592 (7th Cir. 2005) (determining that the plaintiff lacked standing because its injury was speculative, without addressing the merits of the underlying claim).

Under these conditions, Walker simply does not apply. Accordingly, we now turn to the pure standing question whether § 1623 confers a private cause of action upon the Plaintiffs.

Id. (emphases added).¹⁶ Day makes a useful distinction that is helpful to the immediate discussion.

According to the Tenth Circuit, decisions on standing and the merits remain independent legal inquiries whenever a decision on the merits would *not* necessarily decide standing. Only when both merits and standing require a decision on the same legal question does that Circuit find them conjoined so that standing cannot be separately decided first.¹⁷ That is not the case here.

In Press-Enterprise II the Supreme Court made clear that, when the qualified First Amendment right of public access applies (which is an antecedent inquiry Movants failed to

¹⁶ To be clear, Walker itself involved a recognized First Amendment right because plaintiffs were asserting a free-speech interest expressly protected by the First Amendment. 450 F.3d at 1088. In the instant matter, the immediate question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified.

¹⁷ The Tenth Circuit has also recounted “instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing.” Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1236 (10th Cir. 2004). The D.C. Circuit has clearly held that when “plaintiff’s claim has no foundation in law, he has no legally protected interest and thus no standing to sue.” Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1979) (citations omitted). Deciding standing can often come close to the merits without violating legal principles. See Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989) (stating that “[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress”).

surmount in this case), a cause of action arises if (1) access was denied (2) without specific, on-the-record findings (3) demonstrating that “closure [was] essential to preserve higher values” and (4) closure was “narrowly tailored to serve that interest.” 478 U.S. at 13-14 (quoting Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 510 (1984) (“Press-Enterprise I”)). Movants contend that their cause of action also includes as an element a right to challenge the government’s classification decisions. Movants’ Reply In Support of Their Mot. for the Release of Court Records 4, available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply-1.pdf>. These elements form Movants’ cause of action, the merits of which were never discussed in In re Opinions of This Court.

As to standing, however, the question focuses on whether classified FISC judicial opinions and proceedings have been historically open to the public and arise from a trial-like setting, see Richmond Newspapers, so that Movants have a colorable legally protected interest. This latter question does not run to the merits of their cause of action but, instead, to “whether the plaintiffs have a legal right to do what is allegedly being impeded.” Citizen Ctr., 770 F.3d at 910; see also Grella, 553 F.2d at 261 (“standing does require an injury to the party arising out of a legal right”); Cox Cable Commc’ns, Inc., 992 F.2d at 1182 (there is no injury “unless an interest is protected”).

The Majority ignores this directly-applicable precedent in opining that the January 25, 2017 decision ruled improperly on the merits in deciding that Movants had not asserted a legally

protected interest under the First Amendment.¹⁸ The Majority confuses proper application of the Article III requirement that a litigant present a cognizable legal interest with a merits decision on whether that legal interest was unlawfully impaired.

IV.

The Majority Opinion raises other considerations that, in my estimation, are not persuasive and do not detract from the foregoing analysis. From the outset, the Majority Opinion not only confuses the scope of the qualified First Amendment right of public access with the common law presumptive right of access, but the Majority also characterizes as “novel” Movants’ theory that a qualified First Amendment right of public access applies to classified and ex parte FISC judicial proceedings that historically never have been public. However, it is not novel. Movants initially presented their First Amendment theory to the FISC more than a decade ago, at which time it was considered and decisively rejected. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484. This same theory has been re-litigated without success multiple times since.¹⁹

¹⁸ See In re Opinions of This Court, 2017 WL 427591, at *9-13 (listing cases). The Majority Opinion fails to distinguish these cases and cites no applicable precedent to the contrary. Each of the cases cited in In re Opinions of This Court involved dismissal for lack of subject matter jurisdiction, which is not a decision on the merits. See, e.g., Havens v. Mabus, 759 F.3d 91, 98 (D.C. Cir. 2014) (stating that “[w]e have previously held that dismissals for lack of jurisdiction are not decisions on the merits”).

¹⁹ See In re Orders of This Court Interpreting S. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064, at *1 (FISA Ct. 2013) (stating that the ACLU “assert[ed] a qualified First Amendment right of access to the opinions in question”); In re Proceedings Required by 702(i) of FISA Amendments Act of 2008, Misc. No. 08-01, 2008 WL 9487946, at *3 (FISA Ct. 2008) (observing that the ACLU’s request for release under the First Amendment “is similar to a request it made on August 9, 2007”); In re Motion for Release of Court Records, Misc. No. 07-01 (FISA Ct. Feb. 8, 2008) (rejecting on reconsideration the ACLU’s First Amendment theory).

More importantly, the Majority suggests that novelty might have legal significance to the real issue, i.e., whether Movants' claims involve injury to a legally protected interest. For example, the Majority Opinion states, "[a]s far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings" and "[t]hat is so no matter how novel or meritless the claims may be." Majority Op. 11. The Majority Opinion cites no case to support this claim of "uniform" judicial "findings." At best, the Majority Opinion goes on to assert that "[s]ome courts have stretched the right-of-access even farther for standing purposes," Majority Op. 11, then cites a single D.C. Circuit decision, namely Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

The Flynt decision does not do the work the Majority asks of it. Contrary to the Majority's characterization, the Flynt court found that appellants "asserted no *cognizable* First Amendment claim." 355 F.3d at 703 (emphasis added). Nonetheless, the Flynt court found that they had standing to bring (at best some of) their claims alleging a press right to embed with combat troops, which was advanced based on the First Amendment's express guarantees of free press and speech, not the qualified First Amendment right of public access. Id. The Flynt court discussed standing in a single paragraph that omits without explanation Lujan's definition of "injury in fact" as "an invasion of a *legally protected interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."²⁰ 504 U.S. at 560 (internal quotation marks and citations omitted, emphasis added). Since Flynt, the Supreme Court has repeatedly reiterated that required element of an injury-in-fact, see supra page 3, calling into question the perfunctory discussion of standing in Flynt. Finally, the Flynt court's

²⁰ Flynt also makes no mention of the alternative formulation that an "injury in fact" must be legally and judicially cognizable. See Raines, 521 U.S. at 819.

standing analysis did not give any consideration to the novelty of the appellants' claim of a right to embed with troops and did not involve a request for access to judicial proceedings.

The Majority Opinion adds that “many courts—including the Supreme Court—have not even felt it necessary to address standing in dealing with tenuous right-of-access claims,” Majority Op. 12, and “[a] long list of courts have acted in this fashion,” Majority Op. 13. The Majority Opinion then cites eight decisions from six courts: (1) Houchins v. KQED, Inc., 438 U.S. 1 (1978); (2) Dhiab, 852 F.3d 1087; (3) Phillips, 841 F.3d 405; (4) In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283; (5) In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012); (6) In re New York Times Company to Unseal Wiretap and Search Warrant Materials, 577 F.3d 401 (2d Cir. 2009); (7) Baltimore Sun Company v. Goetz, 886 F.2d 60 (4th Cir. 1989); (8) Calder v. Internal Revenue Service, 890 F.2d 781, 783-84 (5th Cir. 1989)). All of these cases collapse upon examination.

Three of the cases cited by the Majority—Dhiab, In re New York Times Company and Baltimore Sun—did not address standing because they involved permissive intervenors.²¹ The federal circuits are split about whether third-parties moving to intervene permissively under Rule 24(b) of the Federal Rules of Civil Procedure in ongoing litigation in which a case or controversy already exists must themselves demonstrate Article III standing. See Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003) (stating that “the circuits are split on the question of whether standing is required to intervene if the original parties are still pursuing the case and thus maintaining a case or controversy”). Cf. In re Endangered Species Act § 4 Deadline Litig., 704

²¹ See Dhiab, 852 F.3d at 1090 (stating that the district court “granted the [press] organizations’ motion to intervene”); In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials, 577 F.3d at 401 (stating in background section that newspaper moved to intervene and citing the district court case confirming that fact); Baltimore Sun, 886 F.2d at 62 (stating that the Baltimore Sun had petitioned the district court to intervene).

F.3d 972, 980 (D.C. Cir. 2013) (“It remains, however, an open question in this circuit whether Article III standing is required for permissive intervention.”).

Houchins involved news media organizations that sought to expand the *scope* of the First Amendment’s express protections for a free press into an “implied special right of access to government-controlled sources of information.” 438 U.S. at 7-8. It is not surprising that the Supreme Court did not discuss standing given that the question was not whether the First Amendment’s right of a free press applied but, rather, whether, properly interpreted, the scope of that right mandated the access sought by the news media organizations. Id.

Because the remaining cases, Phillips, In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), In re Search of Fair Finance and Calder were silent about the question of standing²² it is inappropriate to draw any conclusion about what they “felt” about standing. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) (“The Court would risk error if it relied on assumptions that have gone unstated and unexamined.”). At best, it might be argued that the absence of any relevant discussion of standing by these courts *implies* that they thought there was standing, except that “[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.” Id.²³ “There is no such thing as a precedential *sub silentio* jurisdictional holding[.]” Cuba v. Pylant, 814 F.3d 701, 709 (5th Cir. 2016).

²² Although the Sixth Circuit in Phillips addressed standing with respect to other constitutional claims asserted by the plaintiffs, it failed to do so for the so-called “right-of-access-to-government-proceedings” claim. 841 F.3d at 414-20.

²³ See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (“Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.”).

V.

The Majority Opinion fails to persuade. It confuses the scope of a legally protected interest under the qualified First Amendment right of public access with the scope of such an interest under the common law. It further confuses the standing requirement under Article III that a litigant present an injury to a protected legal interest with the merits decision on whether the litigant can actually prove that the asserted legal interest was impaired. Under Richmond Newspapers, the qualified First Amendment right of public access patently does not apply to non-trial-like judicial proceedings that are not public and never have been. The errors in the Majority Opinion effectively relax the requirements for Article III standing when members of the public ask to review and comment on redacted classified information in FISC judicial opinions. As a result, anyone in the United States apparently has a legally protected First Amendment interest in accessing information in FISC judicial opinions that the Executive Branch determined is classified and may invoke this Court's statutorily-limited and specialized jurisdiction to challenge those classification decisions as unconstitutional. I cannot agree. For these reasons I would conclude that Movants lack standing to assert their claims as Article III standing requirements are understood and applied in any case. But the Court should apply those requirements with particular rigor in *this* case.

The Supreme Court has instructed the lower courts to apply a more rigorous analysis of standing when a party seeks to challenge actions by the Executive or Legislative Branches on constitutional grounds. See, e.g., Raines, 521 U.S. at 819-20. To be precise, the Supreme Court has stated that "our standing inquiry has been *especially rigorous* when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Id. (emphasis added). Accord Crawford v. United States Dep't of the Treasury, 868 F.3d 438, 457 (6th Cir. 2017). Layered onto this

“especially rigorous” analysis is the Supreme Court’s observation that “we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs,” as also is the case here. Clapper v. Amnesty Int’l USA, 568 U.S. 398, 409 (2013).²⁴

Intelligence gathering is one of the “vital aspects of national security.” Gen. Dynamics Corp. v. United States, 563 U.S. 478, 486 (2011). “Matters intimately related to . . . national security are rarely proper subjects for judicial intervention.” Haig v. Agee, 453 U.S. 280, 292 (1981). Accordingly, “unless Congress specifically has provided otherwise, courts traditionally

²⁴ The Majority disagrees that “we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch.” Majority Op. 16. The Majority’s position is difficult to follow; one cannot avoid a Raines analysis here. An especially rigorous standing analysis is required—without reference to the merits—whenever the merits of the dispute would force a court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. Raines, 521 U.S. at 819-20. Movants are asking the FISC to do exactly that. Critically, there has been no sealing, closure, or protective order issued by the FISC to impede Movants’ access to the classified information they seek, so there is no discretionary judicial action being challenged by Movants, unlike cases in which the qualified First Amendment right of access was found to apply. See, e.g., Press-Enter. II, 478 U.S. at 4 (judicial closure order); Press-Enter. I, 464 U.S. at 503-504 (same); Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 598 (1982) (same); Richmond Newspapers, 448 U.S. at 559-60 (same).

The Majority Opinion also seizes on the dissent’s quotation from Clapper to insist that there is no “special standing requirement” for plaintiffs seeking review of acts by the political branches in the fields of intelligence gathering and foreign affairs. Majority Op. 17 (claiming that the dissent is reading Clapper to impose such a requirement and citing Schuchardt v. President of the United States, 839 F.3d 336 (3d Cir. 2016)). But Schuchardt addressed a heightened standing requirement in line with the analysis in Jewel v. Nat’l Sec. Agency, 673 F.3d 902, 913 (9th Cir. 2011), in which the Ninth Circuit rejected a district court’s requirement that plaintiffs demonstrate a “strong” and “persuasive” claim to Article III standing when suing NSA. This dissent quotes Clapper to caution against *relaxing* standing requirements and expanding judicial power, 568 U.S. at 408-409, not to advocate for special standing requirements. Like this dissent, Clapper made no mention of a “special” or “heightened” requirement to establish standing in the national security realm or otherwise. Rather, in combination, Raines and Clapper require courts to ensure the vigor of the principles of separation of powers by giving close attention and exacting consideration to the elements of standing when asked to review actions of the political branches involving intelligence gathering.

have been reluctant to intrude upon the authority of the Executive in . . . national security affairs,” Dep’t of Navy v. Egan, 484 U.S. 518, 530 (1988), including “the protection of classified information,” which the Supreme Court has directed “must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it,” id. at 529.

“Relaxation of standing requirements is directly related to the expansion of judicial power[.]” Clapper, 568 U.S. at 408-409 (quoting United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring)). “The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.” Id. Importantly, “decision-making in the field[] of . . . national security is textually committed to the political branches of government.” Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005). In the exercise of that textually-committed decision-making, Congress has already provided two avenues for any member of the public to obtain access to FISC judicial opinions (Section 402 of the USA FREEDOM Act and FOIA), subject to Executive Branch classification decisions which, under FOIA, are subject to examination in federal district courts insofar as specifically provided by statute.

The Majority Opinion provides no basis in law for the FISC to expand its jurisdiction contrary to Supreme Court guidance, statutory provisions that limit its jurisdiction to a specialized area of national concern, and the evident congressional mandate that the Court conduct its proceedings ex parte and in accord with prescribed security procedures. Applying

well-established principles of Article III standing with the rigor appropriate to a constitutional challenge to Executive Branch determinations in the national security sphere, I continue to conclude that Movants lack standing to assert the constitutional claim in question.

For all these reasons, I respectfully dissent.

From: Gauhar, Tashina (ODAG)
Subject: FW: Sen Paul Letter re 702/Demers
To: Hur, Robert (ODAG); Terwilliger, Zachary (ODAG)
Sent: January 10, 2018 10:39 PM (UTC-05:00)
Attached: 20180108 Paul - Demers Letter.pdf, Paul - Demers Letter response (nsd draft for review).docx

Attached please find a draft response to Sen. Paul's letter to Demers that we discussed during the staff meeting. NSD has drafted a potential response and OLA has asked for any comments by tomorrow. I have reviewed and believe the responses are appropriate per our previous statements (per cleared QFRs or other public statements) on the issues raised in the letter. OLA has asked for any comments tomorrow in hopes of getting a response to the Senator by Friday.

Flagging in light of our discussion – sounds like (b) (5) . Want to confirm with you before moving forward.

Thanks.

United States Senate

WASHINGTON, DC 20510

January 8, 2018

Mr. John Demers
National Security Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Demers:

Congratulations on your nomination to serve as Assistant Attorney General for the National Security Division at the Department of Justice. Based on responses from your confirmation hearing, including saying that you “don’t think you should need a warrant to look at those communications that are already in the government’s communications” collected under Section 702, I am writing to request answers to the following questions. If you do not currently have access to the information requested, please have the appropriate personnel at the Department of Justice provide an answer. I look forward to receiving your responses prior to your Senate confirmation.

1. How many U.S. person queries of Section 702 data are performed each year which are related to purely domestic criminal cases (i.e., non-terrorism, non-proliferation, non-foreign intelligence)?
2. Is any Section 702 information used in parallel construction (i.e., the use of intelligence initially identified through Section 702 subsequently gathered through other means so as to avoid Section 702 “derived from” notice) to build cases without actually introducing that Section 702 information as evidence? If so, how many times per year?
3. How many times per year is information collected under Section 702 passed along to domestic law enforcement (federal, state, and local) without a query taking place?

Thank you for your prompt attention to these questions.

Sincerely,



Senator Rand Paul, M.D.

1. *How many U.S. person queries of Section 702 data are performed each year which are related to purely domestic criminal cases (i.e., non-terrorism, non-proliferation, non-foreign intelligence)?*

(b) (5)

[REDACTED]

2. *Is any Section 702 information used in parallel construction (i.e., the use of intelligence initially identified through Section 702 subsequently gathered through other means so as to avoid Section 702 "derived from" notice) to build cases without actually introducing that Section 702 information as evidence? If so, how many times per year?*

(b) (5)

[REDACTED]

3. *How many times per year is information collected under Section 702 passed along to domestic law enforcement (federal, state, and local) without a query taking place?*

(b) (5)

[REDACTED]

From: OIG, Oversight&Review (OIG)
Subject: Revised Draft OIG Report - A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data
To: DOJExecSec (JMD)
Cc: Whitaker, Matthew (OAG); Hur, Robert (ODAG); Schools, Scott (ODAG); Sheehan, Matthew (ODAG)
Sent: March 15, 2018 8:48 AM (UTC-04:00)
Attached: E2013011 Revised Draft Report (3-14-18) (resp to ODAG comments).pdf

The Office of the Inspector General (OIG) has completed a revised draft report reviewing three programs in which the Drug Enforcement Administration (DEA) has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the attached revised report to show changes that we made to address comments received from the Office of the Deputy Attorney General, the DEA, the Criminal Division, and the Federal Bureau of Investigation in late January 2018 in response to our original draft, sent on December 28, 2017.

If Department staff has any questions about this memorandum or the report, please have them contact Assistant Inspector General Daniel C. Beckhard at (b) (6), or Investigative Counsel (b)(6) per OIG at (b) (6).

Oversight and Review Division
Office of the Inspector General
(b) (6)



U.S. Department of Justice

Office of the Inspector General

March 14, 2018

E2013011

MEMORANDUM FOR THE ATTORNEY GENERAL

THE DEPUTY ATTORNEY GENERAL

FROM:

DANIEL C. BECKHARD
ASSISTANT INSPECTOR GENERAL
OVERSIGHT AND REVIEW DIVISION

SUBJECT:

Draft OIG Report entitled "A Review of the Drug
Enforcement Administration's Use of Administrative
Subpoenas To Collect or Exploit Bulk Data"

The Office of the Inspector General (OIG) has completed a revised draft report reviewing three programs in which the Drug Enforcement Administration (DEA) has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the attached revised report to show changes that we made to address comments received from the Office of the Deputy Attorney General, the DEA, the Criminal Division, and the Federal Bureau of Investigation in late January 2018 in response to our original draft, sent on December 28, 2017.

We are not requesting further written comments on the report at this time. We intend to schedule a meeting with DEA personnel in the near future to address certain issues the DEA raised in prior comments. These issues are identified in comment bubbles on the enclosed draft. We also intend to discuss with DEA personnel what aspects of the programs described in our report should be treated as Law Enforcement Sensitive for purposes of creating a public version of this report.

If Department staff has any questions about this memorandum or the report, please have them contact me at (b) (6) or Investigative Counsel (b)(6) per OIG at (b) (6).

Thank you for your cooperation in this matter.

Attachment

cc: Matthew Whitaker
Chief of Staff and Senior Counselor to the Attorney General

Robert K. Hur
Principal Associate Deputy Attorney General

Scott N. Schools
Associate Deputy Attorney General

Matthew J. Sheehan
Counsel to the Deputy Attorney General

From: Raman, Sujit (ODAG)
Subject: FW: CISA Privacy & Civil Liberties Guidelines, 2018 Edition
To: O'Callaghan, Edward C. (ODAG); Bolitho, Zachary (ODAG)
Sent: June 8, 2018 4:54 PM (UTC-04:00)
Attached: FINAL DRAFT Privacy and Civil Liberties Final Guidelines CLEAN (6.1.18).....docx, FINAL CISA P.CL Memo.pdf

Ed/Zac:

Please see attached (and below). By statute, every two years the Attorney General and the DHS Secretary must "jointly review" the guidelines issued under CISA (the federal cybersecurity information sharing act). In the past, DOJ's chief privacy officer has signed off on the guidelines. (At DHS, the chief privacy officer is the signing official.) We have til **June 15** to sign off this year, and the acting DOJ chief privacy officer (CPO) is asking for permission to do so. It appears we'd be making (b) (5) (described below) from the last time we signed off, so I'm comfortable with those changes. That leaves the legal question of (b) (5). My inclination is that (b) (5), for four basic reasons: (b) (5)

[REDACTED]

In sum, I recommend (b) (5).

Please let me know with your approval, and with any questions.

Many thanks,

Sujit

From: Winn, Peter A. (OPCL)
Sent: Friday, June 8, 2018 1:48 PM
To: Raman, Sujit (ODAG) <(b) (6)>
Cc: Sheehan, Matthew (ODAG) <(b) (6)>; Proia, Andrew (OPCL) <(b) (6)>
Subject: FW: CISA Privacy & Civil Liberties Guidelines, 2018 Edition
Importance: High

Sujit,

Just pingin you about this email from last week, to make sure there weren't any issues about my signing off on the updated CISA Guidelines.

Peter

From: Winn, Peter A. (OPCL)
Sent: Saturday, June 02, 2018 4:41 PM
To: Sujit Raman (ODAG) (b) (6)
Cc: Matthew Sheehan (ODAG) (b) (6); Proia, Andrew (OPCL) <(b) (6)>
Subject: CISA Privacy & Civil Liberties Guidelines, 2018 Edition
Importance: High

Sujit,

As I mentioned to you yesterday, DOJ and DHS are nearing completion of the required biennial review of the Cybersecurity Information Sharing Act Privacy & Civil Liberties Guidelines, which will result in a new 2018 Edition. I have attached the near final draft of the revised Guidelines.

As a substantive matter, when the original Guidelines were issued in 2016, they were very well received by the public (even Stewart Baker had kind words for them). Accordingly, OPCL and DHS National Protection and Programs Directorate (NPPD) have approached the revisions (b)(5) per DHS. As a result, other than fixing some outdated footnotes and web links, the revised Guidelines contain only three minor substantive changes:

(b)(5) per DHS

(b)(5) per DHS

(b)(5) per DHS

As a procedural matter, (b) (5)

[(b)(5); (b)(5) per DHS

■ (b) (5)

I wanted to clear it with you, to make sure that you didn't see any issues.

Formal approval of the revised Guidelines must take place by June 15, 2018.

Peter

Peter A. Winn
Acting Chief Privacy and Civil Liberties Officer
Director, Office of Privacy and Civil Liberties
United States Department of Justice
National Place Building, Suite 1000
1331 Pennsylvania Avenue, NW
Washington DC 20530
Office (b) (6)
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(b) (6)

(b) (6)

<https://www.justice.gov/opcl>

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From: OIG, Oversight&Review (OIG)
Subject: E2013011 - OIG's Final Draft of Law Enforcement Sensitive Version and Draft of Public Version of OIG Report entitled "A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas To Collect or Exploit Bulk Data"
To: DOJExecSec (JMD)
Cc: Whitaker, Matthew (OAG); O'Callaghan, Edward C. (ODAG); Schools, Scott (ODAG); Sheehan, Matthew (ODAG)
Sent: June 8, 2018 5:10 PM (UTC-04:00)
Attached: E2013011 - DEA Admin Subpoenas FINAL DRAFT (LES and public versions) - A....pdf, OIG E2013011 - Final Draft Report (06-08-2018).pdf, OIG E2013011 - Public Version Final Draft Report 06-08-2018.pdf, Key to Public Verison.pdf

The Office of the Inspector General has completed a final draft report (Law Enforcement Sensitive Version) reviewing three programs in which the Drug Enforcement Administration has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the final draft report if you wish to provide any official comments on the report, as a letter attachment.

We are also providing a copy of the attached draft public version of the report for the Department to conduct a sensitivity review. We are also including a separate Key that identifies which programs and offices are identified by which names (e.g., "Program A") in the public version.

Please provide us with any official comments on the final draft report as a letter attachment and the results of your sensitivity review by June 29, 2018.

William M. Blier
Deputy Inspector General



June 8, 2018

MEMORANDUM FOR THE ATTORNEY GENERAL

THE DEPUTY ATTORNEY GENERAL

A handwritten signature in blue ink, appearing to read 'W. M. Blier', is positioned above the printed name.

FROM:

WILLIAM M. BLIER
DEPUTY INSPECTOR GENERAL

SUBJECT:

Final Draft of Law Enforcement Sensitive Version and
Draft of Public Version of OIG Report entitled "A Review of
the Drug Enforcement Administration's Use of
Administrative Subpoenas To Collect or Exploit
Bulk Data"

The Office of the Inspector General (OIG) has completed a final draft report (Law Enforcement Sensitive Version) reviewing three programs in which the Drug Enforcement Administration (DEA) has used its administrative subpoena authority to collect or exploit bulk data in recent years. We are providing a copy of the final draft report if you wish to provide any official comments on the report, as a letter attachment.

Additionally, in prior correspondence the OIG stated that we intended to create a separate public version of the report, in addition to the non-public, Law Enforcement Sensitive version. The OIG has now completed a draft public version of the report, as attached, for your sensitivity review. If you believe that any information is inappropriate for public release, please mark the information and indicate the reason you believe it should not be released. We note for your particular attention, as done in earlier correspondence, that Chapter Three addresses the Office of the Attorney General and the Office of the Deputy Attorney General's historical involvement in the programs discussed in that chapter. We are also including a separate Key that identifies which programs and offices are identified by which names (e.g., "Program A") in the public version.

Please provide us with any official comments on the final draft report as a letter attachment and the results of your sensitivity review by June 29, 2018.

By separate transmittal memoranda, we have sent a copy of the final draft report and the draft public version to the Drug Enforcement Administration for official comments and sensitivity review, and sent relevant portions of the draft

public version to the Federal Bureau of Investigation and the Criminal Division for those Department components to conduct sensitivity reviews. If Department staff has any questions about this memorandum or the report, please have them contact Investigative Counsel (b)(6) per OIG at (b) (6).

Thank you for your cooperation in this matter.

Attachments

cc: Matthew Whitaker
Chief of Staff and Senior Counselor to the Attorney General

Edward O'Callaghan
Principal Associate Deputy Attorney General

Scott N. Schools
Associate Deputy Attorney General

Matthew J. Sheehan
Counsel to the Deputy Attorney General

From: Levi, William \ (OAG\
Subject: Fwd: FBI Comments to DOJ Proposal
To: Newman, Ryan D. \ (OAG\
Sent: March 9, 2020 3:27 PM (UTC-04:00)
Attached: DOJ Leg Proposal (FBI Final Edits 3.9.2020).docx, ATT00001.htm

Begin forwarded message:

From: "Murphy, Paul B. (DO) (FBI)" <(b)(7)(E) per FBI >
Date: March 9, 2020 at 3:13:59 PM EDT
To: "Levi, William (OAG)" <(b) (6) >
Subject: FBI Comments to DOJ Proposal

Duplicative Information - See Document ID 0.7.10663.53979

From: Blue, Matthew \(\ODAG\)
Subject: FW: URGENT - LRM: [MJR-116-186] Due 03/11/2020 Wednesday at 9:30AM -- Request for Views on HR6172 - USA FREEDOM Reauthorization Act of 2020
To: DuCharme, Seth \(\ODAG\); Hovakimian, Patrick \(\ODAG\)
Sent: March 10, 2020 6:58 PM (UTC-04:00)
Attached: BILLS-116hr6172ih.pdf

Seth and Pat,

Good evening. Flagging that in Section 407 -- the "Sunset" provision -- of the attached House bill, Sunset will occur at the same time as the 702 sunsets. If there is any room left for lobbying, it would seem to be in DOJ's best interest to

(b) (5) .

Best,

Matt

Matthew F. Blue
Associate Deputy Attorney General
U.S. Department of Justice

(b) (6)

.....
(Original Signature of Member)

116TH CONGRESS
2D SESSION

H. R. _____

To amend the Foreign Intelligence Surveillance Act of 1978 to prohibit
the production of certain business records, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. NADLER (for himself and Mr. SCHIFF) introduced the following bill; which
was referred to the Committee on _____

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978
to prohibit the production of certain business records,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “USA FREEDOM Reauthorization Act of 2020”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Amendments to the Foreign Intelligence Surveillance Act of 1978.

TITLE I—FISA BUSINESS RECORDS

- Sec. 101. Repeal of authority to access on an ongoing basis call detail records.
- Sec. 102. Protection of certain information.
- Sec. 103. Use of information.
- Sec. 104. Limitation on retention of business record information.
- Sec. 105. Effective date.

TITLE II—ACCURACY AND INTEGRITY OF FISA PROCESS

- Sec. 201. Certifications regarding accuracy of FISA applications.
- Sec. 202. Description of techniques carried out before targeting United States person.
- Sec. 203. Investigations relating to Federal candidates and elected Federal officials.
- Sec. 204. Removal or suspension of Federal officers for misconduct before Foreign Intelligence Surveillance Court.
- Sec. 205. Penalties for offenses related to FISA.
- Sec. 206. Contempts constituting crimes.
- Sec. 207. Effective date.

TITLE III—FOREIGN INTELLIGENCE SURVEILLANCE COURT

- Sec. 301. Declassification of significant decisions, orders, and opinions.
- Sec. 302. Appointment of amici curiae and access to information.
- Sec. 303. Effective and independent advice for Foreign Intelligence Surveillance Court.
- Sec. 304. Transcripts of proceedings and communications regarding applications.
- Sec. 305. Information provided in annual reports.

TITLE IV—TRANSPARENCY, SUNSETS, AND OTHER MATTERS

- Sec. 401. Congressional oversight.
- Sec. 402. Establishment of compliance officers.
- Sec. 403. Public reports on information obtained or derived under FISA and protection of First Amendment activities.
- Sec. 404. Mandatory reporting on certain orders.
- Sec. 405. Report on use of FISA authorities regarding protected activities and protected classes.
- Sec. 406. Improvements to Privacy and Civil Liberties Oversight Board.
- Sec. 407. Sunsets.
- Sec. 408. Technical amendments.

1 SEC. 2. AMENDMENTS TO THE FOREIGN INTELLIGENCE
2 SURVEILLANCE ACT OF 1978.

3 Except as otherwise expressly provided, whenever in
4 this Act an amendment or repeal is expressed in terms
5 of an amendment to, or a repeal of, a section or other
6 provision, the reference shall be considered to be made to

1 a section or other provision of the Foreign Intelligence
2 Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

3 **TITLE I—FISA BUSINESS**
4 **RECORDS**

5 **SEC. 101. REPEAL OF AUTHORITY TO ACCESS ON AN ONGO-**
6 **ING BASIS CALL DETAIL RECORDS.**

7 (a) CALL DETAIL RECORDS.—

8 (1) REPEAL.—Subsection (b)(2) of section 501
9 (50 U.S.C. 1861) is amended—

10 (A) by striking subparagraph (C);

11 (B) in subparagraph (B)—

12 (i) in the matter preceding clause (i),
13 by striking “in the case of” and all that
14 follows through “in subparagraph (C)),”;
15 and

16 (ii) in clause (iii), by striking the
17 semicolon at the end and inserting “;
18 and”; and

19 (C) by redesignating subparagraph (D) as
20 subparagraph (C).

21 (2) PROHIBITION.—Section 501(a) (50 U.S.C.
22 1861) is amended by adding at the end the following
23 new paragraph:

1 “(4) An application under paragraph (1) may not
2 seek an order authorizing or requiring the production on
3 an ongoing basis of call detail records.”.

4 (b) CONFORMING AMENDMENTS.—

5 (1) ORDERS.—Subsection (c) of section 501 (50
6 U.S.C. 1861) is amended—

7 (A) in paragraph (1), by striking “with
8 subsection (b)(2)(D)” and inserting “with sub-
9 section (b)(2)(C)”; and

10 (B) in paragraph (2), by striking subpara-
11 graph (F) and inserting the following:

12 “(F) in the case of an application for call
13 detail records, shall direct the Government—

14 “(i) to adopt minimization procedures
15 that require the prompt destruction of all
16 call detail records produced under the
17 order that the Government determines are
18 not foreign intelligence information; and

19 “(ii) to destroy all call detail records
20 produced under the order as prescribed by
21 such procedures.”;

22 (2) COMPENSATION.—Subsection (j) of section
23 501 (50 U.S.C. 1861) is amended to read as follows:

24 “(j) COMPENSATION.—The Government shall com-
25 pensate a person for reasonable expenses incurred for pro-

1 viding technical assistance to the Government under this
2 section.”.

3 (3) DEFINITIONS.—Subsection (k)(4)(B) of sec-
4 tion 501 (50 U.S.C. 1861) is amended by striking
5 “For purposes of an application submitted under
6 subsection (b)(2)(C)” and inserting “In the case of
7 an application for a call detail record”.

8 (4) OVERSIGHT.—Section 502(b) (50 U.S.C.
9 1862(b)) is amended—

10 (A) by striking paragraph (4); and

11 (B) by redesignating paragraphs (5)
12 through (8) as paragraphs (4) through (7), re-
13 spectively;

14 (5) ANNUAL REPORTS.—Section 603 (50
15 U.S.C. 1873) is amended—

16 (A) in subsection (b)—

17 (i) by transferring subparagraph (C)
18 of paragraph (6) to the end of paragraph
19 (5);

20 (ii) in paragraph (5)—

21 (I) in subparagraph (A), by strik-
22 ing “; and” and inserting a semicolon;

23 (II) in subparagraph (B), by
24 striking the semicolon and inserting “;
25 and”; and

1 (III) in subparagraph (C), as
2 transferred by clause (i) of this sub-
3 paragraph, by striking “any database
4 of”;

5 (iii) by striking paragraph (6) (as
6 amended by clause (i) of this subpara-
7 graph); and

8 (iv) by redesignating paragraph (7) as
9 paragraph (6); and

10 (B) in subsection (d)—

11 (i) in paragraph (1), by striking “any
12 of paragraphs (3), (5), or (6)” and insert-
13 ing “either of paragraph (3) or (5)”; and

14 (ii) in paragraph (2)(A), by striking
15 “Paragraphs (2)(B), (2)(C), and (6)(C)”
16 and inserting “Paragraphs (2)(B) and
17 (2)(C)”.

18 (6) PUBLIC REPORTING.—Section 604(a)(1)(F)
19 (50 U.S.C. 1874(a)(1)(F)) is amended—

20 (A) in clause (i), by striking the semicolon
21 and inserting “; and”;

22 (B) in clause (ii), by striking “; and” and
23 inserting a period; and

24 (C) by striking clause (iii).

1 **SEC. 102. PROTECTION OF CERTAIN INFORMATION.**

2 (a) PROTECTION.—Subsection (a) of section 501 (50
3 U.S.C. 1861), as amended by section 101, is further
4 amended by adding at the end the following new para-
5 graph:

6 “(5)(A) An application under paragraph (1) may not
7 seek an order authorizing or requiring the production of
8 a tangible thing under circumstances in which a person
9 has a reasonable expectation of privacy and a warrant
10 would be required for law enforcement purposes.

11 “(B) An application under paragraph (1) may not
12 seek an order authorizing or requiring the production of
13 cell site location or global positioning system informa-
14 tion.”.

15 (b) CLARIFICATION OF EMERGENCY AUTHORITY FOR
16 CELL SITE LOCATION OR GLOBAL POSITIONING SYSTEM
17 INFORMATION.—The Attorney General may treat the pro-
18 duction of cell site location or global positioning system
19 information as electronic surveillance rather than business
20 records for purposes of authorizing the emergency produc-
21 tion of such information pursuant to section 105(e) of the
22 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
23 1805(e)).

24 (c) CONFORMING AMENDMENT.—Subsection (a) of
25 section 501 (50 U.S.C. 1861) is further amended by strik-

1 ing “Subject to paragraph (3)” and inserting “Subject to
2 paragraphs (3), (4), and (5)”.

3 **SEC. 103. USE OF INFORMATION.**

4 Section 501(h) (50 U.S.C. 1861(h)) is amended—

5 (1) by striking “Information acquired” and in-
6 serting the following:

7 “(1) IN GENERAL.—Information acquired”; and

8 (2) by adding at the end the following new
9 paragraphs:

10 “(2) USE IN TRIALS, HEARINGS, OR OTHER
11 PROCEEDINGS.—For purposes of subsections (b)
12 through (h) of section 106—

13 “(A) information obtained or derived from
14 the production of tangible things pursuant to
15 an investigation conducted under this section
16 shall be deemed to be information acquired
17 from an electronic surveillance pursuant to title
18 I, unless the court or other authority of the
19 United States finds, in response to a motion
20 from the Government, that providing notice to
21 an aggrieved person would harm the national
22 security of the United States; and

23 “(B) in carrying out subparagraph (A), a
24 person shall be deemed to be an aggrieved per-
25 son if—

1 “(i) the person is the target of such
2 an investigation; and

3 “(ii) the activities or communications
4 of the person are described in the tangible
5 things that the Government intends to use
6 or disclose in any trial, hearing, or other
7 proceeding.”.

8 **SEC. 104. LIMITATION ON RETENTION OF BUSINESS**
9 **RECORD INFORMATION.**

10 (a) REQUIREMENT.—Section 501(g) (50 U.S.C.
11 1861(g)) is amended—

12 (1) in paragraph (2), by striking “In this sec-
13 tion” and inserting “In accordance with paragraph
14 (3), in this section”;

15 (2) by redesignating paragraph (3) as para-
16 graph (4); and

17 (3) by inserting after paragraph (2) the fol-
18 lowing new paragraph (3):

19 “(3) LIMITATION ON RETENTION.—The mini-
20 mization procedures under paragraph (1) shall en-
21 sure that tangible things, and information therein,
22 received under this section may not be retained in
23 excess of 5 years, unless—

24 “(A) the tangible thing or information has
25 been affirmatively determined, in whole or in

1 part, to constitute foreign intelligence or coun-
2 terintelligence or to be necessary to understand
3 or assess foreign intelligence or counterintel-
4 ligence;

5 “(B) the tangible thing or information is
6 reasonably believed to constitute evidence of a
7 crime and is retained by a law enforcement
8 agency;

9 “(C) the tangible thing or information is
10 enciphered or reasonably believed to have a se-
11 cret meaning;

12 “(D) retention is necessary to protect
13 against an imminent threat to human life;

14 “(E) retention is necessary for technical
15 assurance or compliance purposes, including a
16 court order or discovery obligation, in which
17 case access to the tangible thing or information
18 retained for technical assurance or compliance
19 purposes shall be reported to the Permanent
20 Select Committee on Intelligence and the Com-
21 mittee on the Judiciary of the House of Rep-
22 resentatives and the Select Committee on Intel-
23 ligence and the Committee on the Judiciary of
24 the Senate on an annual basis; or

1 “(F) retention for a period in excess of 5
2 years is approved by the Director of the Fed-
3 eral Bureau of Investigation, based on a deter-
4 mination that retention is necessary to protect
5 the national security of the United States, in
6 which case the Director shall provide to such
7 committees a written certification describing—

8 “(i) the reasons extended retention is
9 necessary to protect the national security
10 of the United States;

11 “(ii) the duration for which the Direc-
12 tor is authorizing retention;

13 “(iii) generally the tangible things or
14 information to be retained; and

15 “(iv) the measures the Director is tak-
16 ing to protect the privacy interests of
17 United States persons or persons located
18 inside the United States.”.

19 (b) OVERSIGHT.—Section 502(b) (50 U.S.C.
20 1862(b)) is amended—

21 (1) in paragraph (7), by striking “; and” and
22 inserting a semicolon;

23 (2) in paragraph (8)(E), by striking the period
24 and inserting “; and”; and

1 (3) by adding at the end the following new
2 paragraph:

3 “(9) a description of each time that an excep-
4 tion to the 5-year limitation on the retention of in-
5 formation was made pursuant to any of subpara-
6 graphs (C) through (E) of subsection (g)(3) of sec-
7 tion 501, including an explanation for each such ex-
8 ception.”.

9 **SEC. 105. EFFECTIVE DATE.**

10 The amendments made by this title shall take effect
11 on the date of the enactment of this Act and shall apply
12 with respect to applications made under section 501 of the
13 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
14 1861) on or after such date.

15 **TITLE II—ACCURACY AND**
16 **INTEGRITY OF FISA PROCESS**

17 **SEC. 201. CERTIFICATIONS REGARDING ACCURACY OF FISA**
18 **APPLICATIONS.**

19 (a) TITLE I.—Subsection (a) of section 104 (50
20 U.S.C. 1804) is amended—

21 (1) in paragraph (8), by striking “; and” and
22 inserting a semicolon;

23 (2) in paragraph (9), by striking the period at
24 the end and inserting “; and”; and

1 (3) by adding at the end the following new
2 paragraph:

3 “(10) a certification by the applicant that, to
4 the best knowledge of the applicant, the attorney for
5 the Government and the Department of Justice has
6 been apprised of all information that might reason-
7 ably—

8 “(A) call into question the accuracy of the
9 application or the reasonableness of any assess-
10 ment in the application conducted by the de-
11 partment or agency on whose behalf the appli-
12 cation is made; or

13 “(B) otherwise raise doubts with respect to
14 the findings required under section 105(a).”.

15 (b) TITLE III.—Subsection (a) of section 303 (50
16 U.S.C. 1823) is amended—

17 (1) in paragraph (7), by striking “; and” and
18 inserting a semicolon;

19 (2) in paragraph (8), by striking the period at
20 the end and inserting “; and”; and

21 (3) by adding at the end the following new
22 paragraph:

23 “(9) a certification by the applicant that, to the
24 best knowledge of the applicant, the attorney for the

1 Government and the Department of Justice has been
2 apprised of all information that might reasonably—

3 “(A) call into question the accuracy of the
4 application or the reasonableness of any assess-
5 ment in the application conducted by the de-
6 partment or agency on whose behalf the appli-
7 cation is made; or

8 “(B) otherwise raise doubts with respect to
9 the findings required under section 304(a).”.

10 (c) TITLE IV.—Subsection (c) of section 402 (50
11 U.S.C. 1842) is amended—

12 (1) in paragraph (2), by striking “; and” and
13 inserting a semicolon;

14 (2) in paragraph (3), by striking the period at
15 the end and inserting “; and”; and

16 (3) by adding at the end the following new
17 paragraph:

18 “(4) a certification by the applicant that, to the
19 best knowledge of the applicant, the attorney for the
20 Government and the Department of Justice has been
21 apprised of all information that might reasonably—

22 “(A) call into question the accuracy of the
23 application or the reasonableness of any assess-
24 ment in the application conducted by the de-

1 partment or agency on whose behalf the appli-
2 cation is made; or

3 “(B) otherwise raise doubts with respect to
4 the findings required under subsection (d).”.

5 (d) TITLE V.—Subsection (b)(2) of section 501 (50
6 U.S.C. 1861), as amended by section 101, is further
7 amended—

8 (1) in subparagraph (B), by striking “; and”
9 and inserting a semicolon;

10 (2) in subparagraph (C), by striking the period
11 at the end and inserting “; and”; and

12 (3) by adding at the end the following new sub-
13 paragraph:

14 “(D) a statement by the applicant that, to
15 the best knowledge of the applicant, the appli-
16 cation fairly reflects all information that might
17 reasonably—

18 “(i) call into question the accuracy of
19 the application or the reasonableness of
20 any assessment in the application con-
21 ducted by the department or agency on
22 whose behalf the application is made; or

23 “(ii) otherwise raise doubts with re-
24 spect to the findings required under sub-
25 section (c).”.

1 (e) TITLE VII.—

2 (1) SECTION 703.—Subsection (b)(1) of section
3 703 (50 U.S.C. 1881b) is amended—

4 (A) in subparagraph (I), by striking “;
5 and” and inserting a semicolon;

6 (B) in subparagraph (J), by striking the
7 period at the end and inserting “; and”; and

8 (C) by adding at the end the following new
9 subparagraph:

10 “(K) a certification by the applicant that,
11 to the best knowledge of the applicant, the at-
12 torney for the Government and the Department
13 of Justice has been apprised of all information
14 that might reasonably—

15 “(i) call into question the accuracy of
16 the application or the reasonableness of
17 any assessment in the application con-
18 ducted by the department or agency on
19 whose behalf the application is made; or

20 “(ii) otherwise raise doubts with re-
21 spect to the findings required under sub-
22 section (c).”.

23 (2) SECTION 704.—Subsection (b) of section
24 704 (50 U.S.C. 1881c) is amended—

1 (A) in paragraph (6), by striking “; and”
2 and inserting a semicolon;

3 (B) in paragraph (7), by striking the pe-
4 riod at the end and inserting “; and”; and

5 (C) by adding at the end the following new
6 paragraph:

7 “(8) a certification by the applicant that, to the
8 best knowledge of the applicant, the attorney for the
9 Government and the Department of Justice has been
10 apprised of all information that might reasonably—

11 “(A) call into question the accuracy of the
12 application or the reasonableness of any assess-
13 ment in the application conducted by the de-
14 partment or agency on whose behalf the appli-
15 cation is made; or

16 “(B) otherwise raise doubts with respect to
17 the findings required under subsection (c).”.

18 (f) REVIEW OF CASE FILES TO ENSURE ACCU-
19 RACY.—Not later than 180 days after the date of the en-
20 actment of this Act, the Attorney General, in consultation
21 with the Director of the Federal Bureau of Investigation,
22 shall prescribe regulations regarding case files to ensure
23 that applications submitted by the Federal Bureau of In-
24 vestigation to the Foreign Intelligence Surveillance Court
25 are accurate and complete.

