



Press Briefing on the Reauthorization of the FISA Amendment Act

Briefer: Robert Litt, General Counsel, Office of the Director of National Intelligence

Moderator: Shawn Turner, Director of Public Affairs, Office of the Director of National Intelligence

September 11, 2012

Coordinator: Good morning and thank you all for standing by. At this time all participants are in a listen-only mode. After the presentation, we will conduct a question-and-answer session. To ask a question, you'll be asked to press star 1 and record your name. Today's conference is being recorded. If you have any objections, you may disconnect at this time. I'll now turn the meeting over to Mr. Shawn Turner. You may begin.

Shawn Turner: Okay thank you. Good morning everyone. Thanks for joining the call today. As you all are aware, we are facing FISA reauthorization going before the House tomorrow. We believe tomorrow or either later this week so we wanted to get you all together on a call to talk a little bit about that from the intelligence community's perspective.

So I just wanted to open up by laying down the ground rules and then I'm going to turn the call over to Bob Litt who is the ODNI General Counsel. So today's call will be on the record. Once I turn it over to Bob, Bob will make some opening remarks in reference to FISA and then we'll take your questions. If there is an instance in which we need to go on background in order to provide some additional context and we will let you know that ahead of time and we'll let you know when we are back on the record as well.

As the operator has said, you'll know how to tee-up for a question, so please do that. And with that, I'm going go head and turn it over to Bob. And if there

are any other issues with regards to ground rules, I'll pass those back to you as we get going. So with that, I'm going to turn it over to Bob Litt.

Bob Litt: Thanks. I just have a couple of remarks that I want to make at the beginning, but really I suspect that most of the people on this call are familiar with the overall contours of what we're talking about here. And I'd really like to mostly have an opportunity to try answer your questions. There's obviously a fair amount of constraints because we're talking about a classified intelligence program. And I'll just try to do what we can within the limitations that that imposes.

The FISA Amendments Act was passed in 2008 with a sunset of the end of this year. It has - Section 702 in particular has provided authority to collect an extraordinary amount of valuable intelligence dealing with a whole variety of threats to our Nation while at the same time putting in place a rigorous set of protections for privacy civil liberties and other rights of Americans. We think it's important that this Act be reauthorized and we're pleased that Congress is moving ahead promptly with it.

The first sort of preliminary point that I want to make is to emphasize that the FISA Amendments Act and in particular Section 702 is not a tool for spying on Americans. We cannot target American citizens for collection under the FISA Amendments Act. We cannot target persons who are within the United States for collection under the FISA Amendments Act. We cannot intentionally collect the contents of any communication when we know that all parties to the communication are in the United States.

And importantly Section 702 specifically prohibits what's called reverse targeting which is to say targeting a non-US person outside of the US as a pretext for trying to collect the communications whom the target is talking to.

We cannot use 702 in this way to secretly and sort of subversively target US persons.

There is an extensive set of monitoring requirements starting with the FISA Court having to approve the procedures that are put in place by the agencies to ensure that these restrictions are complied with and to ensure that we appropriately, when we do incidentally collect the communications of US persons, that we do minimize the retention and dissemination of US person information.

These procedures have to be approved by the FISA Court for compliance with the statute and with the Fourth Amendment. And then the agencies that execute the FAA authorities and the Department of Justice and the ODNI regularly and extensively monitor the compliance of the agencies with these requirements and report to the Congress twice a year on how the compliance has been.

And I will tell you that the reports, while everybody - I think it's common knowledge at this point - that there have been some compliance incidents, the reports have regularly found that there has never been any indication of any intentional effort to bypass the statutory restrictions in any respect. The incidents that have occurred have been unintentional, accidental, and not reflective of any intent to evade the statute. So this is a statute that really provides robust protection for US persons in surveillance that is targeted at non-US persons.

The other point I want to make is that although this is a classified program and it limits our ability to talk about it publicly, the congressional intelligence and judiciary committees are kept very, very closely informed about what we're doing. As I said they get these classified reports twice a year that go into great

detail about the operation of the program, they're informed of all significant decisions of the FISA Court and of significant filings made by the Department of Justice in connection with this.

We have people from the agency who go regularly down to the Hill to brief people on this collection and we have had members of Congress and their staffs out to the agencies to demonstrate to them how the collection operates.

So my point is that this is not something that is operating in secrecy and apart from public oversight. It's the congressional committees that stand in the shoes of the public as they frequently do with respect to classified intelligence collection and are kept fully and currently informed of the manner in which these authorities operate. And I think I'll stop at that point and take any questions that people have.

