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US PRIVACY AND  
CIVIL LIBERTIES  
OVERSIGHT BOARD

# Privacy and Civil Liberties Oversight Board

## Chairman's White Paper: Oversight of the Foreign Intelligence Surveillance Act

Adam I. Klein, Chairman

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Privacy and Civil Liberties Board • [PCLOB.gov](https://www.pclob.gov) • [info@pclob.gov](mailto:info@pclob.gov)

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## (U) Executive Summary

(U) This White Paper discusses the government's use of certain provisions of the Foreign Intelligence Surveillance Act in counterterrorism investigations. The observations and recommendations presented here derive from my review of classified materials provided to the Privacy and Civil Liberties Oversight Board by the FBI and the Department of Justice, as well as consultations with experts within and outside of government. The views expressed in this White Paper are mine alone and do not necessarily reflect those of the Board as a whole or other Board Members.

(U) In May 2020, the Board formally requested certain materials from the FBI and DOJ related to the use of FISA authorities in counterterrorism investigations. The Board sought a selection of U.S.-person FISA applications related to counterterrorism, as well as the results of oversight and factual-accuracy reviews of FISA applications by the FBI, DOJ, and the DOJ Inspector General. The Board received all of the materials it requested. I thank the FBI and DOJ for their cooperation and am grateful for the hard work of the agency personnel who gathered and prepared materials in response to these requests. Their efforts are particularly appreciated given the challenges of the COVID-19 pandemic.

(U) The Board also sought expert input. In June 2020, we convened a panel of outside experts for a virtual public forum on "The Past and Future of FISA." The Board also solicited and published experts' written views on the use of FISA authorities and possibilities for reform.

**(U) General Observations:** The Board's request provided a rare opportunity to review nineteen complete Title I FISA applications, with very limited redactions. Because few people outside the process have the opportunity to review FISA applications, Part II of this White Paper provides some unclassified, high-level impressions of these applications, in order to give the public a sense of what they contain and how they are organized. It also offers suggestions to improve the applications' structure and readability.

(U) The applications we received involve the use of FISA surveillance to investigate U.S. persons suspected of acting as agents of international terrorist organizations. Most of the targets were located in the United States when the application was filed.

(U) Overall, the facts of these cases indicate that the FBI relies on surveillance and searches under Titles I and III of FISA to help it detect and prevent acts of international terrorism against the U.S. homeland.

(U) For each application, the government prepares a "FISA Summary Memorandum," a one-page summary of key information about the target, the type of surveillance sought, and the reasons why the government believes the surveillance will produce foreign intelligence

[REDACTED]

information. These summaries are concise, well-organized, and generally contain the right elements to quickly inform the reader about the case. At present, the memos are provided to the FISA court, but do not form part of the sworn application.

(U) In my view, these summaries (or something closely resembling them in content and brevity) should form an integral part of the application package provided to the FISA court. They should also concisely highlight any distinctive privacy, civil-liberties, legal, or technological concerns raised by the case.

(U) The body of each application contains a great deal of factual information. That is appropriate, as the government is required to include all relevant facts. This information, however, is sometimes repetitive, and the import of each fact in relation to the others often emerges only after very close reading. I recommend that DOJ use training and guidance to encourage the use of writing techniques that enhance organization and clarity, with the aim of enabling the reader (most notably, the FISA court judge) to more easily assess the relative importance of each fact and the overall strength of the case.

**(U) Accuracy and Oversight:** Part III focuses on factual accuracy in Title I applications. FISA applications are not tested in an adversarial process, and FISA surveillance is classified. The FISA court therefore relies on the government to supply all relevant facts and to identify and correct errors. Rigorous internal checking is vital.

(U) Both FBI and DOJ conduct recurring oversight and accuracy reviews of Title I applications. These reviews serve two critical functions: first, to ensure that complete and accurate information is provided to the FISA court, and second, to provide oversight entities (and, in appropriate cases, the public) with information about whether the FISA process is working as intended.

(U) The government dedicates significant resources to these reviews, and, within the past year, DOJ has increased the scope and number of reviews it conducts. Between 2015 and 2018, DOJ's Office of Intelligence conducted accuracy reviews—in which attorneys verify that the facts in an application accurately reflect supporting documents, but generally do not look beyond the supporting documents provided—of 395 FISA applications.

(U) In 2020, DOJ began conducting “completeness” reviews, which check for omissions as well. DOJ conducted completeness reviews of 95 applications between May 2020 and March 2021. This is a significant development for oversight of the FISA process. Completeness reviews, which require inquiry into the underlying facts of a case, are labor-intensive. Conducting completeness reviews of nearly 100 applications in less than a year represents a major investment of oversight attorneys' time and attention.

(U) The challenge is that DOJ and the FBI have limited resources available to conduct these reviews. The most important limiting factor is the time of the highly specialized attorneys responsible for overseeing surveillance processes. As the Department chooses where to



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allocate its attorneys' limited time, focusing these oversight resources on U.S.-person applications, with particular attention given to the highly sensitive cases known as "Sensitive Investigative Matters," will generate the highest return for privacy and civil liberties.

(U) DOJ and FBI oversight and accuracy reviews also play an important role in informing policymakers about whether the FISA system is functioning as intended and whether FISA applications are "scrupulously accurate," as FBI rules require.<sup>1</sup> DOJ should examine how it categorizes the errors discovered in its oversight reviews and, in particular, it should distinguish between errors related to facts that contributed to the government's showing of probable cause and those that did not. Typographical errors should not be aggregated with other types of errors in Inspector General reports or other oversight reports.

(U) Renewal applications present a fresh opportunity to scrutinize the case supporting a FISA application and the need for ongoing surveillance. Before seeking a renewal, agents and attorneys should reassess the case and assess the need for further surveillance in light of the information obtained during the prior surveillance period. At present, most renewal applications use the same structure as initial filings; DOJ and the FISA court should also consider whether a different format for renewal applications would better encourage this type of critical analysis.

**(U) Considerations for Future Oversight, Legislation, and Internal Reform:** Part IV highlights several topics for further analysis and potential policy or legislative reform.

