

Opening Statement of Deputy Attorney General James M. Cole
Before the Senate Judiciary Committee, July 31, 2013, 9:00am

Thank you, Mr. Chairman, Mr. Ranking Member and members of the committee, for inviting us here to speak about the 215 business records program and section 702 of FISA. With these programs and other intelligence activities, we are constantly seeking to achieve the right balance between the protection of national security and the protection of privacy and civil liberties. We believe these two programs have achieved the right balance.

First of all, both programs are conducted under public statutes passed and later reauthorized by Congress. Neither is a program that has been hidden away or off the books. In fact, all three branches of government play a significant role in the oversight of these programs. The Judiciary – through the Foreign Intelligence Surveillance Court – plays a role in authorizing the programs and overseeing compliance; the Executive Branch conducts extensive internal reviews to ensure compliance; and Congress passes the laws, oversees our implementation of those laws, and determines whether or not the current laws should be reauthorized and in what form.

Let me explain how this has worked in the context of the 215 program. The 215 program involves the collection of metadata from telephone calls. These are

telephone records maintained by the phone companies. They include the number a call was dialed from, the number the call was dialed to, the date and time of the call, and the length of the call. The records do not include names or other personal identifying information, they do not include cell site or other location information, and they do not include the content of any phone calls. These are the kinds of records that under longstanding Supreme Court precedent are not protected by the Fourth Amendment.

The short court order you have seen published in the newspapers only allows the government to acquire the phone records; it does not allow the government to access or use them. The terms under which the government may access or use the records is covered by another, more detailed court order. That other court order provides that the government can only search the data if it has a “reasonable, articulable suspicion” that the phone number being searched is associated with certain terrorist organizations. The order also imposes numerous other restrictions on NSA to ensure that only properly trained analysts may access the data, and that they can only access it when the reasonable, articulable suspicion predicate has been met and documented. The documentation of the analyst’s justification is important so that it can be reviewed by supervisors before the search and audited afterwards to ensure compliance.

In the criminal context, the government could obtain the same types of records with a grand jury subpoena, without going to court. But here, we go to the court approximately every 90 days to seek the court's authorization to collect the records. In fact, since 2006, the court has authorized the program on 34 separate occasions by 14 different judges. As part of that renewal process, we inform the court whether there have been any compliance problems, and if there have been, the court will take a very hard look and make sure we have corrected these problems. As we have explained before, the 11 judges on the FISC are far from a rubber stamp; instead, they review all of our pleadings thoroughly, they question us, and they don't approve the order until they are satisfied that we have met all statutory and constitutional requirements.

In addition to the Judiciary, Congress also plays a significant role in this program. The classified details of this program have been extensively briefed to both the Judiciary and Intelligence Committees and their staffs on numerous occasions. If there are any significant issues that arise with the 215 program, those would be reported to the two committees right away. Any significant interpretations of FISA by the Court would likewise be reported to the committees under our statutory obligation to provide copies of any FISC opinion or order that includes a significant interpretation of FISA, along with the accompanying court

documents. All of this reporting is designed to assist the two committees in performing their oversight role with respect to the program.

In addition, Congress plays a role in reauthorizing the provision under which the government has carried out this program since 2006. Section 215 of the PATRIOT Act has been renewed several times since the program was initiated – including most recently for an additional four years in 2011. In connection with the recent renewals of 215 authority, the government provided a classified briefing paper to the House and Senate Intelligence Committees to be made available to all Members of Congress. That briefing paper set out the operation of the program in detail, explained that the government and the FISC had interpreted section 215 to authorize the bulk collection of telephone metadata, and stated that the government was collecting such information. We also made offers to brief any member on the 215 program. The availability of the briefing paper and opportunity of an oral briefing were communicated through letters sent by the Chairs of the Intelligence Committees to all Members of Congress. Thus, although we could not talk publicly about the program at the time – since its existence was properly classified – the Executive Branch took all reasonably available steps to ensure that members of Congress were appropriately informed about the program when they renewed the 215 authority.

I understand that there have been recent proposals to amend section 215 authority to limit the bulk collection of telephone metadata. As the President has said, we welcome a public debate about how best to safeguard both our national security and the privacy of our citizens. Indeed, we will be considering in the coming days and weeks further steps to declassify information and help facilitate that debate. In the meantime, however, we look forward to working with the Congress to determine in a careful and deliberate way what tools can best secure the nation while also protecting our privacy interests.

Although my opening remarks have focused on the 215 program, we stand ready to take your questions on the 702 program. Thank you.