

Statement of Sharon Bradford Franklin
Chair, Privacy and Civil Liberties Oversight Board
Before the Subcommittee on Crime and Federal Government Surveillance
Of the House Judiciary Committee
Hearing titled “Fixing FISA: How a Law Designed to Protect Americans Has
Been Weaponized Against Them”
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Chairman Biggs, Ranking Member Jackson Lee, and Members of the Subcommittee,

Thank you for the opportunity to testify before you today. I want to start by noting that I am testifying in my individual official capacity, so the views I express are my own, and not necessarily the views of the Privacy and Civil Liberties Oversight Board as a whole or of any of my fellow Board members.

For those of you who may not be familiar with our agency, the PCLOB is an independent agency within the executive branch, and our role is to review federal counterterrorism programs to ensure that they include appropriate safeguards for privacy and civil liberties. Congress created the PCLOB based on a recommendation of the 9/11 Commission. The Commission urged that as Congress took steps to expand the government’s powers to address terrorist threats, Congress should also create a board to serve as a voice within the government for privacy and civil liberties.

The PCLOB is headed by a five-member bipartisan Board, and I am the Chair. Because the PCLOB is an independent agency, we are not required to take positions consistent with those of the administration.

When the PCLOB conducts oversight, our role is not only to assess whether a program complies with existing law and rules, but it is also to make policy recommendations to ensure that there are adequate safeguards for privacy and civil liberties. Our recommendations may urge the executive branch agencies conducting a program to take action, and other recommendations may urge Congress to enact legislative reforms.

The PCLOB is currently examining Section 702 of the Foreign Intelligence Surveillance Act (FISA), which is scheduled to expire at the end of December, unless Congress acts to reauthorize the program. Section 702 authorizes the government to target non-Americans located outside the United States, and to

collect both the content and metadata of their communications. The surveillance must be conducted for a foreign intelligence purpose that is approved by the Foreign Intelligence Surveillance Court (FISA Court), as part of an annual certification process. This program is operated principally by the NSA, but also by the FBI, the CIA and the National Counterterrorism Center.

The PCLOB first reviewed and released a report on Section 702 back in 2014, and we are working to develop and publish a new report this year, to inform the public and congressional debate over reauthorization. Our review focuses on Section 702, which is scheduled to sunset at the end of this year. It does not examine traditional FISA orders, such as the type at issue in the Crossfire Hurricane investigation.

Although the Board has not yet completed our Section 702 report, we can already say that we agree that three things are true: Section 702 is valuable in protecting our national security; Section 702 creates risks to privacy and civil liberties; and these risks can and should be addressed without undermining the core value of the program. We are confident that the privacy risks posed by Section 702 can be addressed while preserving the program's value in protecting Americans' national security.

Since our report is not yet complete, I cannot say what recommendations we will collectively make as a Board. Instead, I would like to briefly describe three particular privacy risks that I urge Congress to address as you consider reauthorization of Section 702: the volume of "incidental" collection, the rules governing U.S. person queries, and the current statutory authority for restarting "abouts" collection.

Volume of Incidental Collection

First, Section 702 implicates the privacy rights of Americans due to the volume of incidental collection. Under Section 702, surveillance targets can only be non-U.S. persons – so only people who are not U.S. citizens or legal permanent residents – and at the time of collection, targets must be reasonably believed to be located outside the United States. Each year, the FISA Court reviews and approves submissions from the Attorney General and Director of National Intelligence that set out the categories of foreign intelligence to be collected, and the FISA Court annually reviews and approves a series of procedures that govern how the Section 702 program is run: targeting procedures, minimization procedures, and querying procedures.

In this way, the FISA Court does review the standards that government analysts need to apply when they select targets under Section 702. These standards focus on whether a target is likely to possess or communicate foreign intelligence information, but do not require any finding of probable cause or even a determination that a target poses a threat or is associated with wrongdoing. In addition, no judge ever reviews analysts' targeting decisions.