1 **SEC. 202. DESCRIPTION OF TECHNIQUES CARRIED OUT BE-**
2 **FORE TARGETING UNITED STATES PERSON.**

3 (a) TITLE I.—Section 104(a)(6) (50 U.S.C.
4 1804(a)(6)) is amended—

5 (1) in subparagraph (D), by striking “; and”
6 and inserting a semicolon; and

7 (2) by adding at the end the following new sub-
8 paragraph:

9 “(F) with respect to a target who is a
10 United States person, including a statement de-
11 scribing the investigative techniques carried out
12 before making the application; and”.

13 (b) TITLE III.—Section 303(a)(6) (50 U.S.C.
14 1823(a)(6)) is amended—

15 (1) in subparagraph (D), by striking “; and”
16 and inserting a semicolon; and

17 (2) by adding at the end the following new sub-
18 paragraph:

19 “(F) with respect to a target who is a
20 United States person, includes a statement de-
21 scribing the investigative techniques carried out
22 before making the application; and”.

1 **SEC. 203. INVESTIGATIONS RELATING TO FEDERAL CAN-**
2 **DIDATES AND ELECTED FEDERAL OFFICIALS.**

3 (a) TITLE I.—Section 104(a)(6) (50 U.S.C.
4 1804(a)(6)), as amended by section 202, is further amend-
5 ed by adding at the end the following new subparagraph:

6 “(G) if the target of the electronic surveil-
7 lance is an elected Federal official or a can-
8 didate in a Federal election, that the Attorney
9 General has approved in writing of the inves-
10 tigation;”.

11 (b) TITLE III.—Section 303(a)(6) (50 U.S.C.
12 1823(a)(6)), as amended by section 202, is further amend-
13 ed by adding at the end the following new subparagraph:

14 “(G) if the target of the physical search is
15 an elected Federal official or a candidate in a
16 Federal election, that the Attorney General has
17 approved in writing of the investigation;”.

18 **SEC. 204. REMOVAL OR SUSPENSION OF FEDERAL OFFI-**
19 **CERS FOR MISCONDUCT BEFORE FOREIGN**
20 **INTELLIGENCE SURVEILLANCE COURT.**

21 Section 103 (50 U.S.C. 1803) is amended by adding
22 at the end the following new subsection:

23 “(I) REMOVAL OR SUSPENSION OF FEDERAL OFFI-
24 CERS FOR MISCONDUCT BEFORE COURTS.—An employee,
25 officer, or contractor of the United States Government
26 who engages in deliberate misconduct with respect to pro-

1 ceedings before the Foreign Intelligence Surveillance
2 Court or the Foreign Intelligence Surveillance Court of
3 Review shall be subject to appropriate adverse actions, in-
4 cluding, as appropriate, suspension without pay or re-
5 moval.”.

6 **SEC. 205. PENALTIES FOR OFFENSES RELATED TO FISA.**

7 (a) FALSE DECLARATIONS BEFORE FISC AND
8 FISCER.—Section 1623(a) of title 18, United States Code,
9 is amended by inserting before “, or both” the following:
10 “or, if such proceedings are before or ancillary to the For-
11 eign Intelligence Surveillance Court or the Foreign Intel-
12 ligence Surveillance Court of Review established by section
13 103 of the Foreign Intelligence Surveillance Act of 1978
14 (50 U.S.C. 1803), imprisoned not more than eight years”.

15 (b) INCREASED PENALTY FOR UNAUTHORIZED
16 USE.—Section 109(c) (50 U.S.C. 1809(c)) is amended by
17 striking “five years” and inserting “eight years”.

18 (c) UNAUTHORIZED DISCLOSURE OF APPLICA-
19 TIONS.—

20 (1) IN GENERAL.—Subsection (a) of section
21 109 (50 U.S.C. 1809) is amended—

22 (A) in the matter preceding paragraph (1),
23 by striking “intentionally”;

24 (B) in paragraph (1)—

1 (i) by inserting “intentionally” before
2 “engages in”; and

3 (ii) by striking “; or” and inserting a
4 semicolon;

5 (C) in paragraph (2)—

6 (i) by inserting “intentionally” before
7 “disclose or uses”; and

8 (ii) by striking the period at the end
9 and inserting “; or”; and

10 (D) by adding at the end the following new
11 paragraph:

12 “(3) is an employee, officer, or contractor of the
13 United States Government and intentionally dis-
14 closes an application, or classified information con-
15 tained therein, for an order under any title of this
16 Act to any person not entitled to receive classified
17 information.”.

18 (2) CONFORMING AMENDMENT.—Subsection (b)
19 of such section is amended by striking “under sub-
20 section (a)” and inserting “under paragraph (1) or
21 (2) of subsection (a)”.

22 **SEC. 206. CONTEMPTS CONSTITUTING CRIMES.**

23 Section 402 of title 18, United States Code, is
24 amended by inserting after “any district court of the
25 United States” the following: “, the Foreign Intelligence

1 Surveillance Court or the Foreign Intelligence Surveillance
2 Court of Review established by section 103 of the Foreign
3 Intelligence Surveillance Act of 1978 (50 U.S.C. 1803),”.

4 **SEC. 207. EFFECTIVE DATE.**

5 The amendments made by this title shall take effect
6 on the date of the enactment of this Act and shall apply
7 with respect to applications made under section 501 of the
8 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
9 1861) on or after such date.

10 **TITLE III—FOREIGN INTEL-**
11 **LIGENCE SURVEILLANCE**
12 **COURT**

13 **SEC. 301. DECLASSIFICATION OF SIGNIFICANT DECISIONS,**
14 **ORDERS, AND OPINIONS.**

15 (a) **TIMING OF DECLASSIFICATION.**—Subsection (a)
16 of section 602 (50 U.S.C. 1872) is amended by adding
17 at the end the following new sentence: “The Director shall
18 complete the declassification review and public release of
19 each such decision, order, or opinion by not later than 180
20 days after the date on which the Foreign Intelligence Sur-
21 veillance Court or the Foreign Intelligence Surveillance
22 Court of Review issues such decision, order, or opinion.”.

23 (b) **MATTERS COVERED.**—Such subsection is further
24 amended—

1 (1) by striking “Subject to subsection (b)” and
2 inserting “(1) Subject to subsection (b)”;

3 (2) by striking “includes a significant” and all
4 that follows through “, and,” and inserting “is de-
5 scribed in paragraph (2) and,”; and

6 (3) by adding at the end the following new
7 paragraph:

8 “(2) The decisions, orders, or opinions issued by the
9 Foreign Intelligence Surveillance Court or the Foreign In-
10 telligence Surveillance Court of Review described in this
11 paragraph are such decisions, orders, or opinions that—

12 “(A) include a significant construction or inter-
13 pretation of any provision of law, including any
14 novel or significant construction or interpretation
15 of—

16 “(i) the term ‘specific selection term’; or

17 “(ii) section 501(a)(5); or

18 “(B) result from a proceeding in which an ami-
19 cus curiae has been appointed pursuant to section
20 103(i).”.

21 (c) APPLICATION OF REQUIREMENT.—Section 602 of
22 the Foreign Intelligence Surveillance Act of 1978 (50
23 U.S.C. 1872) shall apply with respect to each decision,
24 order, or opinion issued by the Foreign Intelligence Sur-
25 veillance Court or the Foreign Intelligence Surveillance

1 Court of Review before, on, or after the date of the enact-
2 ment of such section. With respect to such decisions, or-
3 ders, or opinions issued before or on such date, the Direc-
4 tor of National Intelligence shall complete the declassifica-
5 tion review and public release of each such decision, order,
6 or opinion pursuant to such section by not later than one
7 year after the date of the enactment of this Act.

8 **SEC. 302. APPOINTMENT OF AMICI CURIAE AND ACCESS TO**
9 **INFORMATION.**

10 (a) EXPANSION OF APPOINTMENT AUTHORITY.—
11 Subparagraph (A) of section 103(i)(2) (50 U.S.C.
12 1803(i)(2)) is amended to read as follows:

13 “(A) shall appoint an individual who has
14 been designated under paragraph (1) to serve
15 as amicus curiae to assist such court in the
16 consideration of any application for an order or
17 review that, in the opinion of the court—

18 “(i) presents a novel or significant in-
19 terpretation of the law, unless the court
20 issues a finding that such appointment is
21 not appropriate; or

22 “(ii) presents exceptional concerns
23 about the protection of the rights of a
24 United States person under the first
25 amendment to the Constitution, unless the

1 court issues a finding that such appoint-
2 ment is not appropriate; and”.

3 (b) AUTHORITY TO SEEK REVIEW.—Subsection (i) of
4 section 103 (50 U.S.C. 1803) is amended—

5 (1) by redesignating paragraphs (7) through
6 (11) as paragraphs (8) through (12), respectively;
7 and

8 (2) by inserting after paragraph (6) the fol-
9 lowing new paragraph:

10 “(7) AUTHORITY TO SEEK REVIEW OF DECISIONS.—
11

12 “(A) FISA COURT DECISIONS.—Following
13 issuance of an order under this Act by the For-
14 eign Intelligence Surveillance Court, an amicus
15 curiae appointed under paragraph (2) may peti-
16 tion the court to certify for review to the For-
17 eign Intelligence Surveillance Court of Review a
18 question of law pursuant to subsection (j). If
19 the court denies such petition, the court shall
20 provide for the record a written statement of
21 the reasons for such denial. Upon certification
22 of any question of law pursuant to this sub-
23 paragraph, the Court of Review shall appoint
24 the amicus curiae to assist the Court of Review
25 in its consideration of the certified question, un-

1 less the Court of Review issues a finding that
2 such appointment is not appropriate.

3 “(B) FISA COURT OF REVIEW DECISIONS.—An amicus curiae appointed under
4 paragraph (2) may petition the Foreign Intel-
5 ligence Surveillance Court of Review to certify
6 for review to the Supreme Court of the United
7 States any question of law pursuant to section
8 1254(2) of title 28, United States Code.”.

9
10 (c) ACCESS TO INFORMATION.—

11 (1) APPLICATION AND MATERIALS.—Subpara-
12 graph (A) of section 103(i)(6) (50 U.S.C.
13 1803(i)(6)) is amended by striking clause (ii) and
14 inserting the following new clause:

15 “(ii) may make a submission to the
16 court requesting access to any particular
17 materials or information (or category of
18 materials or information) that the amicus
19 curiae believes to be relevant to the duties
20 of the amicus curiae.”.

21 (2) CONSULTATION AMONG AMICI CURIAE.—
22 Such section is further amended—

23 (A) by redesignating subparagraphs (B),
24 (C), and (D) as subparagraphs (C), (D), and
25 (E), respectively; and

1 (B) by inserting after subparagraph (A)
2 the following new subparagraph:

3 “(B) CONSULTATION.—If the Foreign In-
4 telligence Surveillance Court or the Foreign In-
5 telligence Surveillance Court of Review deter-
6 mines that it is relevant to the duties of an
7 amicus curiae appointed by the court under
8 paragraph (2), the amicus curiae may consult
9 with one or more of the other individuals des-
10 ignated by the court to serve as amicus curiae
11 pursuant to paragraph (1) regarding any of the
12 information relevant to any assigned pro-
13 ceeding.”.

14 (d) TERM LIMITS.—

15 (1) REQUIREMENT.—Paragraph (1) of section
16 103(i) (50 U.S.C. 1803(i)) is amended by adding at
17 the end the following new sentence: “An individual
18 may serve as an amicus curiae for a 5-year term,
19 and the presiding judges may, for good cause, jointly
20 reappoint the individual to a single additional
21 term.”.

22 (2) APPLICATION.—The amendment made by
23 paragraph (1) shall apply with respect to the service
24 of an amicus curiae appointed under section 103(i)
25 of the Foreign Intelligence Surveillance Act of 1978

1 (50 U.S.C. 1803(i)) that occurs on or after the date
2 of the enactment of this Act, regardless of the date
3 on which the amicus curiae is appointed.

4 **SEC. 303. EFFECTIVE AND INDEPENDENT ADVICE FOR FOR-**
5 **EIGN INTELLIGENCE SURVEILLANCE COURT.**

6 Section 103 (50 U.S.C. 1803), as amended by section
7 204, is further amended by adding at the end the following
8 new subsection:

9 “(m) INDEPENDENT LEGAL ADVISORS.—

10 “(1) AUTHORITY.—The Foreign Intelligence
11 Surveillance Court and the Foreign Intelligence Sur-
12 veillance Court of Review may jointly employ legal
13 advisors to assist the courts in all aspects of consid-
14 ering any matter before the courts, including with
15 respect to—

16 “(A) providing advice on issues of law or
17 fact presented by any application for an order
18 under this Act;

19 “(B) requesting information from the Gov-
20 ernment in connection with any such applica-
21 tion;

22 “(C) identifying any concerns with any
23 such application; and

24 “(D) proposing requirements or conditions
25 for the approval of any such application.

1 “(2) DIRECTION.—The legal advisors employed
2 under paragraph (1) shall be subject solely to the di-
3 rection of the presiding judges of the Foreign Intel-
4 ligence Surveillance Court and the Foreign Intel-
5 ligence Surveillance Court of Review.”.

6 **SEC. 304. TRANSCRIPTS OF PROCEEDINGS AND COMMU-**
7 **NICATIONS REGARDING APPLICATIONS.**

8 (a) TRANSCRIPTS.—Subsection (c) of section 103 (50
9 U.S.C. 1803) is amended—

10 (1) by striking “Proceedings under this Act”
11 and inserting “(1) Proceedings under this Act”;

12 (2) by inserting “, and shall be transcribed” be-
13 fore the first period;

14 (3) by inserting “, transcriptions of pro-
15 ceedings,” after “applications made”; and

16 (4) by adding at the end the following new sen-
17 tence: “Transcriptions of proceedings shall be stored
18 in a file associated with the relevant application or
19 order.”.

20 (b) REQUIREMENT FOR WRITTEN RECORDS OF
21 INTERACTIONS WITH COURT.—Such subsection, as
22 amended by paragraph (1) of this section, is further
23 amended by adding at the end the following new para-
24 graph:

1 “(2) The Attorney General and the Foreign Intel-
2 ligence Surveillance Court shall maintain all written sub-
3 stantive communications between the Department of Jus-
4 tice and the court, including the identity of the employees
5 of the court to or from whom the communications were
6 made, regarding an application or order made under this
7 title in a file associated with the application or order.”.

8 (c) CONFORMING AMENDMENT.—Subsection (i)(2) of
9 section 103 (50 U.S.C. 1803) is amended by striking
10 “subsection (c)” and inserting “subsection (c)(1)”.

11 **SEC. 305. INFORMATION PROVIDED IN ANNUAL REPORTS.**

12 (a) REPORTS BY DIRECTOR OF THE ADMINISTRA-
13 TIVE OFFICE OF THE UNITED STATES COURTS.—Sub-
14 section (a)(1) of section 603 (50 U.S.C. 1873) is amend-
15 ed—

16 (1) in subparagraph (E), by striking “; and”
17 and inserting a semicolon;

18 (2) in subparagraph (F), by striking the period
19 at the end and inserting a semicolon; and

20 (3) by adding at the end the following new sub-
21 paragraphs:

22 “(G) the number of times the Attorney
23 General required the emergency production of
24 tangible things pursuant to section 501(i)(1)

1 and the application under subparagraph (D) of
2 such section was denied;

3 “(H) the number of certifications by the
4 Foreign Intelligence Surveillance Court of Re-
5 view pursuant to section 103(j); and

6 “(I) the number of requests to certify a
7 question made by an amicus curiae to the For-
8 eign Intelligence Surveillance Court or the For-
9 eign Intelligence Surveillance Court of Review
10 pursuant to section 103(i)(7).”.

11 (b) REPORTS BY DIRECTOR OF NATIONAL INTEL-
12 LIGENCE.—Subsection (b)(5)(B) of such section, as
13 amended by section 101, is amended by inserting before
14 the semicolon at the end the following: “, including infor-
15 mation received electronically and through hardcopy and
16 portable media”.

17 **TITLE IV—TRANSPARENCY,**
18 **SUNSETS, AND OTHER MATTERS**

19 **SEC. 401. CONGRESSIONAL OVERSIGHT.**

20 (a) IN GENERAL.—Section 601 (50 U.S.C. 1871) is
21 amended—

22 (1) by redesignating subsection (e) as sub-
23 section (f); and

24 (2) by inserting after subsection (d) the fol-
25 lowing new subsection (e):

1 “(e) CONGRESSIONAL OVERSIGHT.—In a manner
2 consistent with the protection of the national security,
3 nothing in this Act or any other provision of law may be
4 construed to preclude the Permanent Select Committee on
5 Intelligence of the House of Representatives and the Se-
6 lect Committee on Intelligence of the Senate from receiv-
7 ing in a timely manner, upon request, applications sub-
8 mitted under this Act to the Foreign Intelligence Surveil-
9 lance Court, orders of the court, and relevant materials
10 relating to such applications and orders.”.

11 (b) CONFORMING AMENDMENT.—Section 602(a) (50
12 U.S.C. 1872(a)) is amended by striking “in section
13 601(e)” and inserting “in section 601(f)”.

14 **SEC. 402. ESTABLISHMENT OF COMPLIANCE OFFICERS.**

15 (a) IN GENERAL.—Title VI (50 U.S.C. 1871 et seq.)
16 is amended by adding at the end the following new section:

17 **“SEC. 605. COMPLIANCE OFFICERS.**

18 “(a) APPOINTMENT.—The head of each covered
19 agency shall appoint a single Federal officer to serve as
20 the Compliance Officer for that agency.

21 “(b) COMPLIANCE.—Each Compliance Officer ap-
22 pointed under subsection (a) shall be responsible for over-
23 seeing the compliance of the relevant covered agency with
24 the requirements of this Act.

1 “(c) AUDITS.—Each Compliance Officer shall con-
2 duct routine audits of the compliance by the relevant cov-
3 ered agency with—

4 “(1) the requirements of this Act regarding
5 submitting applications to the Foreign Intelligence
6 Surveillance Court, including with respect to the ac-
7 curacy of such applications; and

8 “(2) the minimization, targeting, querying, and
9 accuracy procedures required by this Act.

10 “(d) ASSESSMENTS.—Each Compliance Officer
11 shall—

12 “(1) conduct on a routine basis assessments of
13 the efficacy of the minimization, targeting, querying,
14 and accuracy procedures adopted by the Attorney
15 General pursuant to this Act; and

16 “(2) annually submit to the Assistant Attorney
17 General designated as the Assistant Attorney Gen-
18 eral for National Security under section 507A of
19 title 28, United States Code, and the head of the
20 relevant covered agency the findings of such assess-
21 ments, including any recommendations of the Com-
22 pliance Officer with respect to improving such proce-
23 dures.

24 “(e) REMEDIATION.—Each Compliance Officer shall
25 ensure the remediation of any compliance issues of the rel-

1 evant covered agency identified pursuant to this section
2 or the rules of the Foreign Intelligence Surveillance Court.

3 “(f) INSPECTOR GENERALS ASSESSMENT.—On an
4 annual basis, and consistent with the protection of sources
5 and methods, each Inspector General of a covered agency
6 shall submit to the Foreign Intelligence Surveillance Court
7 and the appropriate congressional committees an assess-
8 ment of the implementation of this section by the covered
9 agency.

10 “(g) DEFINITIONS.—In this section:

11 “(1) APPROPRIATE CONGRESSIONAL COMMIT-
12 TEES.—The term ‘appropriate congressional com-
13 mittees’ means—

14 “(A) the Permanent Select Committee on
15 Intelligence and the Committee on the Judici-
16 ary of the House of Representatives; and

17 “(B) the Select Committee on Intelligence
18 and the Committee on the Judiciary of the Sen-
19 ate.

20 “(2) COVERED AGENCY.—The term ‘covered
21 agency’ means a department or agency of the United
22 States Government that submits applications to the
23 Foreign Intelligence Surveillance Court under this
24 Act.

1 “(3) FOREIGN INTELLIGENCE SURVEILLANCE
2 COURT.—The term ‘Foreign Intelligence Surveillance
3 Court’ has the meaning given that term in section
4 101.”.

5 (b) CLERICAL AMENDMENT.—The table of sections
6 at the beginning of the Foreign Intelligence Surveillance
7 Act of 1978 is amended by inserting after the item relat-
8 ing to section 604 the following new item:

 “Sec. 605. Compliance officers.”.

9 **SEC. 403. PUBLIC REPORTS ON INFORMATION OBTAINED**
10 **OR DERIVED UNDER FISA AND PROTECTION**
11 **OF FIRST AMENDMENT ACTIVITIES.**

12 (a) REPORTS.—Not later than 180 days after the
13 date of the enactment of this Act, the Attorney General
14 shall make publicly available the following reports:

15 (1) A report explaining how the United States
16 Government determines whether information is “ob-
17 tained or derived” from activities authorized by the
18 Foreign Intelligence Surveillance Act of 1978 (50
19 U.S.C. 1801 et seq.) for purposes of the notice re-
20 quirements under such Act.

21 (2) A report explaining how the United States
22 Government interprets the prohibition under section
23 501(a) of such Act (50 U.S.C. 1861(a)) on con-
24 ducting an investigation of a United States person

1 “solely upon the basis of activities protected by the
2 first amendment to the Constitution”.

3 (b) REQUIREMENTS.—The Attorney General shall en-
4 sure that the reports under subsection (a) are detailed and
5 use hypothetical fact patterns to describe how the United
6 States Government conducts the analyses covered by the
7 reports.

8 (c) FORM.—The reports under subsection (a) shall be
9 made publicly available in unclassified form.

10 **SEC. 404. MANDATORY REPORTING ON CERTAIN ORDERS.**

11 (a) REPORTING ON UNITED STATES PERSON QUE-
12 RIES.—Subsection (b)(2) of section 603 (50 U.S.C. 1873),
13 as amended by section 101, is amended—

14 (1) in subparagraph (B), by striking “the num-
15 ber of search terms concerning a known United
16 States person” and inserting “the number of search
17 terms that concern a known United States person or
18 are reasonably likely to identify a United States per-
19 son”; and

20 (2) in subparagraph (C), by striking “the num-
21 ber of queries concerning a known United States
22 person” and inserting “the number of queries that
23 concern a known United States person or are rea-
24 sonably likely to identify a United States person”.

(b) MODIFICATION TO EXCEPTIONS.—Subsection (d)(2) of such section, as amended by section 101, is amended by striking “(A) FEDERAL” and all that follows through “(B) ELECTRONIC MAIL ADDRESS AND TELEPHONE NUMBERS.—”.

SEC. 405. REPORT ON USE OF FISA AUTHORITIES REGARDING PROTECTED ACTIVITIES AND PROTECTED CLASSES.

(a) REPORT.—Not later than one year after the date of the enactment of this Act, the Privacy and Civil Liberties Oversight Board shall make publicly available, to the extent practicable, a report on—

(1) the extent to which the activities and protected classes described in subsection (b) are used to support targeting decisions in the use of authorities pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); and

(2) the impact of the use of such authorities on such activities and protected classes.

(b) ACTIVITIES AND PROTECTED CLASSES DESCRIBED.—The activities and protected classes described in this subsection are the following:

(1) Activities and expression protected by the First Amendment to the Constitution of the United States.

1 (2) Race, ethnicity, national origin, religious af-
2 filiation, sex, and any other protected characteristic
3 determined appropriate by the Board.

4 (c) FORM.—In addition to the report made publicly
5 available under subsection (a), the Board may submit to
6 the appropriate congressional committees a classified
7 annex.

8 (d) APPROPRIATE CONGRESSIONAL COMMITTEES
9 DEFINED.—In this section, the term “appropriate con-
10 gressional committees” means—

11 (1) the Committee on the Judiciary and the
12 Permanent Select Committee on Intelligence of the
13 House of Representatives; and

14 (2) the Committee on the Judiciary and the Se-
15 lect Committee on Intelligence of the Senate.

16 **SEC. 406. IMPROVEMENTS TO PRIVACY AND CIVIL LIB-**
17 **ERTIES OVERSIGHT BOARD.**

18 Paragraph (4) of section 1061(h) of the Intelligence
19 Reform and Terrorism Prevention Act of 2004 (42 U.S.C.
20 2000ee(h)) is amended to read as follows:

21 “(4) TERM.—

22 “(A) COMMENCEMENT.—Each member of
23 the Board shall serve a term of 6 years, com-
24 mencing on the date of the appointment of the
25 member to the Board.

1 “(B) REAPPOINTMENT.—A member may
2 be reappointed to one or more additional terms.

3 “(C) VACANCY.—A vacancy in the Board
4 shall be filled in the manner in which the origi-
5 nal appointment was made.

6 “(D) EXTENSION.—Upon the expiration of
7 the term of office of a member, the member
8 may continue to serve, at the election of the
9 member—

10 “(i) during the period preceding the
11 reappointment of the member pursuant to
12 subparagraph (B); or

13 “(ii) until the member’s successor has
14 been appointed and qualified.”.

15 **SEC. 407. SUNSETS.**

16 (a) USA PATRIOT IMPROVEMENT AND REAUTHOR-
17 IZATION ACT OF 2005.—Section 102(b)(1) of the USA
18 PATRIOT Improvement and Reauthorization Act of 2005
19 (50 U.S.C. 1805 note) is amended by striking “March 15,
20 2020” and inserting “December 1, 2023”.

21 (b) INTELLIGENCE REFORM AND TERRORISM PRE-
22 VENTION ACT OF 2004.—Section 6001(b)(1) of the Intel-
23 ligence Reform and Terrorism Prevention Act of 2004 (50
24 U.S.C. 1801 note) is amended by striking “March 15,
25 2020” and inserting “December 1, 2023”.

1 (c) EFFECTIVE DATE.—The amendments made by
2 this section shall take effect on the earlier of the date of
3 the enactment of this Act or March 15, 2020.

4 **SEC. 408. TECHNICAL AMENDMENTS.**

5 (a) IN GENERAL.—The Foreign Intelligence Surveil-
6 lance Act of 1978 (50 U.S.C. 1801 et seq.) is amended
7 as follows:

8 (1) In section 103(e) (50 U.S.C. 1803(e)), by
9 striking “702(h)(4)” both places it appears and in-
10 serting “702(i)(4)”.

11 (2) In section 105(a)(4) (50 U.S.C.
12 1805(a)(4))—

13 (A) by striking “section 104(a)(7)(E)” and
14 inserting “section 104(a)(6)(E)”; and

15 (B) by striking “section 104(d)” and in-
16 serting “section 104(c)”.

17 (3) In section 501(a) (50 U.S.C. 1861(a)), by
18 indenting paragraph (3) 2 ems to the left.

19 (4) In section 603(b)(2)(C) (50 U.S.C.
20 1873(b)(2)(C)), by inserting “and” after the semi-
21 colon.

22 (5) In section 702 (50 U.S.C. 1881a)—

23 (A) in subsection (h)(3), by striking “sub-
24 section (i)” and inserting “subsection (j)”;

1 (B) in subsection (j)(1), by striking “sub-
2 section (g)” each place it appears and inserting
3 “subsection (h)”; and

4 (C) in the subsection heading of subsection
5 (m), by inserting a comma after “ASSESS-
6 MENTS”.

7 (6) In section 801(8)(B)(iii) (50 U.S.C.
8 1885(8)(B)(iii)), by striking “702(h)” and inserting
9 “702(i)”.

10 (7) In section 802(a)(3) (50 U.S.C.
11 1885a(a)(3)), by striking “702(h)” and inserting
12 “702(i)”.

13 (b) REFERENCES TO FOREIGN INTELLIGENCE SUR-
14 VEILLANCE COURT AND FOREIGN INTELLIGENCE SUR-
15 VEILLANCE COURT OF REVIEW.—

16 (1) DEFINITIONS.—Section 101 (50 U.S.C.
17 1801) is amended by adding at the end the following
18 new subsections:

19 “(q) The term ‘Foreign Intelligence Surveillance
20 Court’ means the court established under section 103(a).

21 “(r) The terms ‘Foreign Intelligence Surveillance
22 Court of Review’ and ‘Court of Review’ mean the court
23 established under section 103(b).”.

1 (2) CONFORMING AMENDMENTS.—The Foreign
2 Intelligence Surveillance Act of 1978 (50 U.S.C.
3 1801 et seq.) is amended—

4 (A) in section 102 (50 U.S.C. 1802), by
5 striking “the court established under section
6 103(a)” and inserting “the Foreign Intelligence
7 Surveillance Court”;

8 (B) in section 103 (50 U.S.C. 1803)—

9 (i) in subsection (a)—

10 (I) in paragraph (2)(A), by strik-
11 ing “The court established under this
12 subsection” and inserting “The For-
13 eign Intelligence Surveillance Court”;
14 and

15 (II) by striking “the court estab-
16 lished under this subsection” each
17 place it appears and inserting “the
18 Foreign Intelligence Surveillance
19 Court”;

20 (ii) in subsection (g)—

21 (I) by striking “the court estab-
22 lished pursuant to subsection (a)” and
23 inserting “the Foreign Intelligence
24 Surveillance Court”;

1 (II) by striking “the court of re-
2 view established pursuant to sub-
3 section (b)” and inserting “the For-
4 eign Intelligence Surveillance Court of
5 Review”; and

6 (III) by striking “The courts es-
7 tablished pursuant to subsections (a)
8 and (b)” and inserting “The Foreign
9 Intelligence Surveillance Court and
10 the Foreign Intelligence Surveillance
11 Court of Review”;

12 (iii) in subsection (h), by striking “a
13 court established under this section” and
14 inserting “the Foreign Intelligence Surveil-
15 lance Court or the Foreign Intelligence
16 Surveillance Court of Review”;

17 (iv) in subsection (i)—

18 (I) in paragraph (1), by striking
19 “the courts established under sub-
20 sections (a) and (b)” and inserting
21 “the Foreign Intelligence Surveillance
22 Court and the Foreign Intelligence
23 Surveillance Court of Review”;

24 (II) in paragraph (3)(B), by
25 striking “the courts” and inserting

1 “the Foreign Intelligence Surveillance
2 Court and the Foreign Intelligence
3 Surveillance Court of Review”;

4 (III) in paragraph (5), by strik-
5 ing “the court” and inserting “the
6 Foreign Intelligence Surveillance
7 Court or the Foreign Intelligence Sur-
8 veillance Court of Review, as the case
9 may be,”;

10 (IV) in paragraph (6), by strik-
11 ing “the court” each place it appears
12 and inserting “the Foreign Intel-
13 ligence Surveillance Court or the For-
14 eign Intelligence Surveillance Court of
15 Review”;

16 (V) by striking “a court estab-
17 lished under subsection (a) or (b)”
18 each place it appears and inserting
19 “the Foreign Intelligence Surveillance
20 Court or the Foreign Intelligence Sur-
21 veillance Court of Review”;

22 (VI) by striking “A court estab-
23 lished under subsection (a) or (b)”
24 each place it appears and inserting
25 “The Foreign Intelligence Surveillance

1 Court or the Foreign Intelligence Sur-
2veillance Court of Review”;

3 (v) in subsection (j)—

4 (I) by striking “a court estab-
5lished under subsection (a)” and in-
6serting “the Foreign Intelligence Sur-
7veillance Court”; and

8 (II) by striking “the court deter-
9mines” and inserting “the Foreign In-
10telligence Surveillance Court deter-
11mines”;

12 (vi) by striking “the court established
13under subsection (a)” each place it appears
14and inserting “the Foreign Intelligence
15Surveillance Court”; and

16 (vii) by striking “the court established
17under subsection (b)” each place it appears
18and inserting “the Foreign Intelligence
19Surveillance Court of Review”;

20 (C) in section 105(c) (50 U.S.C.
211805(c))—

22 (i) in paragraph (2)(B), by striking
23“the Court” and inserting “the Foreign
24Intelligence Surveillance Court”; and

1 (ii) in paragraph (3), by striking “the
2 court” each place it appears and inserting
3 “the Foreign Intelligence Surveillance
4 Court”;

5 (D) in section 401(1) (50 U.S.C. 1841(1)),
6 by striking “, and ‘State’” and inserting
7 “‘State’, ‘Foreign Intelligence Surveillance
8 Court’, and ‘Foreign Intelligence Surveillance
9 Court of Review’”;

10 (E) in section 402 (50 U.S.C. 1842)—

11 (i) in subsection (b)(1), by striking
12 “the court established by section 103(a) of
13 this Act” and inserting “the Foreign Intel-
14 ligence Surveillance Court”; and

15 (ii) in subsection (h)(2), by striking
16 “the court established under section
17 103(a)” and inserting “the Foreign Intel-
18 ligence Surveillance Court”;

19 (F) in section 501 (50 U.S.C. 1861)—

20 (i) in subsection (b)(1), by striking
21 “the court established by section 103(a)”
22 and inserting “the Foreign Intelligence
23 Surveillance Court”;

24 (ii) in subsection (g)(3), by striking
25 “the court established under section

1 103(a)” and inserting “the Foreign Intel-
2 ligence Surveillance Court”; and

3 (iii) in subsection (k)(1), by striking
4 “, and ‘State’” and inserting “‘State’, and
5 ‘Foreign Intelligence Surveillance Court’”;

6 (G) in section 502(c)(1)(E), by striking
7 “the court established under section 103” and
8 inserting “the Foreign Intelligence Surveillance
9 Court (as defined by section 101)”;

10 (H) in section 801 (50 U.S.C. 1885)—

11 (i) in paragraph (8)(B)(i), by striking
12 “the court established under section
13 103(a)” and inserting “the Foreign Intel-
14 ligence Surveillance Court”; and

15 (ii) by adding at the end the following
16 new paragraph:

17 “(10) FOREIGN INTELLIGENCE SURVEILLANCE
18 COURT.—The term ‘Foreign Intelligence Surveillance
19 Court’ means the court established under section
20 103(a).”; and

21 (I) in section 802(a)(1) (50 U.S.C.
22 1885a(a)(1)), by striking “the court established
23 under section 103(a)” and inserting “the For-
24 eign Intelligence Surveillance Court”.

1 (c) UPDATED REFERENCES TO CERTAIN INDIVID-
2 UALS.—The Foreign Intelligence Surveillance Act of 1978
3 (50 U.S.C. 1801 et seq.) is amended—

4 (1) in section 102(a) (50 U.S.C. 1802(a))—

5 (A) in paragraph (2), by striking “him”
6 and inserting “the Attorney General”; and

7 (B) in paragraph (3), by striking “his cer-
8 tification” and inserting “the Attorney Gen-
9 eral’s certification”;

10 (2) in section 103(a)(1) (50 U.S.C.
11 1803(a)(1)), by striking “his decision” and inserting
12 “the decision of such judge”;

13 (3) in section 104(a) (50 U.S.C. 1804)(a))—

14 (A) in the language preceding paragraph
15 (1), by striking “his finding” and inserting “the
16 Attorney General’s finding”; and

17 (B) in paragraph (3), by striking “his be-
18 lief” and inserting “the applicant’s belief”;

19 (4) in section 105(a) (50 U.S.C. 1805(a)), by
20 striking “he” and inserting “the judge”;

21 (5) in section 106 (50 U.S.C. 1806)—

22 (A) in subsection (e), by striking “he” and
23 inserting “the person”; and

1 (B) in subsection (j), by striking “his discretion”
2 and inserting “the discretion of the
3 judge”;

4 (6) in section 109 (50 U.S.C. 1809)—

5 (A) in subsection (a), by striking “he” and
6 inserting “the person”; and

7 (B) in subsection (b), by striking “his official
8 duties” and inserting “the official duties of
9 such officer”;

10 (7) in section 305 (50 U.S.C. 1825)—

11 (A) in subsection (f)(1), by striking “he”
12 and inserting “the person”; and

13 (B) in subsection (j)(1), by striking “his
14 discretion” and inserting “the discretion of the
15 judge”;

16 (8) in section 307 (50 U.S.C. 1827)—

17 (A) in subsection (a), by striking “he” and
18 inserting “the person”; and

19 (B) in subsection (b), by striking “his official
20 duties” and inserting “the official duties of
21 such officer”; and

22 (9) in section 403 (50 U.S.C. 1843), by striking
23 “his designee” and inserting “a designee of the At-
24 torney General”.

1 (d) COORDINATION WITH OTHER AMENDMENTS
2 MADE BY THIS ACT.—For purposes of applying amend-
3 ments made by provisions of this Act other than this sec-
4 tion, the amendments made by this section shall be treated
5 as having been enacted immediately before any such
6 amendments by other provisions of this Act.

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(Original Signature of Member)

[DISCUSSION DRAFT]

I

116th CONGRESS
2d Session

H. R. __

IN THE HOUSE OF REPRESENTATIVES

Mr. Nadler
(for himself and Mr. Schiff
) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978 to prohibit the production of certain business records, and for other purposes.

1.

Short title; table of contents

(a)

Short title

This Act may be cited as the USA FREEDOM Reauthorization Act of 2020

.

(b)

Table of contents

The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Amendments to the Foreign Intelligence Surveillance Act of 1978.

Title I—FISA Business Records

Sec. 101. Repeal of authority to access on an ongoing basis call detail records.

Sec. 102. Protection of certain information.

Sec. 103. Use of information.

Sec. 104. Limitation on retention of business record information.

Sec. 105. Effective date.

Title II—Accuracy and integrity of FISA process

Sec. 201. Certifications regarding accuracy of FISA applications.

Sec. 202. Description of techniques carried out before targeting United States person.

Sec. 203. Investigations relating to Federal candidates and elected Federal officials.

Sec. 204. Removal or suspension of Federal officers for misconduct before Foreign Intelligence Surveillance Court.

Sec. 205. Penalties for offenses related to FISA.

Sec. 206. Contempts constituting crimes.

Sec. 207. Effective date.

Title III—Foreign Intelligence Surveillance Court

Sec. 301. Declassification of significant decisions, orders, and opinions.

Sec. 302. Appointment of amici curiae and access to information.

Sec. 303. Effective and independent advice for Foreign Intelligence Surveillance Court.

Sec. 304. Transcripts of proceedings and communications regarding applications.

Sec. 305. Information provided in annual reports.

Title IV—Transparency, sunsets, and other Matters

Sec. 401. Congressional oversight.

Sec. 402. Establishment of compliance officers.

Sec. 403. Public reports on information obtained or derived under FISA and protection of First Amendment activities.

Sec. 404. Mandatory reporting on certain orders.

Sec. 405. Report on use of FISA authorities regarding protected activities and protected classes.

Sec. 406. Improvements to Privacy and Civil Liberties Oversight Board.

Sec. 407. Sunsets.

Sec. 408. Technical amendments.

2.

Amendments to the Foreign Intelligence Surveillance Act of 1978

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

I

FISA Business Records

101.

Repeal of authority to access on an ongoing basis call detail records

(a)

Call detail records

(1)

Repeal

Subsection (b)(2) of section 501 (50 U.S.C. 1861) is amended—

(A)

by striking subparagraph (C);

(B)
in subparagraph (B)—

(i)
in the matter preceding clause (i), by striking in the case of
and all that follows through in subparagraph (C)),
; and

(ii)
in clause (iii), by striking the semicolon at the end and inserting ; and
; and

(C)
by redesignating subparagraph (D) as subparagraph (C).

(2)
Prohibition
Section 501(a) (50 U.S.C. 1861) is amended by adding at the end the following new paragraph:

(4)
An application under paragraph (1) may not seek an order authorizing or requiring the production on an
ongoing basis of call detail records.

.

(b)
Conforming amendments

(1)
Orders
Subsection (c) of section 501 (50 U.S.C. 1861) is amended—

(A)
in paragraph (1), by striking with subsection (b)(2)(D)
and inserting with subsection (b)(2)(C)
; and

(B)
in paragraph (2), by striking subparagraph (F) and inserting the following:

(F)
in the case of an application for call detail records, shall direct the Government—

(i)

to adopt minimization procedures that require the prompt destruction of all call detail records produced under the order that the Government determines are not foreign intelligence information; and

(ii)
to destroy all call detail records produced under the order as prescribed by such procedures.

;

(2)
Compensation
Subsection (j) of section 501 (50 U.S.C. 1861) is amended to read as follows:

(j)
Compensation
The Government shall compensate a person for reasonable expenses incurred for providing technical assistance to the Government under this section.

.

(3)
Definitions
Subsection (k)(4)(B) of section 501 (50 U.S.C. 1861) is amended by striking For purposes of an application submitted under subsection (b)(2)(C) and inserting In the case of an application for a call detail record

.

(4)
Oversight
Section 502(b) (50 U.S.C. 1862(b)) is amended—

(A)
by striking paragraph (4); and

(B)
by redesignating paragraphs (5) through (8) as paragraphs (4) through (7), respectively;

(5)
Annual reports
Section 603 (50 U.S.C. 1873) is amended—

(A)
in subsection (b)—

(i)

by transferring subparagraph (C) of paragraph (6) to the end of paragraph (5);

(ii)
in paragraph (5)—

(I)
in subparagraph (A), by striking ; and
and inserting a semicolon;

(II)
in subparagraph (B), by striking the semicolon and inserting ; and
; and

(III)
in subparagraph (C), as transferred by clause (i) of this subparagraph, by striking any database of
;

(iii)
by striking paragraph (6) (as amended by clause (i) of this subparagraph); and

(iv)
by redesignating paragraph (7) as paragraph (6); and

(B)
in subsection (d)—

(i)
in paragraph (1), by striking any of paragraphs (3), (5), or (6)
and inserting either of paragraph (3) or (5)
; and

(ii)
in paragraph (2)(A), by striking Paragraphs (2)(B), (2)(C), and (6)(C)
and inserting Paragraphs (2)(B) and (2)(C)
.

(6)
Public reporting
Section 604(a)(1)(F) (50 U.S.C. 1874(a)(1)(F)) is amended—

(A)
in clause (i), by striking the semicolon and inserting ; and
;

(B)
in clause (ii), by striking ; and
and inserting a period; and

(C)
by striking clause (iii).

102.
Protection of certain information

(a)
Protection
Subsection (a) of section 501 (50 U.S.C. 1861), as amended by section 101, is further amended by adding at the end the following new paragraph:

(5)

(A)
An application under paragraph (1) may not seek an order authorizing or requiring the production of a tangible thing under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(B)
An application under paragraph (1) may not seek an order authorizing or requiring the production of cell site location or global positioning system information.

.

(b)
Clarification of emergency authority for cell site location or global positioning system information
The Attorney General may treat the production of cell site location or global positioning system information as electronic surveillance rather than business records for purposes of authorizing the emergency production of such information pursuant to section 105(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(e)).

(c)
Conforming amendment
Subsection (a) of section 501 (50 U.S.C. 1861) is further amended by striking Subject to paragraph (3) and inserting Subject to paragraphs (3), (4), and (5)

.

103.

Use of information
Section 501(h) (50 U.S.C. 1861(h)) is amended—

(1)
by striking Information acquired
and inserting the following:

(1)
In general
Information acquired

; and

(2)
by adding at the end the following new paragraphs:

(2)
Use in trials, hearings, or other proceedings
For purposes of subsections (b) through (h) of section 106—

(A)
information obtained or derived from the production of tangible things pursuant to an investigation conducted under this section shall be deemed to be information acquired from an electronic surveillance pursuant to title I, unless the court or other authority of the United States finds, in response to a motion from the Government, that providing notice to an aggrieved person would harm the national security of the United States; and

(B)
in carrying out subparagraph (A), a person shall be deemed to be an aggrieved person if—

(i)
the person is the target of such an investigation; and

(ii)
the activities or communications of the person are described in the tangible things that the Government intends to use or disclose in any trial, hearing, or other proceeding.

.

104.
Limitation on retention of business record information

(a)
Requirement
Section 501(g) (50 U.S.C. 1861(g)) is amended—

(1)
in paragraph (2), by striking In this section
and inserting In accordance with paragraph (3), in this section
;

(2)
by redesignating paragraph (3) as paragraph (4); and

(3)
by inserting after paragraph (2) the following new paragraph (3):

(3)
Limitation on retention
The minimization procedures under paragraph (1) shall ensure that tangible things, and information therein, received under this section may not be retained in excess of 5 years, unless—

(A)
the tangible thing or information has been affirmatively determined, in whole or in part, to constitute foreign intelligence or counterintelligence or to be necessary to understand or assess foreign intelligence or counterintelligence;

(B)
the tangible thing or information is reasonably believed to constitute evidence of a crime and is retained by a law enforcement agency;

(C)
the tangible thing or information is enciphered or reasonably believed to have a secret meaning;

(D)
retention is necessary to protect against an imminent threat to human life;

(E)
retention is necessary for technical assurance or compliance purposes, including a court order or discovery obligation, in which case access to the tangible thing or information retained for technical assurance or compliance purposes shall be reported to the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate on an annual basis; or

(F)
retention for a period in excess of 5 years is approved by the Director of the Federal Bureau of Investigation, based on a determination that retention is necessary to protect the national security of the United States, in which case the Director shall provide to such committees a written certification describing—

(i)
the reasons extended retention is necessary to protect the national security of the United States;

(ii)
the duration for which the Director is authorizing retention;

(iii)
generally the tangible things or information to be retained; and

(iv)
the measures the Director is taking to protect the privacy interests of United States persons or persons located inside the United States.

.

(b)
Oversight
Section 502(b) (50 U.S.C. 1862(b)) is amended—

(1)
in paragraph (7), by striking ; and
and inserting a semicolon;

(2)
in paragraph (8)(E), by striking the period and inserting ; and
; and

(3)
by adding at the end the following new paragraph:

(9)
a description of each time that an exception to the 5-year limitation on the retention of information was made pursuant to any of subparagraphs (C) through (E) of subsection (g)(3) of section 501, including an explanation for each such exception.

.

105.

Effective date

The amendments made by this title shall take effect on the date of the enactment of this Act and shall apply with respect to applications made under section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) on or after such date.

II

Accuracy and integrity of FISA process

201.

