

- Thank you very much. That was terrific. Thank you Mary. Thank you very much. And April, what I wonderful back and forth, this is just an incredible opportunity that we had so much. We're gonna run straight into the next panel. Because we have a class coming in at 5:30 and so we're not actually taking a break right now. And so it falls to me to introduce our next moderator who is both a friend and a colleague of mine here at Georgetown Law. Professor Mary McCord is the Executive Director of the Institute for Constitutional Advocacy and Protection. Those of us from Georgetown, we call it ICAP as we give abbreviations to so many things. In her capacity as Executive director, she prosecutes or no not prosecutors, prosecutor of the court you, you bring cases and she actually been recognized in Virginia, particularly for bringing the case of the white supremacists and private militia groups at the Unite The Right rally in Charlottesville. She is visiting professor of law here, and was previously before coming to Georgetown, the acting Assistant Attorney General for the National Security Division at the Department of Justice. Before that, she was Principal Deputy Assistant Attorney General in 2014 to 2016. Before that, for almost 20 years, she served as US attorney here in Washington DC. For a while she was Deputy Chief in the Appellate Division. She was the Chief of the Criminal Division overseeing all criminal prosecutions. She is also a friend, not just locally in practice, but as an amicus we're lacking friends as well, before the morning Intelligence surveillance court. And she was recently invited and asked, appointed by speaker Nancy Pelosi to be legal counsel for Capitol Security Review. So it's my great pleasure to welcome Mary and her panelists to the discussion.

- Thanks so much Laura. I know it's been a long afternoon, but incredibly insightful. I learned so much from that first panel, even though like I do work in this field, so I'm such really honored to introduce our panelists today. This is going to have some congressional staff people as well as just sort of experts in the field. We are, unfortunately, we are missing one panelist from the house side, Allen Souza the National Security Advisor to speaker McCarthy, who ended up having to be with the speaker this afternoon. So we do not have anyone here from the house side. But Wendy Parker was here earlier, so you did hear some house side representation. Let me just start on the far end with Rita Siemion. She is the Chief National Security and Human Rights Council for the Senate Judiciary Committee where she handles a range of legislative and policy matter matters for Chair Durbin. And previously she was the Director of National Security Advocacy at Human Rights First, where she served as the organization's expert on the law of war and on international human rights law. And love the organization's advocacy for National Security and Counterterrorism policies that respect human rights and rule of law. She's also an adjunct professor here. Eric Losick who's here in the orange Tie. I love that, is General Counsel for the Senate Selects Committee on Intelligence. That's of course led by Chairman Mark Warner. He previously served as council to that committee. And then he literally, I think, has been in the general counsel's office of almost every alphabet suit in National Security agency, including the ODNI, the National Security Agency. He was in the office of Legislative Affairs at DOJ, which is where I first met him. And I think he helped me prepare for one of my testimonies, if I'm not mistaken, but I'm not gonna get into that. And also at the CIA. Alex Joel here to my left is a Senior Project Director and resident Adjunct Professor at the American University's Washington College of Law. He leads the Privacy Across Borders initiative for the school's tech law and security program. Before that, he was a Civil Liberties protection officer in the office of the Director of National Intelligence and also Chief Transparency Officer. Before that, he had worked as an attorney at the CIA and also in private practice and the privacy and technology attorney. And finally, but not least, Julian Sanchez is a writer covering issues at the busy

intersection of technology, privacy and civil liberties with a particular focus on national security and intelligence surveillance. He is a founding editor of the policy blog, just Security Room, also on the editorial board. and a former senior fellow at the Cato Institute. He's written for a wide array publications across the political spectrum in the "New York Times," the national Reviews of the Nation. So I could go on and on about these panelists, but then we would run out of time to talk about what we're here to talk about. So just wanna start by saying, which something that's probably obvious to all of you out there, which is that our panelists from the Hill necessarily are constrained somewhat in what they're able to say in a form of forum like that. But of course Alex and Julian have no such constraints. So for all the complaints that Rita and Eric will have, maybe you know, Alex and Julian you can fill in the blanks. But I do wanna start particularly addressing these two are panelists here from Capitol Hill. And part of this draws off things that we're alluded to at the first panel and also in April Doss's comments, but I don't think got fleshed out as much as maybe they should. And that is, as Congress begins this debate and hearings over reauthorization, which of course has happened before, happened in 2012, it happened in 2018. How do you think this will be similar to and different from these previous reauthorizations and in particular, how are members thinking about the threats from National Security now as compared to the threat strain, the past few reauthorizations? Now again in the alluded to like we did talk about how historically the focus of 702 and reauthorization has been on counterterrorism, but how will concerns about gray power competition and some of the other threats that April talked about, how will those frame the debate? And finally, what types of privacy, civil liberties and related concerns you think will really be highlighted this time. It might be something different from last time. And I'll just start with you Rita.

