

Testimony Concerning Disclosure of Significant Foreign Intelligence Surveillance Court Decisions, Orders, and Opinions, As Overseen by the Director of National Intelligence, Submitted by Daniel Schuman, Policy Director, Demand Progress, for the Senate Defense Appropriations Subcommittee for FY 2022

Dear Chair Tester, Ranking Member Shelby, and Members of the Senate Defense Appropriations Subcommittee:

Thank you for the opportunity to submit testimony concerning the public availability of significant Foreign Intelligence Surveillance Court (FISC) decisions, orders, and opinions. The FISC rules on government requests to conduct domestic electronic surveillance pursuant to the Foreign Intelligence Surveillance Act. Unlike traditional courts, whose opinions and orders are publicly available by default, the FISC's decisions, orders, and opinions (hereinafter "opinions") are routinely kept secret.

A cornerstone of any democracy is the rule of law, which requires that laws be available to the public. This is the method through which the public consents to the law and creates a feedback mechanism through which law is made to reflect popular will. To the extent the FISC issues rulings that interpret and expand upon laws enacted by Congress, those substantive opinions must be publicly available for the democratic process to work.

The role of the FISC has expanded over the decades to include issuing substantive opinions, but laws governing transparency of those opinions have been slow to keep up. For example, there was controversy over mass surveillance in 2013 arising in part from decisions of the FISC, which prompted Congress to debate new transparency and accountability measures intended to ensure the FISC's opinions are sound and reflect Congressional intent.¹ Ultimately, Congress chose to amend the Foreign Intelligence Surveillance Act in 2015 to provide for more transparency.

Specifically, Congress directed the release of significant FISC decisions, orders, and opinions. Section 402 of the USA Freedom Act of 2015 requires the Director of National Intelligence, in consultation with the Attorney General, to "conduct a declassification review of each decision, order, or opinion issued" by the Foreign Intelligence Surveillance Court "that includes a significant construction or interpretation of any provision of law."² Accordingly, the FISC has published some materials online.³

The original scope of section 402 is unclear. Was it to apply to all opinions or only opinions from 2015 forward? Regardless, the Executive branch took the position that

¹ *Reform of the Foreign Intelligence Surveillance Courts: A Brief Overview*, Congressional Research Service Rpt. R43451 (March 31, 2014). <https://www.everycrsreport.com/reports/R43451.html>

² *USA FREEDOM Act of 2015*, P.L. 114-23. <https://www.congress.gov/bill/114th-congress/house-bill/2048>

³ See *Public Filings - U.S. Foreign Intelligence Surveillance Court*, United States Foreign Intelligence Surveillance Court (accessed May 12, 2021). <https://www.fisc.uscourts.gov/public-filings>

the law should not be understood to apply to all rulings, but only those from 2015 forward. Thus, Congress, the public, and litigants before the FISC have some access to recent substantive opinions, but virtually no access to an unknown number of prior, substantive rulings by the Court. These earlier decisions have precedential effect.

We believe, within the framework established in law, that all of the FISC's substantive rulings should be publicly available, regardless of when they were issued.

This view is shared by the House of Representatives and the Senate, which both passed legislation requiring disclosure of substantive FISC opinions last Congress as part of the USA FREEDOM Reauthorization Act of 2020.⁴ A disagreement over an unrelated matter prevented that bill from becoming law.

Section 301 of the draft USA FREEDOM Act, as engrossed by the House of Representatives, provided for a declassification process for all substantive opinions.

"Section 602 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1872) shall apply with respect to each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review **before, on, or after** the date of the enactment of such section. With respect to such decisions, orders, or opinions issued before or on such date, the Director of National Intelligence shall complete the declassification review and public release of each such decision, order, or opinion pursuant to such section by not later than one year after the date of the enactment of this Act." (emphasis added).

The Senate passed identical language. As mentioned above, the House requested a conference committee to address other matters, but the Senate did not concur and the legislation died.

We note there is ongoing litigation to provide for transparency concerning FISC opinions. A petition to the U.S. Supreme Court, filed by ACLU lawyers, former Solicitor General Ted Olson, the Knight First Amendment Institute at Columbia University, and the Media Freedom and Information Access Clinic at Yale University, "argue[d] that the First Amendment gives the public a presumptive right of access to significant judicial opinions, including those of the FISC."⁵

This is a matter best resolved by Congress. The FISC is a creation of the Legislative branch and the determination of what should be made publicly available should be made by the people's representatives. In our view, such direction is best grounded in

⁴ *USA FREEDOM Reauthorization Act of 2020*, H.R. 6172.

<https://www.congress.gov/bill/116th-congress/house-bill/6172/text/eh>

⁵ *The Public Should Have Access to the Surveillance Court's Opinions*, by Charlie Hogle and Alex Abdo, Just Security (April 19, 2021).

<https://www.justsecurity.org/75809/the-public-should-have-access-to-the-surveillance-courts-opinions/>

Congress's policy-making function, not the Court's remedial function concerning Constitutional violations.

The Defense Appropriations Act for FY 2022 is the best route to address transparency concerning all significant FISC opinions. In addition, this request is within the scope of work traditionally performed by appropriators. We are requesting the Director of National Intelligence be directed to provide all significant decisions, orders, and opinions to appropriators pursuant to the already existing legal framework, and to make them publicly available as part of that process. Appropriators routinely request reports from agencies on matters of public interest and direct that they be publicly available. Because Defense Appropriations has jurisdiction over the Office of the Director of National Intelligence, we make this request of you.

Please direct the Director of National Intelligence to report to Congress and to make publicly available all current and historical decisions, orders, and opinions as described in Section 402 of the USA Freedom Act of 2015 (50 U.S.C. 1871(a)(5)) within one year of enactment of the Appropriations Act.

Thank you again for the opportunity to submit this testimony.