Certifications regarding accuracy of FISA applications

(a)

Title I

Subsection (a) of section 104 (50 U.S.C. 1804) is amended—

(1)

in paragraph (8), by striking ; and
and inserting a semicolon;

(2)

in paragraph (9), by striking the period at the end and inserting ; and
; and

(3)

by adding at the end the following new paragraph:

(10)

a certification by the applicant that, to the best knowledge of the applicant, the attorney for the Government and the Department of Justice has been apprised of all information that might reasonably—

(A)

call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(B)

otherwise raise doubts with respect to the findings required under section 105(a).

.

(b)

Title III

Subsection (a) of section 303 (50 U.S.C. 1823) is amended—

(1)

in paragraph (7), by striking ; and
and inserting a semicolon;

(2)

in paragraph (8), by striking the period at the end and inserting ; and
; and

(3)
by adding at the end the following new paragraph:

(9)
a certification by the applicant that, to the best knowledge of the applicant, the attorney for the Government and the Department of Justice has been apprised of all information that might reasonably—

(A)
call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(B)
otherwise raise doubts with respect to the findings required under section 304(a).

.

(c)
Title IV
Subsection (c) of section 402 (50 U.S.C. 1842) is amended—

(1)
in paragraph (2), by striking ; and
and inserting a semicolon;

(2)
in paragraph (3), by striking the period at the end and inserting ; and
; and

(3)
by adding at the end the following new paragraph:

(4)
a certification by the applicant that, to the best knowledge of the applicant, the attorney for the Government and the Department of Justice has been apprised of all information that might reasonably—

(A)
call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(B)
otherwise raise doubts with respect to the findings required under subsection (d).

.

(d)

Title V

Subsection (b)(2) of section 501 (50 U.S.C. 1861), as amended by section 101, is further amended—

(1)

in subparagraph (B), by striking ; and
and inserting a semicolon;

(2)

in subparagraph (C), by striking the period at the end and inserting ; and
; and

(3)

by adding at the end the following new subparagraph:

(D)

a statement by the applicant that, to the best knowledge of the applicant, the application fairly reflects all information that might reasonably—

(i)

call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(ii)

otherwise raise doubts with respect to the findings required under subsection (c).

.

(e)

Title VII

(1)

Section 703

Subsection (b)(1) of section 703 (50 U.S.C. 1881b) is amended—

(A)

in subparagraph (I), by striking ; and
and inserting a semicolon;

(B)

in subparagraph (J), by striking the period at the end and inserting ; and
; and

(C)
by adding at the end the following new subparagraph:

(K)
a certification by the applicant that, to the best knowledge of the applicant, the attorney for the Government and the Department of Justice has been apprised of all information that might reasonably—

(i)
call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(ii)
otherwise raise doubts with respect to the findings required under subsection (c).

.

(2)
Section 704
Subsection (b) of section 704 (50 U.S.C. 1881c) is amended—

(A)
in paragraph (6), by striking ; and
and inserting a semicolon;

(B)
in paragraph (7), by striking the period at the end and inserting ; and
; and

(C)
by adding at the end the following new paragraph:

(8)
a certification by the applicant that, to the best knowledge of the applicant, the attorney for the Government and the Department of Justice has been apprised of all information that might reasonably—

(A)
call into question the accuracy of the application or the reasonableness of any assessment in the application conducted by the department or agency on whose behalf the application is made; or

(B)
otherwise raise doubts with respect to the findings required under subsection (c).

.

(f)

Review of case files to ensure accuracy

Not later than 180 days after the date of the enactment of this Act, the Attorney General, in consultation with the Director of the Federal Bureau of Investigation, shall prescribe regulations regarding case files to ensure that applications submitted by the Federal Bureau of Investigation to the Foreign Intelligence Surveillance Court are accurate and complete.

202.

Description of techniques carried out before targeting United States person

(a)

Title I

Section 104(a)(6) (50 U.S.C. 1804(a)(6)) is amended—

(1)

in subparagraph (D), by striking ; and
and inserting a semicolon; and

(2)

by adding at the end the following new subparagraph:

(F)

with respect to a target who is a United States person, including a statement describing the investigative techniques carried out before making the application; and

.

(b)

Title III

Section 303(a)(6) (50 U.S.C. 1823(a)(6)) is amended—

(1)

in subparagraph (D), by striking ; and
and inserting a semicolon; and

(2)

by adding at the end the following new subparagraph:

(F)

with respect to a target who is a United States person, includes a statement describing the investigative techniques carried out before making the application; and

.

203.

Investigations relating to Federal candidates and elected Federal officials

(a)

Title I

Section 104(a)(6) (50 U.S.C. 1804(a)(6)), as amended by section 202, is further amended by adding at the end the following new subparagraph:

(G)

if the target of the electronic surveillance is an elected Federal official or a candidate in a Federal election, that the Attorney General has approved in writing of the investigation;

.

(b)

Title III

Section 303(a)(6) (50 U.S.C. 1823(a)(6)), as amended by section 202, is further amended by adding at the end the following new subparagraph:

(G)

if the target of the physical search is an elected Federal official or a candidate in a Federal election, that the Attorney General has approved in writing of the investigation;

.

204.

Removal or suspension of Federal officers for misconduct before Foreign Intelligence Surveillance Court
Section 103 (50 U.S.C. 1803) is amended by adding at the end the following new subsection:

(I)

Removal or suspension of Federal officers for misconduct before courts

An employee, officer, or contractor of the United States Government who engages in deliberate misconduct with respect to proceedings before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review shall be subject to appropriate adverse actions, including, as appropriate, suspension without pay or removal.

.

205.

Penalties for offenses related to FISA

(a)

False declarations before FISC and FISCR

Section 1623(a) of title 18, United States Code, is amended by inserting before , or both the following: or, if such proceedings are before or ancillary to the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review established by section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803), imprisoned not more than eight years

.

(b)

Increased penalty for unauthorized use

Section 109(c) (50 U.S.C. 1809(c)) is amended by striking five years and inserting eight years

.

(c)

Unauthorized disclosure of applications

(1)

In general

Subsection (a) of section 109 (50 U.S.C. 1809) is amended—

(A)

in the matter preceding paragraph (1), by striking intentionally ;

(B)

in paragraph (1)—

(i)

by inserting intentionally before engages in ; and

(ii)

by striking ; or and inserting a semicolon;

(C)

in paragraph (2)—

(i)

by inserting intentionally before disclose or uses ; and

(ii)

by striking the period at the end and inserting ; or ; and

(D)

by adding at the end the following new paragraph:

(3)

is an employee, officer, or contractor of the United States Government and intentionally discloses an application, or classified information contained therein, for an order under any title of this Act to any person not entitled to receive classified information.

.

(2)

Conforming amendment

Subsection (b) of such section is amended by striking under subsection (a) and inserting under paragraph (1) or (2) of subsection (a)

.

206.

Contempts constituting crimes

Section 402 of title 18, United States Code, is amended by inserting after any district court of the United States

the following: , the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review established by section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803),

.

207.

Effective date

The amendments made by this title shall take effect on the date of the enactment of this Act and shall apply with respect to applications made under section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) on or after such date.

III

Foreign Intelligence Surveillance Court

301.

Declassification of significant decisions, orders, and opinions

(a)

Timing of declassification

Subsection (a) of section 602 (50 U.S.C. 1872) is amended by adding at the end the following new sentence: The Director shall complete the declassification review and public release of each such decision, order, or opinion by not later than 180 days after the date on which the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review issues such decision, order, or opinion.

.

(b)
Matters covered
Such subsection is further amended—

(1)
by striking Subject to subsection (b)
and inserting (1) Subject to subsection (b)
;

(2)
by striking includes a significant
and all that follows through , and,
and inserting is described in paragraph (2) and,
; and

(3)
by adding at the end the following new paragraph:

(2)
The decisions, orders, or opinions issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review described in this paragraph are such decisions, orders, or opinions that—

(A)
include a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of—

(i)
the term specific selection term
; or

(ii)
section 501(a)(5); or

(B)
result from a proceeding in which an amicus curiae has been appointed pursuant to section 103(i).

.

(c)
Application of requirement
Section 602 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1872) shall apply with respect to each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review before, on, or after the date of the enactment of such section.

With respect to such decisions, orders, or opinions issued before or on such date, the Director of National Intelligence shall complete the declassification review and public release of each such decision, order, or opinion pursuant to such section by not later than one year after the date of the enactment of this Act.

302.

Appointment of amici curiae and access to information

(a)

Expansion of appointment authority

Subparagraph (A) of section 103(i)(2) (50 U.S.C. 1803(i)(2)) is amended to read as follows:

(A)

shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court—

(i)

presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; or

(ii)

presents exceptional concerns about the protection of the rights of a United States person under the first amendment to the Constitution, unless the court issues a finding that such appointment is not appropriate; and

.

(b)

Authority to seek review

Subsection (i) of section 103 (50 U.S.C. 1803) is amended—

(1)

by redesignating paragraphs (7) through (11) as paragraphs (8) through (12), respectively; and

(2)

by inserting after paragraph (6) the following new paragraph:

(7)

Authority to seek review of decisions

(A)

FISA Court decisions

Following issuance of an order under this Act by the Foreign Intelligence Surveillance Court, an amicus curiae appointed under paragraph (2) may petition the court to certify for review to the Foreign Intelligence Surveillance Court of Review a question of law pursuant to subsection (j). If the court denies such petition, the court shall provide for the record a written statement of the reasons for such denial. Upon certification of any question of law pursuant to this subparagraph, the Court of Review shall appoint

the amicus curiae to assist the Court of Review in its consideration of the certified question, unless the Court of Review issues a finding that such appointment is not appropriate.

(B)

FISA Court of Review decisions

An amicus curiae appointed under paragraph (2) may petition the Foreign Intelligence Surveillance Court of Review to certify for review to the Supreme Court of the United States any question of law pursuant to section 1254(2) of title 28, United States Code.

.

(c)

Access to information

(1)

Application and materials

Subparagraph (A) of section 103(i)(6) (50 U.S.C. 1803(i)(6)) is amended by striking clause (ii) and inserting the following new clause:

(ii)

may make a submission to the court requesting access to any particular materials or information (or category of materials or information) that the amicus curiae believes to be relevant to the duties of the amicus curiae.

.

(2)

Consultation among amici curiae

Such section is further amended—

(A)

by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (D), and (E), respectively; and

(B)

by inserting after subparagraph (A) the following new subparagraph:

(B)

Consultation

If the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review determines that it is relevant to the duties of an amicus curiae appointed by the court under paragraph (2), the amicus curiae may consult with one or more of the other individuals designated by the court to serve as amicus curiae pursuant to paragraph (1) regarding any of the information relevant to any assigned proceeding.

.

(d)
Term limits

(1)
Requirement

Paragraph (1) of section 103(i) (50 U.S.C. 1803(i)) is amended by adding at the end the following new sentence: An individual may serve as an amicus curiae for a 5-year term, and the presiding judges may, for good cause, jointly reappoint the individual to a single additional term.

(2)
Application

The amendment made by paragraph (1) shall apply with respect to the service of an amicus curiae appointed under section 103(i) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(i)) that occurs on or after the date of the enactment of this Act, regardless of the date on which the amicus curiae is appointed.

303.
Effective and independent advice for Foreign Intelligence Surveillance Court
Section 103 (50 U.S.C. 1803), as amended by section 204, is further amended by adding at the end the following new subsection:

(m)
Independent legal advisors

(1)
Authority

The Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review may jointly employ legal advisors to assist the courts in all aspects of considering any matter before the courts, including with respect to—

(A)
providing advice on issues of law or fact presented by any application for an order under this Act;

(B)
requesting information from the Government in connection with any such application;

(C)
identifying any concerns with any such application; and

(D)
proposing requirements or conditions for the approval of any such application.

(2)

Direction

The legal advisors employed under paragraph (1) shall be subject solely to the direction of the presiding judges of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.

.

304.

Transcripts of proceedings and communications regarding applications

(a)

Transcripts

Subsection (c) of section 103 (50 U.S.C. 1803) is amended—

(1)

by striking Proceedings under this Act
and inserting (1) Proceedings under this Act
;

(2)

by inserting , and shall be transcribed
before the first period;

(3)

by inserting , transcriptions of proceedings,
after applications made
; and

(4)

by adding at the end the following new sentence: Transcriptions of proceedings shall be stored in a file associated with the relevant application or order.

.

(b)

Requirement for written records of interactions with court

Such subsection, as amended by paragraph (1) of this section, is further amended by adding at the end the following new paragraph:

(2)

The Attorney General and the Foreign Intelligence Surveillance Court shall maintain all written substantive communications between the Department of Justice and the court, including the identity of the employees of the court to or from whom the communications were made, regarding an application or order made under this title in a file associated with the application or order.

.

(c)

Conforming amendment

Subsection (i)(2) of section 103 (50 U.S.C. 1803) is amended by striking subsection (c) and inserting subsection (c)(1)

.

305.

Information provided in annual reports

(a)

Reports by Director of the Administrative Office of the United States Courts

Subsection (a)(1) of section 603 (50 U.S.C. 1873) is amended—

(1)

in subparagraph (E), by striking ; and
and inserting a semicolon;

(2)

in subparagraph (F), by striking the period at the end and inserting a semicolon; and

(3)

by adding at the end the following new subparagraphs:

(G)

the number of times the Attorney General required the emergency production of tangible things pursuant to section 501(i)(1) and the application under subparagraph (D) of such section was denied;

(H)

the number of certifications by the Foreign Intelligence Surveillance Court of Review pursuant to section 103(j); and

(I)

the number of requests to certify a question made by an amicus curiae to the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review pursuant to section 103(i)(7).

.

(b)

Reports by Director of National Intelligence

Subsection (b)(5)(B) of such section, as amended by section 101, is amended by inserting before the semicolon at the end the following: , including information received electronically and through hardcopy and portable media

.

IV
Transparency, sunsets, and other Matters

401.
Congressional oversight

(a)
In general
Section 601 (50 U.S.C. 1871) is amended—

(1)
by redesignating subsection (e) as subsection (f); and

(2)
by inserting after subsection (d) the following new subsection (e):

(e)
Congressional oversight
In a manner consistent with the protection of the national security, nothing in this Act or any other provision of law may be construed to preclude the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate from receiving in a timely manner, upon request, applications submitted under this Act to the Foreign Intelligence Surveillance Court, orders of the court, and relevant materials relating to such applications and orders.

.

(b)
Conforming amendment
Section 602(a) (50 U.S.C. 1872(a)) is amended by striking in section 601(e) and inserting in section 601(f)

.

402.
Establishment of compliance officers

(a)
In general
Title VI (50 U.S.C. 1871 et seq.) is amended by adding at the end the following new section:

605.
Compliance officers

(a)
Appointment

The head of each covered agency shall appoint a single Federal officer to serve as the Compliance Officer for that agency.

(b)

Compliance

Each Compliance Officer appointed under subsection (a) shall be responsible for overseeing the compliance of the relevant covered agency with the requirements of this Act.

(c)

Audits

Each Compliance Officer shall conduct routine audits of the compliance by the relevant covered agency with—

(1)

the requirements of this Act regarding submitting applications to the Foreign Intelligence Surveillance Court, including with respect to the accuracy of such applications; and

(2)

the minimization, targeting, querying, and accuracy procedures required by this Act.

(d)

Assessments

Each Compliance Officer shall—

(1)

conduct on a routine basis assessments of the efficacy of the minimization, targeting, querying, and accuracy procedures adopted by the Attorney General pursuant to this Act; and

(2)

annually submit to the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28, United States Code, and the head of the relevant covered agency the findings of such assessments, including any recommendations of the Compliance Officer with respect to improving such procedures.

(e)

Remediation

Each Compliance Officer shall ensure the remediation of any compliance issues of the relevant covered agency identified pursuant to this section or the rules of the Foreign Intelligence Surveillance Court.

(f)

Inspector Generals assessment

On an annual basis, and consistent with the protection of sources and methods, each Inspector General of a covered agency shall submit to the Foreign Intelligence Surveillance Court and the appropriate congressional committees an assessment of the implementation of this section by the covered agency.

(g)

Definitions

In this section:

(1)

Appropriate congressional committees

The term appropriate congressional committees means—

(A)

the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives; and

(B)

the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

(2)

Covered agency

The term covered agency

means a department or agency of the United States Government that submits applications to the Foreign Intelligence Surveillance Court under this Act.

(3)

Foreign Intelligence Surveillance Court

The term Foreign Intelligence Surveillance Court has the meaning given that term in section 101.

.

(b)

Clerical amendment

The table of sections at the beginning of the Foreign Intelligence Surveillance Act of 1978 is amended by inserting after the item relating to section 604 the following new item:

Sec. 605. Compliance officers.

.

403.

Public reports on information obtained or derived under FISA and protection of First Amendment activities

(a)

Reports

Not later than 180 days after the date of the enactment of this Act, the Attorney General shall make

publicly available the following reports:

(1)

A report explaining how the United States Government determines whether information is obtained or derived from activities authorized by the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) for purposes of the notice requirements under such Act.

(2)

A report explaining how the United States Government interprets the prohibition under section 501(a) of such Act (50 U.S.C. 1861(a)) on conducting an investigation of a United States person solely upon the basis of activities protected by the first amendment to the Constitution

.

(b)

Requirements

The Attorney General shall ensure that the reports under subsection (a) are detailed and use hypothetical fact patterns to describe how the United States Government conducts the analyses covered by the reports.

(c)

Form

The reports under subsection (a) shall be made publicly available in unclassified form.

404.

Mandatory reporting on certain orders

(a)

Reporting on United States person queries

Subsection (b)(2) of section 603 (50 U.S.C. 1873), as amended by section 101, is amended—

(1)

in subparagraph (B), by striking the number of search terms concerning a known United States person and inserting the number of search terms that concern a known United States person or are reasonably likely to identify a United States person
; and

(2)

in subparagraph (C), by striking the number of queries concerning a known United States person and inserting the number of queries that concern a known United States person or are reasonably likely to identify a United States person

.

(b)

Modification to exceptions

Subsection (d)(2) of such section, as amended by section 101, is amended by striking (A) Federal

and all that follows through (B) Electronic mail address and telephone numbers.—

.

405.

Report on use of FISA authorities regarding protected activities and protected classes

(a)

Report

Not later than one year after the date of the enactment of this Act, the Privacy and Civil Liberties Oversight Board shall make publicly available, to the extent practicable, a report on—

(1)

the extent to which the activities and protected classes described in subsection (b) are used to support targeting decisions in the use of authorities pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); and

(2)

the impact of the use of such authorities on such activities and protected classes.

(b)

Activities and protected classes described

The activities and protected classes described in this subsection are the following:

(1)

Activities and expression protected by the First Amendment to the Constitution of the United States.

(2)

Race, ethnicity, national origin, religious affiliation, sex, and any other protected characteristic determined appropriate by the Board.

(c)

Form

In addition to the report made publicly available under subsection (a), the Board may submit to the appropriate congressional committees a classified annex.

(d)

Appropriate congressional committees defined

In this section, the term appropriate congressional committees means—

(1)

the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives; and

(2)

the Committee on the Judiciary and the Select Committee on Intelligence of the Senate.

406.

Improvements to Privacy and Civil Liberties Oversight Board

Paragraph (4) of section 1061(h) of the Intelligence Reform and Terrorism Prevention Act of 2004 (42 U.S.C. 2000ee(h)) is amended to read as follows:

(4)

Term

(A)

Commencement

Each member of the Board shall serve a term of 6 years, commencing on the date of the appointment of the member to the Board.

(B)

Reappointment

A member may be reappointed to one or more additional terms.

(C)

Vacancy

A vacancy in the Board shall be filled in the manner in which the original appointment was made.

(D)

Extension

Upon the expiration of the term of office of a member, the member may continue to serve, at the election of the member—

(i)

during the period preceding the reappointment of the member pursuant to subparagraph (B); or

(ii)

until the member's successor has been appointed and qualified.

.

407.

Sunsets

(a)

USA PATRIOT improvement and reauthorization act of 2005

Section 102(b)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 (50 U.S.C. 1805 note) is amended by striking March 15, 2020

and inserting December 1, 2023

.

(b)

Intelligence reform and terrorism prevention act of 2004

Section 6001(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 1801

note) is amended by striking March 15, 2020

and inserting December 1, 2023

.

(c)

Effective date

The amendments made by this section shall take effect on the earlier of the date of the enactment of this Act or March 15, 2020.

408.

Technical amendments

(a)

In general

The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended as follows:

(1)

In section 103(e) (50 U.S.C. 1803(e)), by striking 702(h)(4)

both places it appears and inserting 702(i)(4)

.

(2)

In section 105(a)(4) (50 U.S.C. 1805(a)(4))—

(A)

by striking section 104(a)(7)(E)

and inserting section 104(a)(6)(E)

; and

(B)

by striking section 104(d)

and inserting section 104(c)

.

(3)

In section 501(a) (50 U.S.C. 1861(a)), by indenting paragraph (3) 2 ems to the left.

(4)

In section 603(b)(2)(C) (50 U.S.C. 1873(b)(2)(C)), by inserting and

after the semicolon.

(5)
In section 702 (50 U.S.C. 1881a)—

(A)
in subsection (h)(3), by striking subsection (i)
and inserting subsection (j)
;

(B)
in subsection (j)(1), by striking subsection (g)
each place it appears and inserting subsection (h)
; and

(C)
in the subsection heading of subsection (m), by inserting a comma after Assessments

.

(6)
In section 801(8)(B)(iii) (50 U.S.C. 1885(8)(B)(iii)), by striking 702(h)
and inserting 702(i)

.

(7)
In section 802(a)(3) (50 U.S.C. 1885a(a)(3)), by striking 702(h)
and inserting 702(i)

.

(b)
References to Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of
Review

(1)
Definitions
Section 101 (50 U.S.C. 1801) is amended by adding at the end the following new subsections:

(q)
The term Foreign Intelligence Surveillance Court
means the court established under section 103(a).

(r)
The terms Foreign Intelligence Surveillance Court of Review
and Court of Review
mean the court established under section 103(b).

.

(2)

Conforming amendments

The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

(A)

in section 102 (50 U.S.C. 1802), by striking the court established under section 103(a) and inserting the Foreign Intelligence Surveillance Court

;

(B)

in section 103 (50 U.S.C. 1803)—

(i)

in subsection (a)—

(I)

in paragraph (2)(A), by striking The court established under this subsection and inserting The Foreign Intelligence Surveillance Court

; and

(II)

by striking the court established under this subsection each place it appears and inserting the Foreign Intelligence Surveillance Court

;

(ii)

in subsection (g)—

(I)

by striking the court established pursuant to subsection (a) and inserting the Foreign Intelligence Surveillance Court

;

(II)

by striking the court of review established pursuant to subsection (b) and inserting the Foreign Intelligence Surveillance Court of Review

; and

(III)

by striking The courts established pursuant to subsections (a) and (b) and inserting The Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review

;

(iii)

in subsection (h), by striking a court established under this section

and inserting the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review
;

(iv)
in subsection (i)—

(I)
in paragraph (1), by striking the courts established under subsections (a) and (b)
and inserting the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review
;

(II)
in paragraph (3)(B), by striking the courts
and inserting the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review
;

(III)
in paragraph (5), by striking the court
and inserting the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, as the case may be,
;

(IV)
in paragraph (6), by striking the court
each place it appears and inserting the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review
;

(V)
by striking a court established under subsection (a) or (b)
each place it appears and inserting the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review
;

(VI)
by striking A court established under subsection (a) or (b)
each place it appears and inserting The Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review
;

(v)
in subsection (j)—

(I)
by striking a court established under subsection (a)

and inserting the Foreign Intelligence Surveillance Court
; and

(II)
by striking the court determines
and inserting the Foreign Intelligence Surveillance Court determines
;

(vi)
by striking the court established under subsection (a)
each place it appears and inserting the Foreign Intelligence Surveillance Court
; and

(vii)
by striking the court established under subsection (b)
each place it appears and inserting the Foreign Intelligence Surveillance Court of Review
;

(C)
in section 105(c) (50 U.S.C. 1805(c))—

(i)
in paragraph (2)(B), by striking the Court
and inserting the Foreign Intelligence Surveillance Court
; and

(ii)
in paragraph (3), by striking the court
each place it appears and inserting the Foreign Intelligence Surveillance Court
;

(D)
in section 401(1) (50 U.S.C. 1841(1)), by striking , and State

and inserting State
, Foreign Intelligence Surveillance Court
, and Foreign Intelligence Surveillance Court of Review
;

(E)
in section 402 (50 U.S.C. 1842)—

(i)
in subsection (b)(1), by striking the court established by section 103(a) of this Act
and inserting the Foreign Intelligence Surveillance Court

; and

(ii)
in subsection (h)(2), by striking the court established under section 103(a)
and inserting the Foreign Intelligence Surveillance Court
;

(F)
in section 501 (50 U.S.C. 1861)—

(i)
in subsection (b)(1), by striking the court established by section 103(a)
and inserting the Foreign Intelligence Surveillance Court
;

(ii)
in subsection (g)(3), by striking the court established under section 103(a)
and inserting the Foreign Intelligence Surveillance Court
; and

(iii)
in subsection (k)(1), by striking , and State

and inserting State
, and Foreign Intelligence Surveillance Court

;

(G)
in section 502(c)(1)(E), by striking the court established under section 103
and inserting the Foreign Intelligence Surveillance Court (as defined by section 101)
;

(H)
in section 801 (50 U.S.C. 1885)—

(i)
in paragraph (8)(B)(i), by striking the court established under section 103(a)
and inserting the Foreign Intelligence Surveillance Court
; and

(ii)
by adding at the end the following new paragraph:

(10)
Foreign Intelligence Surveillance Court

The term Foreign Intelligence Surveillance Court means the court established under section 103(a).

; and

(l)
in section 802(a)(1) (50 U.S.C. 1885a(a)(1)), by striking the court established under section 103(a) and inserting the Foreign Intelligence Surveillance Court

.

(c)
Updated references to certain individuals
The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended—

(1)
in section 102(a) (50 U.S.C. 1802(a))—

(A)
in paragraph (2), by striking him
and inserting the Attorney General
; and

(B)
in paragraph (3), by striking his certification
and inserting the Attorney General's certification
;

(2)
in section 103(a)(1) (50 U.S.C. 1803(a)(1)), by striking his decision
and inserting the decision of such judge
;

(3)
in section 104(a) (50 U.S.C. 1804(a))—

(A)
in the language preceding paragraph (1), by striking his finding
and inserting the Attorney General's finding
; and

(B)
in paragraph (3), by striking his belief
and inserting the applicant's belief
;

(4)
in section 105(a) (50 U.S.C. 1805(a)), by striking he
and inserting the judge
;

(5)
in section 106 (50 U.S.C. 1806)—

(A)
in subsection (e), by striking he
and inserting the person
; and

(B)
in subsection (j), by striking his discretion
and inserting the discretion of the judge
;

(6)
in section 109 (50 U.S.C. 1809)—

(A)
in subsection (a), by striking he
and inserting the person
; and

(B)
in subsection (b), by striking his official duties
and inserting the official duties of such officer
;

(7)
in section 305 (50 U.S.C. 1825)—

(A)
in subsection (f)(1), by striking he
and inserting the person
; and

(B)
in subsection (j)(1), by striking his discretion
and inserting the discretion of the judge
;

(8)
in section 307 (50 U.S.C. 1827)—

(A)
in subsection (a), by striking he
and inserting the person
; and

(B)
in subsection (b), by striking his official duties
and inserting the official duties of such officer
; and

(9)
in section 403 (50 U.S.C. 1843), by striking his designee
and inserting a designee of the Attorney General
.

(d)
Coordination with other amendments made by this Act
For purposes of applying amendments made by provisions of this Act other than this section, the
amendments made by this section shall be treated as having been enacted immediately before any such
amendments by other provisions of this Act.

From: MacTough, Melissa (NSD)
Subject: RE: FISA Path Forward - Senate Amendments
To: Boyd, Stephen E. (OLA); Demers, John C. (NSD); Wiegmann, Brad (NSD); Levi, William (OAG); Newman, Ryan D. (OAG); Escalona, Prim F. (OLA); (b) (6) (OLA)
Sent: March 14, 2020 10:21 PM (UTC-04:00)
Attached: response to possible amendments.docx

Stephen –

I have placed the possible amendments you circulated and our current thinking on (b) (5) in the attached word document for ease of reading. As you know, (b) (5)

(b) (5). I also understand that the FISC separately sent their technical amendments regarding the House Bill to the Senate.

Let me know if this needs to be in a more formal form.

Thanks.
-Melissa

From: Boyd, Stephen E. (OLA) <(b) (6)>
Sent: Saturday, March 14, 2020 11:08 AM
To: Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Wiegmann, Brad (NSD) <(b) (6)>; Levi, William (OAG) <(b) (6)>; Newman, Ryan D. (OAG) <(b) (6)>; Escalona, Prim F. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>
Subject: Re: FISA Path Forward - Senate Amendments

Update: to the extent possible, we will need to get the Senate (b) (5) by Monday at noon.

Sent from my iPhone

On Mar 13, 2020, at 5:06 PM, Boyd, Stephen E. (OLA) <(b) (6)> wrote:

Team FISA:

Here are the (b) (5) believed to be in the works in the Senate. It would be helpful to generate some ideas about (b) (5). We want to (b) (5).

The first in the list (b) (5).

Unfortunately, we don't have a great sense of timing yet. It is possible that we will need our ideas back to SJC by 10:00 AM Monday – but we are trying to confirm the timing of that now. (We don't necessarily need legislative text but if it's available we'll send it also.)

- Wyden Amendment 1: Would strike section 203 from the USA FREEDOM Reauthorization Act because of concerns about political corruption in OAG.
- Wyden Amendment 2 is section 103 of the Wyden-Daines bill (attached). It excludes internet search history information from the definition of business records under section 215.

- Paul Amendment to prohibit FISA orders where target is U.S. citizen. (No text available)
- Leahy “expanded amicus” Amendment is Section 202 of the Lee-Leahy bill (attached).
- Lee Amendment 1 is taken from Section 203 of the Lee-Leahy bill. It’s the part of section 203 that establishes a new section 901 of FISA. It’s the *Brady* requirement.
- Lee Amendment 2 is Section 104 of the Lee-Leahy bill. It requires PC for any order targeting a U.S. person.

Beyond this, we have our technical fixes list and some obvious DOJ amendments ((b) (5) , etc.) that we will push for should the opportunity arise and it make strategic sense to do so.

Thanks –

SB

<Lee Leahy Cramer FISA bill.pdf>
<Wyden-Daines bill.pdf>

- Wyden Amendment 1: Would strike section 203 from the USA FREEDOM Reauthorization Act because of concerns about political corruption in OAG.

(b) (5)

- Wyden Amendment 2 is section 103 of the Wyden-Daines bill (attached). It excludes internet search history information from the definition of business records under section 215.

(b) (5)

(b) (5)

- Paul Amendment to prohibit FISA orders where target is U.S. citizen. (No text available)

(b) (5)

(b) (5)

- Leahy “expanded amicus” Amendment is Section 202 of the Lee-Leahy bill (attached).

(b) (5)

(b) (5)

(b) (5) [Redacted]
[Redacted]

(b) (5) [Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

- Lee Amendment 1 is taken from Section 203 of the Lee-Leahy bill. It's the part of section 203 that establishes a new section 901 of FISA. It's the *Brady* requirement.

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]

- Lee Amendment 2 is Section 104 of the Lee-Leahy bill. It requires PC for any business records order targeting a U.S. person.

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

From: Blier, William M.\(OIG\)
Subject: RE: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures
To: Newman, Ryan D. \(\OAG\); Levi, William \(\OAG\)
Cc: Weinsheimer, Bradley \(\ODAG\)
Sent: March 25, 2020 12:43 PM (UTC-04:00)
Attached: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woodspdf

Gentlemen,

Attached is the final draft of the OIG's MAM on the FBI's execution of the Woods Procedures, with the FBI's response appended. I understand from the emails below that the Department would like to submit a formal response, also to be appended to the memorandum when it is issued and posted publicly. As previously noted, we would appreciate receiving the Department's response by Friday, but please let me know if that is problematic in view of the circumstances. We are planning to issue the memorandum early next week.

Thanks. Bill

From: Newman, Ryan D. (OAG)
Sent: Tuesday, March 24, 2020 3:24 PM
To: Blier, William M.(OIG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>
Subject: RE: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures

Excellent. Sounds good, Bill.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice
T: (b) (6)
M: (b) (6)
(b) (6)

From: Blier, William M.(OIG) <(b) (6)>
Sent: Tuesday, March 24, 2020 3:15 PM
To: Newman, Ryan D. (OAG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>
Subject: RE: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures

Ryan,

Thanks for the heads up. I expect to be able to forward to you guys tomorrow the final version of the Memorandum, updated to include some minor revisions made as a result of comments from FBI and NSD. It would be fine with us if we receive your formal response by Thursday or Friday. We'll plan to issue early next week.

Let me know if you have any questions.

Thanks again. Bill

From: Newman, Ryan D. (OAG)
Sent: Tuesday, March 24, 2020 2:40 PM
To: Blier, William M.(OIG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>

Subject: FW: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures

Bill,

Will asked that I let you know that the Department would like to submit a formal response to the OIG memorandum to be included along with the FBI response. We should be able to get you something by the end of day tomorrow.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)
M: (b) (6)
(b) (6)

From: Levi, William (OAG)
Sent: Wednesday, March 18, 2020 8:13 PM
To: Newman, Ryan D. (OAG) <(b) (6)>
Subject: FW: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures

From: Blier, William M.(OIG) <(b) (6)>
Sent: Wednesday, March 18, 2020 7:02 PM
To: Levi, William (OAG) <(b) (6)>; Weinsheimer, Bradley (ODAG) <(b) (6)>
Subject: OIG DRAFT Management Advisory Memorandum - FBI's Execution of its Woods Procedures

Will/Brad,

Attached is the final draft of the management advisory memorandum resulting from the OIG's ongoing audit of the *FBI's Execution of its Woods Procedures*. Also attached is a redlined version showing revisions made to the March 10 draft as a result of input from FBI and NSD. We provided this final draft to FBI and NSD earlier today. We have requested that if the FBI would like to provide a formal response to be appended to the memorandum when we issue it publicly, it should do so by the close of business on Monday, March 23, 2020. We will provide the FBI's response, if any, to you when we receive it. If the Department would like to provide a formal response to be appended to the memorandum after seeing the FBI's response, we would want to receive it promptly after we provide any FBI response to you. The specific date the final memorandum will be released has yet to be determined, but it will be shortly after the above process concludes.

Please follow the same document handling procedures we described in forwarding the March 10 draft to you.

Let me know if you have any questions. I will provide the document passwords in a separate email.

Thanks. Bill



Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

FROM: Bradley Weinsheimer *G. Bradley Weinsheimer*
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: March 27, 2020

SUBJECT: Response to the Office of the Inspector General Management Advisory
Memorandum on the Federal Bureau of Investigation's Woods Procedures

The Department of Justice (Department) appreciates the steps undertaken by the Office of the Inspector General (OIG) as part of its "Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court (FISC) Relating to U.S. Persons." The audit's initial review and work to date are described in a Management Advisory Memorandum (Memorandum) that the OIG has provided in final draft to the Federal Bureau of Investigation (FBI) and the Department. The Memorandum contains two recommendations, with which the Department and FBI both fully agree.

The Department is committed to ensuring that Foreign Intelligence Surveillance Act (FISA) applications the Government submits to the FISC are complete and accurate. The OIG rightly identified the importance of the FBI's Woods Procedures to its FISA application process. The FBI's Woods Procedures require FBI personnel to compile supporting documentation for each fact included in a FISA application for electronic surveillance or physical search that is submitted to the FISC. This process is an important part of the FBI's internal procedures designed to facilitate accuracy in FISA applications.

As the FBI noted in its response to the draft Memorandum, the FBI has already undertaken many changes to improve FISA application processing. For example, the FBI revised its Woods Procedures form, developed a new confidential human source checklist, developed and released training on this checklist, developed and is working to provide new training on revised FISA forms, and developed new FISA process rigor training. The revised Woods Procedures form now requires agents and supervisors to attest to their diligence in re-

verifying facts from prior applications. All Woods Procedures forms must now be scanned and maintained in the electronic case file.

The Department understands that your audit examined a sample of FISA applications targeting U.S. persons between October 2014 and September 2019 to determine whether the contents of the Woods files supported factual statements in the associated FISA applications. Your audit found deficiencies in the FBI's adherence to its Woods Procedures. Specifically, the audit work to date identified instances of missing Woods files, unsupported facts based on review of the Woods files, and other possible errors. The audit did not examine any FISA applications filed after implementation of the reforms described above.

Although the audit is ongoing, the Memorandum sets forth two recommendations to the FBI. Those recommendations are that: (i) the FBI institute a requirement that it, in coordination with the Department's National Security Division (NSD), systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors so that the FBI can enhance training to improve agents' performance in completing the Woods Procedures, or improve policies to help ensure the accuracy of FISA applications; and (ii) the FBI perform a physical inventory to ensure that Woods files exist for every FISA application submitted to the FISC in all pending investigations. As noted in the FBI's response to the Memorandum, the FBI has agreed to adopt these recommendations and has already taken steps to implement them. The Department also concurs with these recommendations.

As set forth in the FBI's response to the draft Memorandum, the FBI already has formed a team to analyze accuracy and minimization review data as part of the corrective actions announced after the December 2019 OIG report. This team, led by the FBI's Office of Integrity and Compliance, is required to identify and propose audit, review, and compliance mechanisms related to the FBI's FISA processes, including its Woods Procedures. In addition, the FBI's General Counsel has directed every relevant division to account for and ensure the proper maintenance of all FISA Accuracy Subfiles for all dockets (including renewals) beginning on or after January 1, 2015. This action, as the FBI stated in its response to the draft Memorandum, exceeds the OIG's recommendation that these steps be taken only for pending investigations.

NSD conducts analysis of trends based on its oversight work and has incorporated lessons learned from accuracy reviews in how it drafts FISA applications and in training. Consistent with the draft Memorandum's recommendation, NSD will continue to systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors and will work with the FBI so that it can enhance training to improve compliance with the Woods Procedures and shape policies to help ensure the accuracy of FISA applications.

FISA is an essential tool to guard against terrorism and other national security threats. The Department and FBI are committed to taking whatever steps are necessary to ensure the integrity of the FISA process, including strengthening existing policies, procedures, and training to facilitate accuracy in FISA applications.

From: Raimondi, Marc (OPA)
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT
To: Kupec, Kerri (OPA); Weinsheimer, Bradley (ODAG)
Cc: MacTough, Melissa (NSD); Andrews, Kelli (NSD); Hornbuckle, Wyn (OPA); Levi, William (OAG)
Sent: March 30, 2020 5:01 PM (UTC-04:00)
Attached: 2020 03 30 1645 Public Affairs Guidance for OIG Woods Report.docx

Team, here is the document which reverts back to the statement we had prior to modification and that (b) (5)

If there are no more edits and Kerri approves this public affairs guidance, I think we can consider this final.

From: Kupec, Kerri (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 4:26 PM
To: Weinsheimer, Bradley (ODAG) <(b) (6)>
Cc: Raimondi, Marc (OPA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>;
Andrews, Kelli (NSD) <(b) (6)>; Hornbuckle, Wyn (OPA) <(b) (6)>; Levi,
William (OAG) <(b) (6)>
Subject: Re: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

Okay. Let's be sure to clearly make that point on background (b) (5)

On Mar 30, 2020, at 4:22 PM, Weinsheimer, Bradley (ODAG) <(b) (6)> wrote:

I don't think (b) (5) fits. (b) (5)
. I would leave that out, or at least move it to background.

From: Raimondi, Marc (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 4:17 PM
To: Kupec, Kerri (OPA) <(b) (6)>; MacTough, Melissa (NSD)
<(b) (6)>
Cc: Weinsheimer, Bradley (ODAG) <(b) (6)>; Andrews, Kelli (NSD)
<(b) (6)>; Hornbuckle, Wyn (OPA) <(b) (6)>
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

Team, here is the document updated with a statement that adds (b) (5).

If everyone is good with this, I will share it with OLA and the wider group at OAG and ODAG.

From: Kupec, Kerri (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 2:43 PM
To: MacTough, Melissa (NSD) <(b) (6)>
Cc: Weinsheimer, Bradley (ODAG) <(b) (6)>; Raimondi, Marc (OPA)
<(b) (6)>; Andrews, Kelli (NSD) <(b) (6)>; Hornbuckle, Wyn
(OPA) <(b) (6)>
Subject: Re: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

Marc, let's include (b) (5); then segue into (b) (5)

On Mar 30, 2020, at 2:35 PM, MacTough, Melissa (NSD) <(b) (6)> wrote:

Just a couple more things from me

From: Weinsheimer, Bradley (ODAG) <(b) (6)>
Sent: Monday, March 30, 2020 2:28 PM
To: Raimondi, Marc (OPA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>
Cc: Andrews, Kelli (NSD) <(b) (6)>; Hornbuckle, Wyn (OPA) <(b) (6)>
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

Looks good to me. I broke the quote into one more sentence to make it more digestible.
Thanks, Brad.

From: Raimondi, Marc (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 2:21 PM
To: MacTough, Melissa (NSD) <(b) (6)>; Weinsheimer, Bradley (ODAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>
Cc: Andrews, Kelli (NSD) <(b) (6)>; Hornbuckle, Wyn (OPA) <(b) (6)>
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

Team, Adding in Kerri here to weigh in before we send it to OLA and the wider group.

Brad/Melissa, I incorporated all your edits and moved the points Melissa made to Q&A format. Please review again and make sure I caught all your edits properly and that the Q&A section is ok. I would only use the Q&A to shape media understanding.
MR

From: MacTough, Melissa (NSD) <(b) (6)>
Sent: Monday, March 30, 2020 1:55 PM
To: Weinsheimer, Bradley (ODAG) <(b) (6)>; Raimondi, Marc (OPA) <(b) (6)>
Cc: Andrews, Kelli (NSD) <(b) (6)>
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

A few comments from me

From: Weinsheimer, Bradley (ODAG) <(b) (6)>
Sent: Monday, March 30, 2020 1:41 PM
To: Raimondi, Marc (OPA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>
Cc: Andrews, Kelli (NSD) <(b) (6)>
Subject: RE: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

I like the approach. Some proposed edits in the attached. Thanks, Brad.

From: Raimondi, Marc (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 1:17 PM
To: Weinsheimer, Bradley (ODAG) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>
Cc: Andrews, Kelli (NSD) <(b) (6)>
Subject: 2020 03 30 1310 Public Affairs Posture for OIG Woods Report DRAFT

AAG Demers Bcc'd for awareness

Team, attached is a draft of the public affairs response to query statement and background points.

(b)(5) per FBI

I suggest that we (b) (5)

(b) (5) . Thus, to media that inquire, I recommend that we (b) (5)

I wanted to run this by both of you (Melissa and Brad) before sharing it with Boyd and Kupec for their review.

Please review and let me know your thoughts.

Respectfully,
Marc

<2020 03 30 1410 Public Affairs Posture for OIG Woods Report DRAFT
+GBW(mm).docx>

From: Relay, Sean M. (OIG)
Subject: OIG Management Advisory Memorandum 20-047 - FBI's Execution of Woods Procedures for Applications Filed with the FISC Relating to U.S. Persons
To: Weinsheimer, Bradley (ODAG); (b)(6), (7)(C), (7)(E) per FBI (DO) (FBI); (b)(6), (7)(C), (7)(E) per FBI (DO) (FBI)
Cc: Levi, William (OAG); Hodes, Jarad (ODAG); (b)(6) per NSD (NSD); (b)(6) per NSD (NSD); Murphy, Paul B. (DO) (FBI); Leff, Douglas A. (SJ) (FBI); (b)(6), (7)(C), (7)(E) per FBI (FBI); (b)(6), (7)(C), (7)(E) per FBI (FBI); Ryder, Neil (JMD); ALO (JMD); Hines, Ashley (JMD); Taraszka, Carol S. (OIG)
Sent: March 30, 2020 5:06 PM (UTC-04:00)
Attached: OIG Management Advisory Memorandum 20-047 - FBI's Execution of Woods Procedures for Applications Filed with the FISC Relating to US Persons .pdf

Attached please find a Management Advisory Memorandum for the FBI Director Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons. The Management Advisory Memorandum will be released publicly on Tuesday, March 31, 2020.

Please contact me if you have problems accessing the attached file.