By contrast, when the government seeks to conduct surveillance of a target who is a U.S. person, the government must establish probable cause and obtain the approval of a judge before conducting the surveillance. The legal rationale for this distinction is that under Section 702, the targets are non-U.S. persons – so, they are people who do not have recognized Fourth Amendment rights. Nonetheless, if a U.S. person communicates with a foreign target, their communications can be collected through what the government calls “incidental collection.”

Understandably, the government wants to know who is on the other end of communications with its 702 targets – including people inside the United States. They want to figure out whether those people in the United States are working with the non-American targets to plot acts of terrorism or otherwise pose threats to the United States. Thus, incidental collection is a feature of Section 702 and not a bug. This should be distinguished from reverse targeting, which the statute explicitly prohibits, and which would involve targeting someone outside of the United States as a pretext, when the real intent is to acquire the communications of someone inside the United States.

The term “incidental” makes it sound like it's a small amount or insignificant. But we don't actually know the scope of this collection, and this is one of the key policy issues that I believe Congress should address in connection with reauthorization of Section 702. When the PCLOB issued its earlier Report on Section 702 in 2014, the Board recommended that the NSA should calculate and publish several metrics designed to provide insight into the extent of incidental collection, and since that time, Members of the House Judiciary Committee have also urged the intelligence agencies to provide an estimate of the scope of incidental collection.

But the government has not attempted to estimate the number of U.S. persons whose communications have been collected under Section 702, and has instead argued that it would not be feasible to calculate a meaningful number. Within

the past year, some academics have published a paper outlining a method based on secure multi-party computation to provide an estimate of the extent of incidental collection, and this seems to be a promising approach worth exploring further. Essentially, the dispute is over what kind of metrics would be meaningful to Congress and the public.

The extent of incidental collection matters, because the greater the number of Americans who are directly affected, the greater the need for Congress to ensure the safeguards throughout the 702 program are sufficient. So, when the alternative is that we have no estimates at all on the scope of incidental collection, I believe an estimate that involves some margin of error can still be meaningful and helpful to Congress as you assess what safeguards are needed under Section 702.

U.S. Person Queries

A second key aspect of Section 702 surveillance involves what the government calls U.S. person queries, and many privacy advocates refer to as “backdoor searches.” A U.S. person query is a method for intelligence analysts and FBI agents to search through the communications the government has collected under Section 702, seeking information about a particular U.S. person. As I’ve just described, under Section 702, there is no requirement for judicial review before targeting – or at the “front end” of 702 surveillance. And the rules for conducting U.S. person queries also do not require government agents to establish probable cause or to seek the permission of a judge before they conduct such a search through Section 702 data. This is why privacy advocates refer to these U.S. person queries as “backdoor searches.”

This Committee has, in the past, considered and approved amendments to Section 702 that would address this very issue. Although those particular amendments have not made it into law, when Congress last reauthorized Section 702 in January 2018, it did adopt an amendment that applies in a very narrow set of circumstances, to require the FBI to seek a warrant from the FISA Court before accessing the results of a U.S. person query. However, not only is that statutory requirement very narrow, but the FBI has never sought such a court order, even in several documented cases where the requirement actually applied.

In most instances, the existing rules permit intelligence analysts to search through 702 data for information about specific U.S. persons if they assess that

the query is reasonably likely to return foreign intelligence information, and, in the case of the FBI, they may also conduct U.S. person queries if they assess the query is reasonably likely to return evidence of a crime.

There has been a lot of public attention recently to violations of the existing rules for U.S. person queries by the FBI. These have included publicized accounts about queries searching for information about Members of Congress, and queries seeking information about individuals who had requested to participate in FBI's "Citizens Academy" program for business, religious, civic and community leaders.

Importantly, within the past year and a half, the FBI has implemented several reforms designed to improve compliance with the existing rules. These have included changing the default settings in its query system so that agents must affirmatively opt in to have their queries run through 702 data, and establishing special approvals for sensitive queries such as those involving elected officials, members of the media, members of academia, and religious figures.

