

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC 20511

July 26, 2011

The Honorable Ron Wyden  
Select Committee on Intelligence  
United States Senate  
Washington, D.C. 20510

The Honorable Mark Udall  
Select Committee on Intelligence  
United States Senate  
Washington, D.C. 20510

Dear Senator Wyden and Senator Udall:

Thank you for your July 14, 2011 letter seeking unclassified answers to a number of questions about how the Intelligence Community uses critical intelligence collection tools, including the tools Congress authorized under the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008.

The Intelligence Community has supported making available to Congress and the public as much information as possible about the use of these important intelligence collection tools provided the information is made available in a manner that protects intelligence sources and methods and other properly classified information. We agree with you that transparency enhances public confidence that the Intelligence Community acts lawfully and in a manner that protects the civil liberty and privacy rights of Americans. To that end, this interim response answers some of your questions concerning how the FISA Amendments Act ("FAA") has been interpreted and implemented. We are working with other relevant agencies to review and respond to the questions you have posed about geolocational information.

The Intelligence Community strives to satisfy both its obligation to obtain the intelligence necessary to protect the American public and its obligation to be transparent and open with the public. These obligations are sometimes in tension with each other as there are times when our ability to obtain intelligence demands that certain details of our operations remain secret. While we have provided unclassified answers to some of your questions below, in some instances more detailed answers can only be provided in a classified setting. However, the fact that the Intelligence Community operates in secret does not diminish the extensive oversight of Intelligence Community activities. The Senate established the Senate Select Committee on Intelligence (SSCI) "to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States." S. Res. 400, 94th Cong., 2d Sess. (1976). The fact that some of these activities are necessarily classified does not inhibit this oversight.

You asked whether communications of Americans have been collected under the FAA and, if so, whether it is possible to count the number of people located in the United States whose communications were reviewed by the government pursuant to the FAA. Section 702 of the FAA explicitly prohibits the intentional targeting of persons reasonably believed to be located in the United States or United States persons located abroad.<sup>1</sup> The Intelligence Community has put in place a variety of procedures, which have been approved by the FISA Court as required by law, to ensure that only persons reasonably believed to be located outside the United States are targeted and to prevent the intentional acquisition of any communications as to which the sender and all intended recipients are known to be located in the United States. Guidelines are also required by law to ensure compliance with other limitations on FAA collection, including the requirement that a U.S. person may not be intentionally targeted under section 702. If it is discovered that a target has entered the U.S. or is a U.S. person, he or she is promptly detargeted and reports are made as appropriate to the Department of Justice (DOJ), the Office of the Director of National Intelligence (ODNI) and the FISA Court. Moreover, when communications from persons located in the United States are collected because they are communicating with a lawful target, the privacy and civil liberty rights of U.S. persons are protected through the careful implementation of the procedures required under the FAA to “minimize the acquisition and retention, and prohibit the dissemination” of information about U.S. persons.

While it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA, I would direct you to the classified reports that have been provided to Congress under section 702, which report on, among other things, the number of disseminated intelligence reports containing a reference to a United States person and the number of collection targets that were later determined to be located in the United States.

You also asked about compliance incidents under FAA. It is not possible for us to elaborate in an unclassified letter on the specific compliance incidents as requested in your letter. A description of specific incidents necessarily involves discussion of sensitive sources and methods in order for the incidents to be understood. The risk of compliance incidents is always present in any system where people interact with complex — and changing — technology under a set of legal rules. What we can say is that we believe that we have put in place a robust compliance and oversight regime, and that we remain committed to evaluating compliance practices and identifying and remediating any shortcomings.

In enacting the FAA, Congress required a semiannual assessment of compliance, and as you know, we have used that opportunity to reflect on the incidents reported during each six-month period to determine, first and foremost, whether the authorities and safeguards are being used as intended, and whether we can identify patterns or trends that merit closer attention. Our semiannual reports provide our assessments regarding these incidents; it is difficult to elaborate meaningfully on this assessment in an unclassified setting. As was disclosed in the report cited in your letter, the joint ODNI-DOJ oversight team that has been conducting ongoing compliance reviews and assessments — which include extensive documentation reviews and onsite visits —

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<sup>1</sup> While Sections 703 and 704 permit the targeting of U.S. persons located abroad, each requires an individualized finding of probable cause by the FISA Court, in the same manner as FISA requires for domestic targeting of U.S. persons.

"has not found indications of any intentional or willful attempts to violate or circumvent the requirements the Act." That report also noted that "the number of compliance incidents remains small," though we are always careful to review incidents thoroughly, regardless of their absolute number, because seemingly isolated incidents may have broader implications. Through our compliance review and assessment process, we work closely with agency personnel and the Department of Justice, seeking to identify and address root causes.

The Congress, particularly through the intelligence committees, is also an active player in FISA oversight. It is kept fully informed of how these FAA authorities are being used, including classified activities. This includes regular reporting to Congress on compliance incidents. In addition, Congress receives copies of significant FISA Court opinions, including opinions discussing the FAA, and regularly receives briefings and other information concerning the use of these authorities. We always stand ready to provide you and your staff more information, in a classified session if necessary, to answer any questions you might have.

Congressional oversight is, of course, only one part of the oversight regime in place to ensure that the Intelligence Community implements its FISA authorities, to include FAA authorities, in a manner consistent with the law. First, these authorities are exercised under the supervision of the FISA Court, an Article III court. This Court is not a "rubber stamp" for the government; it must review every FAA certification and the associated targeting and minimization procedures to ensure that they contain all the required elements and comport with all statutory and constitutional requirements.


Second, the Executive Branch has developed its own robust oversight regime. Each FAA certification is approved personally by the Attorney General and the Director of National Intelligence after careful review and evaluation. The Executive Branch agencies that use these authorities require personnel to participate in comprehensive training programs to ensure that they understand what is permissible under the law. Further, the Executive Branch has implemented oversight mechanisms that include regularized oversight reviews and self-reporting procedures that allow the Executive Branch to quickly identify potential compliance incidents and address them. Finally, Inspectors General, Civil Liberties Officers, and General Counsels play an important role in helping to ensure compliance with the law.

Finally with respect to the FAA, you asked whether any significant interpretations of the FAA are currently classified. As you are aware, opinions of the FISA Court usually contain extensive discussions of particular intelligence sources, methods, and operations and are therefore classified. Even though not publicly available, by law any opinion containing a significant legal interpretation is provided to the congressional intelligence committees. It is often the case that FISA Court opinions are so closely tied to the facts of the application under review that they cannot be made public in any meaningful form without compromising the sensitive sources and methods at issue. Nonetheless, working with the Department of Justice, we are reviewing FISA Court opinions to see if there are portions that can be declassified and released to the public. Two opinions from the FISA Court of Review have previously been released, one of which specifically concerned the FAA.

The questions you pose on geolocational information are difficult to answer in an unclassified letter. It is our understanding, based on a conversation with your staff, that you are most interested in learning about the government's authority to collect the cell phone mobility data of American citizens in the United States for intelligence purposes. As you acknowledge, the government has some authority to collect cell phone mobility data under appropriate circumstances but there have been a diverse set of rulings concerning the quantum of evidence and the procedures required to obtain such information. We will work closely with the relevant agencies to define the government's view of the full contours of this authority and will get back to you.

Thank you again for your letter and we look forward to working with you as Congress continues its discussion of these critical intelligence tools.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Turner".

Kathleen Turner  
Director of Legislative Affairs

cc: The Honorable Dianne Feinstein  
The Honorable Saxby Chambliss