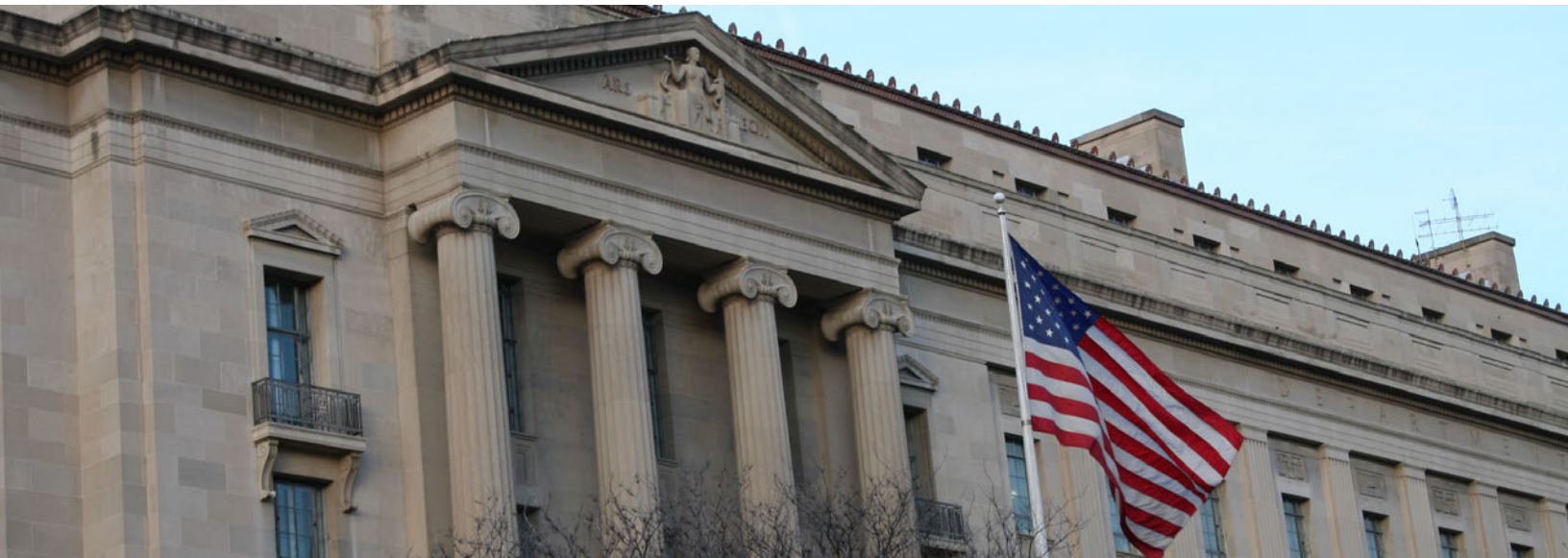
Thank you,

Sean M. Relay
Senior Policy Advisor
Department of Justice
Office of the Inspector General
Audit Division
Office: (b) (6)
Cell: (b) (6)



Office of the Inspector General U.S. Department of Justice

OVERSIGHT ★ INTEGRITY ★ GUIDANCE



Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons

Audit Division 20-047

March 2020



U.S. Department of Justice

Office of the Inspector General

March 30, 2020

MANAGEMENT ADVISORY MEMORANDUM FOR:

CHRISTOPHER WRAY
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Audit of the Federal Bureau of Investigation's
Execution of its Woods Procedures for Applications
Filed with the Foreign Intelligence Surveillance Court
Relating to U.S. Persons

As you are aware, in December 2019 my office issued a report examining four Foreign Intelligence Surveillance Act (FISA) applications—an initial application and three renewal applications—targeting a U.S. Person and other aspects of the Federal Bureau of Investigation's (FBI) "Crossfire Hurricane" investigation ("December 2019 FISA Report").¹ As detailed in our report, among other things, we identified fundamental and serious errors in the agents' conduct of the FBI's factual accuracy review procedures ("Woods Procedures") with regard to all four FISA applications. We found, for example, numerous instances where the Woods File did not include supporting documentation for factual assertions contained in the FISA applications, as required by FBI policy. Additionally, we determined that the Woods File did not contain, as also required by FBI policy, documentation from the Confidential Human Source's (CHS) handling agent stating that the handling agent had reviewed the facts presented in the FISA application regarding the CHS's reliability and background, and that the facts presented were accurate. We further found that the FBI had failed to follow its policies for re-verifying factual

¹ DOJ OIG's *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, Oversight & Review Division Report 20-012 (December 2019), <https://oig.justice.gov/reports/2019/o20012.pdf>.

assertions made in the initial FISA application that were also included in the three FISA renewal applications.

As a result of these findings, in December 2019, my office initiated an audit to examine more broadly the FBI's execution of, and compliance with, its Woods Procedures relating to U.S. Persons covering the period from October 2014 to September 2019. As an initial step in our audit, over the past 2 months, we visited 8 FBI field offices of varying sizes and reviewed a judgmentally selected sample of 29 applications relating to U.S. Persons and involving both counterintelligence and counterterrorism investigations. This sample was selected from a dataset provided by the FBI that contained more than 700 applications relating to U.S. Persons submitted by those 8 field offices over a 5-year period. The proportion of counterintelligence and counterterrorism applications within our sample roughly models the ratio of the case types within that total of FBI FISA applications. Our initial review of these applications has consisted solely of determining whether the contents of the FBI's Woods File supported statements of fact in the associated FISA application; our review did not seek to determine whether support existed elsewhere for the factual assertion in the FISA application (such as in the case file), or if relevant information had been omitted from the application. For all of the FISA applications that we have reviewed to date, the period of court-authorized surveillance had been completed and no such surveillance was active at the time of our review.

We reviewed these applications, and met with available case agents or supervisors who were responsible for them, to assess whether the FBI complied with its Woods Procedures for FISA applications submitted to the Foreign Intelligence Surveillance Court (FISC). We also obtained and reviewed information from the FBI and the Department of Justice's (Department or DOJ) National Security Division (NSD) about their FISA application oversight mechanisms. Specifically, in addition to interviewing FBI and NSD officials, we reviewed 34 FBI and NSD accuracy review reports covering the period from October 2014 to September 2019—which originated from the 8 field offices we have visited to date and addressed a total of 42 U.S. Person FISA applications, only one of which was also included among the 29 FISA applications that we reviewed.

As a result of our audit work to date and as described below, we do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy. Specifically, the Woods Procedures mandate compiling supporting documentation for each fact in the FISA application. Adherence to the Woods Procedures should result in such documentation as a means toward achievement of the FBI's policy that FISA applications be "scrupulously accurate." Our lack of confidence that the Woods Procedures are working as intended stems primarily from the fact that: (1) we could not review original Woods Files for 4 of the 29 selected FISA applications because the FBI has not

been able to locate them and, in 3 of these instances, did not know if they ever existed; (2) our testing of FISA applications to the associated Woods Files identified apparent errors or inadequately supported facts in all of the 25 applications we reviewed, and interviews to date with available agents or supervisors in field offices generally have confirmed the issues we identified; (3) existing FBI and NSD oversight mechanisms have also identified deficiencies in documentary support and application accuracy that are similar to those that we have observed to date; and (4) FBI and NSD officials we interviewed indicated to us that there were no efforts by the FBI to use existing FBI and NSD oversight mechanisms to perform comprehensive, strategic assessments of the efficacy of the Woods Procedures or FISA accuracy, to include identifying the need for enhancements to training and improvements in the process, or increased accountability measures.

During this initial review, we have not made judgments about whether the errors or concerns we identified were material. Also, we do not speculate as to whether the potential errors would have influenced the decision to file the application or the FISC's decision to approve the FISA application. In addition, our review was limited to assessing the FBI's execution of its Woods Procedures, which are not focused on affirming the completeness of the information in FISA applications.

Nevertheless, we believe that a deficiency in the FBI's efforts to support the factual statements in FISA applications through its Woods Procedures undermines the FBI's ability to achieve its "scrupulously accurate" standard for FISA applications. We are providing you with this management advisory memorandum because we believe this information about our preliminary results will help inform the FBI in its ongoing efforts to address the recommendations included in our December 2019 FISA Report, and because we believe our audit work to date warrants additional OIG recommendations, which we have included in this memorandum.

FBI Woods Procedures, "Woods Files," and Certain Oversight Mechanisms

The FBI implemented its Woods Procedures in 2001 following errors in numerous FISA applications submitted to the FISC in FBI counterterrorism investigations. The stated purposes of the Woods Procedures are to minimize factual inaccuracies in FISA applications and to ensure that statements contained in applications are "scrupulously accurate." FBI policy requires the case agent who will be requesting the FISA application to create and maintain an accuracy sub-file (known as a "Woods File") that contains: (1) supporting documentation for every factual assertion contained in a FISA application, and (2) supporting documentation and the results of required database searches and other verifications. Following the creation of the Woods File, the case agent signs the "FD-1079 FISA Verification Form" (Woods Form) to affirm "the accuracy of each and every factual assertion... and that back-up

documentation for each such fact has been retained” in the Woods File. The supervisory special agent is also required to sign the form, confirming that the supervisory special agent has reviewed the Woods File and determined that it contains supporting documentation for every factual assertion within the FISA application. This form must be completed prior to an application being submitted to the FISC.

FBI policy also states that the FBI and DOJ’s NSD “have instituted two broad oversight mechanisms designed to ensure that FISA applications contain accurate and verified information.” Specifically, the FBI requires its Chief Division Counsel (CDC) in each FBI field office to perform each year an accuracy review of at least one FISA application from that field office. Similarly, NSD’s Office of Intelligence (OI) conducts its own accuracy review each year of at least 1 FISA application originating from each of approximately 25 to 30 different FBI field offices. Both the FBI’s and NSD’s accuracy reviews are performed on applications that have already been submitted to and approved by the FISC. The agreed-upon procedures for these accuracy reviews are memorialized in a 2009 joint FBI-NSD memorandum.

Concerns Related to FBI and DOJ National Security Division Accuracy Reviews

As part of our initial audit work, we met with FBI and NSD officials about the current mechanisms that each organization has in place to review the accuracy of FISA applications. As noted above, FBI policy requires the CDCs in each field office to conduct an accuracy review each year of at least one application for an active FISA surveillance order from that field office. According to FBI Office of General Counsel (OGC) officials, these FBI CDC accuracy reports are sent to the FBI OGC at FBI headquarters. NSD OI officials reported that they are not provided with the FBI CDC reports. Separately, as noted above, NSD OI conducts its own accuracy review each year of at least 1 FISA application originating from each of approximately 25 to 30 different FBI field offices. We requested that the FBI provide us with the reports from the FBI CDC and NSD OI accuracy reviews conducted from fiscal years 2015 through 2019. For the 8 field offices that we have visited to date, we received and reviewed a total of 34 FBI CDC and NSD OI reports addressing 42 separate U.S. Person FISA applications.

According to interviews we conducted with FBI and NSD officials, the reviews these entities perform are not focused on assessing compliance with the Woods Procedures or the adequacy of the Woods File. Instead, these reviews are focused on determining whether support exists at the time of the FBI CDC or NSD OI review for each factual assertion in the FISA application under review. Thus, prior to the FBI CDC or NSD OI review, field offices are given advance notification of which FISA application(s) will be reviewed and are expected to compile documentary evidence to support the relevant FISA

application(s). While the field office can use, if available, a well-maintained and complete Woods File for this purpose, it is not required to do so. It follows that this method should identify fewer unsupported facts in the application than would result from only reviewing the Woods File (as the OIG has done in our audit) because the responsible personnel are aware of the upcoming review and given time to gather any existing documentation to support the factual assertions in the FISA applications.

Our preliminary review of the 34 FBI CDC and NSD OI accuracy review reports covering the period from October 2014 to September 2019 for the 8 field offices we visited—which address a total of 42 U.S. Person FISA applications, 1 of which was also included among the 29 FISA applications that we reviewed—revealed that these oversight mechanisms routinely identified deficiencies in documentation supporting FISA applications similar to those that, as described in more detail below, we have observed during our audit to date. Although reports related to 3 of the 42 FISA applications did not identify any deficiencies, the reports covering the remaining 39 applications identified a total of about 390 issues, including unverified, inaccurate, or inadequately supported facts, as well as typographical errors. At this stage in our audit, we have not yet reviewed these oversight reports in detail. Our compilation of the issues identified was produced by reviewing available summary information and did not include examining the specifics of the issues or determining if or how individual issues may have been resolved or mitigated during the review, such as by the case agent providing additional supporting documentation from the case file or if there was coordination with NSD OI and a correction to the application text was made in a subsequent application.

The 2009 joint FBI-NSD policy memorandum states that “OI determines, in consultation with the FBI, whether a misstatement or omission of fact identified during an accuracy review is material.” The 34 reports that we reviewed indicate that none of the approximately 390 identified issues were deemed to be material. However, we were told by NSD OI personnel that the FBI had not asked NSD OI to weigh in on materiality determinations nor had NSD OI formally received FBI CDC accuracy review results, which accounted for about 250 of the total issues in the reports we reviewed. We noted that the joint FBI-NSD policy memorandum does not specifically require that all misstatements or omissions identified during the FBI CDC accuracy reviews be reported to NSD and FBI officials, but rather only requires that CDCs report potentially material misstatements and omissions.

According to FBI OGC personnel, FBI CDCs record their results in a standardized report template that is submitted to FBI OGC at FBI headquarters. However, these submissions are tracked by FBI OGC only to ensure CDC compliance with the requirement to perform the reviews. While FBI officials have told us that corrective action or training may occur at the individual field office level based upon the results of the CDC reviews, no

comprehensive, strategic analysis of the cumulative results is performed at the FBI headquarters level. For NSD OI accuracy reviews, the results are reported in formal correspondence distributed to the head of the local FBI field office and CDC, as well as FBI OGC personnel and other FBI headquarters officials.

Therefore, the results of FBI CDC and NSD OI oversight mechanisms have been available to relevant FBI officials responsible for ensuring the integrity of the FBI's FISA program. FBI OGC personnel told us, however, that the FBI CDC and NSD OI accuracy review reports had not been used in a comprehensive, strategic fashion by FBI Headquarters to assess the performance of individuals involved in and accountable for FISA applications, to identify trends in results of the reviews, or to contribute to an evaluation of the efficacy of quality assurance mechanisms intended to ensure that FISA applications were "scrupulously accurate." That is, the accuracy reviews were not being used by the FBI as a tool to help assess the FBI's compliance with its Woods Procedures.

An NSD official informed us that NSD OI has used its FISA accuracy review results in "trends reports." This official further informed us that these trends reports include observations on the categories and types of errors identified in the reviews and that the review results are used to train new and experienced NSD OI attorneys on FISA application writing and to communicate notable issues as well as best practices. Our audit to date has been focused solely on the FBI and its execution of its Woods Procedures, and we have not yet received or reviewed these NSD OI trends reports. Also, we note that to date we have not identified or been told about any use by the FBI of these OI trends reports to make modifications or enhancements to the FBI's Woods Procedures or other efforts at the FBI to ensure the accuracy of FISA applications.

While the FBI CDC and NSD OI accuracy reviews do not have the stated purpose of confirming the efficacy of the FBI's execution of its Woods Procedures, we believe that the FBI's comprehensive, strategic examination of the results of these reviews would have put the FBI on notice that the Woods Procedures were not consistently executed thoroughly and rigorously for applications submitted during our review period so as to help ensure the FBI's FISA applications were "scrupulously accurate." In addition, the results of these reviews provide a significant amount of information that could be used to assess the FBI's performance of the critical quality assurance measures in its Woods Procedures, and we recommend below that the FBI conduct such an effort in coordination with NSD. FBI OGC informed us that in response to the OIG's December 2019 FISA Report, the FBI started, among other actions, analyzing data contained in the accuracy reviews and coordinating with NSD OI to gain more insight into NSD OI's reviews. As our audit continues, we intend to examine these FISA oversight mechanisms in more detail, including

the process for ensuring that adequate corrective action is taken on individual applications reviewed for accuracy.

Concerns Identified to Date in the OIG Audit of the FBI's Execution of its Woods Procedures

Although all 29 FISA applications that we selected for review were required by FBI policy to have Woods Files created by the case agent and reviewed by the supervisory special agent, we have identified 4 applications for which, as of the date of this memorandum, the FBI either has been unable to locate the Woods File that was prepared at the time of the application or for which FBI personnel suggested a Woods File was not completed. We, therefore, make a recommendation below that the FBI take steps to ensure that a Woods File exists for every FISA application submitted to the FISC in all pending investigations.

Additionally, for all 25 FISA applications with Woods Files that we have reviewed to date, we identified facts stated in the FISA application that were: (a) not supported by any documentation in the Woods File, (b) not clearly corroborated by the supporting documentation in the Woods File, or (c) inconsistent with the supporting documentation in the Woods File. While our review of these issues and follow-up with case agents is still ongoing—and we have not made materiality judgments for these or other errors or concerns we identified—at this time we have identified an average of about 20 issues per application reviewed, with a high of approximately 65 issues in one application and less than 5 issues in another application.

Moreover, although there are specific requirements related to FISA applications that utilize CHS reporting, we have observed that these requirements are not being consistently followed. Specifically, the Woods Procedures require that when a FISA application contains reporting from an FBI CHS, the Woods File must include documentation from the handling agent or CHS coordinator (or either of their immediate supervisors) stating that: (1) this individual has reviewed the facts presented in the FISA application regarding the CHS's reliability and background; and (2) based on a review of the CHS file documentation, the facts presented in the FISA application are accurate. About half of the applications we reviewed contained facts attributed to CHSs, and for many of them we found that the Woods File lacked documentation attesting to these two requirements. For some of these applications, the case agent preparing the FISA application was also the handling agent of the CHS referenced in the application, and therefore would have been familiar with the information in CHS files. Nevertheless, the FBI's policy does not specifically annul the requirement in these situations, and the required documentation was not included in the Woods File.

Our preliminary results also indicate that FBI case agents are not consistently following Woods Procedures requirements related to renewal applications. If continued FISA coverage on a U.S. Person is deemed necessary, the FBI must request from the FISC a renewal of its authorization every 90 days. According to FBI policy, the case agent is required to re-verify that statements of fact repeated in a renewal application from an initial FISA application remain true and must obtain supporting documentation for any new statements of fact included in the renewal application that goes to the FISC for approval. However, based on the results of our review of two renewal files, as well as our discussions with FBI agents, it appears that the FBI is not consistently re-verifying the original statements of fact within renewal applications. In one instance, we observed that errors or unsupported information in the statements of fact that we identified in the initial application had been carried over to each of the renewal applications. In other instances, we were told by the case agents who prepared the renewal applications that they only verified newly added statements of fact in renewal applications because they had already verified the original statements of fact when submitting the initial application. This practice directly contradicts FBI policy.

We believe that the repeated weaknesses in the FBI's execution of the Woods Procedures in each of the 29 FISA applications we reviewed to date—including the 4 applications for which the FBI could not furnish an original Woods File—raise significant questions about the extent to which the FBI is complying with its own requirement that FISA applications be supported by documentation in the Woods File as part of its efforts to ensure that applications are “scrupulously accurate.” Our concerns are supported by the fact that in four instances the FBI could not produce the original Woods File, that the Woods File deficiencies that we identified spanned all eight field offices in which we performed fieldwork, that case agents or supervisors whom we interviewed generally did not contest our results, and that the FBI CDC and NSD OI accuracy reviews conducted for the same period of our review identified similar deficiencies. As a result, we do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy, or that the process is working as it was intended to help achieve the “scrupulously accurate” standard for FISA applications.

As noted earlier in this memorandum, we have not made materiality judgments for these or other errors or concerns we identified. Also, we do not speculate as to whether the potential errors would have influenced the decision to file the application or the FISC's decision to approve the FISA application. Our review was limited to assessing whether the FBI's Woods Files included documentation to support the factual statements in its FISA applications as required by FBI policy; we did not review case files or other documentation to confirm FISA application accuracy or identify any relevant omissions. As our audit continues, we intend to provide the FBI with the details of issues we observed in each of the FISA applications we reviewed to date so that the FBI

can coordinate with NSD to assess whether any of the observed deficiencies were material, and to take action they deem appropriate.

Continued Audit Work

In connection with our ongoing audit, the OIG will conduct further analysis of the deficiencies identified in our work to date and of FBI FISA renewals. In addition, we are expanding the audit's objective to also include FISA application accuracy efforts performed within NSD. Consistent with the OIG's usual practices, we will keep the Department and the FBI appropriately apprised of the scope of our audit, and we will prepare a formal report at the conclusion of our work.

In addition, we understand that, as a result of the OIG's December 2019 report on the Crossfire Hurricane investigation, the FBI is implementing changes to some of its FISA-related policies, procedures, and practices. The OIG's assessment of whether those corrective actions are sufficient to address the recommendations in our December 2019 report will be conducted in accordance with the OIG's usual practices for following up on recommendations.

Recommendations

We recommend that the FBI institute a requirement that it, in coordination with NSD, systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors so that the FBI can enhance training to improve agents' performance in completing the Woods Procedures, or improve policies to help ensure the accuracy of FISA applications.

We recommend that the FBI perform a physical inventory to ensure that Woods Files exist for every FISA application submitted to the FISC in all pending investigations.



We provided a draft of this advisory memorandum to the FBI, and the FBI's response can be found in Attachment 1. We intend to work with the FBI throughout our ongoing audit of the FBI's execution of its Woods Procedures to monitor actions taken in response to the recommendations in this memorandum.

Attachment

cc: Honorable William P. Barr
Attorney General

Honorable Jeffrey Rosen
Deputy Attorney General

William Levi
Chief of Staff
Office of the Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Jarad Hodes
Senior Counsel to the Deputy Attorney General

Honorable John C. Demers
Assistant Attorney General
National Security Division

Patrick Findlay
Special Counsel
National Security Division

Paul B. Murphy
Chief of Staff
Federal Bureau of Investigation

Douglas A. Leff
Assistant Director
Inspection Division
Federal Bureau of Investigation

Scott B. Cheney
Deputy Assistant Director
Inspection Division
Federal Bureau of Investigation

Thomas G. Seiler
Acting Section Chief
External Audit and Compliance Section
Inspection Division
Federal Bureau of Investigation

Louise Duhamel
Acting Assistant Director
Audit Liaison Group
Internal Review and Evaluation Office
Justice Management Division

**FEDERAL BUREAU OF INVESTIGATION RESPONSE
TO THE DRAFT MANAGEMENT ADVISORY MEMORANDUM**



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Associate Deputy Director

Washington, D.C. 20535 - 0001

March 23, 2020

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
Washington, D.C. 20530

Dear Inspector General Horowitz:

Thank you for the opportunity to respond to the Office of the Inspector General (OIG) Management Advisory Memorandum regarding the OIG's "*Audit of the Federal Bureau of Investigation's Execution of its Wood Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons*" (Memorandum).

The FBI's work product and adherence to sound processes must meet the highest possible standard. Director Wray has emphasized that process rigor is at the core of the FBI's mission – to make sure that we always do the right thing, the right way. In December 2019, the OIG released a report titled, "*Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*." As you know, the FBI accepted all of the report's findings and the recommendations to the FBI, and the Director announced sweeping corrective actions, including foundational Foreign Intelligence Surveillance Act (FISA) reforms. Many of the corrective actions went beyond those recommended by the OIG. These remedial steps were intended, above all other things, to ensure that the FBI undertakes its work with painstaking rigor and that the FISA applications submitted to the Foreign Intelligence Surveillance Court are scrupulously accurate.

The Bureau therefore appreciates the ongoing efforts of the OIG to evaluate whether the FBI compiled and maintained accurate, complete Woods files. The "preliminary results" detailed in the OIG Memorandum pertain to a sample of 29 applications covering the five-year period from October 2014 through September 2019 for which court-authorized surveillance had concluded. As noted in the Memorandum, the OIG expressly took no position on the materiality of any identified error. Nor did the OIG evaluate the accuracy and completeness of the FISA applications themselves by, for instance, determining whether support existed in the case file, but not in the

Woods file, for a factual assertion in the FISA application. Nevertheless, the OIG's findings underscore the importance of the more than 40 corrective actions that Director Wray ordered late last year.

Since that time, the FBI has been intensely focused on implementing these remedial measures with the goal of ensuring that our FISA authorities are exercised with objectivity and integrity. Among many other changes, we revised FISA request and verification (Woods) forms, developed a new confidential human source checklist, developed and released training on this checklist, developed and provided new training on revised FISA forms, and developed new FISA process rigor training. The revised Woods form now requires agents and supervisors to attest to their diligence in re-verifying facts from prior applications. All Woods forms, both for initial applications and renewals, must now be scanned and maintained in the electronic case file. These already-implemented changes will drive accountability, accuracy, and completeness in the FISA process.

While we believe that the process errors identified in the OIG's preliminary findings will be addressed by Director Wray's previously ordered corrective actions, the FBI fully accepts the two recommendations set forth in the OIG's Memorandum. First, the FBI will, in coordination with the Department of Justice's National Security Division (NSD), build on existing FBI and NSD accuracy reviews to improve the results of those reviews and enhance compliance with the Woods Procedures. We agree that the lessons learned from accuracy reviews should be used to evaluate and enhance the FBI's adherence to the Woods Procedures, even though the OIG acknowledges that such reviews did not have that stated purpose. Indeed, the FBI formed a team to analyze accuracy and minimization review data as part of the corrective actions announced after the December 2019 OIG report. This team, led by the FBI's Office of Integrity and Compliance, is required to identify and propose audit, review, and compliance mechanisms related to the FBI's FISA processes, including Woods Procedures. This work will, as the OIG recommends, be used to enhance training to improve employee performance or improve policies as appropriate.

Second, the FBI's General Counsel has directed every relevant division to account for and ensure the proper maintenance of all FISA Accuracy Subfiles for all dockets (including renewals) beginning on or after January 1, 2015. This action exceeds the OIG's recommendation that these steps be taken for pending cases. Divisions are required to identify and complete any remedial steps associated with these Accuracy Subfiles.

As Director Wray has stressed, FISA is an indispensable tool to guard against national security threats, but we must ensure that these authorities are carefully exercised and that FISA applications are scrupulously accurate. The FBI remains grateful to the OIG for its independent, professional oversight. We look forward to continuing our commitment to strengthen the FBI as we uphold the Constitution and protect the American people.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul Abbate".

Paul Abbate
Associate Deputy Director

**DEPARTMENT OF JUSTICE RESPONSE TO THE
DRAFT MANAGEMENT ADVISORY MEMORANDUM**



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

FROM: Bradley Weinsheimer *G. Bradley Weinsheimer*
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: March 27, 2020

SUBJECT: Response to the Office of the Inspector General Management Advisory
Memorandum on the Federal Bureau of Investigation's Woods Procedures

The Department of Justice (Department) appreciates the steps undertaken by the Office of the Inspector General (OIG) as part of its "Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court (FISC) Relating to U.S. Persons." The audit's initial review and work to date are described in a Management Advisory Memorandum (Memorandum) that the OIG has provided in final draft to the Federal Bureau of Investigation (FBI) and the Department. The Memorandum contains two recommendations, with which the Department and FBI both fully agree.

The Department is committed to ensuring that Foreign Intelligence Surveillance Act (FISA) applications the Government submits to the FISC are complete and accurate. The OIG rightly identified the importance of the FBI's Woods Procedures to its FISA application process. The FBI's Woods Procedures require FBI personnel to compile supporting documentation for each fact included in a FISA application for electronic surveillance or physical search that is submitted to the FISC. This process is an important part of the FBI's internal procedures designed to facilitate accuracy in FISA applications.

As the FBI noted in its response to the draft Memorandum, the FBI has already undertaken many changes to improve FISA application processing. For example, the FBI revised its Woods Procedures form, developed a new confidential human source checklist, developed and released training on this checklist, developed and is working to provide new training on revised FISA forms, and developed new FISA process rigor training. The revised Woods Procedures form now requires agents and supervisors to attest to their diligence in re-

verifying facts from prior applications. All Woods Procedures forms must now be scanned and maintained in the electronic case file.

The Department understands that your audit examined a sample of FISA applications targeting U.S. persons between October 2014 and September 2019 to determine whether the contents of the Woods files supported factual statements in the associated FISA applications. Your audit found deficiencies in the FBI's adherence to its Woods Procedures. Specifically, the audit work to date identified instances of missing Woods files, unsupported facts based on review of the Woods files, and other possible errors. The audit did not examine any FISA applications filed after implementation of the reforms described above.

Although the audit is ongoing, the Memorandum sets forth two recommendations to the FBI. Those recommendations are that: (i) the FBI institute a requirement that it, in coordination with the Department's National Security Division (NSD), systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors so that the FBI can enhance training to improve agents' performance in completing the Woods Procedures, or improve policies to help ensure the accuracy of FISA applications; and (ii) the FBI perform a physical inventory to ensure that Woods files exist for every FISA application submitted to the FISC in all pending investigations. As noted in the FBI's response to the Memorandum, the FBI has agreed to adopt these recommendations and has already taken steps to implement them. The Department also concurs with these recommendations.

As set forth in the FBI's response to the draft Memorandum, the FBI already has formed a team to analyze accuracy and minimization review data as part of the corrective actions announced after the December 2019 OIG report. This team, led by the FBI's Office of Integrity and Compliance, is required to identify and propose audit, review, and compliance mechanisms related to the FBI's FISA processes, including its Woods Procedures. In addition, the FBI's General Counsel has directed every relevant division to account for and ensure the proper maintenance of all FISA Accuracy Subfiles for all dockets (including renewals) beginning on or after January 1, 2015. This action, as the FBI stated in its response to the draft Memorandum, exceeds the OIG's recommendation that these steps be taken only for pending investigations.

NSD conducts analysis of trends based on its oversight work and has incorporated lessons learned from accuracy reviews in how it drafts FISA applications and in training. Consistent with the draft Memorandum's recommendation, NSD will continue to systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors and will work with the FBI so that it can enhance training to improve compliance with the Woods Procedures and shape policies to help ensure the accuracy of FISA applications.

FISA is an essential tool to guard against terrorism and other national security threats. The Department and FBI are committed to taking whatever steps are necessary to ensure the integrity of the FISA process, including strengthening existing policies, procedures, and training to facilitate accuracy in FISA applications.



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U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL

950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Website	Twitter	YouTube
oig.justice.gov	@JusticeOIG	JusticeOIG

Also at Oversight.gov

From: Raimondi, Marc \(\OPA\)
Subject: RE: OIG Memo on FBI Woods Procedures
To: Weinsheimer, Bradley \(\ODAG\); Boyd, Stephen E. \(\OLA\); MacTough, Melissa \(\NSD\); Newman, Ryan D. \(\OAG\)
Cc: Levi, William \(\OAG\); Kupec, Kerri \(\OPA\); Blue, Matthew \(\ODAG\); (b) (6) \(\OLA\)
Sent: March 30, 2020 5:48 PM (UTC-04:00)
Attached: 2020 03 30 1745 Public Affairs Guidance for OIG Woods Report.docx

Team, here is the Public Affairs Guidance for tomorrow's OIG release.

We are in a passive public affairs mode meaning we do not plan, at this time, to proactively release materials but will respond to media queries by referring them to the OIG memo and providing them our statement and highlighting some key points from the MAM.

The FBI is also referring media to the MAM and highlighting the same key points we are from their response to the OIG.

Marc Raimondi
National Security Spokesman
U.S. Department of Justice
www.justice.gov/nsd

(b) (6)
Direct: (b) (6)
Mobile: (b) (6)

From: Weinsheimer, Bradley (ODAG) <(b) (6)>
Sent: Monday, March 30, 2020 5:33 PM
To: Boyd, Stephen E. (OLA) <(b) (6)>; Raimondi, Marc (OPA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Newman, Ryan D. (OAG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; (b) (6) (OLA) <(b) (6)>
Subject: RE: OIG Memo on FBI Woods Procedures

I heard from OIG that they plan to post the MAM at 10:00 tomorrow. Thanks, Brad.

From: Boyd, Stephen E. (OLA) <(b) (6)>
Sent: Monday, March 30, 2020 10:34 AM
To: Raimondi, Marc (OPA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Weinsheimer, Bradley (ODAG) <(b) (6)>; Newman, Ryan D. (OAG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; (b) (6) (OLA) <(b) (6)>
Subject: RE: OIG Memo on FBI Woods Procedures

+ (b) (6) in OLA.

From: Raimondi, Marc (OPA) <(b) (6)>
Sent: Monday, March 30, 2020 9:47 AM
To: MacTough, Melissa (NSD) <(b) (6)>; Weinsheimer, Bradley (ODAG) <(b) (6)>; Newman, Ryan D. (OAG) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>

Subject: RE: OIG Memo on FBI Woods Procedures

Melisa and I will work on a plan and get it back out to the team.

From: MacTough, Melissa (NSD) <(b) (6)>
Sent: Monday, March 30, 2020 9:24 AM
To: Weinsheimer, Bradley (ODAG) <(b) (6)>; Newman, Ryan D. (OAG) <(b) (6)>; Raimondi, Marc (OPA) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>
Subject: RE: OIG Memo on FBI Woods Procedures

To the extent we get media inquiries on this, please let me know, and we can help with potential responses.

From: Weinsheimer, Bradley (ODAG) <(b) (6)>
Sent: Monday, March 30, 2020 9:21 AM
To: Newman, Ryan D. (OAG) <(b) (6)>; Raimondi, Marc (OPA) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>
Subject: RE: OIG Memo on FBI Woods Procedures

I am happy to work with them, but I think NSD will need to be heavily involved. They are much closer to the issues on the ground and the FISA re-authorization issues. Attached is the final draft of the OIG Management Advisory Memorandum (MAM) and our response (the FBI response is attached to the OIG final draft). We don't know when the OIG will post the MAM, but I will ask them to let us know.

From: Newman, Ryan D. (OAG) <(b) (6)>
Sent: Monday, March 30, 2020 9:14 AM
To: Weinsheimer, Bradley (ODAG) <(b) (6)>; Raimondi, Marc (OPA) <(b) (6)>
Cc: Levi, William (OAG) <(b) (6)>; Kupec, Kerri (OPA) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>
Subject: OIG Memo on FBI Woods Procedures

All,

As some of you are already aware, OIG is expected to release a memo early this week detailing the FBI's failure to comply with its Woods Procedures—i.e., procedures that are designed to help ensure the accuracy of FISA applications. Both the FBI (Paul Abbate) and DOJ (Brad Weinsheimer) submitted short responses to be included with the OIG memo.

I expect that there will be some press and Hill interest once the report is released.

Brad, will you please work with Marc, as well as Stephen Boyd and his team, to prepare responses to queries from the media and the Hill?

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General

Office of the Attorney General

U.S. Department of Justice

T: (b) (6)

M: (b) (6)

(b) (6)

From: MacTough, Melissa (NSD)
Subject: RE: Possible FISA Vote Next Week
To: Boyd, Stephen E. (OLA); Demers, John C. (NSD); Levi, William (OAG); (b) (6) (OLA); Wiegmann, Brad (NSD); DuCharme, Seth (ODAG)
Sent: April 29, 2020 1:47 PM (UTC-04:00)
Attached: response to possible amendments.docx

Stephen –

1. I am attaching the document I prepared in March when we were last considering the various possible Senate amendments. The two you attached (the Wyden/Daines amendment and the Paul amendment) are ones we considered in March. When, you get the Lee amendment, we can see if it was one we looked at before in the attached.
2. The Paul amendment would preclude the use of FISA authorities to target USPs. For ease of reading, I have copied what we said in the attached about that:

(b) (5)

(b) (5)

In short, we could not (b) (5)
(b) (5) If folks want to (b) (5)
(b) (5), we could (b) (5). Let us know.

3. The Wyden/Daines amendment – this amendment would prohibit obtaining BRs for internet search history information or internet website browsing information. This would be (b) (5)
(b) (5). I have pasted below the two alternatives we would suggest:

- a. We could (b) (5)
(b) (5)
- b. We could also (b) (5)
(b) (5)

Please let me know if you would like us to put either or both alternatives in legislative text.

4. Finally, I want to flag that ODNI is doing calls with the media and privacy groups tomorrow as they are publicly releasing the DNI transparency report tomorrow. The transparency report contains various statistics related to the use of FISA, NSLS, and the unmasking of USP identities in IC disseminations. (b)(5) per NSD
(b) (5). This may feed into the separate effort on the Hill to the extent the legislation is considered next week.

Thanks.

-Melissa

From: Boyd, Stephen E. (OLA) <(b) (6)>

Sent: Wednesday, April 29, 2020 11:17 AM

To: Demers, John C. (NSD) <(b) (6)>; Levi, William (OAG) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Wiegmann, Brad (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; DuCharme, Seth (ODAG) <(b) (6)>

Subject: Possible FISA Vote Next Week

Team:

Please keep close hold. The Leader's office hopes to bring up the House-passed FISA bill at the end of next week. As you will recall, there was a unanimous consent agreement to provide votes on three amendments – with side by side alternative votes - during floor consideration. Those amendments, in order of most likely to pass to least likely to pass, are:

1. Wyden/Daines (final version attached)
2. Lee (don't have the new version yet, will circulate when I do)
3. Paul (pre-recess version attached, don't expect major changes)

We need to provide Department-approved side by side alternatives. I am happy to discuss the strategy offline if it is not apparent.

Ideally, it would be great to (b) (5) by Friday noon. We are less concerned with (b) (5). Our alternatives will probably need to be cleared by Barr personally. I know there are ideas already in the works.

Standard caveat – the floor schedule is always subject to change. That said, they seem pretty firm on moving our bill next week.

Back w/ more intel when I have it –

Stephen

From: Ferguson, Andrew (McConnell) <(b) (6)>

Sent: Wednesday, April 29, 2020 10:51 AM

To: Boyd, Stephen E. (OLA) <(b) (6)>

Subject: FISA amendments

Attached is the final text of Daines/Wyden, and the pre-recess text of Paul. Don't expect major changes on Paul, but can't be sure.

If you can get us some Barr-approved side-by-sides, that'd be great. I'll get you Lee when they get it to me.

Andrew

From: Demers, John C. \(\NSD\)
Subject: FW: FISA Amicus
To: Watson, Theresa \(\OAG\)
Cc: Boyd, Stephen E. \(\OLA\); Levi, William \(\OAG\)
Sent: May 12, 2020 4:26 PM (UTC-04:00)
Attached: summary of issues with the proposed amendments (v.4 clean).docx

I think this should do it. What do you think, Stephen?

From: Plack, Laura \\\(ODAG\\)
Subject: RE: Brookings Prep Materials
To: Rosen, Jeffrey A. \\\(ODAG\\)
Cc: Hovakimian, Patrick \\\(ODAG\\); DuCharme, Seth \\\(ODAG\\); Suero, Maya A. \\\(ODAG\\)
Sent: May 29, 2020 6:47 PM (UTC-04:00)
Attached: 10. CRT - Hate Crimes & DT (5.29).docx, May 2020 - Revised TPs.zip

CRT has now provided some updated numbers in the attached Hate Crimes document (also included a new zip file of everything).

Laura

From: Plack, Laura (ODAG)
Sent: Friday, May 29, 2020 4:23 PM
To: Rosen, Jeffrey A. (ODAG) <(b) (6)>
Cc: Patrick Hovakimian (ODAG) <(b) (6)>; DuCharme, Seth (ODAG) <(b) (6)>; Suero, Maya A. (ODAG) <(b) (6)>
Subject: Brookings Prep Materials

Sir:

Attached are the following materials in preparation for the Brookings event next week:

- **Draft talking points** on both affirmative topics, as well as likely and potential topics. There is much more text here than there will be time for, but I thought it was better to err on the side of more information. Please let me know if we can build out any topic or specific point (or add something that is missing).
 - Affirmative topics: (b) (5)
 - Likely Q&A topics: (b) (5)
 - Potential other topics: (b) (5)
- **Requested press releases**
 - New COVID-19 law enforcement-related releases since Chamber event
 - China-related releases from 2019-2020
- **Materials provided to Amy Liu in advance of event**
- **Other background materials** (more data and examples)
 - Opioids
 - Violent crime

Please let me know if any of the zip files give you a hard time – I can also send you the individual documents – was just trying to keep it organized.

Laura J. Plack
(b) (6) (cell)

From: Hovakimian, Patrick (ODAG)
Subject: Questions
To: Demers, John C. (NSD)
Sent: June 23, 2020 12:16 PM (UTC-04:00)

Deliberative
Draft
AWP
Privileged

John – Can I trouble you for some quick thoughts on these draft responses? Sen. Wyden quotes you in one of his questions to me. You're famous.

From the Committee

QUESTION 10: The USA FREEDOM Act of 2015 (P.L. 114-53) reauthorized three national security tools – Business Records collection, Roving Surveillance, and the Lone Wolf provision – that expired on March 15, 2020.

- a. Given your experience at the Department of Justice, what concerns do you have with the expiration of these authorities?
- b. If confirmed as ODNI/GC, what efforts would you undertake to address these concerns?

ANSWER: (b) (5)

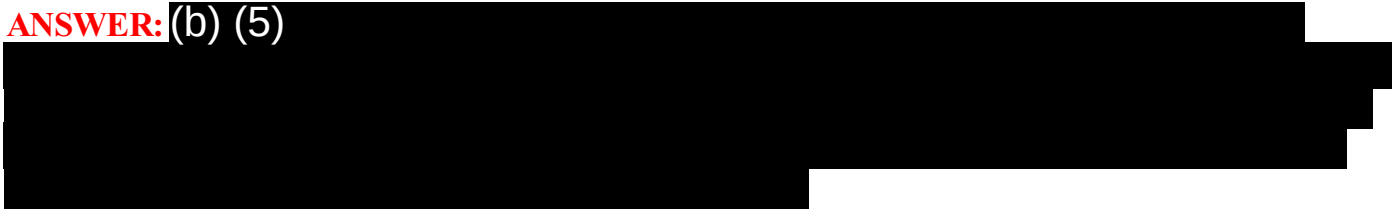


From Sen. Feinstein

QUESTION 4: As you are aware, Congress has not yet passed legislation reauthorizing certain sections of the FISA, including the so-called “business records” provision as it was amended by section 215 of the USA PATRIOT Act, in part because of lingering concerns about the use of that provision to spy on Americans’ internet search and web browser histories without a FISC order finding probable cause that the information will yield foreign intelligence information. The House and the Senate have, however, passed separate bills that would restrict the use of section 215 when a person has a reasonable expectation of privacy and a warrant would be required in a criminal context.

- a. Do you think individuals have a reasonable expectation of privacy in their internet search and web browser histories, and do you think a warrant is required to search them? Why or why not?
- b. More generally, as General Counsel at ODNI, what steps would you take to ensure that the provisions of FISA, including the business records provision, are executed by IC elements in a manner consistent with the expectations of the American public when it comes to the protection of their personal information like internet search and web browser histories?

ANSWER: (b) (5)



.....

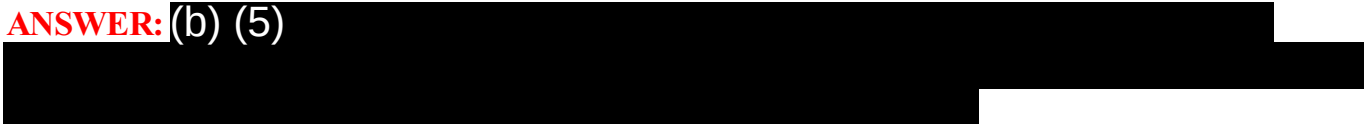
From Sen. Wyden

QUESTION 7: Do you believe that Section 215 of the USA PATRIOT Act should be used to collect “tangible things” if they do not pertain to:

- a. a foreign power or an agent of a foreign power;
- b. the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or
- c. an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation?

If yes, under what specific circumstances do you believe the application for a Section 215 order could be based on the “relevance” standard without satisfying any of the above three requirements for presumptive relevance?

ANSWER: (b) (5)

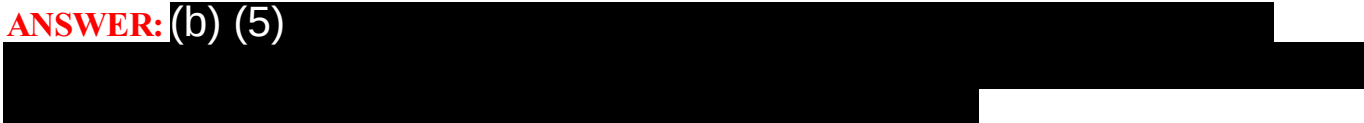


QUESTION 8: Does the government collect web browsing and internet search history pursuant to Section 215?

If so, what are or should be any limitations on such collection or the dissemination and use of such information?

Does the government collect web browsing or internet search history pursuant to FISA Pen Register/Trap and Trace authorities?

ANSWER: (b) (5)

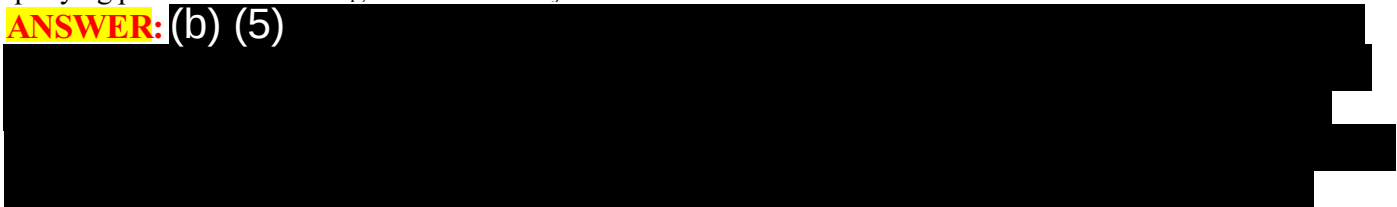


QUESTION 9: During his confirmation process, Assistant Attorney General for National Security John Demers was asked about the prohibition on reverse targeting in Section 702. He responded:

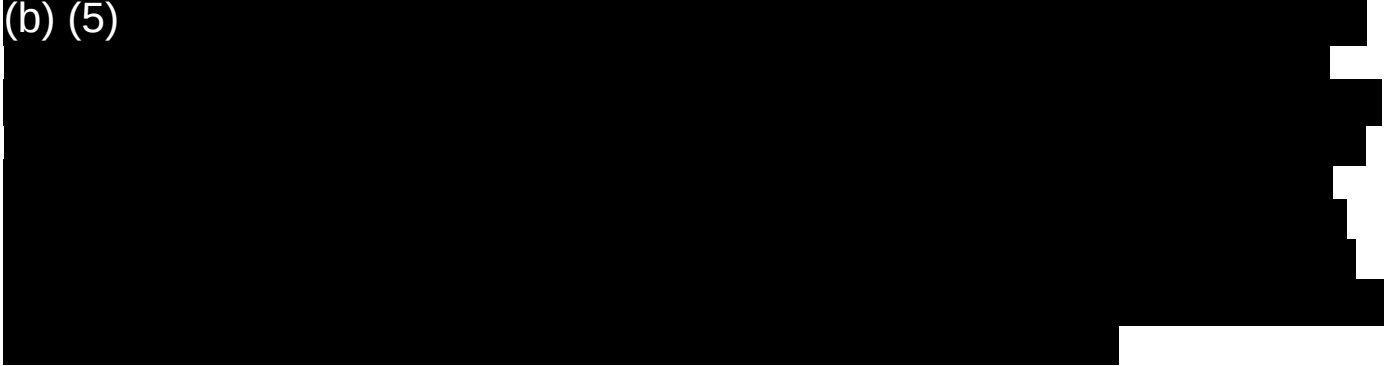
As I understand it, determining whether a particular known U.S. person has been reverse targeted through the targeting of a Section 702 target necessitates a fact specific inquiry that would involve consideration of a variety of factors. For example, as the Privacy and Civil Liberties Oversight Board noted in its 2014 report, if a Section 702 tasking resulted in substantial reporting by the Intelligence Community regarding a U.S. person, but little reporting about the Section 702 target, that might be an indication that reverse targeting may have occurred.