These reforms are welcome, and the FBI has announced that the changes have already led to a drop in the number of U.S. person queries it conducts of over 90%, and that compliance with the existing rules is improving. But I do not believe these changes are sufficient to address the privacy threats posed by these warrantless searches seeking information about specific Americans.

U.S. persons' communications are entitled to protection under the Fourth Amendment. So, when there is no judicial review at the front end, the government should not be able to search through collected 702 data for a specific American's communications without any individualized judicial review. As Congress debates reauthorization of Section 702, I urge you to incorporate a requirement for FISA Court review of U.S. person query terms, to ensure protection of Americans' Fourth Amendment rights.

"Abouts" Collection

The third privacy risk I want to mention is the risk that the government may seek to restart what has been called "abouts" collection. "Abouts" collection involves the collection of communications that are neither "to" nor "from" a target, but instead include a reference to a target's selector, such as an email that contains a target's email address in the body of the message. NSA

previously conducted “abouts” collection through the upstream portion of Section 702, which involves collection of communications from the internet backbone.

As the PCLOB noted in its 2014 report on Section 702, “abouts” collection created unique threats to privacy, by increasing the risk that NSA would collect purely domestic communications and the risk that the government would “acquire communications exclusively between people about whom the government had no prior suspicion, or even knowledge of their existence, based entirely on what is contained within the contents of their communications.”

In the spring of 2017, the NSA announced that it had suspended “abouts” collection, noting that this would reduce the risk of collection of communications of U.S. persons or others who are not in direct contact with a target.

When Congress reauthorized Section 702 in January 2018, the legislation prohibited “abouts” collection, but also provided that the government could restart such collection after obtaining approval from the FISA Court and giving notice to Congress.

Since the NSA suspended “abouts” collection in 2017, it has changed the ways in which it conducts upstream surveillance under Section 702, and the changes have significantly reduced the privacy risks from upstream collection. However, the privacy threats previously identified by the PCLOB would re-emerge if the government were to restart “abouts” collection. I therefore urge Congress to remove the provision authorizing the government to restart this type of collection.

Expanding and Strengthening the Role of the FISA Court Amicus

Finally, I urge that in connection with the reauthorization of Section 702, Congress should take the opportunity to expand and strengthen the role of the FISA Court amici. Congress created this “friend of the court” role through the USA FREEDOM Act in 2015, which requires the FISA Court to appoint a panel of at least five individuals with expertise in privacy, civil liberties, intelligence collection, or communications technology, and to select members of this panel to participate in cases involving “a novel or significant interpretation of the

law.” The amicus role has been valuable, and FISA Court judges have relied upon the amici’s positions.

Back in 2014, when the PCLOB issued its report examining the Section 215 bulk phone records program, the Board unanimously recommended that Congress create what the Board called a “special advocate” role, which was similar to the amicus role that Congress later created. However, the amicus role as enacted in 2015 is weaker than the special advocate position described by the PCLOB in three critical ways. First, the PCLOB recommended that the special advocates participate in more than just matters involving “novel and significant” issues. Second, the PCLOB urged that the special advocates should have full access to information related to the matters in which they participate. Third, the Board recommended that the special advocates should be able to petition for an appeal from the FISA Court to the FISA Court of Review (FISCR), and from the FISCR to the Supreme Court. None of these requirements are contained in the current statute.

As Congress crafts legislation in anticipation of the Section 702 sunset date, I urge you to include provisions that would expand and strengthen the role of the amici in at least these three ways: expand the types of matters in which amici participate, require that amici be provided with full access to information related to the matters in which they participate, and enable the amici to petition for appeal of decisions by the FISA Court and by the FISA Court of Review.

Ultimately, I urge Congress to use the opportunity of the Section 702 sunset date to adopt meaningful reforms, and I am encouraged that the Committee is beginning the process now. I am confident that Congress can address the privacy risks posed by Section 702 while preserving the key value the program offers to protect our national security.

Thank you and I look forward to your questions.