(U) *Reallocating oversight resources to areas of greatest benefit.* Part IV first identifies four ways in which oversight resources, such as the time of DOJ attorneys, could be redirected from tasks that may produce less benefit for privacy and civil liberties to matters of greater concern:

- (U) Using automated tools to enhance oversight capabilities.
- (U) Consolidating duplicative reporting obligations.
- (U) Streamlining the FISA process for certain categories of foreign powers or agents of a foreign power.<sup>2</sup>
- (U) Extending the duration of certain orders targeting entities directed or controlled by a foreign government.<sup>3</sup>


(U) More broadly, I encourage Congress and the FISA court to consider other ways to ease the burden imposed on DOJ's National Security Division by manual, repetitive oversight tasks whose return on investment may be relatively low as compared to possible alternatives.

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<sup>1</sup> (U) *See* FBI Foreign Intelligence Surveillance Act and Standard Minimization Procedures Policy Guide § 14.2.

<sup>2</sup> (U) *See, e.g.*, 50 U.S.C. § 1801(a)(1), (a)(3), (b)(1)(A).

<sup>3</sup> (U) *See* 50 U.S.C. §§ 1801(a)(6), 1805(d)(1).



The FBI and DOJ should also consider using red-team exercises as a way to introduce an element of adversarial testing to the FISA process without unduly delaying time-sensitive applications. In addition, Part IV encourages Congress to reassess FISA's reliance on geographic distinctions in light of ongoing shifts in technology and communications.

(U) *FISA's Business Records Authority*. Finally, I recommend that Congress reauthorize the provision of FISA that allowed the government to collect business records on a targeted basis. A statutory sunset in March 2020 caused that authority to revert to its much narrower, pre-9/11 text, reducing the government's ability to monitor foreign agents in the United States. The classified version of this White Paper provides additional information about how this lapse has affected the government's capabilities.

(U) The government is currently able to use the statute's savings clause to obtain business records under the broader, post-9/11 text, but only in investigations that began or relate to conduct which occurred before the March 2020 statutory sunset. The government confirms that the vast majority of the 28 business-records orders issued in calendar year 2020 would not have been possible in a new investigation not covered by the savings clause. This suggests that, over time, the decline in utility will be near-total.

(U) I therefore recommend that Congress reauthorize this targeted authority at the earliest opportunity. When it does so, it should reinstate the 2015 ban on using this authority for bulk collection, an important constraint that also expired in March 2020.



## **(U) Summary of Recommendations**

### **(U) Recommendations from Part II: General Observations**


- (U) The concise summary memos that accompany FISA applications should form an integral part of the application package provided to the FISA court.
- (U) Summary memos should highlight any distinctive privacy, civil liberties, legal, or technological concerns raised by the case.
- (U) DOJ should use training and guidance to encourage the use of techniques that enhance the readability and structure of FISA applications.

### **(U) Recommendations from Part III: Accuracy and Oversight**

- (U) DOJ should consider conducting an accuracy review of each U.S.-person FISA application related to a Sensitive Investigative Matter as soon as practicable after the application has been approved.
- (U) DOJ and FBI's other post-hoc reviews should focus on the remaining U.S.-person applications.
- (U) For SIM matters where the FBI team anticipates seeking a FISA order, DOJ and the FBI should explore integrating a DOJ attorney at an earlier stage.
- (U) DOJ and FBI reviews should distinguish between errors related to facts that contributed to the government's showing of probable cause and those that did not.
- (U) Typographical errors should not be aggregated with other types of errors in Inspector General or other oversight reports.
- (U) The government and the FISA court should consider whether an alternative structure for renewal applications would better facilitate critical analysis of the need for further surveillance.
- (U) Congress should consider proposals to require renewals to go to the same judge who approved the initial application whenever possible.

### **(U) Recommendations from Part IV: Considerations for Future Oversight, Legislation, and Internal Reform**

- (U) DOJ, Congress, and the FISC should pursue opportunities to make FISA oversight more efficient, allowing the specialized attorneys in DOJ's National Security Division to reallocate time from manual, repetitive oversight tasks with relatively low return on investment to tasks that deploy their expertise to greatest benefit for accuracy, privacy, and civil liberties.
- (U) Congress should support and provide greater funding for DOJ's efforts to deploy automated oversight tools to augment manual reviews. Congress should also provide funding for more oversight attorneys if requested.

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- (U) Congress, in consultation with DOJ, should streamline duplicative reporting obligations while preserving the overall level of transparency and oversight.
  - (U) Congress, DOJ, and the FISA court should consider creating streamlined procedures for certain categories of foreign powers or agents of a foreign power.<sup>4</sup>
  - (U) Congress should also consider modifying FISA to permit orders targeting entities “directed and controlled by a foreign government” to last for up to one year.<sup>5</sup>
  - (U) FBI and DOJ leaders should consider whether a regularized practice of internal red-teaming in the most sensitive matters could serve as an effective check on confirmation bias without unduly delaying time-sensitive applications.
  - (U) Congress should reauthorize FISA’s post-9/11 authority to collect business records on a targeted basis, while reinstating the ban on bulk collection enacted in 2015.

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<sup>4</sup> (U) *See, e.g.*, 50 U.S.C. § 1801(a)(1), (a)(3), (b)(1)(A).

<sup>5</sup> (U) *See* 50 U.S.C. §§ 1801(a)(6), 1805(d)(1).



## **(U) Acknowledgments**

(U) Julissa Milligan Walsh, Counselor to the Chairman at the Privacy and Civil Liberties Oversight Board, provided invaluable assistance with my review of FISA documents and this White Paper. While any errors are mine alone, this project benefited immensely from her legal acumen, diligence, technical expertise, and analytic rigor.

(U) I am also grateful to the officials at the FBI, the Department of Justice's National Security Division, and the DOJ Inspector General's office who provided information on FISA or assisted with document production, redaction, and classification review.

(U) Finally, I thank the outside experts who appeared at our Virtual Public Forum on FISA or contributed written testimony: Stewart Baker, Robert Chesney, Sharon Bradford Franklin, Elizabeth Goitein, David Kris, Jake Laperruque, Peter Margulies, Mary McCord, and Kenneth Wainstein. Their insights have informed and enriched the Board's work.