How should this “fact specific inquiry” be implemented through the Section 702 nominations and querying processes of Intelligence Community entities?

ANSWER: (b) (5)

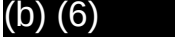


(b) (5)



Patrick Hovakimian
Associate Deputy Attorney General
United States Department of Justice

(b) (6)



From: (b)(3), (b)(6) per ODNI
Subject: FW: ODNI Policy Q's for GC Nominee
To: Hovakimian, Patrick \ (ODAG)
Cc: Bradley A Brooker; (b)(3), (b)(6) per ODNI; Ryan Crumpler
Sent: July 1, 2020 12:11 PM (UTC-04:00)
Attached: ODNI GC Policy Questionnaire FINAL ODNI +edits.docx

Pat – see attached from WH. Scanning it myself now...

From: Harvard, Hope M. EOP/WHO <(b) (6)>
Sent: Wednesday, July 1, 2020 12:07 PM
To: (b)(3), (b)(6) per ODNI; Telle, Adam R. EOP/WHO <(b) (6)>
Cc: Ryan Crumpler <(b)(3) per ODNI>
Subject: RE: ODNI Policy Q's for GC Nominee

Hi (b)(3), (b)(6) – attached please find Hovakimian's questionnaire. WHCO mentioned that if you have not already done so, DOJ may want to take a look at the DOJ-related questions. Hopefully we will have Miller's to you shortly.

Thank you!
Hope

From: (b)(3), (b)(6) per ODNI
Sent: Wednesday, July 1, 2020 10:32 AM
To: Telle, Adam R. EOP/WHO <(b) (6)>; Harvard, Hope M. EOP/WHO <(b) (6)>
Cc: Ryan Crumpler <(b)(3) per ODNI>; Swonger, Amy H. EOP/WHO <(b) (6)>
Subject: Re: ODNI Policy Q's for GC Nominee

Rgr. Yes, Hovakimian and Miller - Thanks so much!

(b)(3), (b)(6) per ODNI
ODNI Legislative Affairs
(b)(3), (b)(6) per ODNI (mobile)

From: "Telle, Adam R. EOP/WHO" <(b) (6)>
Date: Wednesday, July 1, 2020 at 10:24:06 AM
To: (b)(3), (b)(6) per ODNI; "Harvard, Hope M. EOP/WHO" <(b) (6)>
Cc: "Ryan Crumpler" <(b)(3) per ODNI>, "Swonger, Amy H. EOP/WHO" <(b) (6)>
Subject: RE: ODNI Policy Q's for GC Nominee

Hi (b)(3), (b)(6) per ODNI
I chatted with Ryan this morning.

Confirming that Hovakimian's review is the top priority for today? We are working it with WHCO as hard as we can.

Adam

From: (b)(3), (b)(6) per ODNI
Sent: Wednesday, July 1, 2020 9:23 AM
To: Harvard, Hope M. EOP/WHO <(b) (6)>; Telle, Adam R. EOP/WHO <(b) (6)>
Cc: Ryan Crumpler <(b)(3) per ODNI>; Swonger, Amy H. EOP/WHO <(b) (6)>
Subject: Re: ODNI Policy Q's for GC Nominee

Hi Hope - Sorry to pester. Any luck shaking these loose? Need them soonest today to resolve edits and get them to the committee by COB.

(b)(3), (b)(6) per ODNI

ODNI Legislative Affairs

(b)(3), (b)(6) per ODNI (mobile)

From: "Harvard, Hope M. EOP/WHO" <(b) (6)>
Date: Tuesday, June 30, 2020 at 3:21:58 PM
To: (b)(3), (b)(6) per ODNI, "Telle, Adam R. EOP/WHO" <(b) (6)>
Cc: "Ryan Crumpler" <(b)(3) per ODNI>, "Swonger, Amy H. EOP/WHO" <(b) (6)>
Subject: RE: ODNI Policy Q's for GC Nominee

WHCO said they can have edits back to you today. I will send them over as soon as they are cleared. Thanks!

From: (b)(3), (b)(6) per ODNI
Sent: Tuesday, June 30, 2020 3:15 PM
To: Harvard, Hope M. EOP/WHO <(b) (6)>; Telle, Adam R. EOP/WHO <(b) (6)>
Cc: Ryan Crumpler <(b)(3) per ODNI>; Swonger, Amy H. EOP/WHO <(b) (6)>
Subject: Re: ODNI Policy Q's for GC Nominee

Committee is insisting they need it tomorrow COB, and we'll need some time to address your edits. Could you get it to us by noon tomorrow at the latest?

(b)(3), (b)(6) per ODNI

ODNI Legislative Affairs

(b)(3), (b)(6) per ODNI (mobile)

From: "Harvard, Hope M. EOP/WHO" <(b) (6)>
Date: Tuesday, June 30, 2020 at 2:53:28 PM
To: (b)(3), (b)(6) per ODNI, "Telle, Adam R. EOP/WHO" <(b) (6)>
Cc: "Ryan Crumpler" <(b)(3) per ODNI>, "Swonger, Amy H. EOP/WHO" <(b) (6)>
Subject: RE: ODNI Policy Q's for GC Nominee

Hi (b)(3), (b)(6) – WHCO is slammed today. Is this a red alert or can we get the questionnaire back to you by tomorrow? Thank you!

From: (b)(3), (b)(6) per ODNI
Sent: Tuesday, June 30, 2020 11:18 AM
To: Telle, Adam R. EOP/WHO <(b) (6)>
Cc: Ryan Crumpler <(b)(3) per ODNI>; Swonger, Amy H. EOP/WHO <(b) (6)>; Harvard, Hope M. EOP/WHO <(b) (6)>
Subject: Re: ODNI Policy Q's for GC Nominee

Thanks!

Hope, I just spoke with the SSCI staff and they are now pushing to get the responses back by COB tomorrow. Any chance we can get edits back today?

(b)(3), (b)(6) per ODNI

ODNI Legislative Affairs

(b)(3), (b)(6) per ODNI (mobile)

From: "Telle, Adam R. EOP/WHO" <(b) (6)>

Date: Tuesday, June 30, 2020 at 10:13:22 AM

To: (b)(3), (b)(6) per ODNI

Cc: "Ryan Crumpler" (b)(3) per ODNI, "Swonger, Amy H. EOP/WHO" <(b) (6)>, "Harvard, Hope M. EOP/WHO" <(b) (6)>

Subject: Re: ODNI Policy Q's for GC Nominee

+Hope, who is managing this for us.

On Jun 30, 2020, at 10:12 AM, (b)(3), (b)(6) per ODNI wrote:

Hi Adam – Wanted to circle back on our GC and NCTC nom questionnaires to see if you all had a chance to review. Committee indicated they hope to receive these back soonest this week, so want to make sure can turn around any edits quickly. Any questions, let us know.

Thanks,

(b)(3), (b)(6) per ODNI

ODNI Legislative Affairs

(b)(3), (b)(6) per ODNI (mobile)

From: Ryan Crumpler <(b)(3) per ODNI>

Sent: Friday, June 26, 2020 10:34 AM

To: 'Telle, Adam R. EOP/WHO' <(b) (6)>; Swonger, Amy H. EOP/WHO <(b) (6)>

Cc: (b)(3), (b)(6) per ODNI

Subject: ODNI Policy Q's for GC Nominee

Adam –

Here is our GC nominees policy questionnaire for WH/NSC review. Thanks!

Ryan P. Crumpler

Assistant DNI for Legislative Affairs

Office of the Director of National Intelligence

(b)(3) per ODNI

McLean, VA 22102

(S) (b)(3) per ODNI | (U) (b)(3) per ODNI

**SELECT COMMITTEE ON
INTELLIGENCE**

UNITED STATES SENATE



**Additional Pre-Hearing Questions for
Mr. Patrick Hovakimian upon his nomination to be
General Counsel for the Office of the Director of National Intelligence**

Keeping the Intelligence Committee Fully and Currently Informed

QUESTION 1: Section 502 of the National Security Act of 1947 provides that the obligation to keep the congressional intelligence committees fully and currently informed of all intelligence activities applies to the Director of National Intelligence (DNI) and to the heads of all departments, agencies, and other entities of the U.S. Government involved in intelligence activities. What is your understanding of the standard for meaningful compliance with this obligation by the Office of the Director of National Intelligence (ODNI) and the heads of all departments, agencies and other entities of the U.S. Government involved in intelligence activities to keep the congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities? Under what circumstances do you believe it is appropriate to brief the Chairman and Vice Chairman and not the full committee membership?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

Priorities of the Director of National Intelligence

QUESTION 2: Have you discussed with the DNI his specific expectations of you, if confirmed as General Counsel, and his expectations of the Office of the General Counsel as a whole? If so, please describe those expectations.

ANSWER: (b) (5)

[REDACTED]

The Office of the General Counsel

QUESTION 3: The Office of the General Counsel of the ODNI has many roles and responsibilities. What are your expectations for the Office?

a. Do you have any preliminary observations on its responsibilities, performance, and effectiveness?

b. If confirmed, will you seek to make changes in the numbers or qualifications of attorneys in the office, or the operations of the office?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 4: Please describe who or what you understand to be your client or clients in the position of General Counsel of the Office of the Director of National Intelligence (ODNI/GC). As part of your answer, please address how that will guide your relationship with and obligations to the ODNI, the DNI, the Intelligence Community (IC) as a whole, and the President.

ANSWER: (b) (5)

[REDACTED]

QUESTION 5: Please explain how you would respond to each of the following scenarios:

- a. If the President or a White House official asks you to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.

- b. If you become aware that the President or a White House official has asked the DNI to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.

ANSWER: (b) (5)

[REDACTED]

QUESTION 6: Describe your understanding of the responsibilities of the DNI and the GC/ODNI in reviewing, and providing legal advice on, the work of the Central Intelligence Agency (CIA), including covert action undertaken by the CIA.

ANSWER: (b) (5)

[REDACTED]

QUESTION 7: Explain your understanding of the role of the ODNI/GC in resolving conflicting legal interpretations within the IC.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

Guidelines under Executive Order 12333

QUESTION 8: One of the fundamental documents governing the activities of the IC is Executive Order 12333. Under Executive Order 12333, as amended in July 2008, there are requirements for Attorney General-approved guidelines. For each of the following requirements, please update the Committee on the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, any issues you believe need to be resolved, and your perspective on where things stand at present.

ANSWER: (b) (5)

- a. Guidelines under section 1.3(a)(2) for how information or intelligence is provided to, or accessed by, and used or shared by the IC, except for information excluded by law, by the President, or by the Attorney General acting under presidential order in accordance with section 1.5(a).

ANSWER: (b) (5)

(b) (5)

- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the DNI for collection and

analysis directed to departments and other U.S. entities that are not elements of the IC.

ANSWER: (b) (5)

[REDACTED]

- c. Procedures under section 1.6(g) governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities abroad if the elements of the IC involved have intelligence responsibilities for foreign or domestic criminal drug production and trafficking.

ANSWER: (b) (5)

[REDACTED]

- d. Regulations under section 1.7(g)(1) for collection, analysis, production, and intelligence by intelligence elements of the Federal Bureau of Investigation (FBI) of foreign intelligence and counterintelligence to support national and departmental missions.

ANSWER: (b) (5)

[REDACTED]

- e. Procedures under section 2.3 on the collection, retention, and dissemination of United States person information and on the dissemination of information derived from signals intelligence to enable an IC element to determine where the information is relevant to its responsibilities.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the IC uses the least intrusive techniques feasible within the U.S. or directed at U.S. persons abroad.

ANSWER: (b) (5)

[REDACTED]

- g. Procedures under section 2.9 on undisclosed participation in any organization in the United States by anyone acting on behalf of an IC element.

ANSWER: (b) (5)

Foreign Intelligence Surveillance Act

QUESTION 9: The FISA Amendments Reauthorization Act of 2017 (P.L. 115-118) was enacted on January 19, 2018 (hereinafter, the Act). Under section 702, the Attorney General and the DNI may authorize jointly, for a period up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. Section 702(l) also provides for semiannual or annual assessments and reviews.

ANSWER: (b) (5)

- a. Describe your understanding of the matters that the Attorney General and DNI, with the assistance of the ODNI/GC, should evaluate in order to determine whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, (3) querying procedures, and (4) guidelines required, to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

ANSWER: (b) (5)

(b) (5)

[REDACTED]

- b. Describe how the semiannual or annual assessments and reviews required by the Act should be integrated, both in substance and timing, into the process by which the Attorney General and DNI consider whether there should be revisions for the next annual authorization or authorizations under the Act, including in applicable targeting and minimization procedures and guidelines.

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

- c. In addition to the matters described in the Act for semiannual or annual assessment or review, are there additional matters that should be evaluated periodically by the Attorney General or the DNI to improve and ensure the lawful and effective administration of the Act?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: The USA FREEDOM Act of 2015 (P.L. 114-53) reauthorized three national security tools – Business Records collection, Roving Surveillance, and the Lone Wolf provision – that expired on March 15, 2020.

- a. Given your experience at the Department of Justice, what concerns do you have with the expiration of these authorities?
- b. If confirmed as ODNI/GC, what efforts would you undertake to address these concerns?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

Other Surveillance Matters

QUESTION 11: Section 4 of PPD-28 calls on each IC element to update or issue policies and procedures to implement principles for safeguarding all personal information collected through SIGINT. Those policies and procedures are currently posted publicly. Will you ensure that the IC continues to post these policies and procedures as well as any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 12: Are there any circumstances in which an element of the IC may *not* conduct a warrantless search for a U.S. person of communications that have been collected pursuant to Section 12333? If so, please describe.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

Transparency

QUESTION 13: Executive Order 13526 (December 29, 2009) provides that: “In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.” Executive Order 13292 (March 25, 2003) and Executive Order 12958 (April 17, 1995) prohibited classification based on the same factors. Do you agree with the prohibitions in these Executive Orders?

ANSWER: (b) (5)

QUESTION 14: If, for any reason, you make a public statement that is inaccurate, do you commit to making a public statement correcting the record?

ANSWER: (b)(5); contains further (b)(5) per ODNI

Evaluation of Office of the Director of National Intelligence

QUESTION 15: Members of the Committee have expressed concern that the ODNI does not have all of the legal authorities necessary to fulfill congressional expectations for the office. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to a successful mission of the ODNI? If so, please describe.

ANSWER: (b) (5)

QUESTION 16: Members also have expressed concerns that the ODNI’s bureaucracy has resulted in inefficiencies. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to the ability of the General Counsel’s office to function within the ODNI bureaucracy? If so, please describe.

ANSWER: (b) (5)

[REDACTED]

Intelligence Community Whistleblowers

QUESTION 17: Do you believe that IC whistleblowers currently have all the protections they need to interact directly with the congressional intelligence committees?

- a. If not, what legal authorities are required to ensure these protections?
- b. If so, what legal authorities provide the basis for those protections?

ANSWER: (b) (5)

[REDACTED]

QUESTION 18: What is your view of the ODNI/GC’s role relative to advancing an IC “whistleblower” complaint to Congress, pursuant to the Intelligence Community Whistleblower Protection Act?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 19: Under what circumstances would you judge it appropriate to intercede in advancing a whistleblower complaint to Congress?

ANSWER: (b) (5)

QUESTION 20: How would you address a situation in which you disagree with the IC Inspector General’s determination that a whistleblower complaint qualifies as an “urgent concern,” for the purposes of advancing a complaint to Congress?

ANSWER: (b) (5)

QUESTION 21: Under what circumstances would you inform a party named in a whistleblower complaint that he or she is the subject of the complaint?

ANSWER: (b) (5)

Executive Branch Oversight of Intelligence Activities

QUESTION 22: Are there improvements, in terms of resources, methodology, and objectives that you believe should be considered for Executive Branch oversight of the intelligence activities of the United States Government?

ANSWER: (b) (5)

[REDACTED]

Relationship with Other Officials

QUESTION 23: What should be the relationship of the ODNI/GC with respect to the following officers of the IC?

a. General Counsel, CIA;

ANSWER: (b) (5)

[REDACTED]

b. Assistant Attorney General for National Security, Department of Justice;

ANSWER: (b) (5)

[REDACTED]

(b) (5)

c. Inspector General, ODNI; and

ANSWER: (b) (5)

d. Civil Liberties and Privacy Officer, ODNI.

ANSWER: (b) (5)

QUESTION 24: Do you see the ODNI/GC in a supervisory role in relation to other IC agency General Counsel?

ANSWER: (b) (5)

QUESTION 25: Do you see the ODNI/GC in a supervisory role in relation to the Inspector General of the IC?

ANSWER: (b) (5)

QUESTION 26: What is your understanding of the relationship between the ODNI/GC and the White House Counsel’s Office (WHCO)? When do you believe it is appropriate to include WHCO in your legal deliberations?

ANSWER: (b) (5)

QUESTION 27: What do you believe the relationship is between the Office of General Counsel at ODNI and the Office of Legal Counsel (OLC) at the Department of Justice? Do you consider OLC opinions to be binding on the ODNI/GC? Please describe the circumstances under which you believe soliciting an opinion from OLC is appropriate.

ANSWER: (b) (5)

(b) (5)

Recruitment to the ODNI Office of General Counsel

QUESTION 28: What are your plans to recruit and retain top talent in the Office of General Counsel at ODNI? Do you plan to offer additional detailee options at all career levels so that attorneys from other agencies can bring their expertise to ODNI and, in turn, bring ODNI experience back to their home agency?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

Executive Privilege

QUESTION 29: Please describe your understanding of Executive Privilege: its general contours; to whom it can apply; and the time period during which it may apply. Please include your understanding of when the privilege can be waived.

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 30: Please define the phrase “executive branch confidentiality interests.” What are “executive branch confidentiality interests” and when/how do they differ from a claim of Executive Privilege?

ANSWER: (b) (5)

QUESTION 31: At what point would you refer information or material to WHCO to review for executive privilege issues?

ANSWER: (b) (5)

Professional Experience

QUESTION 32: For each of the following, describe specifically how your experiences will enable you to serve effectively as the ODNI/GC. Include within each response a description of issues relating to the position that you can identify based on those experiences.

a. U.S. Department of Justice, Office of the Deputy Attorney General;

ANSWER: (b) (5)

(b) (5)

(b) (5)

(b) (5)

b. U.S. Department of Justice, U.S. Attorney’s Office, Southern District of California; and

ANSWER: (b) (5)

(b) (5)

(b) (5)

[REDACTED]

c. Latham & Watkins, LLP.

ANSWER: (b) (5)

[REDACTED]

QUESTION 33: What, if any, conflicts might arise from your private practice if you are confirmed as General Counsel, and how would you address these conflicts?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

A large black rectangular redaction box covers the majority of the page content, starting below the header and ending above the footer. The text "(b) (5)" is visible at the top left of this redacted area.

ADDITIONAL QUESTIONS FROM SENATOR FEINSTEIN

QUESTION 1: On June 2, 2020, BuzzFeed reported that the DEA requested and obtained expanded authority to engage in covert surveillance and share intelligence without any nexus to crimes related to drugs.

- a. Is it appropriate for law enforcement agencies with a specific statutory mission like the DEA to engage in more general intelligence-related activities like covert surveillance?
- b. What protections in law or policy would prevent the DEA from abusing this authority?
- c. Do you believe these activities would be subject to the requirement in Executive Order 12333 that any collection of intelligence about U.S. persons by an element of the intelligence community be pursuant to guidelines approved by the Attorney General in coordination with the DNI?

ANSWER: (b) (5)

[REDACTED]

QUESTION 2: Under what circumstances, in your view, would intelligence community elements with foreign intelligence missions be authorized to provide intelligence, technical, or other support to law enforcement agencies engaging in covert surveillance activities within the United States for law enforcement purposes? What limitations would apply to that support?

ANSWER: (b) (5)

[REDACTED]

QUESTION 3: As the General Counsel at ODNI, what steps would you take to ensure that all elements of the intelligence community, including ODNI, operate under U.S. persons procedures as required by Executive Order 12333? More generally, what steps

would you take to ensure activities like the covert surveillance of U.S. persons exercising their constitutional rights of free speech and assembly are properly regulated to avoid abuse?

ANSWER: (b) (5)

[REDACTED]

QUESTION 4: As you are aware, Congress has not yet passed legislation reauthorizing certain sections of the FISA, including the so-called “business records” provision as it was amended by section 215 of the USA PATRIOT Act, in part because of lingering concerns about the use of that provision to spy on Americans’ internet search and web browser histories without a FISC order finding probable cause that the information will yield foreign intelligence information. The House and the Senate have, however, passed separate bills that would restrict the use of section 215 when a person has a reasonable expectation of privacy and a warrant would be required in a criminal context.

- a. Do you think individuals have a reasonable expectation of privacy in their internet search and web browser histories, and do you think a warrant is required to search them? Why or why not?
- b. More generally, as General Counsel at ODNI, what steps would you take to ensure that the provisions of FISA, including the business records provision, are executed by IC elements in a manner consistent with the expectations of the American public when it comes to the protection of their personal information like internet search and web browser histories?

ANSWER: (b) (5)

[REDACTED]

ADDITIONAL QUESTIONS FROM SENATOR WYDEN

QUESTION 1: According to a memo from the Acting Administrator of the Drug Enforcement Administration (DEA) to the Deputy Attorney General, the DEA sought the authority to conduct “covert surveillance” in connection with recent protests and to “share intelligence with federal, state, local and tribal counterparts.” Was this authority granted? If so, please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and
- f. the use of the information by the recipients’ entities.

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 2: On May 30, 2020, the Attorney General announced that the Federal Bureau of Investigation, the U.S. Marshals Services, the Bureau of Alcohol, Tobacco, Firearms and Explosives, as well as the DEA, were all participating in law enforcement activities in connection with the protests. The Federal Bureau of Prisons has also been involved. For each of these agencies (or any other agencies of the Department involved), please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and

f. the use of the information by the recipients' entities.

ANSWER: (b) (5)

QUESTION 3: The Attorney General's May 30, 2020, statement attributed incidents of violence and property damage to "[g]roups of outside radicals and agitators," adding that, "in many places, it appears the violence is planned, organized, and driven by anarchistic and far left extremists, using Antifa-like tactics, many of whom travel from out of state to promote the violence." On June 1, 2020, President Trump stated that "our nation has been gripped" by, among others, "professional anarchists" and "antifa." President Trump further described violence and property damage as "acts of domestic terrorism." Do you agree with these assessments? If so, please provide detailed and specific information to support them.

ANSWER: (b) (5)

QUESTION 4: On March 31, 2020, President Trump announced that "[t]he United States will be designating ANTIFA as a Terrorist Organization." Please describe the implications of this designation, in terms of policy, resource allocation, or investigative and surveillance authorities.

ANSWER: (b) (5)

QUESTION 5: Did you play any role or participate in any conversations related to the clearing of Lafayette Square on June 1, 2020? If yes, please describe that role or those conversations.

ANSWER: (b) (5)

QUESTION 6: Have you participated in any conversations about the proposed invocation of the Insurrection Act? If yes, please describe those conversations.

ANSWER: (b) (5)

QUESTION 7: Do you believe that Section 215 of the USA PATRIOT Act should be used to collect “tangible things” if they do not pertain to:

- a. a foreign power or an agent of a foreign power;
- b. the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or
- c. an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation?

If yes, under what specific circumstances do you believe the application for a Section 215 order could be based on the “relevance” standard without satisfying any of the above three requirements for presumptive relevance?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 8: Does the government collect web browsing and internet search history pursuant to Section 215? If so, what are or should be any limitations on such collection or the dissemination and use of such information? Does the government collect web browsing or internet search history pursuant to FISA Pen Register/Trap and Trace authorities?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 9: During his confirmation process, Assistant Attorney General for National Security John Demers was asked about the prohibition on reverse targeting in Section 702. He responded:

As I understand it, determining whether a particular known U.S. person has been reverse targeted through the targeting of a Section 702 target necessitates a fact specific inquiry that would involve consideration of a variety of factors. For example, as the Privacy and Civil Liberties Oversight Board noted in its 2014 report, if a Section 702 tasking resulted in substantial reporting by the Intelligence Community regarding a U.S. person, but little reporting about the Section 702 target, that might be an indication that reverse targeting may have occurred.

How should this “fact specific inquiry” be implemented through the Section 702 nominations and querying processes of Intelligence Community entities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: Do you believe Section 702 of FISA authorizes the collection of communications known to be entirely domestic?

ANSWER: (b) (5)

[REDACTED]

QUESTION 11: The 2018 legislation reauthorizing Section 702 of FISA codified limitations on the use of U.S. person information in criminal proceedings.

- a. Do you believe these limitations should be extended to other provisions of FISA?
- b. The limitations include an exception for “transnational crime, including transnational narcotics trafficking and transnational organized crime.” Please describe the full scope of “transnational crime” in this context.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 12: Under Section 702 of FISA, the government can direct an electronic communications service provider to provide “assistance necessary to accomplish the acquisition.” Under Section 702(h)(5), if a provider does not comply with a directive, the government may seek an order from the FISA Court to compel compliance. Prior to the reauthorization of Section 702 in 2018, the government stated that it had “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.”

- a. Is that still the case?
- b. Do you believe that the government should inform the FISA Court when it issues a directive to a provider to alter the encryption afforded by a service or a product, regardless of whether the government files a motion to compel compliance?
- c. Will you commit to notifying Congress of any such directive?

ANSWER: (b) (5)

QUESTION 13: Title 50, section 1812, provides for exclusive means by which electronic surveillance and interception of certain communications may be conducted. Do you agree that this provision is binding on the President?

ANSWER: (b)(5); contains further (b)(5) per ODNI

QUESTION 14: Do you believe that intelligence surveillance and collection activities covered by FISA can be conducted outside the FISA framework? If yes, please specify

which intelligence surveillance and collection activities, the limits (if any) on extra-statutory collection activities, and the legal authorities you believe would authorize those activities.

ANSWER: (b) (5)

[REDACTED]

QUESTION 15: What would you do if the Intelligence Community was requested or directed to conduct such collection activities outside the FISA framework? Would you notify the full congressional intelligence committees?

ANSWER: (b) (5)

[REDACTED]

QUESTION 16: Do you believe the Intelligence Community can purchase information related to U.S. persons if the compelled production of that information would be covered by FISA? If yes, what rules and guidelines would apply to the type and quantity of the information purchased and to the use, retention and dissemination of that information? Should the congressional intelligence committees be briefed on any such collection activities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 17: Is it legal for an element of the Intelligence Community to seek intelligence from a foreign partner or source on a U.S. person that that entity is not legally entitled to collect directly?

ANSWER: (b) (5)

QUESTION 18: What limitations do you believe should apply to the receipt, use or dissemination of communications of U.S. persons collected by a foreign partner or source? How should those limitations address instances in which the foreign partner or source specifically targeted U.S. persons or instances in which the foreign partner or source has collected bulk communications known to include those of U.S. persons?

ANSWER: (b) (5)

QUESTION 19: Do you believe that communications data collected in transit are or should be treated differently than communications data at rest? Please address any distinctions as they may apply to FISA, Executive Order 12333, PPD-28, and USSID 18.

ANSWER: (b) (5)

QUESTION 20: NSA Director Nakasone has stated that, absent consent of the U.S. person or certain emergency situations, U.S. person queries of communications collected under Executive Order 12333 “normally must be approved by the Attorney General on a case-by-case basis after a finding of probable cause.” Do you believe such limitation should apply to other elements of the Intelligence Community?

ANSWER: (b) (5)

QUESTION 21: In March 2019, the Department of Justice Inspector General released its “Review of the Drug Enforcement Administration’s use of Administrative Subpoenas to Collect or Exploit Bulk Data.” Do you believe that the subpoena authorities in question, and 21 U.S.C. 876(a) in particular, allow for bulk collection?

ANSWER: (b) (5)

QUESTION 22: Do you believe it is acceptable to forward a whistleblower complaint determined to be an “urgent concern” by the Intelligence Community Inspector General to the Department of Justice or the White House? If so, under what circumstances?

ANSWER: (b) (5)

QUESTION 23: Do you agree that the reports of the Privacy and Civil Liberties Oversight Board should be released to the public?

ANSWER: (b) (5)

QUESTION 24: Will you support the declassification and public release of any interpretation of law that provides a basis for intelligence activities but is inconsistent with the public’s understanding of the law?

ANSWER: (b) (5)

(b) (5)

QUESTION 25: If a U.S. ambassador directs the Intelligence Community to cease a particular program or operation in the country where the ambassador is serving, is the Intelligence Community obligated to do so, absent or pending intervention by the President?

ANSWER: (b) (5)

QUESTION 26: Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the Detainee Treatment Act, the U.S statutory prohibition on torture, the War Crimes Act, or U.S. obligations under the Convention Against Torture or Common Article 3 of the Geneva Convention?

ANSWER: (b) (5)

QUESTION 27: On February 21, 2020, the Department of Defense announced that the Under Secretary for Intelligence & Security would review Army Field Manual (FM) 2-22.3, Human Intelligence Collector Operations. That review will include consultation with the DNI. Do you agree that the CIA's former enhanced interrogation techniques should be prohibited under the Field Manual and, if so, should that prohibition be explicit?

ANSWER: (b)(5); contains further (b)(5) per ODNI

QUESTION 28: Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 prohibits the use of any interrogation technique or approach or treatment related to interrogation not authorized by the Army Field Manual. Is this provision of law absolutely binding on the President?

ANSWER: (b) (5)

(b) (5)

QUESTION 29: Please describe your view of the legal implications of targeting or otherwise knowingly killing a U.S. person in a U.S. government lethal operation. What additional public transparency do you believe would be warranted in that situation?

ANSWER: (b) (5)

QUESTION 30: On May 18, 2020, Newsweek ran a story entitled “Trump’s Secret New Watchlist Lets His Administration Track Americans Without Needing a Warrant.” The story described a database of individuals associated with transnational organized crime.

- a. Which entity is responsible for the database?
- b. What is the purpose of the database and what entities are its primary customers?
- c. What is the standard for inclusion in the database?
- d. Are U.S. persons in the database? If so, please provide any guidelines, regulations or Privacy Impact Assessments governing their inclusion.
- e. What information populates the database and what entities provide it? Does the database include classified intelligence, unclassified information, or both?
- f. How is “Transnational Organized Crime” defined for purposes of inclusion in the database?
- g. How many entries are in the database?

ANSWER: (b) (5)

QUESTION 31: Does the Terrorist Identities Datamart Environment (TIDE) database include U.S. persons or persons inside the United States who are not known or suspected terrorists? If so, please describe the basis for their inclusion.

ANSWER: (b) (5)

[REDACTED]

QUESTION 32: The January 2017 Intelligence Community Assessment concluded that Russia interfered in the 2016 election to benefit Donald Trump, an assessment confirmed by the Senate Select Committee on Intelligence. Do you agree with this assessment?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

From: (b)(3), (b)(6) per ODNI
Subject: ODNI GC Policy Questionnaire Final v2.docx
To: Hovakimian, Patrick \ (ODAG)\
Sent: July 1, 2020 1:12 PM (UTC-04:00)
Attached: ODNI GC Policy Questionnaire Final v2.docx

I accepted all the minor edits. I left tracked changes on the consequential edits we partially accepted – please review and let me know if all looks good.

In the meantime, I'll shop this with Ryan and Brad and let you know if they have any concerns with how we've dealt with the edits. But I think you're in good shape and we'll definitely get to the committee this afternoon.

(b)(3), (b)(6) per ODNI

ODNI Legislative Affairs

(b)(3), (b)(6) per ODNI (mobile)

**SELECT COMMITTEE ON
INTELLIGENCE**

UNITED STATES SENATE



**Additional Pre-Hearing Questions for
Mr. Patrick Hovakimian upon his nomination to be
General Counsel for the Office of the Director of National Intelligence**

Keeping the Intelligence Committee Fully and Currently Informed

QUESTION 1: Section 502 of the National Security Act of 1947 provides that the obligation to keep the congressional intelligence committees fully and currently informed of all intelligence activities applies to the Director of National Intelligence (DNI) and to the heads of all departments, agencies, and other entities of the U.S. Government involved in intelligence activities. What is your understanding of the standard for meaningful compliance with this obligation by the Office of the Director of National Intelligence (ODNI) and the heads of all departments, agencies and other entities of the U.S. Government involved in intelligence activities to keep the congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities? Under what circumstances do you believe it is appropriate to brief the Chairman and Vice Chairman and not the full committee membership?

ANSWER: (b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

Priorities of the Director of National Intelligence

QUESTION 2: Have you discussed with the DNI his specific expectations of you, if confirmed as General Counsel, and his expectations of the Office of the General Counsel as a whole? If so, please describe those expectations.

ANSWER: (b) (5)

[REDACTED]

The Office of the General Counsel

QUESTION 3: The Office of the General Counsel of the ODNI has many roles and responsibilities. What are your expectations for the Office?

a. Do you have any preliminary observations on its responsibilities, performance, and effectiveness?

b. If confirmed, will you seek to make changes in the numbers or qualifications of attorneys in the office, or the operations of the office?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 4: Please describe who or what you understand to be your client or clients in the position of General Counsel of the Office of the Director of National Intelligence (ODNI/GC). As part of your answer, please address how that will guide your relationship with and obligations to the ODNI, the DNI, the Intelligence Community (IC) as a whole, and the President.

ANSWER: (b) (5)

[REDACTED]

QUESTION 5: Please explain how you would respond to each of the following scenarios:

- a. If the President or a White House official asks you to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.
- b. If you become aware that the President or a White House official has asked the DNI to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.

ANSWER: (b) (5)

[REDACTED]

QUESTION 6: Describe your understanding of the responsibilities of the DNI and the GC/ODNI in reviewing, and providing legal advice on, the work of the Central Intelligence Agency (CIA), including covert action undertaken by the CIA.

ANSWER: (b) (5)

[REDACTED]

QUESTION 7: Explain your understanding of the role of the ODNI/GC in resolving conflicting legal interpretations within the IC.

ANSWER: (b) (5)

[REDACTED]

(b) (5) [REDACTED]

Guidelines under Executive Order 12333

QUESTION 8: One of the fundamental documents governing the activities of the IC is Executive Order 12333. Under Executive Order 12333, as amended in July 2008, there are requirements for Attorney General-approved guidelines. For each of the following requirements, please update the Committee on the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, any issues you believe need to be resolved, and your perspective on where things stand at present.

ANSWER: (b) (5) [REDACTED]

- a. Guidelines under section 1.3(a)(2) for how information or intelligence is provided to, or accessed by, and used or shared by the IC, except for information excluded by law, by the President, or by the Attorney General acting under presidential order in accordance with section 1.5(a).

ANSWER: (b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5)

- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the DNI for collection and analysis directed to departments and other U.S. entities that are not elements of the IC.

ANSWER: (b) (5)

- c. Procedures under section 1.6(g) governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities abroad if the elements of the IC involved have intelligence responsibilities for foreign or domestic criminal drug production and trafficking.

ANSWER: (b) (5)

- d. Regulations under section 1.7(g)(1) for collection, analysis, production, and intelligence by intelligence elements of the Federal Bureau of Investigation (FBI) of foreign intelligence and counterintelligence to support national and departmental missions.

ANSWER: (b) (5)

- e. Procedures under section 2.3 on the collection, retention, and dissemination of United States person information and on the dissemination of information derived from signals intelligence to enable an IC element to determine where the information is relevant to its responsibilities.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the IC uses the least intrusive techniques feasible within the U.S. or directed at U.S. persons abroad.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

- g. Procedures under section 2.9 on undisclosed participation in any organization in the United States by anyone acting on behalf of an IC element.

ANSWER: (b) (5)

Foreign Intelligence Surveillance Act

QUESTION 9: The FISA Amendments Reauthorization Act of 2017 (P.L. 115-118) was enacted on January 19, 2018 (hereinafter, the Act). Under section 702, the Attorney General and the DNI may authorize jointly, for a period up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. Section 702(l) also provides for semiannual or annual assessments and reviews.

ANSWER: (b) (5)

- a. Describe your understanding of the matters that the Attorney General and DNI, with the assistance of the ODNI/GC, should evaluate in order to determine whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, (3) querying procedures, and (4) guidelines required, to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

ANSWER: (b) (5)

(b) (5)

[REDACTED]

- b. Describe how the semiannual or annual assessments and reviews required by the Act should be integrated, both in substance and timing, into the process by which the Attorney General and DNI consider whether there should be revisions for the next annual authorization or authorizations under the Act, including in applicable targeting and minimization procedures and guidelines.

ANSWER: (b) (5)

[REDACTED]

- c. In addition to the matters described in the Act for semiannual or annual assessment or review, are there additional matters that should be evaluated periodically by the Attorney General or the DNI to improve and ensure the lawful and effective administration of the Act?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: The USA FREEDOM Act of 2015 (P.L. 114-53) reauthorized three national security tools – Business Records collection, Roving Surveillance, and the Lone Wolf provision – that expired on March 15, 2020.

- a. Given your experience at the Department of Justice, what concerns do you have with the expiration of these authorities?
- b. If confirmed as ODNI/GC, what efforts would you undertake to address these concerns?

ANSWER: (b) (5)

[REDACTED]

Other Surveillance Matters

QUESTION 11: Section 4 of PPD-28 calls on each IC element to update or issue policies and procedures to implement principles for safeguarding all personal information collected through SIGINT. Those policies and procedures are currently posted publicly. Will you ensure that the IC continues to post these policies and procedures as well as any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: (b) (5)

[REDACTED]

QUESTION 12: Are there any circumstances in which an element of the IC may *not* conduct a warrantless search for a U.S. person of communications that have been collected pursuant to Section 12333? If so, please describe.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

Transparency

QUESTION 13: Executive Order 13526 (December 29, 2009) provides that: “In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.” Executive Order 13292 (March 25, 2003) and Executive Order 12958 (April 17, 1995) prohibited classification based on the same factors. Do you agree with the prohibitions in these Executive Orders?

ANSWER: (b) (5)

QUESTION 14: If, for any reason, you make a public statement that is inaccurate, do you commit to making a public statement correcting the record?

ANSWER: (b) (5)

Evaluation of Office of the Director of National Intelligence

QUESTION 15: Members of the Committee have expressed concern that the ODNI does not have all of the legal authorities necessary to fulfill congressional expectations for the office. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to a successful mission of the ODNI? If so, please describe.

ANSWER: (b) (5)

(b) (5)

QUESTION 16: Members also have expressed concerns that the ODNI’s bureaucracy has resulted in inefficiencies. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to the ability of the General Counsel’s office to function within the ODNI bureaucracy? If so, please describe.

ANSWER: (b) (5)

Intelligence Community Whistleblowers

QUESTION 17: Do you believe that IC whistleblowers currently have all the protections they need to interact directly with the congressional intelligence committees?

- a. If not, what legal authorities are required to ensure these protections?
- b. If so, what legal authorities provide the basis for those protections?

ANSWER: (b) (5)

QUESTION 18: What is your view of the ODNI/GC’s role relative to advancing an IC “whistleblower” complaint to Congress, pursuant to the Intelligence Community Whistleblower Protection Act?

ANSWER: (b) (5)

(b) (5)

QUESTION 19: Under what circumstances would you judge it appropriate to intercede in advancing a whistleblower complaint to Congress?

ANSWER: (b) (5)

QUESTION 20: How would you address a situation in which you disagree with the IC Inspector General’s determination that a whistleblower complaint qualifies as an “urgent concern,” for the purposes of advancing a complaint to Congress?

ANSWER: (b) (5)

QUESTION 21: Under what circumstances would you inform a party named in a whistleblower complaint that he or she is the subject of the complaint?

ANSWER: (b) (5)

Executive Branch Oversight of Intelligence Activities

QUESTION 22: Are there improvements, in terms of resources, methodology, and objectives that you believe should be considered for Executive Branch oversight of the intelligence activities of the United States Government?

ANSWER: (b) (5)

[REDACTED]

Relationship with Other Officials

QUESTION 23: What should be the relationship of the ODNI/GC with respect to the following officers of the IC?

a. General Counsel, CIA;

ANSWER: (b) (5)

[REDACTED]

b. Assistant Attorney General for National Security, Department of Justice;

ANSWER: (b) (5)

[REDACTED]

c. Inspector General, ODNI; and

ANSWER: (b) (5)

[REDACTED]

d. Civil Liberties and Privacy Officer, ODNI.

ANSWER: (b) (5)

[REDACTED]

QUESTION 24: Do you see the ODNI/GC in a supervisory role in relation to other IC agency General Counsel?

ANSWER: (b) (5)

[REDACTED]

QUESTION 25: Do you see the ODNI/GC in a supervisory role in relation to the Inspector General of the IC?

ANSWER: (b) (5)

QUESTION 26: What is your understanding of the relationship between the ODNI/GC and the White House Counsel’s Office (WHCO)? When do you believe it is appropriate to include WHCO in your legal deliberations?

ANSWER: (b) (5)

QUESTION 27: What do you believe the relationship is between the Office of General Counsel at ODNI and the Office of Legal Counsel (OLC) at the Department of Justice? Do you consider OLC opinions to be binding on the ODNI/GC? Please describe the circumstances under which you believe soliciting an opinion from OLC is appropriate.

ANSWER: (b) (5)

(b) (5)

Recruitment to the ODNI Office of General Counsel

QUESTION 28: What are your plans to recruit and retain top talent in the Office of General Counsel at ODNI? Do you plan to offer additional detailee options at all career levels so that attorneys from other agencies can bring their expertise to ODNI and, in turn, bring ODNI experience back to their home agency?

ANSWER: (b) (5)

[REDACTED]

Executive Privilege

QUESTION 29: Please describe your understanding of Executive Privilege: its general contours; to whom it can apply; and the time period during which it may apply. Please include your understanding of when the privilege can be waived.

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 30: Please define the phrase “executive branch confidentiality interests.” What are “executive branch confidentiality interests” and when/how do they differ from a claim of Executive Privilege?

ANSWER: (b) (5)

QUESTION 31: At what point would you refer information or material to WHCO to review for executive privilege issues?

ANSWER: (b) (5)

Professional Experience

QUESTION 32: For each of the following, describe specifically how your experiences will enable you to serve effectively as the ODNI/GC. Include within each response a description of issues relating to the position that you can identify based on those experiences.

a. U.S. Department of Justice, Office of the Deputy Attorney General;

ANSWER: (b) (5)

(b) (5) [REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b. U.S. Department of Justice, U.S. Attorney’s Office, Southern District of California; and

ANSWER: (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]

(b) (5)

[REDACTED]

c. Latham & Watkins, LLP.

ANSWER: (b) (5)

[REDACTED]

QUESTION 33: What, if any, conflicts might arise from your private practice if you are confirmed as General Counsel, and how would you address these conflicts?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

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ADDITIONAL QUESTIONS FROM SENATOR FEINSTEIN

QUESTION 1: On June 2, 2020, BuzzFeed reported that the DEA requested and obtained expanded authority to engage in covert surveillance and share intelligence without any nexus to crimes related to drugs.

- a. Is it appropriate for law enforcement agencies with a specific statutory mission like the DEA to engage in more general intelligence-related activities like covert surveillance?
- b. What protections in law or policy would prevent the DEA from abusing this authority?
- c. Do you believe these activities would be subject to the requirement in Executive Order 12333 that any collection of intelligence about U.S. persons by an element of the intelligence community be pursuant to guidelines approved by the Attorney General in coordination with the DNI?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 2: Under what circumstances, in your view, would intelligence community elements with foreign intelligence missions be authorized to provide intelligence, technical, or other support to law enforcement agencies engaging in covert surveillance activities within the United States for law enforcement purposes? What limitations would apply to that support?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 3: As the General Counsel at ODNI, what steps would you take to ensure that all elements of the intelligence community, including ODNI, operate under U.S. persons procedures as required by Executive Order 12333? More generally, what steps

would you take to ensure activities like the covert surveillance of U.S. persons exercising their constitutional rights of free speech and assembly are properly regulated to avoid abuse?

ANSWER: (b) (5)

[REDACTED]

QUESTION 4: As you are aware, Congress has not yet passed legislation reauthorizing certain sections of the FISA, including the so-called “business records” provision as it was amended by section 215 of the USA PATRIOT Act, in part because of lingering concerns about the use of that provision to spy on Americans’ internet search and web browser histories without a FISC order finding probable cause that the information will yield foreign intelligence information. The House and the Senate have, however, passed separate bills that would restrict the use of section 215 when a person has a reasonable expectation of privacy and a warrant would be required in a criminal context.

- a. Do you think individuals have a reasonable expectation of privacy in their internet search and web browser histories, and do you think a warrant is required to search them? Why or why not?
- b. More generally, as General Counsel at ODNI, what steps would you take to ensure that the provisions of FISA, including the business records provision, are executed by IC elements in a manner consistent with the expectations of the American public when it comes to the protection of their personal information like internet search and web browser histories?