Shawn Turner: And before we do that, I want to make sure (unintelligible) that we get full identification for Bob. So the name is Robert Litt, L-I-T-T, and the title is ODNI General Counsel. And with that, we'll go ahead and take the first question.

Coordinator: Thank you sir. We'll now begin our question-and-answer session. If you would like to ask a question, please press star 1. Please unmute your phone and record your name clearly when prompted. Your name is required to introduce your question. To withdraw your request, it's star 2. Just one moment. Mark Hosenball with Reuters.

Mark Hosenball: Hello?

Robert Litt: Hi.

Mark Hosenball: Can you hear me?

Robert Litt: I can hear you.

Mark Hosenball: So I'm sitting here - this is Mark Hosenball from Reuters - I'm sitting here with the report on this bill from the Senate Intelligence Committee and looking at the minority views of Senators Wyden and Udall. And they say we are concerned that if no one has estimated how many Americans have had communications under the FISA Amendments Act that it's possible this number could be quite large.

They say that you've refused even to estimate the number of Americans who might have been inadvertently the targets of collection of this program and they say that Section 702 as it's currently written does not contain adequate protections against warrantless back door searches. They offered an amendment during the committee (markup) of this bill that were clarified law to prohibit searching through communications collected under Section 702 in an effort to find a particular American's communications, their amendment was voted down.

So they're basically saying that there is inadequate safeguards and you actually haven't been as candid or forthcoming with them as they think that you should have been. What's your comment?

Bob Litt: So I guess I have three separate comments to make. The first is...

Mark Hosenball: This is still Bob Litt, right?

Bob Litt: Oh yes, this is still Bob Litt and I hope to remain so for some time.

Mark Hosenball: Okay.

Bob Litt: The first is to reiterate that the procedures that we use, the acquisition guidelines and the targeting and minimization procedures that are called for by the statute, are all reviewed by the FISA Court which has to find that the targeting and minimization guidelines comply with the Fourth Amendment. And so that's a statutory protection that exists out there. That we can't do this unless the FISA Court believes we're complying with the Fourth Amendment.

The second point, I think I would with great respect disagree with the use of the words that "we've refused" to provide information about the number of US persons. What we have told them and what two Inspectors General for the NSA and the ODNI have both independently also told them is that it's simply not a number that can be provided with any reasonable degree of accuracy or reasonable degree of effort.

The whole purpose of this collection is not to target US persons and to have to go back and try to then make account of this, the information simply is not readily available. So it's not that we have refused to do it, it's that, they have been told and they've been briefed on this in some detail as well, it's simply not reasonably possible.

The final point is simply to reject the suggestion that there's any back door here. As I said the surveillance here has to be targeted at non-US persons who are located outside of the United States. We're specifically prohibited by statute from using that as a subterfuge to collect the communications of a US person and those requirements as I said are audited by the Department of Justice and ODNI and reported to the FISA Court and to the Congress. There's just not a back door here.

Shawn Turner: Okay. Thank you. Next question please.

Coordinator: Our next question will come from (Siobhan Gorman) of The Wall Street Journal.

(Siobhan Gorman): Thanks so much for doing this. Sort of a quick follow on to Mark's question and a related question on sort of Senator Wyden's concerns. One I was just wondering what you're doing to allay the concerns of Wyden and Udall and others in advance of the Senate having to vote on this and Senator Wyden's I guess intent to put a hold on it?

And the related question was just Senator Wyden has asked for the ability to state publicly that the FISA Court had found on at least one occasion the program had violated the Fourth Amendment. And I was just wondering what you can about what measures were taken to fix that just because a lot of your explanations here rely on sort of the system of oversight where you say we can't do it if we're violating the Fourth Amendment? But then the FISA Court had found that there was a violation of the Fourth Amendment.

Bob Litt: Okay. So let me take those in order. On the first one which was what we're doing to allay the concern. We have provided a classified document for members of Congress that sets out in considerably more detail how the program operates and how in particular the privacy and civil liberties protections operate. We've also, as I mentioned, we have provided briefings.

I've actually met with Senator Wyden myself and talked through some of these issues with him and we are prepared to continue doing that. You know, members and/or staff can go out to NSA and be walked through exactly how this operates.

So we're genuinely committed to be as transparent as we possibly can with the Congress frankly because I think this is a valuable program and a good program that in fact is protective of privacy and civil liberties and, you know, we are prepared to provide them as much information as we possibly can.