## I. (U) Background

(U) The Privacy and Civil Liberties Oversight Board is an independent executive branch agency responsible for ensuring that authorities used to protect the nation against terrorism, including FISA, are appropriately balanced with privacy and civil liberties. The Board's statute authorizes it to receive "all relevant records, reports, audits, reviews, documents, papers, recommendations, or other relevant material, including classified material."<sup>6</sup>

(U) In May 2020, our Board requested certain materials from the FBI and Department of Justice related to the use of FISA Title I authorities in counterterrorism investigations. On June 24, 2020, the Board held a Virtual Public Forum on "The Past and Future of FISA." The Board also sought written input from experts related to the use of FISA authorities and possibilities for reform, and published those expert opinions on its website. I thank these outside experts for their time and insights.

(U) The Board's document requests sought:

- (U) From the FBI Office of the General Counsel:
  - (U) Results of any accuracy, completeness, or compliance reviews pertaining to U.S.-person Title I FISA applications between 2015 and 2020.
  - (U) The number of "sensitive investigative matters" pertaining to U.S. persons in which the FBI sought a FISA probable cause order in each year between 2015 and 2019, a summary of each matter (including the type of investigation and the features resulting in its classification as a "sensitive investigative matter"), and whether each request was granted.
- (U) From the DOJ Inspector General: The OIG's findings regarding each counterterrorism-related FISA application included in its 2020 review of 29 Title I applications.
- (U) From the DOJ National Security Division:
  - (U) Each counterterrorism-related FISA application that was included in the recent OIG review of 29 Title I applications.
  - (U) Results of any accuracy, completeness, or compliance reviews pertaining to U.S.-person Title I FISA applications conducted between 2015 and 2020.

(U) The Board received all materials it requested. Most notably, it received nineteen complete Title I FISA applications filed in counterterrorism investigations. The applications were lightly redacted, using a first-name-last-initial convention to partially mask the identities

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<sup>6</sup> (U) 42 U.S.C. § 2000ee(g)(1)(A).

[REDACTED]

of U.S. persons. All Board Members have had the opportunity to review these materials in the Board's Secure Compartmented Information Facility.

(U) The Board did not have the opportunity to review the underlying evidence supporting the applications. The Board did, however, receive documents in which the DOJ National Security Division responded in detail to the Inspector General's assertions of factual errors.

(U) The Board did not request applications from any non-counterterrorism matters, such as the counterintelligence case involving Carter Page. Nor did the Board seek the identities of any individuals involved in cases deemed "sensitive investigative matters" by the FBI.

(U) I thank the FBI and DOJ for their cooperation and am grateful for the hard work of the agency personnel who gathered and prepared materials in response to these requests. Their efforts are particularly appreciated given the challenges of the ongoing COVID-19 pandemic.

(U) Below, I provide several observations and recommendations based on this review. These views are provided in my individual official capacity as Chairman and should not be attributed to the Board as a whole or to other members of the Board.

## II. (U) General Observations

(U) The Board's request offered a rare opportunity to review nineteen complete Title I FISA applications, with very limited redactions. These applications were not a random sample; each had previously been reviewed by the DOJ Inspector General, and the set included only counterterrorism cases. However, given that few people outside the process have the opportunity to review FISA applications, it may be useful to provide some general impressions.

(U) [REDACTED] The applications we received involve the use of FISA surveillance to investigate U.S. persons suspected of acting as agents of international terrorist organizations.<sup>7</sup> Most of the targets were located in the United States when the FISA application was filed.<sup>8</sup>

(U) [REDACTED] Each of the applications described in detail the target's course of conduct and included conduct other than First Amendment activity. [REDACTED]  
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<sup>7</sup> [REDACTED]

<sup>8</sup> [REDACTED]

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(U) Each application contained a section recounting in detail the history and modus operandi of the relevant international terrorist group. These descriptions appear to be re-used across applications alleging links to a given group.

(U) Each application also described the background of the FBI agent making the application; enumerated the facilities or places the government proposed to surveil; and detailed the methods the government would use for each. The applications also include other legal boilerplate required by the statute or FISA court rules.

(U) Overall, the facts of these cases indicate that the FBI relies on surveillance and search under Titles I and III of FISA to help it detect and prevent acts of international terrorism against the U.S. homeland.<sup>9</sup>

#### **A. (U) Summaries**

(U) For each application, the government prepares a “FISA Summary Memorandum,” which provides a one-page summary of key information about the target, the type of surveillance sought, and the reasons why the government believes the surveillance will produce foreign intelligence information. These summaries are concise, well-organized, and generally contain the right elements to quickly inform the reader about the case.

(U) This summary memo accompanies the application up the bureaucratic ladder of approvals, culminating with signoff by the FBI Director’s office.

(U) In my view, these summaries should be seen as far more than a bureaucratic convenience. Preparing the summary helps drafting attorneys and agents think rigorously about which facts are essential to probable cause, which are merely supportive, and why the surveillance is necessary in the first place. For those reviewing the application, a concise summary helps them identify and critically assess the key planks of the government’s factual showing.

(U) At present, the memos are provided to the FISA court, but do not form part of the sworn application. In my view, these summaries (or something closely resembling them in content and brevity) should form an integral part of the application package provided to the FISA court. Summary memos should also highlight—where applicable, and with the same

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<sup>9</sup> (U) The relative weighting of probable-cause-based FISA surveillance as compared to other authorities in the FBI’s counterterrorism toolkit (publicly available information, Section 702, etc.) is beyond the scope of this review, which was limited to applications based on probable cause. Other active Board oversight projects are examining the FBI’s use for counterterrorism purposes of information received under Section 702 and of open-source and commercially-available data.



[REDACTED]

brevity as the rest of the memorandum—any distinctive privacy, civil-liberties, legal, or technological concerns raised by the case.

## **B. (U) Clarity and Organization**

(U) The applications present the reader (most notably, the FISA court judge) with a great deal of factual information, which is appropriate. This information, however, is sometimes repetitive, and the organization does not necessarily facilitate critical analysis.<sup>10</sup> The applications recite many facts related to the target's potential involvement with terrorism. But each fact's relative importance emerges only after very close reading.