ANSWER: (b) (5)

[REDACTED]

ADDITIONAL QUESTIONS FROM SENATOR WYDEN

QUESTION 1: According to a memo from the Acting Administrator of the Drug Enforcement Administration (DEA) to the Deputy Attorney General, the DEA sought the authority to conduct “covert surveillance” in connection with recent protests and to “share intelligence with federal, state, local and tribal counterparts.” Was this authority granted? If so, please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and
- f. the use of the information by the recipients’ entities.

ANSWER: (b) (5)

[REDACTED]

QUESTION 2: On May 30, 2020, the Attorney General announced that the Federal Bureau of Investigation, the U.S. Marshals Services, the Bureau of Alcohol, Tobacco, Firearms and Explosives, as well as the DEA, were all participating in law enforcement activities in connection with the protests. The Federal Bureau of Prisons has also been involved. For each of these agencies (or any other agencies of the Department involved), please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and

f. the use of the information by the recipients' entities.

ANSWER: (b) (5)

QUESTION 3: The Attorney General's May 30, 2020, statement attributed incidents of violence and property damage to "[g]roups of outside radicals and agitators," adding that, "in many places, it appears the violence is planned, organized, and driven by anarchistic and far left extremists, using Antifa-like tactics, many of whom travel from out of state to promote the violence." On June 1, 2020, President Trump stated that "our nation has been gripped" by, among others, "professional anarchists" and "antifa." President Trump further described violence and property damage as "acts of domestic terrorism." Do you agree with these assessments? If so, please provide detailed and specific information to support them.

ANSWER: (b) (5)

QUESTION 4: On March 31, 2020, President Trump announced that "[t]he United States will be designating ANTIFA as a Terrorist Organization." Please describe the implications of this designation, in terms of policy, resource allocation, or investigative and surveillance authorities.

ANSWER: (b) (5)

QUESTION 5: Did you play any role or participate in any conversations related to the clearing of Lafayette Square on June 1, 2020? If yes, please describe that role or those conversations.

ANSWER: (b) (5)

QUESTION 6: Have you participated in any conversations about the proposed invocation of the Insurrection Act? If yes, please describe those conversations.

ANSWER: (b) (5)

QUESTION 7: Do you believe that Section 215 of the USA PATRIOT Act should be used to collect “tangible things” if they do not pertain to:

- a. a foreign power or an agent of a foreign power;
- b. the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or
- c. an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation?

If yes, under what specific circumstances do you believe the application for a Section 215 order could be based on the “relevance” standard without satisfying any of the above three requirements for presumptive relevance?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 8: Does the government collect web browsing and internet search history pursuant to Section 215? If so, what are or should be any limitations on such collection or the dissemination and use of such information? Does the government collect web browsing or internet search history pursuant to FISA Pen Register/Trap and Trace authorities?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 9: During his confirmation process, Assistant Attorney General for National Security John Demers was asked about the prohibition on reverse targeting in Section 702. He responded:

As I understand it, determining whether a particular known U.S. person has been reverse targeted through the targeting of a Section 702 target necessitates a fact specific inquiry that would involve consideration of a variety of factors. For example, as the Privacy and Civil Liberties Oversight Board noted in its 2014 report, if a Section 702 tasking resulted in substantial reporting by the Intelligence Community regarding a U.S. person, but little reporting about the Section 702 target, that might be an indication that reverse targeting may have occurred.

How should this “fact specific inquiry” be implemented through the Section 702 nominations and querying processes of Intelligence Community entities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: Do you believe Section 702 of FISA authorizes the collection of communications known to be entirely domestic?

ANSWER: (b) (5)

[REDACTED]

QUESTION 11: The 2018 legislation reauthorizing Section 702 of FISA codified limitations on the use of U.S. person information in criminal proceedings.

- a. Do you believe these limitations should be extended to other provisions of FISA?
- b. The limitations include an exception for “transnational crime, including transnational narcotics trafficking and transnational organized crime.” Please describe the full scope of “transnational crime” in this context.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 12: Under Section 702 of FISA, the government can direct an electronic communications service provider to provide “assistance necessary to accomplish the acquisition.” Under Section 702(h)(5), if a provider does not comply with a directive, the government may seek an order from the FISA Court to compel compliance. Prior to the reauthorization of Section 702 in 2018, the government stated that it had “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.”

- a. Is that still the case?
- b. Do you believe that the government should inform the FISA Court when it issues a directive to a provider to alter the encryption afforded by a service or a product, regardless of whether the government files a motion to compel compliance?
- c. Will you commit to notifying Congress of any such directive?

ANSWER: (b) (5)

QUESTION 13: Title 50, section 1812, provides for exclusive means by which electronic surveillance and interception of certain communications may be conducted. Do you agree that this provision is binding on the President?

ANSWER: (b) (5)

QUESTION 14: Do you believe that intelligence surveillance and collection activities covered by FISA can be conducted outside the FISA framework? If yes, please specify which intelligence surveillance and collection activities, the limits (if any) on extra-

statutory collection activities, and the legal authorities you believe would authorize those activities.

ANSWER: (b) (5)

[REDACTED]

QUESTION 15: What would you do if the Intelligence Community was requested or directed to conduct such collection activities outside the FISA framework? Would you notify the full congressional intelligence committees?

ANSWER: (b) (5)

[REDACTED]

QUESTION 16: Do you believe the Intelligence Community can purchase information related to U.S. persons if the compelled production of that information would be covered by FISA? If yes, what rules and guidelines would apply to the type and quantity of the information purchased and to the use, retention and dissemination of that information? Should the congressional intelligence committees be briefed on any such collection activities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 17: Is it legal for an element of the Intelligence Community to seek intelligence from a foreign partner or source on a U.S. person that that entity is not legally entitled to collect directly?

ANSWER: (b) (5)

QUESTION 18: What limitations do you believe should apply to the receipt, use or dissemination of communications of U.S. persons collected by a foreign partner or source? How should those limitations address instances in which the foreign partner or source specifically targeted U.S. persons or instances in which the foreign partner or source has collected bulk communications known to include those of U.S. persons?

ANSWER: (b) (5)

QUESTION 19: Do you believe that communications data collected in transit are or should be treated differently than communications data at rest? Please address any distinctions as they may apply to FISA, Executive Order 12333, PPD-28, and USSID 18.

ANSWER: (b) (5)

QUESTION 20: NSA Director Nakasone has stated that, absent consent of the U.S. person or certain emergency situations, U.S. person queries of communications collected under Executive Order 12333 “normally must be approved by the Attorney General on a case-by-case basis after a finding of probable cause.” Do you believe such limitation should apply to other elements of the Intelligence Community?

ANSWER: (b) (5)

[REDACTED]

QUESTION 21: In March 2019, the Department of Justice Inspector General released its “Review of the Drug Enforcement Administration’s use of Administrative Subpoenas to Collect or Exploit Bulk Data.” Do you believe that the subpoena authorities in question, and 21 U.S.C. 876(a) in particular, allow for bulk collection?

ANSWER: (b) (5)

[REDACTED]

QUESTION 22: Do you believe it is acceptable to forward a whistleblower complaint determined to be an “urgent concern” by the Intelligence Community Inspector General to the Department of Justice or the White House? If so, under what circumstances?

ANSWER: (b) (5)

[REDACTED]

QUESTION 23: Do you agree that the reports of the Privacy and Civil Liberties Oversight Board should be released to the public?

ANSWER: (b) (5)

[REDACTED]

QUESTION 24: Will you support the declassification and public release of any interpretation of law that provides a basis for intelligence activities but is inconsistent with the public’s understanding of the law?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 25: If a U.S. ambassador directs the Intelligence Community to cease a particular program or operation in the country where the ambassador is serving, is the Intelligence Community obligated to do so, absent or pending intervention by the President?

ANSWER: (b) (5)

QUESTION 26: Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the Detainee Treatment Act, the U.S statutory prohibition on torture, the War Crimes Act, or U.S. obligations under the Convention Against Torture or Common Article 3 of the Geneva Convention?

ANSWER: (b) (5)

QUESTION 27: On February 21, 2020, the Department of Defense announced that the Under Secretary for Intelligence & Security would review Army Field Manual (FM) 2-22.3, Human Intelligence Collector Operations. That review will include consultation with the DNI. Do you agree that the CIA's former enhanced interrogation techniques should be prohibited under the Field Manual and, if so, should that prohibition be explicit?

ANSWER: (b) (5)

QUESTION 28: Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 prohibits the use of any interrogation technique or approach or treatment related to interrogation not authorized by the Army Field Manual. Is this provision of law absolutely binding on the President?

ANSWER: (b) (5)

QUESTION 29: Please describe your view of the legal implications of targeting or otherwise knowingly killing a U.S. person in a U.S. government lethal operation. What additional public transparency do you believe would be warranted in that situation?

ANSWER: (b) (5)

[REDACTED]

QUESTION 30: On May 18, 2020, Newsweek ran a story entitled “Trump’s Secret New Watchlist Lets His Administration Track Americans Without Needing a Warrant.” The story described a database of individuals associated with transnational organized crime.

- a. Which entity is responsible for the database?
- b. What is the purpose of the database and what entities are its primary customers?
- c. What is the standard for inclusion in the database?
- d. Are U.S. persons in the database? If so, please provide any guidelines, regulations or Privacy Impact Assessments governing their inclusion.
- e. What information populates the database and what entities provide it? Does the database include classified intelligence, unclassified information, or both?
- f. How is “Transnational Organized Crime” defined for purposes of inclusion in the database?
- g. How many entries are in the database?

ANSWER: (b) (5)

[REDACTED]

QUESTION 31: Does the Terrorist Identities Datamart Environment (TIDE) database include U.S. persons or persons inside the United States who are not known or suspected terrorists? If so, please describe the basis for their inclusion.

ANSWER: (b) (5)

[REDACTED]

QUESTION 32: The January 2017 Intelligence Community Assessment concluded that Russia interfered in the 2016 election to benefit Donald Trump, an assessment confirmed by the Senate Select Committee on Intelligence. Do you agree with this assessment?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

From: Hovakimian, Patrick \ (ODAG\
Subject: RE: ODNI GC Policy Questionnaire Final v2.docx
To: (b)(3), (b)(6) per ODNI
Sent: July 1, 2020 1:46 PM (UTC-04:00)
Attached: ODNI GC Policy Questionnaire Final v2 PH.docx

Thanks (b)(3), (b)(6). Please see attached. I made some edits reflected in track changes to the answer to the last question. With these edits, I am ok with this being submitted to the Committee.

In addition to accepting the track changes that remain, please remember to delete the markings in the header before transmission.

Thanks again,

Pat

From: (b)(3), (b)(6) per ODNI
Sent: Wednesday, July 1, 2020 1:12 PM
To: Hovakimian, Patrick (ODAG) <(b)(6)>
Subject: ODNI GC Policy Questionnaire Final v2.docx

Duplicative Information - See Document ID 0.7.10659.55872

**SELECT COMMITTEE ON
INTELLIGENCE**

UNITED STATES SENATE



**Additional Pre-Hearing Questions for
Mr. Patrick Hovakimian upon his nomination to be
General Counsel for the Office of the Director of National Intelligence**

Keeping the Intelligence Committee Fully and Currently Informed

QUESTION 1: Section 502 of the National Security Act of 1947 provides that the obligation to keep the congressional intelligence committees fully and currently informed of all intelligence activities applies to the Director of National Intelligence (DNI) and to the heads of all departments, agencies, and other entities of the U.S. Government involved in intelligence activities. What is your understanding of the standard for meaningful compliance with this obligation by the Office of the Director of National Intelligence (ODNI) and the heads of all departments, agencies and other entities of the U.S. Government involved in intelligence activities to keep the congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities? Under what circumstances do you believe it is appropriate to brief the Chairman and Vice Chairman and not the full committee membership?

ANSWER: (b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

Priorities of the Director of National Intelligence

QUESTION 2: Have you discussed with the DNI his specific expectations of you, if confirmed as General Counsel, and his expectations of the Office of the General Counsel as a whole? If so, please describe those expectations.

ANSWER: (b) (5)

[REDACTED]

The Office of the General Counsel

QUESTION 3: The Office of the General Counsel of the ODNI has many roles and responsibilities. What are your expectations for the Office?

a. Do you have any preliminary observations on its responsibilities, performance, and effectiveness?

b. If confirmed, will you seek to make changes in the numbers or qualifications of attorneys in the office, or the operations of the office?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 4: Please describe who or what you understand to be your client or clients in the position of General Counsel of the Office of the Director of National Intelligence (ODNI/GC). As part of your answer, please address how that will guide your relationship with and obligations to the ODNI, the DNI, the Intelligence Community (IC) as a whole, and the President.

ANSWER: (b) (5)

[REDACTED]

QUESTION 5: Please explain how you would respond to each of the following scenarios:

- a. If the President or a White House official asks you to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.
- b. If you become aware that the President or a White House official has asked the DNI to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.

ANSWER: (b) (5)

[REDACTED]

QUESTION 6: Describe your understanding of the responsibilities of the DNI and the GC/ODNI in reviewing, and providing legal advice on, the work of the Central Intelligence Agency (CIA), including covert action undertaken by the CIA.

ANSWER: (b) (5)

[REDACTED]

QUESTION 7: Explain your understanding of the role of the ODNI/GC in resolving conflicting legal interpretations within the IC.

ANSWER: (b) (5)

[REDACTED]

(b) (5) [REDACTED]

Guidelines under Executive Order 12333

QUESTION 8: One of the fundamental documents governing the activities of the IC is Executive Order 12333. Under Executive Order 12333, as amended in July 2008, there are requirements for Attorney General-approved guidelines. For each of the following requirements, please update the Committee on the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, any issues you believe need to be resolved, and your perspective on where things stand at present.

ANSWER: (b) (5) [REDACTED]

- a. Guidelines under section 1.3(a)(2) for how information or intelligence is provided to, or accessed by, and used or shared by the IC, except for information excluded by law, by the President, or by the Attorney General acting under presidential order in accordance with section 1.5(a).

ANSWER: (b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5)

- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the DNI for collection and analysis directed to departments and other U.S. entities that are not elements of the IC.

ANSWER: (b) (5)

- c. Procedures under section 1.6(g) governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities abroad if the elements of the IC involved have intelligence responsibilities for foreign or domestic criminal drug production and trafficking.

ANSWER: (b) (5)

- d. Regulations under section 1.7(g)(1) for collection, analysis, production, and intelligence by intelligence elements of the Federal Bureau of Investigation (FBI) of foreign intelligence and counterintelligence to support national and departmental missions.

ANSWER: (b) (5)

- e. Procedures under section 2.3 on the collection, retention, and dissemination of United States person information and on the dissemination of information derived from signals intelligence to enable an IC element to determine where the information is relevant to its responsibilities.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

[REDACTED]

- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the IC uses the least intrusive techniques feasible within the U.S. or directed at U.S. persons abroad.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

- g. Procedures under section 2.9 on undisclosed participation in any organization in the United States by anyone acting on behalf of an IC element.

ANSWER: (b) (5)

Foreign Intelligence Surveillance Act

QUESTION 9: The FISA Amendments Reauthorization Act of 2017 (P.L. 115-118) was enacted on January 19, 2018 (hereinafter, the Act). Under section 702, the Attorney General and the DNI may authorize jointly, for a period up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. Section 702(l) also provides for semiannual or annual assessments and reviews.

ANSWER: (b) (5)

- a. Describe your understanding of the matters that the Attorney General and DNI, with the assistance of the ODNI/GC, should evaluate in order to determine whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, (3) querying procedures, and (4) guidelines required, to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

ANSWER: (b) (5)

(b) (5)

[REDACTED]

- b. Describe how the semiannual or annual assessments and reviews required by the Act should be integrated, both in substance and timing, into the process by which the Attorney General and DNI consider whether there should be revisions for the next annual authorization or authorizations under the Act, including in applicable targeting and minimization procedures and guidelines.

ANSWER: (b) (5)

[REDACTED]

- c. In addition to the matters described in the Act for semiannual or annual assessment or review, are there additional matters that should be evaluated periodically by the Attorney General or the DNI to improve and ensure the lawful and effective administration of the Act?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: The USA FREEDOM Act of 2015 (P.L. 114-53) reauthorized three national security tools – Business Records collection, Roving Surveillance, and the Lone Wolf provision – that expired on March 15, 2020.

- a. Given your experience at the Department of Justice, what concerns do you have with the expiration of these authorities?
- b. If confirmed as ODNI/GC, what efforts would you undertake to address these concerns?

ANSWER: (b) (5)

[REDACTED]

Other Surveillance Matters

QUESTION 11: Section 4 of PPD-28 calls on each IC element to update or issue policies and procedures to implement principles for safeguarding all personal information collected through SIGINT. Those policies and procedures are currently posted publicly. Will you ensure that the IC continues to post these policies and procedures as well as any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: (b) (5)

[REDACTED]

QUESTION 12: Are there any circumstances in which an element of the IC may *not* conduct a warrantless search for a U.S. person of communications that have been collected pursuant to Section 12333? If so, please describe.

ANSWER: (b) (5)

[REDACTED]

(b) (5) [REDACTED]

Transparency

QUESTION 13: Executive Order 13526 (December 29, 2009) provides that: “In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.” Executive Order 13292 (March 25, 2003) and Executive Order 12958 (April 17, 1995) prohibited classification based on the same factors. Do you agree with the prohibitions in these Executive Orders?

ANSWER: (b) (5) [REDACTED]

QUESTION 14: If, for any reason, you make a public statement that is inaccurate, do you commit to making a public statement correcting the record?

ANSWER: (b) (5) [REDACTED]

Evaluation of Office of the Director of National Intelligence

QUESTION 15: Members of the Committee have expressed concern that the ODNI does not have all of the legal authorities necessary to fulfill congressional expectations for the office. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to a successful mission of the ODNI? If so, please describe.

ANSWER: (b) (5) [REDACTED]

(b) (5)

QUESTION 16: Members also have expressed concerns that the ODNI’s bureaucracy has resulted in inefficiencies. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to the ability of the General Counsel’s office to function within the ODNI bureaucracy? If so, please describe.

ANSWER: (b) (5)

Intelligence Community Whistleblowers

QUESTION 17: Do you believe that IC whistleblowers currently have all the protections they need to interact directly with the congressional intelligence committees?

- a. If not, what legal authorities are required to ensure these protections?
- b. If so, what legal authorities provide the basis for those protections?

ANSWER: (b) (5)

QUESTION 18: What is your view of the ODNI/GC’s role relative to advancing an IC “whistleblower” complaint to Congress, pursuant to the Intelligence Community Whistleblower Protection Act?

ANSWER: (b) (5)

(b) (5)

QUESTION 19: Under what circumstances would you judge it appropriate to intercede in advancing a whistleblower complaint to Congress?

ANSWER: (b) (5)

QUESTION 20: How would you address a situation in which you disagree with the IC Inspector General’s determination that a whistleblower complaint qualifies as an “urgent concern,” for the purposes of advancing a complaint to Congress?

ANSWER: (b) (5)

QUESTION 21: Under what circumstances would you inform a party named in a whistleblower complaint that he or she is the subject of the complaint?

ANSWER: (b) (5)

Executive Branch Oversight of Intelligence Activities

QUESTION 22: Are there improvements, in terms of resources, methodology, and objectives that you believe should be considered for Executive Branch oversight of the intelligence activities of the United States Government?

ANSWER: (b) (5)

[REDACTED]

Relationship with Other Officials

QUESTION 23: What should be the relationship of the ODNI/GC with respect to the following officers of the IC?

a. General Counsel, CIA;

ANSWER: (b) (5)

[REDACTED]

b. Assistant Attorney General for National Security, Department of Justice;

ANSWER: (b) (5)

[REDACTED]

c. Inspector General, ODNI; and

ANSWER: (b) (5)

[REDACTED]

d. Civil Liberties and Privacy Officer, ODNI.

ANSWER: (b) (5)

[REDACTED]

QUESTION 24: Do you see the ODNI/GC in a supervisory role in relation to other IC agency General Counsel?

ANSWER: (b) (5)

[REDACTED]

QUESTION 25: Do you see the ODNI/GC in a supervisory role in relation to the Inspector General of the IC?

ANSWER: (b) (5)

QUESTION 26: What is your understanding of the relationship between the ODNI/GC and the White House Counsel’s Office (WHCO)? When do you believe it is appropriate to include WHCO in your legal deliberations?

ANSWER: (b) (5)

QUESTION 27: What do you believe the relationship is between the Office of General Counsel at ODNI and the Office of Legal Counsel (OLC) at the Department of Justice? Do you consider OLC opinions to be binding on the ODNI/GC? Please describe the circumstances under which you believe soliciting an opinion from OLC is appropriate.

ANSWER: (b) (5)

(b) (5)

Recruitment to the ODNI Office of General Counsel

QUESTION 28: What are your plans to recruit and retain top talent in the Office of General Counsel at ODNI? Do you plan to offer additional detailee options at all career levels so that attorneys from other agencies can bring their expertise to ODNI and, in turn, bring ODNI experience back to their home agency?

ANSWER: (b) (5)

[REDACTED]

Executive Privilege

QUESTION 29: Please describe your understanding of Executive Privilege: its general contours; to whom it can apply; and the time period during which it may apply. Please include your understanding of when the privilege can be waived.

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

QUESTION 30: Please define the phrase “executive branch confidentiality interests.” What are “executive branch confidentiality interests” and when/how do they differ from a claim of Executive Privilege?

ANSWER: (b) (5)

QUESTION 31: At what point would you refer information or material to WHCO to review for executive privilege issues?

ANSWER: (b) (5)

Professional Experience

QUESTION 32: For each of the following, describe specifically how your experiences will enable you to serve effectively as the ODNI/GC. Include within each response a description of issues relating to the position that you can identify based on those experiences.

a. U.S. Department of Justice, Office of the Deputy Attorney General;

ANSWER: (b) (5)

(b) (5) [REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b. U.S. Department of Justice, U.S. Attorney’s Office, Southern District of California; and

ANSWER: (b) (5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(b) (5) [REDACTED]
[REDACTED]
[REDACTED]

(b) (5)

[REDACTED]

c. Latham & Watkins, LLP.

ANSWER: (b) (5)

[REDACTED]

QUESTION 33: What, if any, conflicts might arise from your private practice if you are confirmed as General Counsel, and how would you address these conflicts?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

A large rectangular area of the document is completely redacted with a solid black fill, covering the majority of the page's content.

ADDITIONAL QUESTIONS FROM SENATOR FEINSTEIN

QUESTION 1: On June 2, 2020, BuzzFeed reported that the DEA requested and obtained expanded authority to engage in covert surveillance and share intelligence without any nexus to crimes related to drugs.

- a. Is it appropriate for law enforcement agencies with a specific statutory mission like the DEA to engage in more general intelligence-related activities like covert surveillance?
- b. What protections in law or policy would prevent the DEA from abusing this authority?
- c. Do you believe these activities would be subject to the requirement in Executive Order 12333 that any collection of intelligence about U.S. persons by an element of the intelligence community be pursuant to guidelines approved by the Attorney General in coordination with the DNI?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 2: Under what circumstances, in your view, would intelligence community elements with foreign intelligence missions be authorized to provide intelligence, technical, or other support to law enforcement agencies engaging in covert surveillance activities within the United States for law enforcement purposes? What limitations would apply to that support?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 3: As the General Counsel at ODNI, what steps would you take to ensure that all elements of the intelligence community, including ODNI, operate under U.S. persons procedures as required by Executive Order 12333? More generally, what steps

would you take to ensure activities like the covert surveillance of U.S. persons exercising their constitutional rights of free speech and assembly are properly regulated to avoid abuse?

ANSWER: (b) (5)

[REDACTED]

QUESTION 4: As you are aware, Congress has not yet passed legislation reauthorizing certain sections of the FISA, including the so-called “business records” provision as it was amended by section 215 of the USA PATRIOT Act, in part because of lingering concerns about the use of that provision to spy on Americans’ internet search and web browser histories without a FISC order finding probable cause that the information will yield foreign intelligence information. The House and the Senate have, however, passed separate bills that would restrict the use of section 215 when a person has a reasonable expectation of privacy and a warrant would be required in a criminal context.

- a. Do you think individuals have a reasonable expectation of privacy in their internet search and web browser histories, and do you think a warrant is required to search them? Why or why not?
- b. More generally, as General Counsel at ODNI, what steps would you take to ensure that the provisions of FISA, including the business records provision, are executed by IC elements in a manner consistent with the expectations of the American public when it comes to the protection of their personal information like internet search and web browser histories?

ANSWER: (b) (5)

[REDACTED]

ADDITIONAL QUESTIONS FROM SENATOR WYDEN

QUESTION 1: According to a memo from the Acting Administrator of the Drug Enforcement Administration (DEA) to the Deputy Attorney General, the DEA sought the authority to conduct “covert surveillance” in connection with recent protests and to “share intelligence with federal, state, local and tribal counterparts.” Was this authority granted? If so, please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and
- f. the use of the information by the recipients’ entities.

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 2: On May 30, 2020, the Attorney General announced that the Federal Bureau of Investigation, the U.S. Marshals Services, the Bureau of Alcohol, Tobacco, Firearms and Explosives, as well as the DEA, were all participating in law enforcement activities in connection with the protests. The Federal Bureau of Prisons has also been involved. For each of these agencies (or any other agencies of the Department involved), please describe:

- a. how the surveillance was conducted;
- b. the nature of the information collected;
- c. the authorities under which the surveillance was conducted;
- d. any recipient federal, state, local, municipal or tribal entities;
- e. any minimization procedures that apply to such sharing or dissemination;
and

f. the use of the information by the recipients' entities.

ANSWER: (b) (5)

QUESTION 3: The Attorney General's May 30, 2020, statement attributed incidents of violence and property damage to "[g]roups of outside radicals and agitators," adding that, "in many places, it appears the violence is planned, organized, and driven by anarchistic and far left extremists, using Antifa-like tactics, many of whom travel from out of state to promote the violence." On June 1, 2020, President Trump stated that "our nation has been gripped" by, among others, "professional anarchists" and "antifa." President Trump further described violence and property damage as "acts of domestic terrorism." Do you agree with these assessments? If so, please provide detailed and specific information to support them.

ANSWER: (b) (5)

QUESTION 4: On March 31, 2020, President Trump announced that "[t]he United States will be designating ANTIFA as a Terrorist Organization." Please describe the implications of this designation, in terms of policy, resource allocation, or investigative and surveillance authorities.

ANSWER: (b) (5)

QUESTION 5: Did you play any role or participate in any conversations related to the clearing of Lafayette Square on June 1, 2020? If yes, please describe that role or those conversations.

ANSWER: (b) (5)

QUESTION 6: Have you participated in any conversations about the proposed invocation of the Insurrection Act? If yes, please describe those conversations.

ANSWER: (b) (5)

QUESTION 7: Do you believe that Section 215 of the USA PATRIOT Act should be used to collect “tangible things” if they do not pertain to:

- a. a foreign power or an agent of a foreign power;
- b. the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or
- c. an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation?

If yes, under what specific circumstances do you believe the application for a Section 215 order could be based on the “relevance” standard without satisfying any of the above three requirements for presumptive relevance?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 8: Does the government collect web browsing and internet search history pursuant to Section 215? If so, what are or should be any limitations on such collection or the dissemination and use of such information? Does the government collect web browsing or internet search history pursuant to FISA Pen Register/Trap and Trace authorities?

ANSWER: (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

QUESTION 9: During his confirmation process, Assistant Attorney General for National Security John Demers was asked about the prohibition on reverse targeting in Section 702. He responded:

As I understand it, determining whether a particular known U.S. person has been reverse targeted through the targeting of a Section 702 target necessitates a fact specific inquiry that would involve consideration of a variety of factors. For example, as the Privacy and Civil Liberties Oversight Board noted in its 2014 report, if a Section 702 tasking resulted in substantial reporting by the Intelligence Community regarding a U.S. person, but little reporting about the Section 702 target, that might be an indication that reverse targeting may have occurred.

How should this “fact specific inquiry” be implemented through the Section 702 nominations and querying processes of Intelligence Community entities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 10: Do you believe Section 702 of FISA authorizes the collection of communications known to be entirely domestic?

ANSWER: (b) (5)

[REDACTED]

QUESTION 11: The 2018 legislation reauthorizing Section 702 of FISA codified limitations on the use of U.S. person information in criminal proceedings.

- a. Do you believe these limitations should be extended to other provisions of FISA?
- b. The limitations include an exception for “transnational crime, including transnational narcotics trafficking and transnational organized crime.” Please describe the full scope of “transnational crime” in this context.

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 12: Under Section 702 of FISA, the government can direct an electronic communications service provider to provide “assistance necessary to accomplish the acquisition.” Under Section 702(h)(5), if a provider does not comply with a directive, the government may seek an order from the FISA Court to compel compliance. Prior to the reauthorization of Section 702 in 2018, the government stated that it had “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.”

- a. Is that still the case?
- b. Do you believe that the government should inform the FISA Court when it issues a directive to a provider to alter the encryption afforded by a service or a product, regardless of whether the government files a motion to compel compliance?
- c. Will you commit to notifying Congress of any such directive?

ANSWER: (b) (5)

QUESTION 13: Title 50, section 1812, provides for exclusive means by which electronic surveillance and interception of certain communications may be conducted. Do you agree that this provision is binding on the President?

ANSWER: (b) (5)

QUESTION 14: Do you believe that intelligence surveillance and collection activities covered by FISA can be conducted outside the FISA framework? If yes, please specify which intelligence surveillance and collection activities, the limits (if any) on extra-

statutory collection activities, and the legal authorities you believe would authorize those activities.

ANSWER: (b) (5)

[REDACTED]

QUESTION 15: What would you do if the Intelligence Community was requested or directed to conduct such collection activities outside the FISA framework? Would you notify the full congressional intelligence committees?

ANSWER: (b) (5)

[REDACTED]

QUESTION 16: Do you believe the Intelligence Community can purchase information related to U.S. persons if the compelled production of that information would be covered by FISA? If yes, what rules and guidelines would apply to the type and quantity of the information purchased and to the use, retention and dissemination of that information? Should the congressional intelligence committees be briefed on any such collection activities?

ANSWER: (b) (5)

[REDACTED]

QUESTION 17: Is it legal for an element of the Intelligence Community to seek intelligence from a foreign partner or source on a U.S. person that that entity is not legally entitled to collect directly?

ANSWER: (b) (5)

QUESTION 18: What limitations do you believe should apply to the receipt, use or dissemination of communications of U.S. persons collected by a foreign partner or source? How should those limitations address instances in which the foreign partner or source specifically targeted U.S. persons or instances in which the foreign partner or source has collected bulk communications known to include those of U.S. persons?

ANSWER: (b) (5)

QUESTION 19: Do you believe that communications data collected in transit are or should be treated differently than communications data at rest? Please address any distinctions as they may apply to FISA, Executive Order 12333, PPD-28, and USSID 18.

ANSWER: (b) (5)

QUESTION 20: NSA Director Nakasone has stated that, absent consent of the U.S. person or certain emergency situations, U.S. person queries of communications collected under Executive Order 12333 “normally must be approved by the Attorney General on a case-by-case basis after a finding of probable cause.” Do you believe such limitation should apply to other elements of the Intelligence Community?

ANSWER: (b) (5)

[REDACTED]

QUESTION 21: In March 2019, the Department of Justice Inspector General released its “Review of the Drug Enforcement Administration’s use of Administrative Subpoenas to Collect or Exploit Bulk Data.” Do you believe that the subpoena authorities in question, and 21 U.S.C. 876(a) in particular, allow for bulk collection?

ANSWER: (b) (5)

[REDACTED]

QUESTION 22: Do you believe it is acceptable to forward a whistleblower complaint determined to be an “urgent concern” by the Intelligence Community Inspector General to the Department of Justice or the White House? If so, under what circumstances?

ANSWER: (b) (5)

[REDACTED]

QUESTION 23: Do you agree that the reports of the Privacy and Civil Liberties Oversight Board should be released to the public?

ANSWER: (b) (5)

[REDACTED]

QUESTION 24: Will you support the declassification and public release of any interpretation of law that provides a basis for intelligence activities but is inconsistent with the public’s understanding of the law?

ANSWER: (b) (5)

[REDACTED]

(b) (5)

QUESTION 25: If a U.S. ambassador directs the Intelligence Community to cease a particular program or operation in the country where the ambassador is serving, is the Intelligence Community obligated to do so, absent or pending intervention by the President?

ANSWER: (b) (5)

QUESTION 26: Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the Detainee Treatment Act, the U.S statutory prohibition on torture, the War Crimes Act, or U.S. obligations under the Convention Against Torture or Common Article 3 of the Geneva Convention?

ANSWER: (b) (5)

QUESTION 27: On February 21, 2020, the Department of Defense announced that the Under Secretary for Intelligence & Security would review Army Field Manual (FM) 2-22.3, Human Intelligence Collector Operations. That review will include consultation with the DNI. Do you agree that the CIA's former enhanced interrogation techniques should be prohibited under the Field Manual and, if so, should that prohibition be explicit?

ANSWER: (b) (5)

QUESTION 28: Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 prohibits the use of any interrogation technique or approach or treatment related to interrogation not authorized by the Army Field Manual. Is this provision of law absolutely binding on the President?

ANSWER: (b) (5)

QUESTION 29: Please describe your view of the legal implications of targeting or otherwise knowingly killing a U.S. person in a U.S. government lethal operation. What additional public transparency do you believe would be warranted in that situation?

ANSWER: (b) (5)

[REDACTED]

QUESTION 30: On May 18, 2020, Newsweek ran a story entitled “Trump’s Secret New Watchlist Lets His Administration Track Americans Without Needing a Warrant.” The story described a database of individuals associated with transnational organized crime.

- a. Which entity is responsible for the database?
- b. What is the purpose of the database and what entities are its primary customers?
- c. What is the standard for inclusion in the database?
- d. Are U.S. persons in the database? If so, please provide any guidelines, regulations or Privacy Impact Assessments governing their inclusion.
- e. What information populates the database and what entities provide it? Does the database include classified intelligence, unclassified information, or both?
- f. How is “Transnational Organized Crime” defined for purposes of inclusion in the database?
- g. How many entries are in the database?

ANSWER: (b) (5)

[REDACTED]

QUESTION 31: Does the Terrorist Identities Datamart Environment (TIDE) database include U.S. persons or persons inside the United States who are not known or suspected terrorists? If so, please describe the basis for their inclusion.

ANSWER: (b) (5)

[REDACTED]

QUESTION 32: The January 2017 Intelligence Community Assessment concluded that Russia interfered in the 2016 election to benefit Donald Trump, an assessment confirmed by the Senate Select Committee on Intelligence. Do you agree with this assessment?

ANSWER: (b)(5); contains further (b)(5) per ODNI

[REDACTED]

From: Creegan, Erin (ODAG)
Subject: FW: Compliance Memos
To: Moran, John (ODAG)
Sent: August 24, 2020 5:53 PM (UTC-04:00)
Attached: Compliance Memo_8.24.2020_REDLINE.docx, Compliance Memo_8.24.2020_REDLINE.pdf, Compliance Memo_8.24.2020_CLEAN.docx, Supplement Reforms_8.24.2020_REDLINE.docx, Supplement Reforms_8.24.2020_REDLINE.pdf, Supplement Reforms_8.24.2020_CLEAN.docx

FYI looks like this is moving even faster than expected. Does DAG want a brief Wednesday afternoon in our scheduled meeting (at which time changes will be difficult) or tomorrow? Some of this verbiage has kicked around for a while since it was part of the legislative proposal, and Ryan and I have personally edited, so I am not expecting the DAG will need to personally review, but want to give him the opportunity if he would like to do so.

From: Newman, Ryan D. (OAG) <(b) (6)>
Sent: Monday, August 24, 2020 4:34 PM
To: Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>
Subject: Compliance Memos

All,

Melissa and I met with the AG this afternoon regarding the compliance memos we've been working on. The AG wants these memos to be issued no later than end of day on Wednesday.

Attached are the current drafts of the memos, including redlined versions. Please provide comments asap, as I would like to send the drafts to FBI today.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice
T: (b) (6)
M: (b) (6)
(b) (6)

From: Newman, Ryan D. \ (OAG\
Subject: FW:
To: Watson, Theresa \ (OAG\
Cc: Levi, William \ (OAG\
Sent: August 24, 2020 6:14 PM (UTC-04:00)
Attached: Compliance Memo_8.24.2020_CLEAN.docx, Supplement
Reforms_8.24.2020_CLEAN.docx

Theresa,

Will asked that the attached memos go home with the AG this evening.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)

M: (b) (6)

(b) (6)

-----Original Message-----

From: Levi, William (OAG) <(b) (6)>
Sent: Monday, August 24, 2020 3:18 PM
To: Newman, Ryan D. (OAG) <(b) (6)>
Subject:

Can you send him the drafts w the AG tonight?

From: Newman, Ryan D. (OAG)
Subject: RE: Update re: AG Memos
To: MacTough, Melissa (NSD); Kjergaard, Alison (OPA); Demers, John C. (NSD); Engel, Steven A. (OLC); Whitaker, Henry C. (OLC); Boyd, Stephen E. (OLA); (b) (6) (OLA); Hankey, Mary Blanche (OLA); Lofthus, Lee J (JMD); Blue, Matthew (ODAG); Creegan, Erin (ODAG); Timmons, Mollie R. (PAO); Lloyd, Matt (PAO)
Cc: Harwood, Stacy (OAG); Levi, William (OAG)
Sent: August 30, 2020 5:55 PM (UTC-04:00)
Attached: FBI Compliance Memo_8.30.2020_FINAL.docx, Supplement Reforms_8.30.2020_FINAL.docx

Apologies. Neglected to attach both memos. Both are attached here.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)
M: (b) (6)
(b) (6)

From: Newman, Ryan D. (OAG)
Sent: Sunday, August 30, 2020 5:53 PM
To: MacTough, Melissa (NSD) <(b) (6)>; Kjergaard, Alison (OPA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>; Lloyd, Matt (PAO) <(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>; Levi, William (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

All,

Attached are the current, final versions of the two AG memos that we plan to issue tomorrow, pending final clearance in the morning by OLC.

Stacy, please prepare the memos for AG signature, but do not print them out until I give you a final green light.

As we discussed last week, once the memos are signed, I will provide them to OLA for transmittal to the Hill.

OPA should wait to release the press statement until at least 3 hours after the memos are delivered to the Hill.

Please let me know if you have any questions or concerns. I will let everyone know once the memos are signed.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)
M: (b) (6)
(b) (6)

From: MacTough, Melissa (NSD) <(b) (6)>
Sent: Saturday, August 29, 2020 9:25 AM
To: Newman, Ryan D. (OAG) <(b) (6)>; Kjergaard, Alison (OPA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>; Lloyd, Matt (PAO) <(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

Alison – attached are current versions of the fact sheets that reflect the current versions of the memos.

Thanks.
-Melissa

From: Newman, Ryan D. (OAG) <(b) (6)>
Sent: Friday, August 28, 2020 9:32 PM
To: Kjergaard, Alison (OPA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>; Lloyd, Matt (PAO) <(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

Ali,

Attached are my proposed edits to the press statement.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)
M: (b) (6)
(b) (6)

From: Kjergaard, Alison (OPA) <(b) (6)>
Sent: Friday, August 28, 2020 6:26 PM
To: Newman, Ryan D. (OAG) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6)

(OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD)
<(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG)
<(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>; Lloyd, Matt (PAO)
<(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

Thanks Ryan. Looping in Matt too.

From: Newman, Ryan D. (OAG) <(b) (6)>
Sent: Friday, August 28, 2020 10:22 AM
To: Kjergaard, Alison (OPA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>;
MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker,
Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6)
(OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD)
<(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG)
<(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

Ali,

I will have additional comments / edits, but looks like I won't be able to get to it until later today.

And, yes, please make sure that (b) (5) . Very important.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice
T: (b) (6)
M: (b) (6)
(b) (6)

From: Kjergaard, Alison (OPA) <(b) (6)>
Sent: Friday, August 28, 2020 10:20 AM
To: Newman, Ryan D. (OAG) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>;
MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker,
Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6)
(OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Lofthus, Lee J (JMD)
<(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG)
<(b) (6)>; Timmons, Mollie R. (PAO) <(b) (6)>
Cc: Harwood, Stacy (OAG) <(b) (6)>
Subject: RE: Update re: AG Memos

Hello all,

I wanted to touch base on this to see if more tweaks needed to be made to the statement based on additional FBI/OLC comments.

I'm in touch with FBI and I believe the plan is for them to (b)(5) per FBI .

Ali Kjergaard

Public Affairs Specialist

Department of Justice

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(Cell)

From: Newman, Ryan D. (OAG) <(b) (6)>

Sent: Wednesday, August 26, 2020 7:26 PM

To: Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Kjergaard, Alison (OPA) <(b) (6)>; Lofthus, Lee J (JMD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>

Cc: Harwood, Stacy (OAG) <(b) (6)>

Subject: RE: Update re: AG Memos

All,

The event that was driving the timeline has been postponed to next week, so the AG has decided to push the rollout of the two memos to Monday. I have received the FBI's comments and intend to send it to NSD for their views. Once we adjudicate the FBI comments, I will merge those edits with the existing draft and kick it back to OLC tomorrow.

Thanks,

Ryan

Ryan D. Newman

Counselor to the Attorney General

Office of the Attorney General

U.S. Department of Justice

T: (b) (6)

M: (b) (6)

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From: Newman, Ryan D. (OAG)

Sent: Wednesday, August 26, 2020 10:56 AM

To: Demers, John C. (NSD) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>; Engel, Steven A. (OLC) <(b) (6)>; Whitaker, Henry C. (OLC) <(b) (6)>; Boyd, Stephen E. (OLA) <(b) (6)>; (b) (6) (OLA) <(b) (6)>; Hankey, Mary Blanche (OLA) <(b) (6)>; Kjergaard, Alison (OPA) <(b) (6)>; Lofthus, Lee J (JMD) <(b) (6)>; Blue, Matthew (ODAG) <(b) (6)>; Creegan, Erin (ODAG) <(b) (6)>

Cc: Harwood, Stacy (OAG) <(b) (6)>

Subject: Update re: AG Memos

All,

Just a quick update on the status of the two AG memos that we hoped to issue today. They are still undergoing review by the FBI, so I conferred with Will, and we decided to hold off issuing the memos until tomorrow. Here is an updated

timeline:

- (1) FBI completes its review by end of day today.
- (2) OLC completes its final form and legality review by 10:30 am tomorrow.
- (3) AG reviews and approves language.
- (4) Memos are prepared, autopenned, and distributed to components by 2 pm tomorrow.
- (5) OLA sends memos to relevant congressional staff between 2 – 2:30 pm.
- (6) OPA releases press statement at 5 pm.

Any objections or concerns with this timeline?

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)

M: (b) (6)

(b) (6)

From: Newman, Ryan D. (OAG)
Subject: Supplemental Reform and Compliance Memoranda
To: Levi, William (OAG)
Cc: Harwood, Stacy (OAG); Watson, Theresa (OAG)
Sent: August 31, 2020 2:17 PM (UTC-04:00)
Attached: AG Memo Supplemental Reforms to Enhance Compliance Oversight and Accountability. 8.31.2020.pdf, AG Memo Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation . 8.31.2020.pdf

Will,

OLC just approved the two FBI memos for AG signature. Final versions attached. I can have hard copies waiting for the AG to review and sign when he gets back from the WH or, if you prefer and the AG approves, I can have them autopenned.

Let me know what you'd like to do.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)

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Office of the Attorney General
Washington, D. C. 20530

August 31, 2020

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE ASSISTANT ATTORNEY GENERAL FOR
NATIONAL SECURITY

FROM: THE ATTORNEY GENERAL

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability
with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of
Investigation

Collecting foreign intelligence information is vital to our national security. At the same time, the American people must have confidence that the United States Government will collect and use this information in a manner that protects the civil liberties of Americans, avoids interference in the political process, and complies with the Constitution and the laws of the United States. Compliance with the law is also important to ensure that, in appropriate cases, the collected information may be used in criminal proceedings.

To protect the civil liberties of Americans, it is imperative that the Department make accurate and complete representations to judicial officers when seeking to obtain legal authority to conduct intelligence activities. When those activities involve federal elected officials, federal political candidates, or their respective staff members, the Department must be especially vigilant. Such intelligence activities must be subject to rigorous review to ensure that they are justified and non-partisan, are based on full and complete information, take into account the significant First Amendment interests at stake, and do not undermine the political process.

Therefore, in order to address concerns identified in the report by the Inspector General of the Department of Justice entitled, "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" (December 2019), and to build on the important reforms described by the Director of the Federal Bureau of Investigation ("FBI") in his December 6, 2019, response to the Inspector General's report, I hereby direct that the following additional steps be taken:

1. Before any application initiating or renewing the targeting of a United States person is submitted to the Foreign Intelligence Surveillance Court ("FISC"), relevant FBI personnel, as determined by the Director of the FBI, shall (i) review the case file and the accuracy sub-file to ensure the proposed application is accurate and complete, and (ii) report the findings of these reviews to the attorney from the National Security Division ("NSD") Office of Intelligence who is handling the case.