On the second point, I can't go into detail about specifically what was done, what the nature of the compliance problem and issue was, and what was done to fix it. I can tell you that once this issue came to light, it was worked on extensively by the intelligence community and, in the Department of Justice, a solution was found, the FISA Court subsequently found that the problem had been cured. So that's actually an example of how this system operates is from time to time if a problem does develop, we fix it.

Shawn Turner: Thank you, next question.

Coordinator: Our next question comes from Carrie Johnson of NPR.

Carrie Johnson: Hi, thanks for taking my call. Sorry I have a cold so my voice is terrible. I'm wondering...

Bob Litt: I'm sorry.

Carrie Johnson: I'm just wondering what you can say about the success of this program? It seems to operate so much in the shadows. And what we know most recently is that the US government has apparently in some regard violated the Fourth Amendment. Why is this program so important? Why is it your highest intelligence priority in Congress this year?

Bob Litt: So Carrie, you're killing me. I would love nothing better than to be able to sit down and talk through with you some of the successes that we have had as a result of this program.

It provides us a degree of capability and flexibility and an ability to collect certain kinds of communications that we can't get any other way and that have been incredibly valuable not only with respect to the terrorism, but in a variety of other important foreign intelligence priorities as well. I'd love to be able to do that, I can't.

I can't do it because to the extent I talk about what we've been able to collect, it's going to send a signal to the people we're collecting against about what we're collecting and how we're collecting it. And I can't tell you how painful it is to me to ask you to just take my word for the incredible value that this collection has to the protection of our national security.

Carrie Johnson: One follow up, Bob.

Bob Litt: Sure.

Carrie Johnson: Some bloggers have pointed out as part of the senate judiciary markup debate that some IG reviews as prescribed by the FAA have not yet been done. Is that the case? Can you tell us what kind of oversight aside from members of Congress coming over to get briefings has been done by the Inspector General community?

Bob Litt: Carrie, I'm sorry I don't know exactly what you're referring to there. I do know that there have been IG reports that have been done on a regular basis. Can I try to get back to you on that point?

Carrie Johnson: Sure.

Bob Litt: Okay.

Shawn Turner: Okay thanks Carrie, next question.

Coordinator: Charlie Savage of New York Times.

Charlie Savage: Hi. So to continue on the steam a little bit, I don't understand why it can't be reasonably possible to talk about how many Americans' communications have intercepted incidentally if it's also true that minimization procedures attach when it comes to retention.

Is it that that's done in an automated way and the system just hasn't been designed to say how many times the system has minimized it or could you at least say how many contents have been listened to and then minimized by human? Is there some reason that it has to be such capacity around something that on its face doesn't sound like it should be so mysterious?

And then the second thing is you haven't addressed, what is the problem with Wyden and Udall's proposal to require probable cause before searching this archive of stored communications for an American's name?

Bob Litt: So Charlie on your first point, I cannot give you more specificity and I know it's frustrating for you and it's frustrating for me. It's not that I'm trying to, you know, hide the ball here. It's that the only way to explain in detail why it's not possible to do this count would require more disclosure than can be done on the public record about what we collect, and how we collect, and how we handle it.

I will note for you to the extent there is any utility that the reports that we're required to make to Congress by the statute include that we have to inform the Congress of how many times we in fact disseminate information about US persons acquired as a result of this collection. So that's a classified report, but again that's information that the Congress gets. If anything rises to the threshold where it actually makes a disseminated - makes its way into a piece of disseminated intelligence, it does get reported to the Congress.

On your second point, this would be an extraordinary requirement I think to say that information that's lawfully been collected and collected pursuant to the law that there's an additional restriction imposed upon it before that can be used appropriately.

Bear in mind that we have minimization procedures that already govern the acquisition, and retention, and dissemination of information about US persons that we can't do anything with this information except for foreign intelligence or appropriate law enforcement purposes. And to impose on top of that some sort of probable cause requirement, it really is not necessary and it could be extremely burdensome.

As I said, the Foreign Intelligence Surveillance Court has found that the procedures we're using are consistent with the Fourth Amendment. We're talking about surveillance that's targeted at foreign persons, but it's not - there's no reason to require that the lawfully acquired information then be subject to some of kind of probable cause requirement.

Charlie Savage: Can I briefly follow up on that?

Bob Litt: Sure.