(U) [REDACTED] The applications are also interspersed with the FBI's analytical judgments. Some of these judgments explain FBI's assessment of the significance of a fact, others draw conclusions based on the compilation of facts described. The FBI's judgments are distinguished from the facts [REDACTED]

(U) [REDACTED] Overall, these applications provide a great deal of relevant information and generally aim to highlight potential question marks for the court. However, their clarity and organization could be improved by the use of writing techniques to help the reader understand the logical flow of the application and how each alleged fact in a complex course relates to the others.<sup>11</sup> These could include strong topic sentences, expanded use of headings, and roadmapping. To that end, DOJ and the FBI should use training and guidance to enhance organization and clarity in FISA applications.<sup>12</sup>

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<sup>10</sup> (U) DOJ notes that there can be a tension between avoiding repetition and ensuring that the application provides a complete picture of a target's activities, and that DOJ tends to err on the side of inclusion. Given the *ex parte* nature of the proceedings, it is appropriate to err in favor of inclusion and to present all exculpatory information or facts that tend to undermine the government's case for probable cause, even if that information is repetitive. The suggestions provided here are intended to facilitate judges' critical analysis of a complete (and thus voluminous and potentially repetitive) recounting of the facts, rather than to suggest that agents or attorneys exclude potentially relevant information.

<sup>11</sup> (U) In implementing these approaches, drafting attorneys may benefit from access to the source documents, particularly those documents supporting the facts that are essential to probable cause. (U//FOUO) Current policy permits DOJ attorneys to request access to relevant source documents, subject to certain confidentiality requirements and dissemination restrictions, such as those that apply to information about confidential human sources or other sensitive sources.

<sup>12</sup> (U) Where such introductory or summary statements restate or summarize facts presented elsewhere in the application, those statements should not require separate supporting documentation in the Woods File. (The Woods File is the FBI's internal compilation of documents providing support for the facts in the FISA application).

[REDACTED]

[REDACTED]

(U) Why does this matter? The government's internal process for checking and re-checking facts is designed to ensure that each statement in the application is literally accurate. That is vital, and recent reforms to strengthen the fact-checking process are justified. But a fair process that reaches reliable conclusions requires more than fact-checking. Accurate information must also be presented in a form that facilitates a critical assessment of the strength of the case.

(U) [REDACTED] Using these approaches for drafting and organizing applications, where possible,<sup>13</sup> could enable judges and advisors to spend less time picking out the key facts from among a lengthy recitation, and more time testing the government's case.

### C. (U) Noteworthy Features

(U) A few applications had features that are noteworthy in light of recent policy debates:

- [REDACTED] One application highlighted for the court the distinctive privacy implications of using an established surveillance technique in certain circumstances—namely, it noted that [REDACTED].<sup>14</sup> The application further explained how the FBI's standard minimization procedures would apply if that occurred. (The surveillance did not involve novel technology or rest upon a novel or expansive interpretation of the government's legal authority.)
- [REDACTED] Some applications used footnotes to offer caveats. For example, applications noted incentives given to human sources who provided information used in the application, accompanied by the FBI's assessment of each source's credibility.<sup>15</sup> Others alerted the court to potential countervailing facts or instances where the FBI had changed its assessment of a person's veracity in light of new information.<sup>16</sup>

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[REDACTED]

<sup>13</sup> (U) DOJ notes that agents and attorneys may be precluded from paraphrasing or summarizing certain types of information.

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While [REDACTED] thus did not appear to be based solely upon “activities protected by the first amendment to the Constitution,”<sup>19</sup> [REDACTED]

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### III. (U) Accuracy and Oversight of FISA Applications

(U) Factual accuracy is particularly important in FISA applications, which are not subject to the adversarial testing and transparency present in criminal prosecutions.<sup>20</sup> The FISA court relies on the Justice Department to produce the relevant facts and to identify and correct errors. In part for this reason, how DOJ allocates oversight resources, conducts accuracy reviews, and explains the review results are especially important in ensuring the integrity of the FISA process.

(U) Internal reviews help ensure the system’s integrity in two ways. One purpose is to ensure that complete and accurate information is provided to the FISA court. But the FISA court is not the only actor with a stake in the accuracy of FISA applications: DOJ and FBI reviews provide other oversight bodies (and, in appropriate cases, the public) with information about whether the FISA process is working effectively and appropriately balancing privacy and civil liberties with security imperatives.

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<sup>17</sup> [REDACTED]

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<sup>19</sup> (U) 50 U.S.C. § 1805(a)(2)(A).

<sup>20</sup> (U) DOJ has confirmed that some applications have been reviewed by FISA court amici. However, amici are not adversarial parties and they are not privy to the underlying facts, which are stored on FBI systems.

[REDACTED]

(U) The DOJ and the FBI periodically review a sample of previously submitted FISA probable-cause applications. Both DOJ and the FBI produced to the Board the results of their post-hoc accuracy reviews conducted between 2015 and 2019.<sup>21</sup> During these reviews, attorneys scrutinize each fact in an application to ensure that it accurately reflects documents in the FBI's possession.<sup>22</sup>

(U) Since mid-2020, DOJ has also begun conducting recurring "completeness" reviews, which examine the accuracy of the facts in the application *and* check for omissions of information that potentially undermines the government's case for probable cause.<sup>23</sup>

(U) Between May 2020 and March 2021, DOJ attorneys conducted completeness reviews of 95 applications. This is a significant development for oversight of the FISA process. Completeness reviews, which require inquiry into the underlying facts of a case, are labor-intensive. Conducting reviews of nearly 100 applications in less than a year represents a major investment of oversight attorneys' time and attention.

(U) The documents we reviewed suggest that the accuracy reviews are thorough and methodical. The DOJ reviews divide errors into two categories: material and non-material, with material errors explained in greater detail and immediately reported to the FISC.<sup>24</sup> Each review culminates in a report regarding DOJ's findings that is provided to FBI headquarters and field-office leadership. Pursuant to an order issued by the FISC in 2020, DOJ will also produce the results of its accuracy and completeness reviews to the FISC twice a year.<sup>25</sup>

(U) In the FBI reviews, a field-office attorney identifies factual inaccuracies by comparing each fact in the application to the source document. The FBI codes the significance of each

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<sup>21</sup> (U) The FBI also provided the results of its post-hoc accuracy reviews from the first half of 2020.

(U) DOJ produced to the Board the results of accuracy reviews it conducted as part of its recurring oversight of the FISA process. DOJ attorneys also conduct other accuracy reviews for dockets for which there has been a request to use the surveillance materials in a criminal proceeding.