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Assistant Attorney General for National Security

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation Page 2

2. Any misstatement or omission of material fact in a submission to the FISC, as determined by NSD, must be immediately reported to the FISC in accordance with the FISC's Rules of Procedure. With respect to the implementation of an approval or authority granted by the FISC, any instance of non-compliance with applicable law or with such approval or authorization, as determined by NSD, including non-compliance with procedures adopted by the Attorney General and approved by the FISC, must be immediately reported to the FISC in accordance with the FISC's Rules of Procedure. If the FBI self-identifies a compliance incident related to the Foreign Intelligence Surveillance Act ("FISA"), it must be immediately reported to NSD.
3. With respect to applications for authorization to conduct electronic surveillance or physical searches pursuant to FISA targeting (i) a federal elected official or staff members of the elected official, or (ii) an individual who is a declared candidate for federal elected office or staff members or advisors of such candidate's campaign (including any person who has been publicly announced by a campaign as a staff member or member of an official campaign advisory committee or group, or any person who is an informal advisor to the campaign), the Assistant Attorney General for National Security and the Director of the FBI shall take steps to ensure that:
 - (a) no such application shall be made unless the Director of the FBI first considers conducting a defensive briefing of the target and either the FBI conducts such a briefing or, if the Director determines that such a briefing is not appropriate, the Director documents this determination in writing;
 - (b) such application shall be approved by the Attorney General, after submission through the Deputy Attorney General and the Assistant Attorney General for National Security and certification by the Director of the FBI (approval by the Attorney General and certification by the Director of the FBI in this subparagraph may not be delegated);
 - (c) no such application shall be made unless an Assistant Special Agent in Charge or designee in a field office not involved in the investigation, in consultation with the FBI Deputy General Counsel, National Security and Cyber Law Branch, or designee, reviews the case file and evaluates the proposed filing for accuracy and completeness, and the results of such a review are briefed to the Attorney General, the Deputy Attorney General, and the Assistant Attorney General for National Security before the Attorney General approves the application;

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Assistant Attorney General for National Security

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation Page 3

- (d) the Department shall not apply for an order that authorizes surveillance or search for a period of more than 60 days, which order may be renewed;
 - (e) the Department shall file reports every 30 days with the FISC on the results of the approved surveillance or search and the continued need for such authority;
 - (f) such application shall include a full and complete statement as to whether other less intrusive investigative procedures have been tried and failed or why such procedures reasonably appear to be unlikely to succeed if tried or to be too dangerous, including for purposes of personal safety or national security;
 - (g) the Assistant Attorney General for National Security shall conduct a case file review of any investigation and an accuracy review of any application within 60 days of the grant of such application. Such reviews shall ensure that the investigation, including the application, was properly predicated, that the various national security investigative tools used during the investigation were consistent with applicable authorities, and that all material information that could reasonably call into question the accuracy of any information or assessment in the application or that is capable of influencing the probable cause determination was accurately and completely disclosed in the application.
4. To address concerns that United States persons may become unwitting participants in an effort by a foreign power to influence an election or the policy or conduct of the United States Government, the Director of the FBI shall, within 90 days of the date of this memorandum, promulgate procedures, in consultation with the Deputy Attorney General, concerning defensive briefings.
 5. The Director of the FBI shall, within 90 days of the date of this memorandum, conduct a comprehensive review of, and make any necessary revisions to, the disciplinary policies and procedures of the FBI to ensure that any agent or employee who knowingly causes a misrepresentation or omission of material fact in a submission to the FISC or the Foreign Intelligence Surveillance Court of Review is referred to appropriate officials in a timely manner for disciplinary action in accordance with policy and procedure. The Director of the FBI shall report the results of such review to the Deputy Attorney General.

This memorandum shall be implemented consistent with applicable law, including FISA and the orders of the FISC. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



Office of the Attorney General
Washington, D. C. 20530

August 31, 2020

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE
THE ASSISTANT ATTORNEY GENERAL FOR
NATIONAL SECURITY
THE ASSISTANT ATTORNEY GENERAL FOR
ADMINISTRATION

FROM: THE ATTORNEY GENERAL

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of
Investigation

A robust internal compliance program is critical to ensure faithful compliance with the laws, policies, and procedures that govern agency activities. The Office of Integrity and Compliance ("OIC") and the Inspection Division ("INSD") of the Federal Bureau of Investigation ("FBI") currently have responsibility for internal compliance and internal investigations within the FBI. To enhance the FBI's existing compliance efforts, the Director of the FBI is taking steps to build a more robust and exacting internal audit capability, including the creation of an office focused on auditing the FBI's national security activities. To support that effort, I hereby authorize the Director of the FBI to commence the process of establishing, consistent with law and policy, the Office of Internal Auditing ("OIA"). A separate office devoted to internal auditing and headed by a senior FBI official will ensure that rigorous and robust auditing, which is an essential ingredient to an effective compliance regime, is carried out. The FBI shall work with the Justice Management Division to make the required reorganization notifications regarding this new office. Once established, OIA shall be led by an Assistant Director who shall have the same reporting chain as the Assistant Director for OIC and the Assistant Director for INSD. The Director of the FBI shall appoint the Assistant Directors for OIC, INSD, and OIA, with the approval of the Deputy Attorney General.

OIC, INSD, and OIA shall be responsible for carrying out the internal compliance functions of the FBI as assigned by the Director of the FBI, who shall ensure that each office does not duplicate responsibilities and is adequately staffed to perform its assigned functions. The Deputy Attorney General and the Assistant Attorney General for Administration shall coordinate with the Director to ensure that those functions are resourced and funded appropriately. The compliance functions of the FBI shall include, but are not limited to, the following responsibilities:

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Inspector General, Department of Justice
The Assistant Attorney General for National Security
The Assistant Attorney General for Administration

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation

Page 2

1. Developing compliance and oversight mechanisms, training, and other internal controls to ensure FBI compliance with applicable Attorney General guidelines, the FBI Domestic Investigations and Operations Guide ("DIOG"), applicable provisions of the Foreign Intelligence Surveillance Act ("FISA"), and other applicable statutes, policies, procedures, and court orders governing the FBI's national security activities;
2. Conducting routine audits of the FBI's national security activities to ensure compliance with applicable Attorney General guidelines and the DIOG;
3. Conducting routine audits of the FBI's use of National Security Letters to determine compliance with applicable statutes, policies, and procedures;
4. Conducting routine audits of the FBI's compliance with FISA, Foreign Intelligence Surveillance Court orders, and FISA minimization, targeting, and querying procedures;
5. Conducting routine audits of the measures taken by the FBI to ensure the accuracy and completeness of FISA applications;
6. Assessing on a routine basis the efficacy of FISA minimization, targeting, and querying procedures adopted by the Attorney General, as well as the efficacy of any corrective measures, including the enhanced training and revised FISA request, FISA verification, and confidential human source forms adopted by the Director of the FBI;
7. Assessing on a routine basis whether there are sufficient processes in place to ensure that the National Security Division ("NSD") is timely notified of applicable investigations, as required by the Attorney General Guidelines for Domestic FBI Operations;
8. Recommending remediation measures to the Director of the FBI, as appropriate, for any identified compliance incidents, including those identified by the NSD or a federal court;
9. Assessing on a routine basis trends in FBI compliance with applicable statutes, policies, procedures, and court orders governing the FBI's national security activities, and developing recommendations to enhance compliance, including recommendations with respect to disciplinary policies and procedures; and

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Inspector General, Department of Justice
The Assistant Attorney General for National Security
The Assistant Attorney General for Administration

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation

Page 3

10. Reporting the findings of audits or assessments through the Director of the FBI to the Deputy Attorney General and, as applicable, the Assistant Attorney General for National Security, and providing any recommendations to improve policies, procedures, training, and internal compliance controls.

Within 60 days of the date of this memorandum, the Director of the FBI shall provide the Attorney General and Deputy Attorney General a status report on the implementation of this memorandum, including an assessment of whether the FBI's implementation plans will satisfy the requirements of this memorandum.

The Department of Justice Inspector General has agreed to assess the implementation of this memorandum ("initial assessment") no sooner than 18 months after the establishment of OIA and to report such assessment, consistent with the Inspector General Act, to the Attorney General, Deputy Attorney General, Director of the FBI, and Assistant Attorney General for National Security. The Inspector General has further agreed to conduct a subsequent assessment no later than five years after the initial assessment, and periodically thereafter as determined by the Inspector General, and to report such assessments, consistent with the Inspector General Act, to the Attorney General, Deputy Attorney General, Director of the FBI, and Assistant Attorney General for National Security.

Within 60 days of the date of the Inspector General's initial assessment, the Director of the FBI shall provide the Attorney General and Deputy Attorney General an assessment of the implementation of this memorandum, including an assessment of the effectiveness of the FBI's compliance structure and whether compliance functions should be consolidated under an Executive Assistant Director.

In addition, the Inspector General has agreed to conduct, within one year of the date of this memorandum, a comprehensive review of the roles and responsibilities of the FBI Office of General Counsel ("OGC") in overseeing compliance with applicable laws, policies, and procedures relating to the FBI's national security activities. The Inspector General has agreed to provide recommendations, if any, on how OGC's roles and responsibilities should be clarified or restructured.

This memorandum shall be implemented consistent with applicable law and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

From: Newman, Ryan D. \ (OAG\
Subject: FBI Memos
To: Levi, William \ (OAG\
Cc: Raimondi, Marc \ (OPA\
Sent: August 31, 2020 4:36 PM (UTC-04:00)
Attached: AG Memo Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation . 8.31.2020.pdf, AG Memo Supplemental Reforms to Enhance Compliance Oversight and Accountability with Respect to Certain Foreign Intelligence Activities of the FBI. 8.31.2020.pdf

Will / Kerri,

Attached are the signed AG memos.

Given the late hour, I understand that OLA would prefer to wait until tomorrow morning—perhaps 8 am—to send them to the Hill. Kerri, I understand you feel the same.

Please advise. I can have OLA hold until 8 am.

Thanks,
Ryan

Ryan D. Newman
Counselor to the Attorney General
Office of the Attorney General
U.S. Department of Justice

T: (b) (6)

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(b) (6)



Office of the Attorney General
Washington, D. C. 20530

August 31, 2020

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE
THE ASSISTANT ATTORNEY GENERAL FOR
NATIONAL SECURITY
THE ASSISTANT ATTORNEY GENERAL FOR
ADMINISTRATION

FROM: THE ATTORNEY GENERAL *W. Barr*

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation

A robust internal compliance program is critical to ensure faithful compliance with the laws, policies, and procedures that govern agency activities. The Office of Integrity and Compliance ("OIC") and the Inspection Division ("INSD") of the Federal Bureau of Investigation ("FBI") currently have responsibility for internal compliance and internal investigations within the FBI. To enhance the FBI's existing compliance efforts, the Director of the FBI is taking steps to build a more robust and exacting internal audit capability, including the creation of an office focused on auditing the FBI's national security activities. To support that effort, I hereby authorize the Director of the FBI to commence the process of establishing, consistent with law and policy, the Office of Internal Auditing ("OIA"). A separate office devoted to internal auditing and headed by a senior FBI official will ensure that rigorous and robust auditing, which is an essential ingredient to an effective compliance regime, is carried out. The FBI shall work with the Justice Management Division to make the required reorganization notifications regarding this new office. Once established, OIA shall be led by an Assistant Director who shall have the same reporting chain as the Assistant Director for OIC and the Assistant Director for INSD. The Director of the FBI shall appoint the Assistant Directors for OIC, INSD, and OIA, with the approval of the Deputy Attorney General.

OIC, INSD, and OIA shall be responsible for carrying out the internal compliance functions of the FBI as assigned by the Director of the FBI, who shall ensure that each office does not duplicate responsibilities and is adequately staffed to perform its assigned functions. The Deputy Attorney General and the Assistant Attorney General for Administration shall coordinate with the Director to ensure that those functions are resourced and funded appropriately. The compliance functions of the FBI shall include, but are not limited to, the following responsibilities:

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Inspector General, Department of Justice
The Assistant Attorney General for National Security
The Assistant Attorney General for Administration

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation

Page 2

1. Developing compliance and oversight mechanisms, training, and other internal controls to ensure FBI compliance with applicable Attorney General guidelines, the FBI Domestic Investigations and Operations Guide ("DIOG"), applicable provisions of the Foreign Intelligence Surveillance Act ("FISA"), and other applicable statutes, policies, procedures, and court orders governing the FBI's national security activities;
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6. Assessing on a routine basis the efficacy of FISA minimization, targeting, and querying procedures adopted by the Attorney General, as well as the efficacy of any corrective measures, including the enhanced training and revised FISA request, FISA verification, and confidential human source forms adopted by the Director of the FBI;
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8. Recommending remediation measures to the Director of the FBI, as appropriate, for any identified compliance incidents, including those identified by the NSD or a federal court;
9. Assessing on a routine basis trends in FBI compliance with applicable statutes, policies, procedures, and court orders governing the FBI's national security activities, and developing recommendations to enhance compliance, including recommendations with respect to disciplinary policies and procedures; and

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Inspector General, Department of Justice
The Assistant Attorney General for National Security
The Assistant Attorney General for Administration

SUBJECT: Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation

Page 3

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Within 60 days of the date of the Inspector General's initial assessment, the Director of the FBI shall provide the Attorney General and Deputy Attorney General an assessment of the implementation of this memorandum, including an assessment of the effectiveness of the FBI's compliance structure and whether compliance functions should be consolidated under an Executive Assistant Director.

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This memorandum shall be implemented consistent with applicable law and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



Office of the Attorney General
Washington, D. C. 20530

August 31, 2020

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE ASSISTANT ATTORNEY GENERAL FOR
NATIONAL SECURITY

FROM: THE ATTORNEY GENERAL *W. Barr*

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability
with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of
Investigation

Collecting foreign intelligence information is vital to our national security. At the same time, the American people must have confidence that the United States Government will collect and use this information in a manner that protects the civil liberties of Americans, avoids interference in the political process, and complies with the Constitution and the laws of the United States. Compliance with the law is also important to ensure that, in appropriate cases, the collected information may be used in criminal proceedings.

To protect the civil liberties of Americans, it is imperative that the Department make accurate and complete representations to judicial officers when seeking to obtain legal authority to conduct intelligence activities. When those activities involve federal elected officials, federal political candidates, or their respective staff members, the Department must be especially vigilant. Such intelligence activities must be subject to rigorous review to ensure that they are justified and non-partisan, are based on full and complete information, take into account the significant First Amendment interests at stake, and do not undermine the political process.

Therefore, in order to address concerns identified in the report by the Inspector General of the Department of Justice entitled, "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" (December 2019), and to build on the important reforms described by the Director of the Federal Bureau of Investigation ("FBI") in his December 6, 2019, response to the Inspector General's report, I hereby direct that the following additional steps be taken:

1. Before any application initiating or renewing the targeting of a United States person is submitted to the Foreign Intelligence Surveillance Court ("FISC"), relevant FBI personnel, as determined by the Director of the FBI, shall (i) review the case file and the accuracy sub-file to ensure the proposed application is accurate and complete, and (ii) report the findings of these reviews to the attorney from the National Security Division ("NSD") Office of Intelligence who is handling the case.

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Assistant Attorney General for National Security

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with
Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation Page 2

2. Any misstatement or omission of material fact in a submission to the FISC, as determined by NSD, must be immediately reported to the FISC in accordance with the FISC's Rules of Procedure. With respect to the implementation of an approval or authority granted by the FISC, any instance of non-compliance with applicable law or with such approval or authorization, as determined by NSD, including non-compliance with procedures adopted by the Attorney General and approved by the FISC, must be immediately reported to the FISC in accordance with the FISC's Rules of Procedure. If the FBI self-identifies a compliance incident related to the Foreign Intelligence Surveillance Act ("FISA"), it must be immediately reported to NSD.
3. With respect to applications for authorization to conduct electronic surveillance or physical searches pursuant to FISA targeting (i) a federal elected official or staff members of the elected official, or (ii) an individual who is a declared candidate for federal elected office or staff members or advisors of such candidate's campaign (including any person who has been publicly announced by a campaign as a staff member or member of an official campaign advisory committee or group, or any person who is an informal advisor to the campaign), the Assistant Attorney General for National Security and the Director of the FBI shall take steps to ensure that:
 - (a) no such application shall be made unless the Director of the FBI first considers conducting a defensive briefing of the target and either the FBI conducts such a briefing or, if the Director determines that such a briefing is not appropriate, the Director documents this determination in writing;
 - (b) such application shall be approved by the Attorney General, after submission through the Deputy Attorney General and the Assistant Attorney General for National Security and certification by the Director of the FBI (approval by the Attorney General and certification by the Director of the FBI in this subparagraph may not be delegated);
 - (c) no such application shall be made unless an Assistant Special Agent in Charge or designee in a field office not involved in the investigation, in consultation with the FBI Deputy General Counsel, National Security and Cyber Law Branch, or designee, reviews the case file and evaluates the proposed filing for accuracy and completeness, and the results of such a review are briefed to the Attorney General, the Deputy Attorney General, and the Assistant Attorney General for National Security before the Attorney General approves the application;

Memorandum For The Deputy Attorney General
The Director, Federal Bureau Of Investigation
The Assistant Attorney General for National Security

SUBJECT: Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation Page 3

- (d) the Department shall not apply for an order that authorizes surveillance or search for a period of more than 60 days, which order may be renewed;
 - (e) the Department shall file reports every 30 days with the FISC on the results of the approved surveillance or search and the continued need for such authority;
 - (f) such application shall include a full and complete statement as to whether other less intrusive investigative procedures have been tried and failed or why such procedures reasonably appear to be unlikely to succeed if tried or to be too dangerous, including for purposes of personal safety or national security;
 - (g) the Assistant Attorney General for National Security shall conduct a case file review of any investigation and an accuracy review of any application within 60 days of the grant of such application. Such reviews shall ensure that the investigation, including the application, was properly predicated, that the various national security investigative tools used during the investigation were consistent with applicable authorities, and that all material information that could reasonably call into question the accuracy of any information or assessment in the application or that is capable of influencing the probable cause determination was accurately and completely disclosed in the application.
4. To address concerns that United States persons may become unwitting participants in an effort by a foreign power to influence an election or the policy or conduct of the United States Government, the Director of the FBI shall, within 90 days of the date of this memorandum, promulgate procedures, in consultation with the Deputy Attorney General, concerning defensive briefings.
5. The Director of the FBI shall, within 90 days of the date of this memorandum, conduct a comprehensive review of, and make any necessary revisions to, the disciplinary policies and procedures of the FBI to ensure that any agent or employee who knowingly causes a misrepresentation or omission of material fact in a submission to the FISC or the Foreign Intelligence Surveillance Court of Review is referred to appropriate officials in a timely manner for disciplinary action in accordance with policy and procedure. The Director of the FBI shall report the results of such review to the Deputy Attorney General.

This memorandum shall be implemented consistent with applicable law, including FISA and the orders of the FISC. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

From: Raman, Sujit (ODAG)
Subject: FW: Schrems II White Paper
To: Donoghue, Richard (ODAG); Moran, John (ODAG)
Cc: Blue, Matthew (ODAG); Creegan, Erin (ODAG)
Sent: September 23, 2020 11:52 PM (UTC-04:00)
Attached: SCCs White Paper.FORMATTED.v2.docx, Cover Letter (Schrems II) (09-23).docx, Interagency Op-Ed Accompanying Publication of SCCs White Paper.v3.docx

Colleagues:

FYSA – at the interagency’s request, our team (comprised of reps from CRM, OPCL, and NSD) has pulled together a powerfully detailed white paper to assist industry in dealing with the fallout from Schrems II, by providing detailed arguments about how U.S. surveillance law has strong, built-in privacy protections. We plan to (b)(5) per DOC [REDACTED] We also plan to

(b) (5) [REDACTED].

Per below, I’ve sent to NSC for awareness. Will let you know if anything comes up. OAG was closely involved in the formulation of these materials and has already cleared.

We still don’t have a date yet for the Deputies meeting on these issues, but I anticipate it will be at some point next week.

Please let me know with any questions.

Thanks,

Sujit

From: Raman, Sujit (ODAG)
Sent: Wednesday, September 23, 2020 11:22 PM
To: Ellis, Michael J. EOP/NSC <(b) (6)>; Souza, Allen R. EOP/NSC <(b) (6)>
Cc: 'James Sullivan' <(b) (6)>; Bradley A Brooker <(b)(3) per ODNI >
Subject: Schrems II White Paper

Michael,

I hope you’re well. With tremendous thanks to DOC and ODNI colleagues for their partnership, we are close to final on the SCCs White Paper and accompanying materials. Attached, please find:

- The current version of the White Paper. We’re still running down a couple details with the IC, but this is near-final. We plan to (b)(5) per DOC [REDACTED].
- We also plan to (b) (5) [REDACTED]

The plan is to go live with these materials this week, most likely on Friday.

Happy to receive any thoughts or comments you may have. Thanks for your continued leadership on this issue.

Sujit

Sujit Raman

Associate Deputy Attorney General

U.S. Department of Justice

T: (b) (6)

Letter from Deputy Assistant Secretary James Sullivan on the *Schrems II* Decision

The July 16 decision by the European Court of Justice (ECJ) in the *Schrems II* case has created enormous uncertainty about the ability of companies to transfer personal data from the European Union to the United States in a manner consistent with EU law. In addition to invalidating the European Commission's 2016 adequacy decision for the EU-U.S. Privacy Shield Framework (on which more than 5,300 companies relied to conduct transatlantic trade in compliance with EU data protection rules), the ECJ's *Schrems II* ruling requires organizations that use EU-approved data transfer mechanisms like Standard Contractual Clauses and Binding Corporate Rules to now verify, on a case-by-case basis, whether foreign legal protections concerning government access to personal data meet EU standards. Accordingly, in an effort to assist organizations in assessing whether their transfers offer appropriate data protection in accordance with the ECJ's ruling, the U.S. Government has prepared the attached White Paper, which outlines the robust limits and safeguards in the United States pertaining to government access to data.

Like European nations and other countries, the United States conducts intelligence-gathering activities to ensure that national security and foreign policy decision makers have access to timely, accurate, and insightful information on the threats posed by terrorists, criminals, cyber hackers, and other malicious actors. Particularly in view of the extensive U.S. surveillance reforms since 2013, however, and as detailed more fully in the White Paper, the U.S. legal framework for foreign intelligence collection provides clearer limits, stronger safeguards, and more rigorous independent oversight than the equivalent laws of almost all other countries.

While the White Paper can help organizations make the case that they should be able to send personal data to the United States using EU-approved transfer mechanisms, it is not intended to provide companies with guidance on EU law or what positions to take before EU regulators or courts. Nor does it eliminate the urgent need for clarity from European authorities or the onerous compliance burdens generated by the *Schrems II* decision.

The ECJ's ruling has generated significant legal and operational challenges for organizations at a time when the ability to move, store, and process data seamlessly across borders has never been more crucial. Cross-border data flows have become indispensable to how citizens on both sides of the Atlantic live, work, and communicate. They power the international operations and growth of American and European businesses of every size and in every industry, and underpin the \$7.1 trillion transatlantic economic relationship. Most importantly, they enable governments, private companies, and organizations worldwide to leverage the data sharing and collaborative research critical to understanding the COVID-19 virus, mitigating its spread, and expediting the discovery and development of treatments and vaccines.

To address the challenges posed by the *Schrems II* ruling, the U.S. Government is exploring all options at its disposal and remains committed to working with the European Commission to negotiate a solution that satisfies the ECJ's requirements. Publication of

this White Paper represents an important step by our Government to help maintain the mutually beneficial flows of information that are so vital to our transatlantic partnership.

Sincerely,

James M. Sullivan
Deputy Assistant Secretary for Services
U.S. Department of Commerce

From: Riley, Patrick W. \ (ODAG\
Subject: FW: OLA Serv 120262, FISA Oversight - NSD/FBI/NSA Jt Tstmny
To: Raman, Sujit \ (ODAG\
Cc: Metcalf, David \ (ODAG\); Lee, Steffanie G. \ (ODAG\
Sent: September 16, 2019 9:05 AM (UTC-04:00)
Attached: FISA60.doc.docx, FISA60.doc (1).docx

Hi Sujit, checking in on this item. Any edits/comments re: OLC?

From: Riley, Patrick W. (ODAG)
Sent: Friday, September 13, 2019 4:39 PM
To: Gauhar, Tashina (ODAG) <(b) (6)>; Raman, Sujit (ODAG) <(b) (6)>; Groves, Brendan M. (ODAG) <(b) (6)>
Cc: Metcalf, David (ODAG) <(b) (6)>; Lee, Steffanie G. (ODAG) <(b) (6)>
Subject: RE: OLA Serv 120262, FISA Oversight - NSD/FBI/NSA Jt Tstmny

Tash, yes that is correct. I confirmed with OLA.

Patrick W. Riley
Paralegal Specialist
U.S. Department of Justice Office of the Deputy Attorney General
4411 RFK Building, 950 Pennsylvania Ave NW, Washington, DC 20530
(b) (6) Office / (b) (6) Mobile
(b) (6)

From: Gauhar, Tashina (ODAG) <(b) (6)>
Sent: Friday, September 13, 2019 3:55 PM
To: Riley, Patrick W. (ODAG) <(b) (6)>; Raman, Sujit (ODAG) <(b) (6)>; Bacon, Antoinette T. (ODAG) <(b) (6)>; Groves, Brendan M. (ODAG) <(b) (6)>
Cc: Metcalf, David (ODAG) <(b) (6)>; Lee, Steffanie G. (ODAG) <(b) (6)>
Subject: RE: OLA Serv 120262, FISA Oversight - NSD/FBI/NSA Jt Tstmny

Just to make sure I understand – this draft already incorporates edits from OLC, CRM, and FBI. I don't see the comments attached, so I am assuming NSD already incorporated and cleared this version.

Assuming that is right, I clear for me and Brendan.

Thanks.

From: Riley, Patrick W. (ODAG) <(b) (6)>
Sent: Friday, September 13, 2019 3:18 PM
To: Raman, Sujit (ODAG) <(b) (6)>; Bacon, Antoinette T. (ODAG) <(b) (6)>; Gauhar, Tashina (ODAG) <(b) (6)>; Groves, Brendan M. (ODAG) <(b) (6)>
Cc: Metcalf, David (ODAG) <(b) (6)>; Lee, Steffanie G. (ODAG) <(b) (6)>
Subject: FW: OLA Serv 120262, FISA Oversight - NSD/FBI/NSA Jt Tstmny
Importance: High

Tash, Brendan, Sujit, and Toni –

Please review the NSD/FBI/NSA joint statement below, which addressed comments from OLC, CRM, and FBI, and respond as soon as possible.

<< File: 120262 controls.DOC >>

Thanks,
Patrick

Patrick W. Riley

Paralegal Specialist

U.S. Department of Justice Office of the Deputy Attorney General

4411 RFK Building, 950 Pennsylvania Ave NW, Washington, DC 20530

(b) (6) Office / (b) (6) Mobile

(b) (6)

From: Silas, Adrien (OLA) <(b) (6)>

Sent: Friday, September 13, 2019 3:03 PM

To: Lee, Steffanie G. (ODAG) <(b) (6)>; Metcalf, David (ODAG) <(b) (6)>; Riley, Patrick W. (ODAG) <(b) (6)>

Cc: Johnson, Joanne E. (OLA) <(b) (6)>; Rubens, William B. (OLA) <(b) (6)>; Lasseter, David F. (OLA) <(b) (6)>; Cox, Stephen (OASG) <(b) (6)>

Subject: OLA Serv 120262, FISA Oversight - NSD/FBI/NSA Jt Tstmny

Importance: High

Any ODAG objection to submitting to OMB the attached, draft congressional hearing statement to OMB for clearance? *As noted below, the Committee's deadline for receiving the statement is Monday, September 16, 2019. Therefore, we would like to submit it to OMB today.*

1) The materials circulated to

JMD/CIO CIV	OPCL
OLP	CRM
NSD	EOUSA
OLC	FBI

2) OLC (Nate Forrester), CRM (David Brink), FBI ((b)(6), (7)(C) per FBI and (b)(6), (7)(C) per FBI) submitted comments;

3) EOUSA did not respond;

4) As noted above, the Committee's deadline for receiving the statement is Monday, September 16, 2019; therefore, we would like to submit it to OMB today;

5) I have attached the associated OLA control sheet.

<< File: FISA60.doc.docx >>

Attached for OMB clearance is a draft joint statement ("FISA60.doc.docx") for the Department of Justice's National Security Division, the FBI, and the National Security Agency for a September 18, 2019, oversight hearing before the House Judiciary Committee concerning the Foreign Intelligence Surveillance Act. The Committee's deadline for receiving the statement is Monday, September 16, 2019. Please acknowledge receipt of this message. Thank you.

<< File: FISA60.doc.docx >>

From: Herbert, Jenelle R. \(\OLA\)

Subject: DUE BY 2PM TOMORROW, 10/30/2019! (OLA WF 120597) Request for Views on Statement for the Record (SFR) for a 11/6/2019, SJC hearing on Reauthorizing the USA FREEDOM Act of 2015.

To: Chanthaphone, Patti \(\JMD\); Denis, Dave \(\JMD\); Klimavicz, Joseph \(\JMD\); Rogers, Melinda \(\JMD\); Davis, Valorie A \(\OLP\); Jones, Lisha \(\OLP\); Matthews, Matrina \(\OLP\); OLP LRM Mailbox; (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); NSD LRM Mailbox \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); Forrester, Nate \(\OLC\); Hardy, Liam P. \(\OLC\); Mascott, Jennifer \(\OLC\); Wallace, Benjamin \(\OLC\); Dorsey, Cassandra \(\CIV\); policy, civil \(\CIV\); Toplin, Jessica \(\CIV\); Brink, David \(\CRM\); (b)(6), (7)(C) per CRM \(\CRM\); (b)(6), (7)(C) per CRM \(\CRM\); Morales, Michelle \(\CRM\); Opl, Legislation \(\CRM\); Wroblewski, Jonathan \(\CRM\); USAEO-Legislative; (b)(6), (7)(C) per CRM \(\CRM\); (b)(6), (7)(C) per EOUS \(\USAE\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); ATF Exec Sec; Intergovernmental Affairs; Northrop, Allison M. \(\ATF\); PGA - Legislative Affairs; Simms, Larysa A.; Ashley, Thomas \(\BOP\); (b)(6), (7)(C), (7)(F) per USMS \(\USMS\); (b)(6), (7)(C), (7)(F) per USMS \(\USMS\); Braswell, Beau \(\OPCL\); Harman-Stokes, Katherine M. \(\OPCL\); Lane Scott, Kristi Z \(\OPCL\); Mayer, Hannah J. \(\OPCL\); Proia, Andrew \(\OPCL\); Ramsden, Michelle \(\JMD\); Winn, Peter A. \(\OPCL\); Wood, Alexander W \(\OPCL\); Young, Brian A. \(\OPCL\)

Cc: Hankey, Mary Blanche \(\OLA\); Escalona, Prim F. \(\OLA\); Lasseter, David F. \(\OLA\); Johnson, Joanne E. \(\OLA\); Rubens, William B. \(\OLA\); Silas, Adrien \(\OLA\); Lee, Steffanie G. \(\ODAG\); Metcalf, David \(\ODAG\); Riley, Patrick W. \(\ODAG\); Cox, Stephen \(\OASG\); Hall, Jeffrey \(\OASG\)

Sent: October 29, 2019 2:12 PM (UTC-04:00)

Attached: DRAFT SJC SFR 29 OCT 2019.docx, 120597 Control.DOC

**PLEASE PROVIDE COMMENTS
TO ADRIEN SILAS/OLA, BY
NO LATER THAN 2:00PM
TOMORROW, 10/30/2019.**

From: Riley, Patrick W. \ (ODAG\
Subject: FW: OLA Serv 120597, USA FREEDOM Reauth - NSD/FBI/NSA Tstmny
To: Groves, Brendan M. \ (ODAG\
Cc: Metcalf, David \ (ODAG\
Sent: November 1, 2019 4:04 PM (UTC-04:00)
Attached: 120597 Control.DOC, FISA61.doc.docx, misc14.docx, FISA61.doc (1).docx, misc14 (1).docx, misc14.pdf

Good afternoon, Brendan, Mike, and Sujit,

Please review the draft FBI/NSA statement below and respond **as soon as possible**.

This statement was adapted from a previously cleared statement on the same subject. The document below (in Word and PDF) tracks the changes – the statements are nearly identical.

Patrick W. Riley

Paralegal Specialist

U.S. Department of Justice Office of the Deputy Attorney General

4411 RFK Building, 950 Pennsylvania Ave NW, Washington, DC 20530

(b) (6) Office / (b) (6) Mobile

(b) (6)

From: Silas, Adrien (OLA) <(b) (6)>
Sent: Friday, November 1, 2019 3:37 PM
To: Lee, Steffanie G. (ODAG) <(b) (6)>; Metcalf, David (ODAG) <(b) (6)>; Riley, Patrick W. (ODAG) <(b) (6)>
Cc: Johnson, Joanne E. (OLA) <(b) (6)>; Rubens, William B. (OLA) <(b) (6)>; Lasseter, David F. (OLA) <(b) (6)>; Cox, Stephen (OASG) <(b) (6)>
Subject: OLA Serv 120597, USA FREEDOM Reauth - NSD/FBI/NSA Tstmny
Importance: High

Any ODAG objection to submitting to OMB the attached, draft NSD hearing statement? ***F.Y.I., as noted below, the statement is due to the Committee on Monday, November 4, 2019.***

1) The materials circulated to

JMD/CIO CIV	ATF
OLP	CRM USMS
NSD	EOUSA OPCL
OLC	FBI

2) CRM (David Brink) and FBI ((b)(6), (7)(C) per FBI) and ((b)(6), (7)(C) per FBI)) submitted comments; NSD declined the edits in order that the statement align as closely as possible to a previously cleared edit on the same subject; CRM and the FBI acceded;

3) As noted below, the statement is due to the Committee on Monday, November 4, 2019; therefore, we would like to get the statement to OMB as quickly as possible;

4) I have attached the associated OLA control sheet.

Attached for OMB clearance is a draft prepared statement (“FISA61.doc.docx”) for the November 6, 2019, joint appearance of Deputy Assistant Attorney General J. Bradford Wiegmann, an FBI Deputy Assistant Director yet-to-be identified, and Susan Morgan of the National Security Agency before the Senate Judiciary Committee at a hearing entitled “Reauthorizing the USA FREEDOM Act of 2015.” I have attached a document (“misc14.docx”) tracking changes from a previously cleared September 18, 2019, statement before the House Judiciary Committee on the same subject. The statements are nearly identical. The statement is due to the Committee on Monday, November

4, 2019.

Please acknowledge receipt of this message. Thank you.

From: Herbert, Jenelle R. \(\OLA\)

Subject: (OLA WF 120932) Request for Views on USA Freedom Act SJC QFR Responses.

To: Chanthaphone, Patti \(\JMD\); Denis, Dave \(\JMD\); Klimavicz, Joseph \(\JMD\); Rogers, Melinda \(\JMD\); OLP_LRM Mailbox; (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); NSD LRM Mailbox \(\NSD\); (b)(6) per NSD \(\NSD\); (b)(6) per NSD \(\NSD\); Forrester, Nate \(\OLC\); Hardy, Liam P. \(\OLC\); Mascott, Jennifer \(\OLC\); Wallace, Benjamin \(\OLC\); Dorsey, Cassandra \(\CIV\); Pickell, Lindsay A. \(\CIV\); policy, civil \(\CIV\); Toplin, Jessica \(\CIV\); Brink, David \(\CRM\); (b)(6), (7)(C) per CRM \(\CRM\); (b)(6), (7)(C) per CRM \(\CRM\); Morales, Michelle \(\CRM\); Opl, Legislation \(\CRM\); Wroblewski, Jonathan \(\CRM\); Shatz, Eileen M. \(\TAX\); USAEO-Legislative; (b)(6), (7)(C) per CRM \(\CRM\); (b)(6), (7)(C) per EOUSA \(\USAEO\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); (b)(6), (7)(C) per FBI \(\DO\ \FBI\); ATF Exec Sec; Intergovernmental Affairs; Northrop, Allison M. \(\ATF\); PGA - Legislative Affairs; Simms, Larysa A.; Braswell, Beau \(\OPCL\); Harman-Stokes, Katherine M. \(\OPCL\); Lane Scott, Kristi Z \(\OPCL\); Mayer, Hannah J. \(\OPCL\); Proia, Andrew \(\OPCL\); Ramsden, Michelle \(\JMD\); Winn, Peter A. \(\OPCL\); Wood, Alexander W \(\OPCL\); Young, Brian A. \(\OPCL\)

Cc: Hankey, Mary Blanche \(\OLA\); Escalona, Prim F. \(\OLA\); Johnson, Joanne E. \(\OLA\); Rubens, William B. \(\OLA\); Silas, Adrien \(\OLA\); Lee, Steffanie G. \(\ODAG\); Metcalf, David \(\ODAG\); Riley, Patrick W. \(\ODAG\); Cox, Stephen \(\OASG\); Hall, Jeffrey \(\OASG\)

Sent: December 23, 2019 12:03 PM (UTC-05:00)

Attached: SJC QFR Responses (draft 12.20.2019) (clean).docx

**PLEASE PROVIDE COMMENTS
TO ADRIEN SILAS/OLA, BY
NO LATER THAN 11:00AM
TUESDAY, 1/7/2020.**

Questions for the Record from Senator Charles E. Grassley
U.S. Senate Committee on the Judiciary
“Reauthorizing the USA FREEDOM Act of 2015”
Submitted on November 13, 2019

Mr. Wiegmann

1. It became quite clear at the Senate Judiciary Committee hearing held on November 6 that effective oversight of the USA FREEDOM Act – particularly the use and misuse of Section 215’s Call Detail Records Program – is hard to achieve. Letters and questions from Congress to relevant agencies go answered.
 - a. To that end, what current oversight and accountability tools exist in the USA FREEDOM Act that prohibits the government from misusing the law? Are these tools effective? If so, why?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI
[REDACTED]

a. (b)(5); (b)(5) per FBI
[REDACTED]

(b) (5)

[REDACTED]

(b)(5); (b)(5) per FBI

[REDACTED]

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

(b) (5) [Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

b. (b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

c. (b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5)

(b) (5)

(b)(5); (b)(5) per FBI

2. At the hearing, I asked you about privacy and civil liberty concerns that must be balanced against national security interests, when evaluating the four provisions of the USA FREEDOM Act that are set to expire. You stated that you don't "think there are any significant privacy concerns or controversies associated" with the authorities of the law, including that of roving wiretap surveillance and lone wolf provisions. Ms. Goietein stated later at the hearing that "with respect, Mr. Wiegmann is not correct . . . that there are no privacy and civil liberty concerns" with both provisions.

- a. In its practice and use of each of the expiring provisions of the USA FREEDOM Act, how does the Justice Department balance privacy concerns with federal surveillance authorities?

PROPOSED RESPONSE:

(b) (5)

(b) (5)

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]

(b) (5) [Redacted]
[Redacted]

(b)(5); (b)(5) per FBI [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b) (5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

3. The Administration stated that reauthorization of all the expiring provisions is important because “as technology changes, our adversaries’ tradecraft and communications habits will continue to evolve and adapt.”
 - a. How have the landscape and capabilities of terrorist organizations changed, and is the USA FREEDOM Act equipped to combat these advances?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b)(5); (b)(5) per FBI [Redacted]
[Redacted]
[Redacted]
[Redacted]

(b)(5); (b)(5) per FBI [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

(b)(5); (b)(5) per FBI
[Redacted]

(b)(5); (b)(5) per FBI
[Redacted]

(b)(5); (b)(5) per FBI
[Redacted]

4. The Administration wants a permanent reauthorization of the USA FREEDOM Act. Important national security provisions shouldn't expire because Congress fails to act; this is particularly true in light of the recent events surrounding ISIS leadership. Why is permanent reauthorization critical for FBI, NSA, and DOJ to protect national security interests?

PROPOSED RESPONSE:

(b) (5)
[Redacted]

**Written Questions for Brad Wiegmann
Submitted by Senator Patrick Leahy
Wednesday, November 13, 2019**

1. One of the major transparency improvements included in USA FREEDOM was the requirement that the government declassify and release novel or significant FISA Court opinions. Our intent behind this requirement was to make key FISA Court rulings public almost immediately. Recently, due to this requirement, the government released a significant FISA Court opinion, finding serious problems with FBI Section 702

collections, but only after a near yearlong delay.

- a. Are there other significant FISA Court opinions issued over a year ago that the government has not yet declassified?

PROPOSED RESPONSE:

(b) (5)

- b. Given that the FISA Court has made efforts to ease the creation of declassified versions of its opinions, how long does — and how long should — it take to create a declassified version of a FISA Court opinion once it has begun its declassification review?

PROPOSED RESPONSE:

(b) (5)

2. Recent FISA court opinions reprimand the government for failing to properly monitor Section 215, Section 702, and the FISA pen register statute and accurately represent their scope to the Court.
 - a. In the wake of the recently declassified FISA court opinions and the problems those opinions identified, what oversight improvements have been implemented and what additional oversight mechanisms should we consider?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI

(b)(5); (b)(5) per FBI

(b)(5); (b)(5) per FBI

- b. The FISA Court has admonished the government for poor management. How can we trust that this pattern of misuse will not continue in the future as new technologies and methods of acquiring communications are developed?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI

(b)(5); (b)(5) per FBI

3. Are there any non-public Office of Legal Counsel opinions interpreting Section 215 and if so, what specific conclusions they reach?

PROPOSED RESPONSE:

(b) (5)

**Senate Judiciary Committee Hearing
“Reauthorizing the USA FREEDOM Act of 215”
Questions for the Record
for Brad Wiegmann
Deputy Attorney General, National Security Division
Department of Justice**

Submitted November 13, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Last year, the U.S. Supreme Court held in Carpenter v. United States that Mr. Carpenter had a reasonable expectation of privacy in the whole of his physical movements, such that the government needed a warrant to obtain 127 days of his cell-site location data.¹

¹ Carpenter v. United States, 138 S.Ct. 2206, 2219 (2018).

The Court held that this information was protected by the Fourth Amendment even though it was created and maintained by third parties (the wireless carriers).²

Section 215 allows the government to access business records without a warrant based on the assumption that records shared with third parties are categorically not protected by the Fourth Amendment. Carpenter calls that assumption into question.

What guidance has DOJ given to federal law enforcement about what records they can and cannot collect under section 215 after Carpenter?

PROPOSED RESPONSE:

(b) (5) [REDACTED]

(b) (5) [REDACTED]

² Id. at 2219-20.

**Mr. Brad Wiegmann –
Reauthorizing the USA FREEDOM Act of 2015
Questions for the Record
Submitted November 13, 2019**

QUESTIONS FROM SENATOR COONS

1. In your recent testimony to the House Judiciary Committee, you suggested that the Supreme Court’s decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), was “not controlling” but that it was relevant to how information is collected under Section 215. What effect does the *Carpenter* decision have on the government’s ability to obtain business records under Section 215?
 - a. You further stated at the Senate Judiciary Committee hearing that the business records authority under Section 215 cannot be used to obtain anything that is protected under the Fourth Amendment. Is the cell site location information discussed in *Carpenter* accessible through the Section 215 business records authority?
 - b. At the House hearing, you also stated that the Department of Justice (DOJ) had not issued any guidance on how the *Carpenter* decision is to be interpreted in the Foreign Intelligence Surveillance Act (FISA) context. Has the DOJ now issued any such guidance? If not, does the DOJ plan to do so in the future?

PROPOSED RESPONSE:

(b) (5)

2. Is it the DOJ’s position that the metadata about phone calls that is derived from searches under the Call Detail Records (CDR) program can also be accessed using the business records authority under Section 215?

PROPOSED RESPONSE:

(b) (5)

3. Is there any requirement that a defendant in a criminal case be given notice of the evidence or information in his or her case that was derived from a search under either the CDR or business records authority under Section 215? If not, why isn't notice required?

PROPOSED RESPONSE:

(b) (5)

[REDACTED]

(b) (5)

[REDACTED]

4. It has been reported that Federal Bureau of Investigation agents were able to query and access Section 702 information in a number of instances that were not reasonably likely to return foreign intelligence information. Under what circumstances can information collected through the FISA process be used in a domestic criminal investigation?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI

[REDACTED]

(b)(5); (b)(5) per FBI

(b)(5); (b)(5) per FBI

(b)(5); (b)(5) per FBI

(b) (5)

- a. How do you determine whether a domestic case is sufficiently related to international terrorism to merit access to records obtained under FISA?

PROPOSED RESPONSE:

(b) (5)

- b. What protections are in place to ensure that Section 215 information cannot be accessed in a domestic criminal investigation without a sufficient national security justification?

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI

**Questions for Brad Wiegmann
From Senator Mazie Hirono**

1. Last month, Office of the Director of National Intelligence released declassified FISA Court opinions that showed the Federal Bureau of Investigation (FBI) had failed to comply with even basic restrictions involving its data collection program under Section 702 of the Foreign Intelligence Surveillance Act. The Court found that the FBI's procedures for accessing communications "incidentally" collected under Section 702 violated the law and the Fourth Amendment. Section 702 allows the federal government to collect information on foreigners overseas for foreign intelligence purposes without a warrant, which is a significant power.
 - a. **Given the government's record of failing to comply with existing restrictions under these data collection programs, what is the government's basis for asking Congress to permanently reauthorize the "roving wiretap," "business records," "lone wolf," and call detail records provisions?**

PROPOSED RESPONSE:

(b)(5); (b)(5) per FBI
[Redacted text block]

(b)(5); (b)(5) per FBI
[Redacted text block]

(b)(5); (b)(5) per FBI
[Redacted text block]

- b. In light of the government's prior record of noncompliance, would you agree that additional accountability measures are justified for any reauthorization of the USA FREEDOM Act?

PROPOSED RESPONSE:

(b) (5)
[Redacted text block]

(b)(5); (b)(5) per FBI

- c. What steps has the Department of Justice taken to review its data collection efforts to ensure that it is complying with the law and following basic safeguards to protect people's civil rights?

PROPOSED RESPONSE:

(b) (5)

2. In *Carpenter v. United States*, the Supreme Court held that the Fourth Amendment protects location information taken from users of cell phones. In the majority opinion, Chief Justice Roberts explained that location information creates a "detailed chronicle of a person's physical presence compiled every day, every moment over several years." As a result, law enforcement must now get a warrant before obtaining this data.

- a. Has the Department of Justice issued any guidance on how the *Carpenter* decision should apply to its data collection efforts under Section 215? If so, what is that guidance?

