

Statement of Beth A. Williams
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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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Thank you, Chairman Jordan, Chairman Biggs, and Ranking Members Nadler and Jackson Lee for inviting me to testify before you today regarding Section 702 of the Foreign Intelligence Surveillance Act (“FISA”). On behalf of the Privacy and Civil Liberties Oversight Board (“PCLOB”), I am grateful to be here today, and I commend this Committee and your Staff for its attention to this very important law, months before a potential reauthorization deadline.

Before I begin, there are a few caveats to my testimony today. First, I am only one Member of a bipartisan, five-Member Board, so I am speaking in my individual capacity as a Board Member, and not for the Board as a whole. Second, I want to note that we are currently working on an extensive report, updating the Board’s 2014 Report on the Section 702 program. We anticipate that this report will explain the program in as complete and unclassified a manner as possible; that it will provide analysis both of its privacy and civil liberties implications and of the value of the program to our national security; and that it will provide further recommendations going forward. On that last point, the report – and the Members’ discussions and deliberations – are very much still in process, so out of respect for my fellow Members and our discussions, (as well as the fact that we are still receiving new information, much of which is classified), I will be somewhat limited in what I can opine on at this time.¹ Third, I note that our forthcoming report is

¹ 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

focused on the program operated pursuant to Section 702, which is due for reauthorization in December, not on FISA as a whole, and not on the Title I authorities. So I would defer to my co-panelist, Inspector General Horowitz, on questions beyond Section 702.

I am, however, deeply concerned, as I know are many of the members of this Subcommittee and others in Congress, regarding FBI misuses of its authority. There must be no repeat of the egregious violations of law and policy committed during the investigation of alleged Russian interference in the 2016 election campaign of former President Trump.

Furthermore, although those violations occurred under a separate section of FISA that governs investigations of U.S. citizens, the Intelligence Community has not been faultless in its application of the Section 702 program either. Indeed, it is evident that many queries of information about U.S. persons were run against 702-collected information, specifically by the FBI, in conflict with governing policies and procedure. This is unacceptable, and must be acknowledged and addressed. The FBI has taken some steps to remediate this problem going forward. I anticipate that the Board's forthcoming report will detail some of the significant compliance incidents, and will make further recommendations to the FBI and to the Intelligence Community as a whole.

Having said that, I would like to spend a few minutes this morning clarifying a few points about the program. To begin with, Section 702 permits the U.S. Government to target non-U.S. persons outside the United States, and the targeting must be conducted to acquire foreign intelligence information. If you are physically located in the United States, or if you are a U.S. person abroad, you may not be targeted.

confident that the privacy risks posed by Section 702 can be addressed while preserving the program's value in protecting Americans' national security.

Also important, Section 702 is *not* a bulk collection program. Instead, the program consists entirely of targeting specific non-U.S. persons abroad about whom an individualized determination has been made that they are reasonably likely to possess, receive, or communicate foreign intelligence information. That intelligence information has led to the discovery of previously unknown terrorist plots directed against the United States and our allies, enabling the disruption of those plots. It has assisted and protected our troops abroad. And it has been used to identify, and to allow the United States to mitigate or prevent multiple foreign attacks on our critical infrastructure. There can be no question that the program is extraordinarily valuable to the safety and well-being of Americans.

In contrast to some of the querying compliance issues that I expect we will discuss further, we also have not seen significant compliance problems with regard to the *collection* of information. Indeed, in the most recently released Joint Assessment of the program, the NSA targeting compliance incident rate was 0.08 percent, not including notification delay errors. During the same reporting period, the FBI targeting compliance incident rate was 0.007 percent. These low rates have been fairly constant. This means that the Intelligence Community is largely avoiding improper collection under existing law and policies—that is, they are not improperly targeting U.S. persons or persons reasonably believed to be located in the United States.

As you are deliberating on how to improve Section 702 going forward, I would like to offer two topics for your consideration:

First, what the FBI considers “sensitive queries” are crucially important. When you get at the heart of what most worries concerned citizens, it is that the Intelligence Community will be weaponized against politically disfavored opponents. That is unacceptable in a democracy, and must be guarded against. Recently, and belatedly, the FBI put in place procedures that require

heightened review for certain queries, such as those involving elected officials, members of the media, and religious figures—in the most sensitive cases, review by the Deputy Director of the FBI personally. Congress should look closely at these enhanced pre-approval policies, and consider whether this requirement might be codified, strengthened, or reviewed by the Foreign Intelligence Surveillance Court (FISC).

Second, Congress might consider how Section 702-derived information could be used in the context of vetting – both for immigration purposes, and for individuals applying for high-level security clearance. Currently, for most agencies, a query of unminimized 702 data is permitted only where the search is “reasonably likely to retrieve foreign intelligence information.”² This means that the U.S. Government may already have in its possession information that a visa applicant or person applying for a high-level clearance poses a threat to our national security or is in communication with someone who does. But no one from our government might ever see this information, because our agents and analysts cannot run a query for it in the unminimized 702 collection unless they first have specific information tying that applicant to foreign intelligence information or evidence of a crime. If Congress wants to ensure that persons coming to live and work in our country, or persons entrusted with our most important national security information, are thoroughly vetted against information already in the Government’s possession, it might consider looking further into this issue.

In closing, as the Chair stated, the Board was created by Congress based on a recommendation of the 9/11 Commission. In recommending creation of the Board, the Commission explained, “The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home. Our

²https://www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_Cert_NSA%20Querying%20Procedures_10.19.2020.pdf

history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.”

Thank you, and I look forward to your questions.