<sup>22</sup> (U) In February 2020, in response to the DOJ Inspector General's findings, the FBI began conducting case-file accuracy reviews before submitting U.S.-person FISA applications to the FISC; the practice was then enshrined in an August 2020 Attorney General Memorandum. During these reviews, an FBI agent reviews the case file for inaccuracies *and* factual omissions. FBI guidance requires agents to review "all potentially relevant aspects of any serial and hard copy case file materials in which an agent could reasonably be expected to find relevant information bearing on the requested legal findings." Searches beyond the case file, "for example, in the file of the subject of a related national security investigation[,] are necessary only where the agent could reasonably be expected to find relevant information bearing on the requested legal findings." Communication from FBI (Apr. 19, 2021).

<sup>23</sup> (U) Communication from DOJ National Security Division (May 12, 2021).

<sup>24</sup> (U) See FISC Rule 13(a) ("misstatement or omission of material fact" requires report to the Court).

<sup>25</sup> (U) See Corrected Opinion and Order (Mar. 5, 2020) entered in *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Docket No. Misc. 19-02, For. Intel. Surv. Ct.

[REDACTED]

inaccuracy on a 1-3 scale.<sup>26</sup> It is then the Justice Department's responsibility to determine whether an error is material and must be reported to the FISA court.<sup>27</sup>

#### **A. (U) How Best to Allocate Oversight Resources**

(U) Oversight reviews are time-consuming for both the reviewer and the agent or analyst responsible for compiling the source documentation in support of the application. As a result, only a portion of all U.S.-person Title I and Title III applications are audited each year. Even with greater resources being devoted to these reviews, it remains impracticable to conduct one in every case.<sup>28</sup>

(U) External oversight, internal reviews, and other checks on the FISA process should assign greatest energy and attention to matters that are most likely to affect the privacy and civil liberties of Americans. Some features of the FISA regime reflect this prioritization: for example, the requirement that FISA court judges consider appointing an amicus to review matters raising novel questions of law or technology. DOJ policy now also requires that the Attorney General approve FISA applications targeting federal elected officials, their staff, or candidates for federal office and members of their campaigns, among other procedural

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<sup>26</sup> [REDACTED]

<sup>27</sup> (U) The field offices also provide these reports to FBI headquarters and, pursuant to recently updated guidance from DOJ, to relevant personnel at DOJ.

<sup>28</sup> (U) Between 2015 and 2018, DOJ's Office of Intelligence conducted accuracy reviews of 395 FISA applications. Communication from DOJ National Security Division (May 13, 2021). As noted, DOJ also conducted completeness reviews (reviews that check for omissions as well as verifying the accuracy of included facts) of 95 applications between May 2020 and March 2021. FBI field office attorneys also reviewed several dozen FISA applications each year.

(U) By contrast, the FISC approved more than five hundred U.S.-person FISA applications in each of those years, Communication from Office of the Director of National Intelligence (May 8, 2020), and more than one thousand FISA probable cause applications overall, though the total number of probable-cause-based FISA applications has declined significantly since then. See Office of the Director of National Intelligence, *Annual Statistical Transparency Report Regarding Use of National Security Authorities for Calendar Year 2020* at 10-11 (Apr. 2021) ("2020 Annual Statistical Transparency Report") (FISC approved 524 probable-cause orders in 2020, down from 907 in 2019.).

(U) DOJ notes that reviews may in some cases be conducted in a different calendar year than the year in which the application was approved. Thus, these numbers provide a sense of the overall proportion of applications reviewed, rather than a specific percentage for a specific year.

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safeguards.<sup>29</sup> In other areas, however, there may be opportunities to better allocate DOJ's limited resources.

(U) Which cases should receive these reviews? The FBI and DOJ already identify certain matters that raise special concerns as Sensitive Investigative Matters, or SIMs, when those SIMs are initiated by the FBI and prior to the filing of any application for FISA authority. The Attorney General's Guidelines for Domestic FBI Operations define SIMs as investigative matters involving the activities of domestic political figures, religious or political organizations or individuals prominent in such organizations, the news media, or possessing another attribute which the FBI or DOJ deems particularly sensitive.<sup>30</sup>

(U) [REDACTED] Given the inherent sensitivity of these categories, DOJ should consider conducting an accuracy review of each U.S.-person FISA application related to a Sensitive Investigative Matter. This should be feasible: information received by the Board indicates that relatively few FISA applications are obtained each year in SIMs.<sup>31</sup>

(U) DOJ should consider conducting those reviews soon after the application has been submitted, such as within 60 to 90 days if practicable. For SIM matters where the FBI team anticipates seeking a FISA order, it may also be helpful to integrate a DOJ attorney at an earlier stage, so that the attorney is well-versed in the facts and better able to advise the team throughout the FISA process.

(U) To the extent permitted by FISC orders, allocating proportionately greater time and effort to other U.S.-person probable cause applications would be the best investment of resources.<sup>32</sup> Review priorities should also include field offices whose applications performed poorly in the last review cycle.

## **B. (U) How to Categorize Factual Errors in Oversight Reviews**

(U) The FISA court relies on the Justice Department and the FBI to produce the relevant facts and to identify and correct errors in FISA applications. DOJ and FBI reviews are typically the only time applications are reviewed against the supporting documents or, in

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<sup>29</sup> (U) See Attorney General Memorandum, *Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation* (Aug. 31, 2020).

<sup>30</sup> (U) See Attorney General's Guidelines for Domestic FBI Operations Part VII-N. The Board did not request FISA applications filed in SIM matters as part of this review.

<sup>31</sup> [REDACTED]

<sup>32</sup> (U) DOJ plans to begin conducting accuracy reviews of business-records applications and pen register/tap-and-trace applications, in addition to probable-cause-based applications. As DOJ considers how to allocate resources among oversight priorities, it should weigh the comparative risks to privacy and civil liberties posed by those forms of surveillance against the risks posed by the more intrusive surveillance permitted by probable-cause orders, alongside such other factors as whether the target is a U.S. person and whether the investigation has been deemed a Sensitive Investigative Matter.