- Sure. Thank you so much for having me. I think that's right, that the process is gonna be different this time. The politics are quite different this time around. And we've got new folks, both the House and the Senate, but also we have more revelations since the last reauthorization of compliance concerns and abuses and also more revel revelations as we're discussed on the last panel about sort of how the authority, even within the existing statutory framework, how the authorities being used. So I think it's just gonna be a different type of conversation as members are sort of thinking through concerns that they had in the past or maybe those didn't have those concerns, maybe have them now. So I think it looks a little bit different. So the other part about your question on the sort of different types of national security threats that the authority is used to address, you know I find it interesting, I think that, you know we've seen some folks who like actually explicitly saying that counter-terrorism is actually not the Trump card that it once was. And so recommending to the IC that they start touting its use for other purposes as a tactic for getting folks engaged and interested in supporting it. And I think the sort of flip side of that is interesting and important for Congress to be thinking about. We have the history of the program and how we got here, where you have a temporary emergency targeted authority that's meant to be for one discreet purpose, now being justified for a whole host of purposes for on an ongoing basis. So you know on the one hand we can look at it as really important for lots of different purposes, but on the other hand you can sort of look at this as a concerning pattern like with many sort of exceptional authorities that are justified as necessary for one discrete temporary emergency that over time, two decades later are justified as we can't possibly let these authorities go, now we need them for everything.

- So the changing of the national security threat could cause some concern that has driven uses that were not predicted or expected in the original authorization. Although I suppose one could say it was directed at being able to respond to national security threats, you know whatever those may be. Eric.

- Sorry, do I need to? Yes its working. So thanks first it's privilege to be here. It's participating in this debate. It's refreshing on every issue that comes before our congressional staff are involved. Such questions at this one. So appreciate that opportunity. So a couple things, I think I would encourage anyone that hasn't done so already, to take a look at the worldwide threat hearing that our committee had in March and annual threat assessment. If you read through that document, it's a sort of a variable collection of villains and global issues, one of which is certainly terrorism, but probably foremost is the threat posed by China and rising competition with the United States across economic, military, political grounds. Cause I think you heard a little bit from the first panel, 702 is instrumental in the government's ability to collect the information that needs to counter those threats. I would not use described as a tactic, I think it is true that 702 is vital and it's true that 702 is important to be able to address those threats. I think that's playing out in this cycle to a greater degree in past cycles. But that's also a reflection of the way the world has changed in the interviewing years. In terms of process, I agree with Rita. I think it's going to be a political reasons if nothing else, a much more difficult reauthorization cycle this time around. I do think the general means of how it will unfold is likely to be the same. I think you'll see the Senate Judiciary Committee and the Senate Intelligence Committee and some combination holding hearings and marking up things at some point. I think that floor time and the Senate in particular is a precious commodity. But each story last reauthorizations cycle, a FISA bill has received floor time and I think the force that have driven that in the past will drive it again this time. Members want an opportunity to vote on their amendments. There are other paths towards enacting vice reauthorization, but I expect that will be how it unfolds and I expect that as in past cycles. It will come down to the last minute, I remember 2012 being on the Senate floor between the weeks of Christmas and New Years for reauthorization. I would not be surprised if something similar were to transpire again. Yeah, do you have any process points to add to that Rita? Just on kind of timing and what's gonna happen on, and if anybody wants to venture to discuss the house side, please be my guest.

