Hearing of the House Judiciary Committee, Opening Statement of Mr. Robert S. Litt, General Counsel, ODNI

Hearing of the House Judiciary Committee
Opening Statement of Mr. Robert S. Litt, General Counsel, ODNI

Subject: Oversight of the Administration's Use of FISA Authorities

Chaired by: Representative Robert Goodlatte (R-VA)

Witnesses:

James M. Cole, Deputy Attorney General, U.S. Department of Justice;
John C. Inglis, Deputy Director, National Security Agency;
Robert S. Litt, General Counsel, Office of Director of National Intelligence;
Stephanie Douglas, Executive Assistant Director of the National Security Branch, Federal Bureau of Investigation;

Location: 2141 Rayburn House Office Building, Washington, D.C.

Date: Wednesday, July 17, 2013; Time: 10:00 a.m. EDT

ROBERT LITT: Thank you, Mr. Chairman, Mr. Ranking Member. We appreciate your having this hearing. We think it's very important to correct some of the misimpressions that have been created about these activities, which, as the deputy attorney general explained, are entirely lawful and appropriate for protecting the nation. In the -- in my opening statement, I'd like to make three related points about the Foreign Intelligence Surveillance Court.

The first is that the activity that this court regulates, which is the acquisition of foreign intelligence for national security purposes, was historically outside of all judicial supervision. In fact, courts have held that the Fourth Amendment does not require a warrant at all for the conduct of surveillance for foreign intelligence purposes. FISA was passed in 1978 and at that time established for the first time a requirement that we get a judicial order in order to conduct certain kinds of foreign intelligence or counterintelligence activities within the United States.

But at the time FISA was passed, it was clear that the Congress did not intend that FISA would cover electronic surveillance directed at non-U.S. persons outside of the United States for foreign intelligence purposes. And as you noted in your opening statement, because of technological changes in the way international communications are carried, over time, more and more surveillance -- that is to say, foreign intelligence surveillance directed at non-U.S. persons outside of the United States -- more and more of that began to fall within the technical definitions that required FISA court approval, even though that was not what Congress had

Hearing of the House Judiciary Committee, Opening Statement of Mr. Robert S. Litt, General Counsel, ODNI

intended.

So in the FISA Amendments Act, Congress set up the procedure of Section 702, which the deputy attorney general described, to provide a degree of judicial supervision over some kinds of foreign intelligence surveillance of foreigners outside the United States.

Properly viewed then, Section 702 is not a derogation of the authority of the FISA court but an extension of the court's authority over a type of surveillance that Congress originally had not intended would be subject to the court at all. The extent to which this nation involves the courts in foreign intelligence surveillance goes well beyond what is required by the Fourth Amendment and, I think, beyond what other countries require of their intelligence services.

The second point I want to make is to -- is to forcefully rebut the notion that some have advanced that the FISA court is a rubber stamp. It is true that the court approves the vast majority of applications that the government presents to it. But that does not reflect any independence or lack of care on the part of the court. Quite the contrary, the judges of the court and their full-time professional staff review each application carefully, ask questions and can request changes or limitations. And an application is not signed unless and until the judge is satisfied that the application complies with the statute and the Fourth Amendment. And these are some of the best and most experienced federal judges in the country, and they take seriously their twin obligations to protect national security and to protect individual rights.

Finally, we agree with the ranking member that we should -- and the chairman -- that we should strive for the maximum possible transparency about the activities of the court, consistent with the need to protect sensitive sources and methods. We have been working for some time to declassify the court's opinions to the extent possible.

But legal discussions and court opinions don't take place in a vacuum. They derive from the facts of the particular -- of the particular case. And I want to quote here from Judge Walton, who is now chief judge of the FISA court, who said in a letter to the foreign -- to the Senate Intelligence Committee, quote, "Most FISC opinions rest heavily on the facts presented in the particular matter before the court. Thus in most cases, the facts and legal analysis are so inextricably intertwined that excising the classified information from the FISC analysis would result in a remnant void of much or any useful meaning," close quote.

That's an excellent and pithy summary of the challenge we face in trying to declassify these opinions. Of course, as you know, we do provide copies of all significant opinions of the FISC to the Judiciary and the Intelligence Committees of both houses. And I can tell you that in light of the recent disclosures, we are redoubling our efforts to try to provide meaningful public insight

Hearing of the House Judiciary Committee, Opening Statement of Mr. Robert S. Litt, General Counsel, ODNI

into the rulings of the FISA court, again, to the extent we can do that consistent with the need to protect our intelligence activity.

With that, Mr. Chairman, I'm glad to answer any questions you have. Thank you.

Download the Opening Statement