Charlie Savage: Well to the extent that any of us on the outside can understand what's happening there which is of course through a glass darkly, you know, one of the reasons that ordinary Fourth Amendment procedures are being set aside here is precisely because it's supposed to be targeted at foreigners abroad and we understand the, you know, issues that have arisen involving data packets that cross over American soils which is in all this stuff from years ago. But that's one reason to set aside and have the program setup as it is because it's not supposed to be about Americans.

And so when you say that's extraordinary, it sort of gets around the whole reason this special procedure has been setup. Can you at least say how often an American person has been searched for in the database? Does it not happen very often, does it happen all the time?

Bob Litt: I can't. I can't, you know. That crosses the line where I can't talk about. But the fundamental - I completely agree with your fundamental premise. You have to bear in mind that what we're talking about here is stuff that is incidentally collected when we are appropriately targeting a foreign person. And there are all sorts of incidental collections that take place throughout law enforcement and intelligence. The question is are we lawfully acquiring the communications and we are.

Shawn Turner: Thank you, next question please.

Coordinator: Our next question will come from Suzanne Kelly of CNN.

Suzanne Kelly: Hi. Thank you for doing this. We're wondering if this does not pass what will the impact be on the Intel community?

Bob Litt: We'll lose an incredibly valuable source of foreign intelligence information that I think it's fair to say has been critical to protecting our country over the last few years. Since this has gone into effect, it's just been an invaluable source of important intelligence information for us. It would be a real shame if we lost this. It would - I mean I'm not a hysteric, but I think this would really create a risk for our security if we lost this capability.

Suzanne Kelly: I don't suppose it's possible to ask you to be any more specific?

Bob Litt: Well it is certainly possible to ask me to be more specific.

Suzanne Kelly: I can ask you, I know you might say no.

Bob Litt: But what's not possible is for me to answer in any more specificity. And as I say - as I told I think Carrie earlier, I'd love to be able to. I mean I came into this job not knowing a lot about this program and I have been, you know, just really, really impressed over the 3-1/2 years I've been on the job with the value that we've gotten from this program and with the care that the agencies are taking and executing it.

Suzanne Kelly: Forgive me just for one more follow up and for pressing you on a little bit too much detail if that's the case. But would you at least be able to say that you know of certain attempted attacks over the past decade that may have been successful had you not had this ability?

Bob Litt: I guess I wouldn't put it that way. I would say that I know of specific instances both involving terrorist attacks and involving other kinds of threats where we have been able to thwart them or gain significant insight into them as a result of this collection activity. I'm always reluctant to do the kind of cause and effect that says, you know, if we hadn't had this this would have

happened. But there's no question that we have gotten valuable information that's led to intelligence and national security successes as a result of this collection.

Suzanne Kelly: Thank you.

Coordinator: Our next question will come from John Walcott of Bloomberg.

John Walcott: Yes thank you and thank you for doing this. I think it's relatively easy for most of us on the outside to understand that there are benefits to this program and the difficulty of talking about those. I think it's harder for us to understand why if this program is so closely monitored and there is transparency with the Hill, you cannot even estimate the number of times that Americans have been collected on outside the bounds of the law.

And I think it makes a difference whether we're talking about 3 incidents, or 30, or 300, or 3000 and yet you seem to be unable even to give us a ballpark number of how often that problem has raised its head. And I'm kind of mystified by that frankly.

Bob Litt: I understand what you're saying. I can tell you only that we have briefed the members of Congress on precisely this concern. We have explained to them why it simply is not reasonably feasible. It has to do with what we collect and we don't collect, what we look for and what we don't look for, and what we do with the information. I cannot be any more specific than that.

But I can only tell you that the NSA, the ODNI, the Inspector General of NSA, and the Inspector General of ODNI have all looked at this and all come to the same conclusion which is that this is not something that's reasonable possible to estimate with any degree of accuracy. Believe me, I wish it were

possible to explain it to you more because I do think there's a righteous story here but it's not because in order to do that we'd have to talk about the details of the collection in a way that would compromise national security. I would point out that - well let me just stop there.

John Walcott: Well let me ask a quick follow up...

Bob Litt: Sure.

John Walcott: ...to make sure I'm not extrapolating wrongly from what you said. Do you know how many of these incidents there have been?

Bob Litt: What we have said is and I'm not, I think the word incidents, we're talking about incidental collection here, what have said is that it is not possible reasonably to estimate the number with reasonable accuracy the number of times that communications of Americans have been incidentally collected. I think that's an answer to your question.

John Walcott: So the answer is you don't know?

Bob Litt: You know, there are times when somebody in my position likes to stick very closely to the talking points. So I'll just, you know, assume that I've reiterated what I said before.