[REDACTED]

certain cases, against the facts known to the FBI. These reviews therefore serve two critical functions: first, to ensure that complete and accurate information is provided to the FISA court, and second, to provide oversight entities (and, in appropriate cases, the public) with information about whether the FISA process is working as intended.

(U) Each of the applications the Board received for this review had already been subject to an accuracy review by the DOJ Inspector General. In preliminary results regarding its review of 29 FISA applications, the Inspector General identified discrepancies between the application and source documentation in all 25 applications for which the FBI produced a consolidated file of source documentation.<sup>33</sup> The Inspector General reported an average of 20 errors per application, with a high of approximately 65 errors in one application.<sup>34</sup> These figures did not include errors of omission, which were outside the scope of the review. Nor did the preliminary results assess the materiality or significance of the errors, which ranged from assertions that were unsupported by or inconsistent with the supporting documentation to mere typos. The Inspector General concluded that these failures “undermine[] the FBI’s ability to achieve its ‘scrupulously accurate’ standard for FISA applications.”<sup>35</sup>

(U) The DOJ National Security Division responded to the Inspector General’s review in filings to the FISA court.<sup>36</sup> It argued that the 29 applications included a total of two material misstatements and two material omissions, “none of which are assessed to have invalidated the authorizations granted” by the FISA court in the corresponding cases.<sup>37</sup> DOJ deemed the remaining 205 errors it found “non-material.”<sup>38</sup>

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<sup>33</sup> (U) Michael Horowitz, Inspector General, U.S. Department of Justice, *Audit of the Federal Bureau of Investigation’s Execution of its Woods Procedures* (March 30, 2020) (“OIG 2020 Audit”). The IG did not receive a consolidated file of source documentation for three of the remaining applications; the source file for the final application was compiled after that application was submitted to the FISC, and it was not reviewed by the IG.

<sup>34</sup> (U) *See id.*

<sup>35</sup> (U) *Id.*

<sup>36</sup> (U) DOJ and the FBI have undertaken a number of reforms in response to the findings of the Inspector General. FBI instituted a slate of changes to improve adherence with the Woods Procedures, a set of guidelines designed to ensure that FISA applications are accurate and supported with appropriate documentation. Attorney General Barr also instructed the FBI to institute various measures to augment the Bureau’s internal compliance functions, *see* Attorney General Memorandum, *Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation* (Aug. 31, 2020), and increased oversight of FISA applications targeting federal officials, candidates for office, or their staff or campaigns, *see* Attorney General Memorandum, *Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation* (Aug. 31, 2020).

<sup>37</sup> (U) *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Foreign Intelligence Surveillance Court Docket No. Misc. 19-023 (June 15, 2020); *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Foreign Intelligence Surveillance Court Docket No. Misc. 19-023 (July 29, 2020); Letter from Kevin J. O’Connor, Chief, Oversight Section, to the Honorable James E. Boasberg (Oct. 27, 2020).

<sup>38</sup> (U) *Id.*

[REDACTED]

(U) What should outside observers make of the gulf between these assessments? And what, if any, lessons can be drawn from these figures about the overall accuracy of the FISA process?

(U) “Materiality” is central for DOJ because material errors trigger mandatory reporting to the FISA court.<sup>39</sup> From an oversight perspective, however, the materiality standard can lump together errors of different types, with different policy implications.<sup>40</sup> Indeed, this review suggests that there is a gradation of importance among the “non-material” errors.

(U) [REDACTED] Providing a more granular breakdown of these non-material errors would be instructive in at least two ways. First, a simple raw error count may suggest pervasive inaccuracies when, in fact, a number of errors deemed “inaccuracies” were in fact trivial typographical errors. On the other hand, a more graduated classification might provide a more complete picture of the accuracy of the FISA process.<sup>41</sup>

(U) Specifically, the government should consider categorizing factual errors for purposes of oversight reporting using the following schema, which would better enable reviewers, agency leaders, and overseers to decide whether factual errors give rise to genuine concern about the integrity of the process.

1. (U) Misstatements of facts known to the government at the time of the application that contributed to the government’s case for probable cause (for example, hypothetically, the number of times the target talked to a particular known or suspected terrorist). Based on this review, this category would likely encompass some errors that were deemed “non-material” in light of the other facts presented in an application.
2. (U) Omissions of facts known to the government at the time, which would have cut against the case for probable cause. Like category 1, this category might include both

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<sup>39</sup> (U) See FISC Rule 13(a) (“misstatement or omission of material fact” requires report to the Court). According to DOJ, a factual inaccuracy or omission is “material” if it is “capable of influencing the [FISC’s] probable cause determination,” considering “the information established by the supporting documentation compared to the factual assertion presented in the application or, in the case of an unsupported fact, the remaining facts supporting probable cause in the absence of that information.” Gov’t Supp. Response to Order Dated Apr. 3, 2020, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02, at 10 (June 15, 2020) (Gov’t Supp. Response). DOJ “errs in favor of disclosing information that [DOJ’s Office of Intelligence] believes the Court would want to know.” *Id.*

<sup>40</sup> (U) See also Peter Margulies, *FISA and the FBI: Fixing Material Omissions, Overbroad Queries, and Antiquated Technology*, Statement to the Privacy and Civil Liberties Oversight Board, at 5-6, 9 (Sept. 2020).

<sup>41</sup> [REDACTED]



[REDACTED]

errors deemed material and non-material under the standard used by the FISC and DOJ.

3. (U) Misstatements of facts known to the government at the time of the application which were ancillary to the government's case for probable cause (for example, hypothetically, the name of the target's high school).
4. (U) Genuinely trivial typographical errors.

(U) [REDACTED] Errors in the first two categories would be of greatest concern, though the third also suggests sloppiness and a heightened likelihood of error.<sup>42</sup>

(U) Whether a particular fact contributes to the government's case for probable cause will often depend on the context. For example, an error in a date might fit within the first bucket if the date is relevant to showing the development of a target's plans or contacts with a known or suspected terrorist. However, a minor date error regarding when the FBI first opened a source—predating any contact with the target by months—may fall within bucket three. Attributing a statement to an incorrect source might also be relevant to probable cause: the source's relationship with and knowledge of the target could be important to how the FISC assesses the reliability of that information.