PROPOSED RESPONSE:

(b) (5)

- b. Would the Department of Justice support adding a clarification that Section 215 cannot be used to obtain geolocation information that implicates individuals' reasonable expectation of privacy, following the reasoning of the *Carpenter* decision?

PROPOSED RESPONSE:

(b) (5)

(b) (5)

QUESTIONS FROM SENATOR BOOKER

1. The joint statement from the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the National Security Agency (NSA) for this hearing says the following about the Call Detail Records (CDR) program:

[T]he NSA recently discontinued the CDR program for technical and operational reasons. But the CDR program retains the potential to be a source of valuable foreign intelligence information. The CDR program may be needed again in the future, should circumstances change. NSA's careful approach to the program, and the legal obligations imposed by the FREEDOM Act in the form of judicial oversight, legislative oversight, and transparency, support the reauthorization of the CDR program. . . . [T]he Administration's view is that the time has come for Congress to extend these authorities permanently.

- a. Are you aware of any examples of past instances in which DOJ, the FBI, or the NSA (or any other relevant agency) shut down a statutorily authorized program, but Congress nevertheless permanently reauthorized the underlying statutory authority to make it available for an unspecified future use?

PROPOSED RESPONSE:

(b) (5)

- b. Are you aware of any examples of existing provisions in the U.S. Code for which DOJ, the FBI, or the NSA (or any other relevant agency) have discontinued the authorized program, but could reactivate the program if the agency chose to do so?

PROPOSED RESPONSE:

(b) (5)

- c. What were the “technical and operational reasons” that the CDR program was discontinued, with as much specificity as possible in an open setting?

PROPOSED RESPONSE:

(b) (5)

- d. The NSA’s collection of call-detail records from telecommunications providers more than tripled from 2016 to 2017, rising from more than 151 million to more than 534 million.³ When this increase was first reported last year, the Office of the Director of National Intelligence’s chief civil liberties officer, Alex Joel, “cited a variety of factors that might have contributed to the increase, potentially including changes in the amount of historical data companies are choosing to keep, the number of phone accounts used by each target and changes to how the telecommunications industry creates records based on constantly shifting technology and practices.”⁴ A few weeks after this report was issued, the NSA began purging hundreds of millions of call- detail records that were subject to “technical irregularities.”⁵ Given what is now known, was the tripling in the collection of call-detail records from 2016 to 2017 attributable in any part to the “technical irregularities” in these records? If so, did the dramatic increase in collection help to spur the discovery of the underlying data integrity and compliance problems?

PROPOSED RESPONSE:

(b) (5)

³ OFFICE OF CIVIL LIBERTIES, PRIVACY & TRANSPARENCY, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING USE OF NATIONAL SECURITY AUTHORITIES, CALENDAR YEAR 2017, at 34 fig.19 (Apr. 2018), <https://www.dni.gov/files/documents/icotr/2018-ASTR----CY2017----FINAL-for-Release-5.4.18.pdf>.

⁴ Charlie Savage, *N.S.A. Triples Collection of Data From U.S. Phone Companies*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html>.

⁵ Charlie Savage, *N.S.A. Purges Hundreds of Millions of Call and Text Records*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/us/politics/nsa-call-records-purged.html>.

- e. In an August 2019 letter, then-Director of National Intelligence Dan Coats said the following in support of reauthorizing the provision that underlay the discontinued CDR program: “as technology changes, our adversaries’ tradecraft and communications habits will continue to evolve and adapt.”⁶ What further detail can you provide in an open setting about how this statutory authority could be used in the future if it is reauthorized?

PROPOSED RESPONSE:

(b) (5)

- f. Given the “technical and operational” shortcomings with the discontinued CDR program and the lack of specific anticipated uses, why does the Administration believe that a *permanent*, and not just temporary, reauthorization of this statutory authority is appropriate?

PROPOSED RESPONSE:

(b) (5)

- 2. As noted at the hearing, to date the government has never used the “lone wolf” provision since it was added to the Foreign Intelligence Surveillance Act (FISA) in 2004.
 - a. Given that the “lone wolf” provision has yet to be used, what metrics can Congress look to in assessing its intelligence value?

PROPOSED RESPONSE:

(b) (5)

[REDACTED]

⁶ Letter from Daniel R. Coats, Dir. of Nat’l Intelligence, to Senators Richard Burr, Lindsey O. Graham, Mark Warner & Dianne Feinstein 1-2 (Aug. 14, 2019), <https://int.nyt.com/data/documenthelper/1640-odni-letter-to-congress-about/20bfc7d1223dba027e55/optimized/full.pdf>.

- b. The government witnesses' joint statement says that the "lone wolf" provision "fills an important gap in the Government's collection capabilities" for isolated actors such as "a foreign person who has self-radicalized" or "a known international terrorist who severs his connection with a terrorist group." Why is it nevertheless the case that the government has not actually used this authority over the last 15 years? If other legal authorities have been used instead, what independent value does this provision offer?

PROPOSED RESPONSE:

(b) (5)

3. During the hearing, this Committee heard testimony about the U.S. Supreme Court's recent decision in *Carpenter v. United States*.⁷ As Ms. Goitein testified, "the Court in *Carpenter* essentially held that there are certain types of information that are so sensitive, so inherently sensitive in what they reveal about a person's life that the mere fact that they are held by a third party does not eviscerate the person's Fourth Amendment interest in that information."

The facts of *Carpenter* involved "several months' worth of cell phone location data."⁸

In light of *Carpenter*, what steps, if any, should Congress take in the context of reauthorizing the USA FREEDOM Act to ensure compliance with the constitutional protections described in *Carpenter*?

PROPOSED RESPONSE:

(b) (5)

⁸ Senate Judiciary Committee Holds Hearing on USA FREEDOM Legislation Reauthorization, CQ CONG. TRANSCRIPTS (Nov. 6, 2019), <https://plus.cq.com/doc/congressionaltranscripts-5765239>.

4. According to Mr. Orlando's testimony, the FBI's working definition of "tangible things" in the context of business records includes "books, records, papers, document[s], other items, airline records, hotel accommodations, storage facilities, [and] vehicle rentals. It also provides for some sensitive items such as library circulation records, book sales, book customer lists, firearm sales records, tax records, [and] educational returns." Mr. Orlando also acknowledged that medical records fall under the FBI's working definition of tangible things.⁹ In that vein, you told the Committee that "you could not get Fourth Amendment protected content with a business records order."¹⁰

In light of the Supreme Court's decision in *Carpenter*, why do you believe that the FBI's working definition of "tangible things" does not encompass content protected by the Fourth Amendment?

PROPOSED RESPONSE:

(b) (5) [REDACTED]

(b) (5) [REDACTED]

5. The USA FREEDOM Act enacted a number of reforms to Foreign Intelligence Surveillance Court proceedings, including requiring the appointment of at least five individuals to be amici curiae who are charged with helping to protect individual privacy and civil liberties.¹¹

⁹ *Id.*

¹⁰ *Id.*

¹¹ 50 U.S.C. § 1803(i).

- a. What is your assessment of how well this process, in which an outside amicus argues against the government in Foreign Intelligence Surveillance Court proceedings, has worked in practice?

PROPOSED RESPONSE:

(b) (5)

[REDACTED]

- b. Do you believe the amicus process has provided an adequate voice for the protection of privacy and civil liberties in Foreign Intelligence Surveillance Court proceedings?

PROPOSED RESPONSE:

(b) (5)

[REDACTED]

- c. Are there any ways in which you believe the amicus process should be changed? If so, please explain why you believe the change is needed, and how individual privacy and civil liberties would be protected.

PROPOSED RESPONSE:

(b) (5)

[REDACTED]

6. Has DOJ's Office of Legal Counsel produced any opinions interpreting any of the expiring

¹² Available at https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FIS_C_Opin_18Oct18.pdf

provisions of the USA FREEDOM Act that are not currently public? If so, please describe the conclusions of any such opinions.

PROPOSED RESPONSE:

(b) (5)

From: Levi, William (OAG)
Subject: Re: 10 am meeting
To: MacTough, Melissa (NSD)
Cc: Watson, Theresa (OAG)
Sent: February 21, 2020 9:59 AM (UTC-05:00)
Great thank you

> On Feb 21, 2020, at 9:50 AM, MacTough, Melissa (NSD) <(b) (6)> wrote:

>

> They are not done; I am waiting on FBI. I will send them to Theresa ahead of the meeting if possible.

>

> -----Original Message-----

> From: Levi, William (OAG) <(b) (6)>

> Sent: Friday, February 21, 2020 9:23 AM

> To: MacTough, Melissa (NSD) <(b) (6)>

> Cc: Watson, Theresa (OAG) <(b) (6)>

> Subject: Re: 10 am meeting

>

> Theresa will add you to the 3:00 meeting. Did you drop off materials w her already or are you bringing with you?

>

>> On Feb 21, 2020, at 8:40 AM, MacTough, Melissa (NSD) <(b) (6)> wrote:

>>

>> Ok - I will not come at 10. If there is a different meeting I need to be at regarding FISA today, please let me know.

>>

>> -----Original Message-----

>> From: Levi, William (OAG) <(b) (6)>

>> Sent: Thursday, February 20, 2020 7:38 PM

>> To: MacTough, Melissa (NSD) <(b) (6)>

>> Subject: Re: 10 am meeting

>>

>> I will fix

>>

>>>> On Feb 20, 2020, at 6:55 PM, MacTough, Melissa (NSD) <(b) (6)> wrote:

>>>>

>>>> Will -

>>>>

>>>> You invited me to a 10 am meeting for 15 minutes. Can you tell me the topic? Is it the expiration of the business records provision?

>>>>

>>>> Thanks

>>>> Melissa

>>>>

>>>> Sent from my iPhone

From: MacTough, Melissa (NSD)
Subject: AG Memorandum/Order summary - revised
To: Levi, William (OAG)
Sent: February 27, 2020 11:11 PM (UTC-05:00)
Attached: Summary of EO AGO (2.27.20).docx, ATT00001.htm

Will - attached is a revised version of the summary document that describes the AG memorandum on FISA.

Thanks
-Melissa

From: MacTough, Melissa \(\NSD\)
Subject: RE: AG FISA Memorandum
To: Burns, David P. \(\NSD\); Levi, William \(\OAG\)
Sent: March 3, 2020 12:24 PM (UTC-05:00)
Attached: bullets on legislation we can work with(3.3.20).docx

We will bring hard copies of the various documents today, but here is a soft copy of the bullets on legislative proposals we have reviewed that we can live with. Thanks.

-Melissa

From: Burns, David P. (NSD) <(b) (6)>
Sent: Tuesday, March 3, 2020 8:21 AM
To: Levi, William (OAG) <(b) (6)>; MacTough, Melissa (NSD) <(b) (6)>
Subject: RE: AG FISA Memorandum

Will, the current draft of the talking points is attached. We are tweaking this morning – including adding a bullet on the (b) (5) or an alternative that we will need to discuss further. But we wanted to get you this draft as we are not certain what time the plane departs.

David P. Burns
Principal Deputy Assistant Attorney General
National Security Division
U.S. Department of Justice
(b) (6)

From: Levi, William (OAG) <(b) (6)>
Sent: Tuesday, March 3, 2020 7:05 AM
To: MacTough, Melissa (NSD) <(b) (6)>
Cc: Burns, David P. (NSD) <(b) (6)>
Subject: Re: AG FISA Memorandum

Great thank you. If you have the talking points for the changes in the order would you flip to me so he can read on plane?

On Mar 2, 2020, at 10:31 PM, MacTough, Melissa (NSD) <(b) (6)> wrote:

We will bring hard copies of the below to the prep meeting.

In the meantime, please see the latest on the memorandum – tracked and clean versions. We made some tweaks in the memorandum at the end to address (b) (5).

From: Levi, William (OAG) <(b) (6)>
Sent: Monday, March 2, 2020 10:14 PM
To: MacTough, Melissa (NSD) <(b) (6)>
Cc: Burns, David P. (NSD) <(b) (6)>
Subject: RE: AG FISA Memorandum

Thanks again for this. For our prep tomorrow, can we have: the memorandum; the one-pager bullets of main revisions in the memorandum; some possible tweaks to the (b) (5) that we could live with; and, finally, a one pager identifying certain of the proposals in the legislation you reviewed

that we could live with. This way he can go armed to the meeting. Thanks!

From: MacTough, Melissa (NSD) <(b) (6)>
Sent: Monday, March 2, 2020 11:41 AM
To: Levi, William (OAG) <(b) (6)>
Cc: Boyd, Stephen E. (OLA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; Burns, David P. (NSD) <(b) (6)>
Subject: RE: AG FISA Memorandum

Will –

Attached is a revised version of the Memorandum per the below and our discussions. The second attachment is a clean version.

We are working on the bullets.

Thanks.
-Melissa

From: Levi, William (OAG) <(b) (6)>
Sent: Monday, March 2, 2020 8:10 AM
To: MacTough, Melissa (NSD) <(b) (6)>
Cc: Boyd, Stephen E. (OLA) <(b) (6)>; Demers, John C. (NSD) <(b) (6)>; Burns, David P. (NSD) <(b) (6)>
Subject: Re: AG FISA Memorandum

Thank you. I think you can just give them to him at our prep session tomorrow.

On Mar 2, 2020, at 8:03 AM, MacTough, Melissa (NSD) <(b) (6)> wrote:

Thanks. I will work on this. When is the one page of bullets needed by?

Sent from my iPhone

On Mar 1, 2020, at 10:15 PM, Levi, William (OAG) <(b) (6)> wrote:

Thanks Melissa. A few things. (1) The AG would like to reframe the paragraphs on (b) (5)

(b) (5) . So for (b) (5) , something like

(2) Can we consider whether, (b) (5)

(3) Can we please put together a page of bullet points identifying the chief changes this order will bring about for the AG's use at the meeting.

Thanks for all. Happy to chat about any of these.

From: MacTough, Melissa (NSD) <(b) (6)>
Sent: Saturday, February 29, 2020 7:05 PM
To: Levi, William (OAG) <(b) (6)>
Cc: Demers, John C. (NSD) <(b) (6)>; Burns, David P. (NSD) <(b) (6)>
Subject: AG FISA Memorandum

Will –

Upon re-reading, we noted a few minor edits we made. I have attached the latest version of the AG Memorandum and a summary of it.

Thanks.
Melissa

<FISA AG Order Draft 3.2.20 (clean).docx>
<FISA AG Order Draft 3.2.20 (tracked).docx>

From: Blue, Matthew \ (ODAG\
Subject: Fwd: Misc 19-02
To: DuCharme, Seth \ (ODAG\
Cc: Hovakimian, Patrick \ (ODAG\); Sherwin, Michael R. \ (ODAG\
Sent: March 4, 2020 5:21 PM (UTC-05:00)
Attached: Misc 19 02 Opinion and Order PJ JEB 200304.pdf, ATT00001.htm

Seth,

We got beat up by the FISC. OAG (Sofer) and ODAG are meeting with FBI DGC (Browning) and OI (MacTough) tomorrow — in an already planned meeting — to discuss FBI compliance improvement measures. You and Pat are welcome to join. Let me know if you are interested.

Best,

Matt

Sent from my iPhone

Begin forwarded message:

From: "MacTough, Melissa (NSD)" <(b) (6)>
Date: March 4, 2020 at 4:22:47 PM EST
To: "Levi, William (OAG)" <(b) (6)>, "Sofer, Gregg (OAG)" <(b) (6)>, "Blue, Matthew (ODAG)" <(b) (6)>, "Sherwin, Michael R. (ODAG)" <(b) (6)>
Subject: FW: Misc 19-02

I just wanted to flag that Judge Boasberg issued an opinion today (attached) related to the accuracy-related filings. The judge found that the planned/existing accuracy-related measures were not enough and/or that he needed additional information to assess their efficacy. This opinion will be made public later today. The opinion not only discusses FBI errors in the Page matter, but also discusses failings by the DOJ attorney.

We have a number of reporting obligations with the FISC, work to be done on enhancing oversight, requirements related to certain attestations in our FISA applications, and other requirements. Please forward to others who should review.

Thanks.
-Melissa

MAR 04 2020

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

LeeAnn Flynn Hall, Clerk of Court

**IN RE ACCURACY CONCERNS REGARDING
FBI MATTERS SUBMITTED TO THE FISC**

Docket No. Misc. 19-02

OPINION AND ORDER

Last December, the Department of Justice's Office of the Inspector General issued a comprehensive report examining, among other things, applications to the Foreign Intelligence Surveillance Court for authority to conduct electronic surveillance of U.S. person Carter W. Page. The OIG found that those applications contained significant factual inaccuracies and omissions relevant to whether there was probable cause to believe Page was an agent of the Russian government. There is thus little doubt that the government breached its duty of candor to the Court with respect to those applications.

The frequency and seriousness of these errors in a case that, given its sensitive nature, had an unusually high level of review at both DOJ and the Federal Bureau of Investigation have called into question the reliability of the information proffered in other FBI applications. To safeguard the integrity of its proceedings going forward, the Court ordered the government to explain how it would ensure the accuracy and completeness of future FBI applications. Acknowledging its deficiencies, the government has done so, undertaking multiple remedial measures in response to both the OIG Report and this Court's Order.

Yet the errors the OIG pointed out cannot be solved through procedures alone. DOJ and the FBI, including all personnel involved in the FISA process, must fully understand and embrace the heightened duties of probity and transparency that apply in *ex parte* proceedings. While DOJ and the FBI have both expressed their commitment to these tenets, this Opinion and Order sets out a framework for holding them accountable to those commitments.

I. Procedural Background

On December 9, 2019, DOJ submitted to the Court a copy of the Office of the Inspector General, U.S. Dep't of Justice, Review of Four FISA Applications and Other Aspects of FBI's Crossfire Hurricane Investigation ("OIG Report"), along with a letter filed in accordance with Rule 13(a) of the Foreign Intelligence Surveillance Court's Rules of Procedure discussing several of the misstatements and omissions described therein. See Order at 3-4, Misc. 19-02 (Dec. 17, 2019) (referencing government's Dec. 9, 2019, submission). Those filings discussed myriad errors and omissions in the applications for authority to conduct electronic surveillance of Page, which the Court separately approved in October 2016, January 2017, April 2017, and June 2017. See OIG Rpt. at vi. The OIG Report also made several recommendations to assist DOJ and the FBI in avoiding similar failures in future investigations. See, e.g., id. at 414-17.

The FBI accepted all of the OIG's findings, acknowledged responsibility for the failures, and proposed various measures to implement the OIG's recommendations. See FBI's Resp. to Report, OIG Rpt. app. 2. On December 17, 2019, then-Presiding Judge Rosemary Collyer directed the government to provide additional information specifically addressing: (1) the FBI's efforts to ensure that the statement of facts in each FBI application accurately and completely reflects the information possessed by the Bureau that is material to any issue presented by the application, and (2) if unable to implement those efforts by the time of the response, (a) a proposed timetable for such

implementation and (b) an explanation of why the information in FBI applications submitted in the interim should be regarded as reliable. See Dec. 17, 2019, Order at 3-4. DOJ filed its response to the December Order on January 10, 2020. See Gov't Resp. to Court Order dated Dec. 17, 2019, Misc. 19-02. That filing outlined the government's implementation plan for the measures it proposed in response to the OIG Report and described interim procedures intended to provide additional assurances to the Court that the information in FBI FISA applications would be complete and accurate. See Decl. of FBI Dir. Christopher W. Wray in Support of Resp. to Court Order dated Dec. 17, 2019, at 2-15, Misc. 19-02 (Jan. 10, 2020).

To assist in its evaluation of the government's response, the Court exercised its discretion to appoint an *amicus curiae* and selected David Kris, a member of the pool of five *amici* designated under 50 U.S.C. § 1803(i)(1) and a person familiar with the complexities of the FISA application process. In his submission, *Amicus* agreed that the remedial measures proposed by the government were on the right track, but he concluded that they were insufficient. See Amicus Letter Br. at 3, 15 (Jan. 15, 2020). He argued that to provide the required assurances to the Court, the government's efforts must be expanded and improved, and he offered several recommendations. Id. at 3, 7-14. The government subsequently replied to *Amicus's* recommendations on January 31, 2020. See Resp. to Amicus's Letter Br. dated Jan. 15, 2020, Misc. 19-02. The Court greatly values *Amicus's* thoughtful assessment of the government's proposals, which has resulted, *inter alia*, in the government's supplementing its proposed remedial measures. See, e.g., id. at 9, 13.

Prior to the Court's receipt of the OIG Report, the government notified it of significant misconduct by an attorney in the FBI's Office of the General Counsel. See Order, No. [REDACTED], at 1 (Dec. 5, 2019) (citing Rule 13(a) letters filed on Oct. 25, 2019, and Nov. 27, 2019), *declassified version available at* <https://fisc.uscourts.gov/public-filings/order-33>; see also OIG Rpt. at xii-xiii,

249-56. Judge Collyer directed the government to provide additional information concerning any other matters involving that FBI OGC attorney and to advise whether any bar association or disciplinary referrals had been made. See Dec. 5, 2019, Order, at 2. Because the aforementioned Rule 13(a) letters and the government's responses to the December 5, 2019, Order are classified, and because the Court's consideration of such matter advances on a separate track, it will continue to address that specific circumstance separately and will not further examine it here.

The Court is also considering the government's handling and disposition of information acquired pursuant to the Page authorizations in a separate proceeding in which the government's submissions are substantially classified. See Order Regarding Handling and Disposition of Information, Nos. 16-1182, 17-52, 17-375, 17-679, at 1-2 (Jan. 7, 2020), *declassified version available at* <https://fisc.uscourts.gov/public-filings/order-regarding-handling-and-disposition-information> (addressing government's conclusion in Dec. 9, 2019, Rule 13(a) letter that third and fourth electronic-surveillance applications for Page were unlawful and undertaking to sequester information FBI acquired pursuant to all four FISA authorizations concerning Page). This issue, too, falls outside the scope of this Opinion.

II. Problems with the Carter Page Applications

Omissions of material fact were the most prevalent and among the most serious problems with the Page applications. For example, information about Page's prior relationship with another U.S. government agency was not disclosed to the Court, including: (1) the other agency's approval of Page as an operational contact from 2008 to 2013; (2) his notifying that agency of his prior contacts with certain Russian intelligence officers (at least one of whom was discussed in the FISA applications); and (3) that agency's assessment that Page was candid in describing those contacts. See OIG Rpt. at viii, 157-160, 248 n.391. Those facts were relevant

in assessing the import of more recent contact Page was alleged to have had with other individuals connected to the Russian government. Further, when pressed by the FBI declarant about the possibility of a prior relationship between Page and the other agency during the preparation of the final application in June 2017, the FBI OGC attorney added text to an email from the other agency stating that Page was “not a source.” Id. at xi, 254-55. The FBI declarant relied upon that altered document in signing the final renewal application, which did not correct the omissions. Id. at xi, 248, 255.

All four Page applications relied on information from reports prepared by Christopher Steele for his employer, which Steele also gave to the FBI. Id. at v, vii, xi, 93-94. Specifically, the Steele reporting relied on in the applications indicated that: (1) the Kremlin controlled derogatory information about Hillary Clinton compiled over many years and had been feeding information to the Trump campaign; (2) during a July 2016 trip to Moscow, Page discussed future cooperation and the lifting of Ukraine-related sanctions against Russia in a secret meeting with Igor Sechin, Chairman of Rosneft and a close associate of Russian President Vladimir Putin, and also discussed divulging derogatory information about Clinton to the Trump campaign with Igor Divyekin, a highly placed Russian government official; (3) Page was an intermediary between Russia and the Trump campaign in a “well-developed conspiracy of cooperation,” managed by Trump's then-campaign manager Paul Manafort, which led to Russia's disclosure of hacked Democratic National Committee emails to WikiLeaks in exchange for agreeing to sideline Russian intervention in Ukraine as a campaign issue; and (4) at Page's suggestion, Russia released the DNC emails to WikiLeaks to swing voters to Trump. Id. at 241 (referencing Steele Reports Nos. 80, 94, 95, and 102).

As stated in the applications, Steele obtained this information from a primary sub-source, who had, in turn, obtained the information from his/her own source network. Id. The FBI did not, however, advise DOJ or the Court of inconsistencies between sections of Steele's reporting that had been used in the applications and statements Steele's primary sub-source had made to the FBI about the accuracy of information attributed to "Person 1," who the FBI assessed had been the source of the information in Reports 95 and 102. Id. at ix, 242-43. The government also did not disclose that Steele himself had undercut the reliability of Person 1, telling the FBI that Person 1 was a "boaster" and an "egoist" and "may engage in some embellishment." Id. at xi, 163-64 (internal quotation marks omitted).

Information bearing on Steele's personal credibility and professional judgment was also omitted or mischaracterized. Id. at xi, 257. The information that was included overstated the significance and corroboration of Steele's past reporting and was not approved by Steele's FBI handling agent, as required by FBI procedures. Id. at viii-ix, 160-161. In addition, although from the outset the applications acknowledged the likely political bias of the person who had hired Steele, see, e.g., id. at 143 (citing footnote 8 of the initial application, "The FBI speculates that the [person who hired Steele] was likely looking for information that could be used to discredit [Clinton's] campaign."), information that confirmed the political origins of the Steele reporting was not. Id. at 234-35. Information concerning Steele's own personal bias was also left out of the renewal applications. Id. at xi, 234-35. (The government did provide the Court with information concerning Steele's motivations and reliability obtained from DOJ attorney Bruce Ohr in a July 2018 Rule 13(a) letter, id. at 230, 237-38, but that was long after the expiration of all FISA authorities relating to Page.)

The government also did not disclose in the final application that the FBI had learned that Steele had been the direct source of information in a September 2016 news article, which was described in all four applications and generally tracked much of Steele's reporting. Id. at 238-40. Because the applications stated that the FBI assessed that either the person who employed Steele to conduct the research or the law firm that had hired Steele's employer had provided the information to the media, id. at 107, 238-39, the government made clear that the news article was not being used to corroborate the Steele reporting. Nevertheless, Steele's sharing of the information he gave to the FBI with the media would have shed further light on his motivations. The FBI's assessment that he had not been the direct source of the information should have been corrected.

Finally, the government omitted statements Page made to a confidential human source that contradicted the FBI's theory of the case. In support of the contention that Page was participating in a conspiracy with Russia by acting as an intermediary for Trump campaign manager Paul Manafort, the government included statements Page had made to the source in October 2016 that tended to support that theory, but omitted statements he had made to the same source that did not. Id. at 170. The government also omitted Page's statements to a confidential human source that he intentionally had "stayed clear" of efforts to change the Republican platform, id. at xii, 170, 264, 322, as well as evidence tending to show that two other Trump campaign officials were responsible for the change. Id. at 264-66. Both pieces of information were inconsistent with the government's suggestion that, at the behest of the Russian government, Page may have facilitated a change to the Republican platform regarding Russia's annexation of part of Ukraine. Id. at xii.

III. Analysis

The question the OIG Report squarely tees up is simple: how do we keep this from happening again? As noted in the Court's December Order, only when the government fully and accurately provides all information in its possession that is material to whether probable cause exists can the Court's review effectively serve as a check on Executive Branch decisions to conduct surveillance. See Dec. 17, 2019, Order at 2. Without facts that are both accurate and complete, the Court is necessarily hamstrung in its ability to balance the interests of national security with those of personal privacy.

The Court is encouraged by the government's responses to the OIG Report and its Orders, as the FBI and DOJ have each indicated that the flaws identified in the OIG Report require significant and systemic remedial action. See generally OIG Rpt. app. 2, at 424-27; Gov't Resp. to Dec. 17, 2019, Order; Wray Decl. Beyond mere acknowledgment, the government has been proactive in its response to the OIG's findings and recommendations, see OIG Rpt. app. 2 at 428-34, as well as to concerns raised by *Amicus*. See Resp. to Amicus.

The Court now separately analyzes the proposed remedial actions in three areas: improvements to procedures for preparing FISA applications, improvements to training and other efforts to institutionalize the importance of accuracy and completeness, and oversight.

A. Improvements to Procedures for Preparing FISA Applications

In response to the most prevalent type of error found in the Page applications – omissions of relevant facts – the OIG recommended that DOJ and the FBI put in place procedures that ensure DOJ's Office of Intelligence obtains all relevant and accurate information. See OIG Rpt. at 414-15. In the OIG's view, such procedures should include revised forms that ensure information is identified for DOJ that “tends to disprove, does not support, or is inconsistent with

a finding or an allegation that the target is a foreign power or an agent of a foreign power” or “bears on the reliability of every [confidential human source] whose information is relied upon in the FISA application.” Id. at 415.

The FBI agreed with this recommendation and said that it would revise the form it uses to request a FISA application to direct agents to provide additional information and to “collect all details relevant to the consideration of a probable cause finding, emphasizing the need to err on the side of disclosure.” OIG Rpt. app. 2 at 428. The government subsequently opined that these revisions “are designed . . . to elicit information that may undermine probable cause and to ensure robust disclosure.” Resp. to Amicus at 7. The Court has reviewed the revised request form and is not convinced that it lives up to those assertions. Other than to generally remind case agents to provide information that undermines probable cause, it is unclear how the new questions on the revised form are designed to trigger the inclusion of unhelpful information. The Court understands, however, that the revised request form is already in use. It is therefore ordering the government to assess, after a reasonable period of time, whether the modifications do, in fact, elicit information that might otherwise have been excluded and to explain the basis of that assessment.

The FBI also said that it would require “all information known at the time of the request and bearing on the reliability of a CHS whose information is used to support the FISA application is included in the FISA Request Form and verified by the CHS handler.” OIG Rpt. app. 2 at 428. Yet the revised request form does not include these requirements. It does, however, require completion of a CHS checklist, which, although still under development, will be attached to the request form and appears intended to document the same information. See Wray Decl. at 5; Resp. to Amicus at 5. The government plans to begin using the new CHS

checklist on March 27, 2020. See Resp. to Amicus at 5. To facilitate its assessment of this proposed improvement, the Court is ordering the government to provide a copy of the CHS checklist and an update on the status of its implementation. The Court also seeks clarification as to whether the FBI CHS handler is required to verify all CHS reliability information before the FBI submits the FISA request form to DOJ.

The OIG Report also recommended improvements to the “Woods Form,” which is used by the FBI to verify that all information in the FISA application is supported by documented evidence in the case file: specifically, that the forms (1) emphasize the obligations to re-verify factual assertions repeated from prior applications and to obtain written approval from handling agents for CHSs of all source characterizations in applications, and (2) specify what steps must be taken and documented during the legal review performed by the FBI OGC line attorney and supervisor (including clarification of what positions may serve as a supervisor) before submission of the FISA package to the FBI Director. See OIG Rpt. app. 2 at 415. In response, the FBI agreed to implement all of these recommendations and has modified the Woods Form in several ways. Among other things, agents and their supervisors must now affirm that DOJ has been apprised of all information that might reasonably call into question the accuracy of the information or factual assessments in the application, or that otherwise raises doubts about the requested probable-cause finding or the theory of the case. See OIG Rpt. app. 2 at 428-29. The need to re-verify the accuracy and completeness of information from prior applications is also emphasized, and the pertinent CHS handler must confirm the accuracy and completeness of each CHS reliability statement and all CHS-originated content in the FISA application. Id. at 428.

In addition, the FBI agreed to formalize the role of the FBI attorney in the legal review process. Id. at 429. But the role described in the revised Woods Form appears largely

perfunctory. To assess whether additional modifications to the Woods Form or related procedures may be warranted, the Court is directing the FBI to describe the current responsibilities FBI OGC lawyers have throughout the FISA process.

The FBI also commits to identifying and pursuing short- and long-term technological improvements, in partnership with DOJ, that will aid in consistency and accountability. See Wray Decl. at 9. Given the lack of specific information on this point, however, the Court is currently unable to assess the likely effectiveness of such improvements and therefore is directing further reporting.

In general, these modifications to the FBI's methodology for making a FISA request and verifying supportive information appear likely to reduce inadvertent errors and omissions, and they should remind agents and other responsible FBI personnel of their obligation to provide accurate and complete information. As *Amicus* pointed out, however, improvements to the “iterative process” for preparing FISA applications, in which “attorneys and supervisory attorneys in OI work closely with the case agent or agents . . . to elicit, articulate, and provide full factual context” are also necessary. See *Amicus* Letter Br. at 8 (quoting Gov't Resp. to Dec. 17, 2019, Order at 9). The government has confirmed that DOJ attorneys are expected to look for errors and omissions while drafting renewal applications. See Gov't Resp. to Dec. 17, 2019, Order at 10. DOJ has committed to updating guidance on this practice and providing training to emphasize specific steps to elicit all relevant information, id. at 6, 12-13, but otherwise has not suggested measures to improve the performance of its attorneys in the iterative process.

According to the OIG Report, the DOJ attorney responsible for preparing the Page applications was aware that Page claimed to have had some type of reporting relationship with

another government agency. See OIG Rpt. at 157. The DOJ attorney did not, however, follow up to confirm the nature of that relationship after the FBI case agent declared it “outside scope.” Id. at 157, 159. The DOJ attorney also received documents that contained materially adverse information, which DOJ advises should have been included in the application. Id. at 169-70. Greater diligence by the DOJ attorney in reviewing and probing the information provided by the FBI would likely have avoided those material omissions. As a result, reminders of DOJ’s obligation to meet the heightened duty of candor to the FISC appear warranted. The Court is therefore directing that any attorney submitting a FISA application make the following representation: “To the best of my knowledge, this application fairly reflects all information that might reasonably call into question the accuracy of the information or the reasonableness of any FBI assessments in the application, or otherwise raise doubts about the requested probable cause findings.”

DOJ should also consider whether its attorneys need more formalized guidance – *e.g.*, their own due-diligence checklists. Consideration should also be given to the potential benefits of DOJ attorney visits to field offices to meet with case agents and review investigative files themselves, at least in select cases – *e.g.*, initial applications for U.S.-person targets. Increased interaction between DOJ attorneys and FBI case agents during the preparatory process should not only improve accuracy in individual cases but also likely foster a common understanding of how to satisfy the government’s heightened duty of candor to the FISC.

Amicus also suggested that the FBI case agent, who usually works in a field office, rather than a supervisory headquarters agent, attest to the FISA application itself. See *Amicus* Letter Br. at 8. Because case agents have more direct knowledge of most information uncovered in an investigation, they are in the best position to affirm the veracity of the proffer. The government

agreed to this change in its reply and is in the process of working out how to implement it. See Resp. to Amicus at 9. The Court believes that this development could significantly improve the FISA process, provided that case agents fully understand their duty of candor and are held accountable for fulfilling it. To that end, the Court is directing that each FBI declarant attest: “To the best of my knowledge, the Office of Intelligence of the Department of Justice has been apprised of all information that might reasonably call into question the accuracy of the information or reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested probable cause findings.”

B. Improvements to Training and Other Efforts to Institutionalize Importance of Accuracy and Completeness

While more rigorous procedures for preparing FISA applications should prove helpful, the Court is also mindful that changes in culture will require more than checklists. To that end, the FBI has committed to improved training of those involved. First, the FBI (and DOJ) have conducted training to familiarize their personnel with the new forms and procedures and to emphasize the heightened duty of candor to the FISC. See Gov’t Resp. to Dec. 17, 2019, Order at 12-13; Wray Decl. at 6-7. Second, the Bureau will create and teach a case study based on the OIG Report findings – “analyzing all steps of that particular FISA application and its renewals to show FBI personnel the errors, omissions, failures to follow policy, and communication breakdowns, and to instruct where new or revised policies and procedures will apply, so that mistakes of the past are not repeated.” Wray Decl. at 3. The FBI will also develop and require training “focused on FISA process rigor and the steps FBI personnel must take, at all levels, to make sure that OI and the FISC are apprised of all information in the FBI’s holdings at the time of an application that would be relevant to a determination of probable cause.” Id. *Amicus*

viewed these improvements to training as positive, but recommended an additional step – to wit, that DOJ attorneys participate along with FBI personnel in conducting all FBI FISA training, absent a compelling reason for non-participation. See Amicus Letter Br. at 10. In response, the government described significant past and planned coordination between DOJ and the FBI regarding FISA training. See Resp. to Amicus at 10-11. The Court is satisfied with the reported level of cooperation.

In addition, *Amicus* highlighted the importance of establishing and maintaining a culture that embraces the government’s *ex parte* obligations in FISA proceedings. See Amicus Letter Br. at 12-15. Improved training should be an important vehicle for driving such cultural change. *Amicus* also views individual responsibility and accountability as critical to establishing the necessary culture. Id. at 14. The OIG recommended that the FBI conduct performance reviews of all employees who had responsibility for the FISA applications, including managers, supervisors, and senior officials in the chain of command, and take appropriate action. See OIG Rpt. at 417. The FBI accepted this recommendation, “undertaking the review of FBI personnel and taking actions as appropriate.” OIG Rpt. app. 2 at 434. Director Wray also pledged to take appropriate disciplinary action regarding individuals who have been referred by the OIG for review, if warranted at the completion of the required procedures for disciplinary review. Id. at 425. *Amicus* urges the Court to “require the government to provide an appropriate briefing on these disciplinary reviews and results to ensure that Wray’s pledge is carried out.” *Amicus* Letter Br. at 14.

In response, the government advises that the FBI will ensure individual accountability by following its “longstanding, well-established processes for conducting disciplinary reviews involving its Inspection Division and Office of Professional Responsibility,” and it will follow

those “processes to ensure appropriate individual accountability.” Resp. to Amicus at 16. Yet the integrity of the FISA process must be protected while those disciplinary reviews are ongoing. FBI personnel under disciplinary review in relation to their work on FISA applications accordingly should not participate in drafting, verifying, reviewing, or submitting such applications to the Court while the review is pending. The same prohibition applies to any DOJ attorney under disciplinary review, as well as any DOJ or FBI personnel who are the subject of a criminal referral related to their work on FISA applications.

C. Oversight

The last ingredient for successful reform is oversight and ongoing monitoring. In response to the December 17, 2019, Order, DOJ provided a brief explanation of its current oversight of FBI accuracy in FISA applications. See Gov’t Resp. to Dec. 17, 2019, Order at 7-9. It further advised that it was considering how to expand such oversight to include a check for completeness. Id. at 9.

Amicus agrees that reviews designed to elicit any pertinent facts omitted from the application, rather than merely verifying the facts that were included, would be extremely valuable, but also recognizes that such in-depth reviews would be extremely resource intensive. See *Amicus* Letter Br. at 12. He thus recommends that such reviews be conducted periodically at least in some cases and, echoing Samuel Johnson, advises that selection of cases for such reviews should be unpredictable because the possibility that any case might be reviewed “should help concentrate the minds of FBI personnel in all cases.” Id. In its response, the government advised that “it will expand its oversight to include additional reviews to determine whether, at the time an application is submitted to the FISC, there was additional information of which the Government was aware that should have been included and brought to the attention of the

Court.” Resp. to Amicus at 13. DOJ advised, however, that given limited personnel to conduct such reviews, it is still developing a process for such reviews and a sampling methodology to select cases for review. Id. The Court sees value in more comprehensive completeness reviews, and random selection of cases to be reviewed should increase that value. As DOJ is still developing the necessary process and methodology, the Court is directing further reporting on this effort.

Amicus also encouraged the Court to require a greater number of accuracy reviews using the standard processes already in place. See Amicus Letter Br. at 12. He believes that the FBI and DOJ have the resources to ensure that auditing occurs in a reasonable percentage of cases and suggested that it might be appropriate to audit a higher percentage of certain types of cases, such as those involving U.S. persons, certain foreign-agent definitions, or sensitive investigative matters. Id. The government did not address *Amicus*’s recommendation that it increase the number of standard reviews.

Even though accuracy reviews are conducted after the Court has ruled on the application in question, the Court believes that they have some positive effect on future accuracy. In addition to guarding against the repetition of errors in any subsequent application for the same target, they should provide a practical refresher on the level of rigor that should be employed when preparing any FISA application. It is, however, difficult to assess to what extent accuracy reviews contribute to the process as a whole, partly because it is not clear from the information provided how many cases undergo such reviews. The Court is therefore directing further reporting on DOJ’s current practices regarding accuracy reviews, as well as on the results of such reviews.

Finally, the FBI has directed its Office of Integrity and Compliance to work with its Resource Planning Office to identify and propose audit, review, and compliance mechanisms to assess the effectiveness of the changes to the FISA process discussed above. See OIG Rpt. app. 2 at 429. Although the Court is interested in any conclusions reached by those entities, it will independently monitor the government's progress in correcting the failures identified in the OIG Report.

IV. Conclusion

The government has put forward several remedial measures that hold promise. While some have been implemented, others are still under development. Acknowledging that significant change can take time, and recognizing the limits of its authority, see In re Sealed Case, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (*per curiam*), the Court is ordering the government to provide additional information responsive to the Court's concerns in the three categories discussed above.

Accordingly, it is ORDERED that the government shall provide:

1. By March 27, 2020:
 - a. a copy of the CHS checklist, an update on the status of its implementation, and information indicating whether the FBI CHS handler is required to verify CHS reliability information prior to the FBI's submission of a FISA request form;
 - b. a description of the current responsibilities FBI OGC lawyers have throughout the FISA process;
 - c. a description of any planned or implemented technological improvements to the process of preparing FISA applications or verifying the information contained in FISA applications and updates every thirty days thereafter until they have been fully implemented;
 - d. a report containing the following information regarding suggested means of improving DOJ proactiveness in ensuring the completeness of FISA applications:

- i. the viability of DOJ attorney participation in field-office visits to assist in the preparation of FISA applications; and
 - ii. whether the government believes formalized guidance should be provided to DOJ attorneys to ensure their diligence in soliciting the types of information that were improperly omitted from the Page applications and, if so, how and when DOJ plans to provide such guidance;
- e. a description of the steps taken to have FBI field agents serve as declarants in FISA applications, as well as an estimate of when the government expects such agents to begin signing FISA applications; and
- f. a description of DOJ's Office of Intelligence Oversight Section's process and methodology for conducting completeness reviews, including the methodology that will be used to select applications for review; and by September 1, 2020, and every six months thereafter, a general description of the results of the completeness reviews and of the standard accuracy reviews conducted since the issuance of this Opinion, including the number and types of FISA applications reviewed, the field office(s) visited, and a description of the manner in which cases were selected for review;
2. By May 4, 2020, a summary description of the FBI case-study training and FISA-process training courses and related testing requirements; in addition, by July 3, 2020, confirmation that all FBI personnel participating in the FISA process have completed the training and satisfied any testing requirements; and
3. By May 22, 2020, a description of any audit, review, or compliance mechanisms implemented or to be implemented by the FBI's Office of Integrity and Compliance or Resource Planning Office that bear on the efficacy of any of the remedial measures discussed above; and by June 30, 2020, a report assessing the extent to which use of the revised forms has resulted in the inclusion in FISA applications of material information that might otherwise have been omitted.

IT IS FURTHER ORDERED THAT no DOJ or FBI personnel under disciplinary or criminal review relating to their work on FISA applications shall participate in drafting, verifying, reviewing, or submitting such applications to the Court. Any finding of misconduct relating to the handling of FISA applications shall be promptly reported to the Court.

IT IS FURTHER ORDERED THAT each application for authority to conduct electronic surveillance or physical search pursuant to 50 U.S.C. § 1804 or 1823, to install and use a pen register or trap-and-trace device pursuant to 50 U.S.C. § 1842, or to target a U.S. person to

acquire foreign-intelligence information pursuant to 50 U.S.C. § 1881b or 1881c, filed on or after March 9, 2020, shall include the following representation by the DOJ attorney:

To the best of my knowledge, this application fairly reflects all information that might reasonably call into question the accuracy of the information or the reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested findings.

Any such applications brought on behalf of the FBI shall also include the following attestation by the declarant:

I attest that, to the best of my knowledge, the Office of Intelligence of the Department of Justice has been apprised of all information that might reasonably call into question the accuracy of the information or the reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested findings.

Applications for the production of tangible things pursuant to 50 U.S.C. § 1861 must include a statement of facts but need not be supported by oath or affirmation. Such applications, filed on or after March 9, 2020, shall include the following representation by the FBI applicant or the DOJ attorney for the applicant:

To the best of my knowledge, this application fairly reflects all information that might reasonably call into question the accuracy of the information or the reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested findings.

SO ORDERED.

Entered this 4th day of March, 2020.


JAMES E. BOASBERG
Judge, United States Foreign
Intelligence Surveillance Court

From: Murphy, Paul B. (DO) (FBI)
Subject: FBI Comments to DOJ Proposal
To: Levi, William (OAG)
Sent: March 9, 2020 3:13 PM (UTC-04:00)
Attached: DOJ Leg Proposal (FBI Final Edits 3.9.2020).docx

Will –

I wanted to make sure that you have this, too.

Paul

From: (b)(6). (7)(C), (7)(E) per FBI (OGC) (FBI)
Sent: Monday, March 9, 2020 2:46 PM
To: Wiegmann, Brad (NSD) (JMD) <(b) (6)>; MacTough, Melissa (NSD) (JMD) <(b) (6)>
Cc: (b)(6). (7)(C), (7)(E) per FBI (DO) (FBI) <(b)(6). (7)(C), (7)(E) per FBI>; Browning, Dawn M. (OGC) (FBI) <(b)(6). (7)(C), (7)(E) per FBI>; (b)(6). (7)(C), (7)(E) per FBI (DO) (OGA) <(b)(6). (7)(C), (7)(E) per FBI>
Subject: FBI Comments to DOJ Proposal

Brad and Melissa,

Attached are comments to the DOJ Proposal. These have been coordinated through the Director's Office.

We've got a couple things to note. (b)(5) per FBI

[REDACTED]

We're happy to discuss. Thanks.

(b)(6). (7)(C), (7)(E) per FBI

[REDACTED]

Office of the General Counsel
Federal Bureau of Investigation

(b)(6). (7)(C), (7)(E) per FBI