John Walcott: Understood. I skipped law school myself so.

Bob Litt: Okay.

Coordinator: Our next question will come from Ellen Nakashima of Washington Post.

Ellen Nakashima: Yes, thank you. So Charlie and Bob touched on the questions, but I just wanted to go at you a third hoping a little bit more of a charm here but. Why again are you unable to give even a subset of collections for instance using perhaps IP address as a reasonable proxy of a location of a US person? Is that a technology impediment?

Bob Litt: So Ellen let me just ask you a question. Why is IP address a reasonable proxy for location?

Ellen Nakashima: You know apart from people who would be using toward to mask. You'd at least have that subset of users who were I'd say reasonably thought - believed to be in the US when the communication was collected. I mean if you have guidelines that are reasonably believed to be collecting on people outside the US, you must have ways to know when people are - reasonably know that people are inside the US?

Bob Litt: Ellen, I'm trying to think of a way to answer this and I don't think I can. I think I'm just going to have to stand on what I said before which is this is not my word that I'm asking you to take on this. This is the judgment of NSA and ODNI and two Inspectors General who as you know have a degree of independence from us and we've all looked at this and said that this question can't reasonably be answered with a reasonable degree of accuracy. And I just don't think I can explain it anymore without starting to compromise sources and methods.

Ellen Nakashima: Okay. Can I just get another metric or sense of the efficacy of this program through asking. Can you tell me is this collection providing the bulk of our foreign intelligence information?

Bob Litt: I can't answer that either. It's a very, very important source of valuable foreign intelligence information.

Ellen Nakashima: And can we say whether it's more than half of this?

Bob Litt: Is that a different question from is it the bulk?

Ellen Nakashima: Yes. Is it strictly for foreign communication that's just passing through the US?

Bob Litt: It's a very, very important source of valuable foreign intelligence information, Ellen.

Ellen Nakashima: All right. And I guess one of the other concerns is if you have an enormous amount of data that can be searched for important insights or tips or trends, how long is that data actually held? Can you give us a sense of that?

Bob Litt: There are guidelines that are approved by the FISA Court that determine how long the information can be retained and we comply with those guidelines and the FISA Court has approved them as consistent with the Fourth Amendment.

Ellen Nakashima: All right.

Shawn Turner: Okay, thanks Ellen. We will take one more question.

Coordinator: Okay. We have (Siobhan Gorman) of Wall Street Journal.

(Siobhan Gorman): Thanks. I just wanted to follow up on the question about what happens if this doesn't pass. In 2008, we saw some pretty dramatic exchanges with the ODNI going up to Capitol Hill and warning of, you know, going deaf and things like

that. It seems like your take was a little bit more muted than that. And I'm just wondering, you know, whether or not you think that it will be something less than, you know, we're going deaf or if it's just, you know, kind of that's your perspective versus, you know, (predecessors) perspective?

Bob Litt: (Siobhan), I guess maybe I'm more muted in my approach in general. You know, I just said to Ellen that this is a very, very valuable source...

(Siobhan Gorman): Right.

Bob Litt: ...you know. If we lose this, we lose that information and I can't say specifically that, you know, what we won't get. But I know that there's a lot of important stuff that we won't get. Can I say that if we lose this collection it will lead to the next 911, I can't say that obviously. Nobody can say that.

(Siobhan Gorman): Right.

Bob Litt: Can I say with some degree of confidence that if we lose this, we are going to miss out on critical foreign intelligence? Yes, I can say that with great confidence.

(Siobhan Gorman): I mean how aggressively is the administration going to be pressing for resolution to this this year given obviously there's a lot of political sensitivities and it is an election year?

Bob Litt: This is, you know, this is as we said this is the intelligence community's top priority. The administration just issued yesterday I think a statement of position...

(Siobhan Gorman): Right.

Bob Litt: ...urging strong swift passage of the Act and we're hopeful that Congress will do that.

(Siobhan Gorman): Thank you.

Shawn Turner: Okay that'll be the last question (and) we wanted to thank everybody for getting on the call. Bob, did you have any closing remarks...

((Crosstalk))

Bob Litt: No. I just want to thank all of you and I understand the frustrations. Believe me, it's difficult for me as well but I appreciate your taking the time to hear us out on this.

Shawn Turner: Okay great. Thanks again to everyone for getting on the call. If you have any questions, please follow up with me. I think you all know - have my contact information. Thanks again.

Coordinator: Thank you. This will conclude today's call. You may go ahead and disconnect.

END