(U) Likewise, minor deviations from source documents deserve close attention. For example, the number of international trips, whether the target made or received international phone calls, and whether a person with whom the target is in contact is "known" (rather than "believed") to aid and abet international terrorism are all facts that are likely to bear on the probable-cause finding.

(U) Errors in the fourth category, genuinely trivial typographical errors, are undesirable but are typically not systemically significant for oversight bodies. They should not be aggregated with other types of errors in Inspector General reports or other oversight reports. However, they can be indicative of other problems if they occur in high numbers.

(U) DOJ and the FBI should also note when statements of fact in an application that were believed to be true at the time were contradicted by information received later. These would not be "errors" in the sense intended here, because the information available at the time of the submission supported the assertion. However, knowing when reasonably held assessments need to be revised would nonetheless be informative regarding the strength of

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<sup>42</sup> [REDACTED]

[REDACTED]

those assessments and the utility of surveillance in disconfirming things previously believed to be true or assessed to be probable.<sup>43</sup>

### C. (U) Renewals

(U) Renewals offer an opportunity for agents to reassess the case and modify their view based on newly obtained information. The DOJ Inspector General found, however, that some renewal applications were insufficiently scrutinized.<sup>44</sup>

(U) The applications we received included several renewals. These renewal applications appeared to consist of the original applications with new material inserted in bold text at the relevant place in the original document. The bold text helped the reader quickly identify new information, including corrections or caveats to assertions in the original application.

(U) Why do renewal applications take this form? (Put differently: Why squeeze the newly discovered information into the text of the original application, rather than presenting the new information as an update?) Using the first application as a template may save agents time. Or it might reflect the fact that a different judge likely will review the second filing.<sup>45</sup>

(U) On the other hand, this approach may not be the best way to facilitate critical analysis of the need for further surveillance. The structure of renewal applications may influence the cognitive process agents and lawyers undertake in preparing them. It may encourage the drafters to rest on the facts in the original application, rather than reconsidering the probable cause assessment in light of new developments.

(U) Before seeking a renewal, agents should re-assess their original case in light of the information obtained through the surveillance and examine the need for, and expectations of, further surveillance. For example, they might ask:

- [REDACTED] Did the surveillance (or other investigatory steps taken in the meantime) reveal new facts relevant to the initial probable cause finding?<sup>46</sup>

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<sup>43</sup> (U) Note, however, that errors of this kind do not necessarily indicate malfeasance or investigative errors. Intelligence always operates in a realm of uncertainty and investigations often lead in unexpected directions. Testing a hypothesis supported by probable cause is an appropriate purpose of FISA surveillance.

<sup>44</sup> (U) OIG 2020 Audit (“the FBI is not consistently reverifying the original statements of fact within renewal applications”).

<sup>45</sup> (U) The statute does not impose special requirements for renewals; it provides only that “[e]xtensions of an order ... may be granted on the same basis as an original order upon an application for an extension.” 50 U.S.C. § 1805(d)(2).

<sup>46</sup> [REDACTED]

- [REDACTED]
- [REDACTED] If not, how does the absence of new facts influence the FBI's judgment about the need for and anticipated benefit from ongoing surveillance?<sup>47</sup>

- (U) Did any new information contradict things that the government believed before?
- (U) How do these new facts affect the case?
- (U) What does the government hope to learn during the renewal period?

(U) To ensure that these questions are considered, it may be helpful to require agents to answer these questions in writing and highlight those answers in renewal applications.

(U) More broadly, the government and the FISA court should consider whether an alternative structure for renewal applications would better ensure a rigorous renewal process. For example, renewal applications could provide a brief summary of the key points of the initial application, with cross-references to the full document; concise answers to key questions about the need and expectations for a renewal, like those proposed above; and a detailed recitation of the new information obtained from the initial surveillance, along with the government's assessment of its significance and cross-references to relevant points in the initial application. The initial application could be appended.

(U) Given the factual intricacy of these applications, proposals to require renewals to go to the same judge who approved the initial application whenever possible merit consideration.<sup>48</sup> Logically, a judge who is already familiar with the facts should be able to devote more time and attention to what has been found (or not found) by the initial surveillance and other distinctive features of a renewal.

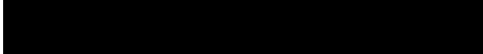
#### **IV. (U) Considerations for Future Oversight, Legislation, and Internal Reform**

(U) As Congress and the Department of Justice consider future changes, the following topics offer opportunities for further analysis and potential reform:

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<sup>47</sup> [REDACTED]

<sup>48</sup> (U) *See, e.g.*, H.R. 5396, 116th Cong., § 2(e) (Dec. 11, 2019) (“To the extent practicable, an extension of an order issued under this title shall be granted or denied by the same judge who issued the original order.”).

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- **(U) Using Automation to Enhance Internal Oversight.** Manual, post-hoc internal review by DOJ of every U.S.-person FISA application (much less of all applications) is not practicable in light of resource constraints and DOJ's many other responsibilities. By all accounts, the experienced oversight attorneys in DOJ's National Security Division work diligently to ensure compliance with statutes and regulations. Their time is limited, however. Prioritizing one set of matters (for example, review of targeting decisions under Section 702, which permits surveillance of non-Americans located overseas) necessarily means that less time can be allocated to others (such as reviewing probable-cause applications targeting U.S. persons). The question is what allocation of human resources, supplemented with automated tools where appropriate, will produce the greatest benefit to Americans' privacy and civil liberties and to the FISA process.

(U) To that end, DOJ and Congress should examine the allocation of oversight resources across the National Security Division to identify opportunities for greater efficiency. Manually reviewing Section 702 targeting decisions, for example, requires significant time and resources. Automated tools can relieve this burden by flagging specific matters for manual review based on privacy and civil liberties risk, indicia of error, or other relevant factors.<sup>49</sup> This can help streamline routine processes and free up more resources for complex matters involving U.S. persons. NSD has already invested in some automated tools to streamline attorneys' review of 702 targeting decisions. If needed, greater funding for automation should be provided. Congress and the FISC should also explore other ways to ease the burden imposed on NSD by manual, repetitive oversight tasks whose return on investment may be relatively low as compared to possible alternatives, such as greater scrutiny of U.S.-person FISA applications and closer engagement with FBI field offices. Congress should also provide resources for additional oversight attorneys if requested.

- **(U) Reducing Duplicative Reports.** Transparency reports have been invaluable for experts inside and outside of government seeking to understand the scale of government surveillance programs and their evolution over time. The Intelligence Community's Annual Statistical Transparency Report, for example, illustrates how detailed statistics can be paired with narrative descriptions to enhance public understanding of classified programs and facilitate oversight and accountability. The Administrative Office of the U.S. Courts also produces a useful annual Report on the Activities of Foreign Intelligence Surveillance Court.

(U) In other instances, however, reports overlap, imposing duplicative tasks on the limited pool of DOJ and FBI personnel available for oversight. For example, there is

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<sup>49</sup> (U) See also Margulies, *FISA and the FBI*, at 13-16.

[REDACTED]

duplication between the FISA Section 702 joint assessments and the Section 702 semiannual reports to Congress. Streamlining reporting requirements, without reducing the amount of information ultimately provided to Congress and the public, could increase the personnel available for oversight of FISA activities.

- **(U) Streamlining the FISA Process for Certain Targets.** Congress, DOJ, and the FISA court should consider whether to create streamlined procedures for certain categories of foreign powers or agents of a foreign power,<sup>50</sup> and whether to permit orders in those matters to last longer. Congress should also consider modifying FISA to permit orders targeting entities “directed and controlled by a foreign government” to last for up to one year.<sup>51</sup> In those cases, once the government has established the target’s status, privacy and civil liberties concerns center on preventing reverse targeting and ensuring appropriate minimization. Reducing some bureaucratic requirements in these matters, while maintaining the existing level of scrutiny for reverse targeting and minimization, could free up resources for increased oversight of U.S.-person applications and other sensitive matters.
- **(U) Reconsidering FISA’s Geographic Distinctions.** FISA continues to rely largely on geographic distinctions, which turn on both the location of the collection and the location of the communicants. Does that still make sense? On one hand, the internet and other technologies have made the place of collection less useful as a proxy for the nationality of the communicants, as Section 702 illustrates.<sup>52</sup> On the other, geography remains relevant: for example, electronic surveillance or physical searches targeting people in the United States are more likely to incidentally collect U.S.-person communications and could present a greater risk of reverse targeting, even if the target is a non-U.S. person visiting the country temporarily. As technology continues to evolve, these geographic distinctions will come under greater pressure, creating challenges but also opportunities for reform.
- **(U) Red-teaming.** Ensuring accuracy without adversarial testing remains an enduring challenge for FISA, even after the significant reforms of recent years. DOJ and FBI leaders should consider whether a regularized practice of internal red-teaming in the most sensitive cases, whether within the FBI or in collaboration with

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<sup>50</sup> (U) *See, e.g.*, 50 U.S.C. § 1801(a)(1), (a)(3), (b)(1)(A).

<sup>51</sup> (U) *See* 50 U.S.C. §§ 1801(a)(6), 1805(d)(1).

<sup>52</sup> (U) *See, e.g.*, Testimony of Prof. Robert M. Chesney, University of Texas School of Law, at Privacy and Civil Liberties Oversight Board Virtual Public Forum, *The Past and Future of the Foreign Intelligence Surveillance Act* (June 24, 2020); David Kris, Statement on FISA Provided to the Privacy and Civil Liberties Oversight Board, at 2 (Aug. 2020) (expressing concern about “the growing indeterminacy of location on the internet and other networks” and noting that “FISA and other surveillance (collection) rules depend significantly on the government’s ability to determine the location of communicants, and in some cases the location of other things”).

[REDACTED]

attorneys at the National Security Division, could serve as an effective check on confirmation bias without unduly delaying time-sensitive applications.

- **(U) FISA Business Records.** In March 2020, FISA’s post-9/11 authority to collect business records on a targeted basis expired, causing the law to revert to its much narrower, pre-9/11 text. The lapsed provision authorized the government to seek a FISA court order to collect third-party records in certain national security matters where ordinary subpoenas or national security letters are not available. Unlike national security letters, which the FBI can issue unilaterally, FISA business-records orders require individualized approval by a FISA court judge, and a 2015 amendment to the statute barred the government from using this authority for bulk collection.<sup>53</sup>

(U) The pre-9/11 version of the statute, which has now returned to force after nearly 20 years, is quite limited. Unlike the post-9/11 version, it only applies to records from certain, specific types of businesses listed in the statute: common carriers (such as airlines), public accommodation facilities (such as hotels), physical storage facilities, and vehicle rental facilities. The number of FISA business-records orders and targets fell by 50% in calendar year 2020.

(U) Based on the information I have reviewed, I am concerned that the sunset of the post-9/11 business-records authority has reduced the government’s ability to investigate the activities of foreign agents in the United States.

[REDACTED]

[REDACTED]

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<sup>53</sup> (U) As our Board explained in a February 2020 report, the NSA has terminated its use of the law’s special authority permitting “two-hop” collection of call detail records, which resulted in a large volume of collection. See Privacy and Civil Liberties Oversight Board, *Report on the Government’s Use of the Call Detail Records Program Under the USA Freedom Act*; see also Sharon Bradford Franklin, Policy Director, New America’s Open Technology Institute, *Statement to the Privacy and Civil Liberties Oversight Board Regarding Exercise of Authorities under the Foreign Intelligence Surveillance Act*, at 2, 12 (Aug. 31, 2020).

[REDACTED]

[REDACTED]

(U) The longer the statutory lapse persists, the more significant its effect will become. The statute’s “savings clause” allows the government to continue using the broader, post-9/11 authority in investigations that began or relate to conduct that occurred before March 15, 2020.<sup>54</sup> As time passes, however, that clause will cover a progressively smaller share of active national-security investigations.

(U) The government confirms that the vast majority of the 28 business-records orders issued in calendar year 2020 would not have been possible in a new investigation not covered by the savings clause. This suggests that the decline in utility over time will be near-total.

(U) Congress should reauthorize this targeted authority at the earliest opportunity. When it does so, it should reinstate the 2015 ban on using this authority for bulk collection, an important constraint that also expired in March 2020.

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<sup>54</sup> (U) *See* Jake Laperruque, Project on Government Oversight, Statement to the Privacy and Civil Liberties Oversight Board, at 14-15 (Aug. 2020).