- I'll stay out that one. But I'll say that you know from my boss chair Durbin, you know, I do think folks can expect to see the Senate Judiciary Committee holding hearings, hosting briefings potentially. And that you know Senator Durbin has made it clear that, you know even though he has voted against 702 in every past reauthorization cycle because of concern the many of the concerns that were discussed in detail on the last panel. You know he is really looking to try to forge a path forward here that addresses those very serious concerns, but also recognizes the National Security Board intelligence value and importance of section 702. So I think you can also sort of expect him trying to forge a sort of bipartisan bicameral cross committee forward here.

- Now before I kinda turn to Alex and Julian to kind of weigh in on the change threat. I do wanna ask the two of you another question, which is that, you know do you think this is the kind of year where we'll be talking about tweaks amendments addressing specific discreet issues? Or do you think this is the kind of

year that's going to be deeper reform and specifically I guess I would say beyond 702 reform? Because there's plenty of two things we could talk about just limited to reforms. So that would apply to 702. But you know there has been damage to I think the reputation of the intelligence committee through some of the compliance issues. And I think it seems to me there's interest among congress as well as of course in the executive branch to kind of rebuild trust. So does that put more than just 702 on the table in your opinion? Rita, and then I'll go back.

- Yeah I mean we're certainly hearing from folks about a range of concerns, you know that are you know some directly related to 702 that also concerns that go beyond that. Some of the panelists, the panel just for this one, you know they spoke about sort of the ecosystem of related surveillance authorities, spoke about I think quoting Liza Goitein, on the sort of whack-a-mole compliance issues. And you know and also I think a few of the government panelists mentioned that if, you know, if you take away this authority then we're just gonna do it another way and it's going to be harder and more cumbersome to do it in this other way. So you know we are certainly hearing from folks that want Congress to be looking at all of the different related authorities and the impact of those authorities on American's privacy and how to sort of address them holistically. Many of these authorities either don't have a statutory component at all or don't have a sunset date. So this upcoming sunset is an important time to have that conversation. And I will also say just in terms of the, you know going up until 1159 on December 31st, this is Congress. So I wouldn't personally be surprised if that's where we find ourselves, but I think that the American people will be best served if these concerns are taken seriously earlier on in the process and that the reforms are not, to your point, the sort of tinkering around the edges type reforms, which Congress has tried repeatedly in the past, that Congress is gonna be in a better place if we take those concerns and sort of bigger reforms head on earlier in the process so we don't sort of end up a week out from the sunset than trying to scramble to figure those out.

- Yeah, so I think as a descriptive statement, I think there will certainly be amendments proposed and considered by Congress that go beyond 702. I think that's certainly true. I think Congress needs more time really between, and they should use the time it has and it should used the opportunity that's supported by the sunset to you know consider you know whether the reforms FBI has already made, are sufficient, how well they're working, whether additional reforms are necessary. I think we're gonna take a look at that. I reserve judgment on whether further reforms are necessary or what it's going to take to get to 60 votes in the Senate and 218 in house. I think that's a real question and I think that it's a complicated one as it concerns sort of like new sky big picture reforms. And in principle I think congress will be open to looking at that. But as a practical matter, if you go back to the history of my committee, certainly very shortly after it was established, one of the first things they tried to do was establish a charter for the IC, which had the support of the Carter administration at the time, that was unsuccessful for a whole host of reasons and ultimately sort of gave rise to what is now 12 . I don't really think we've solved that problem, and I don't see that like achieving a resolution now at end of the year. I'm skeptical that sort of really big, you know go for broke reforms are going to get achievable between now and the sunset night. And I'm of the opinion that we should not let the sunset happen.

- Very useful, well let me kick it over to Julian and Alex to comment on everything we've just discussed from the perspective of being outside of Capitol Hill outside of that process, although well may be that either or both of you will testify.

- Sure I'll speak to the question of performance. Everything a pattern you've seen repeatedly in these reauthorization fights beyond the predictable pushing to the last minute, usually which probably becomes too late to seriously consider reforms. We can't let these vital authorities expire, but what we see as repeatedly is the sunset of one authorities typically, I think quite properly communicated consider the broader ecosystem of authorities, interrelated authorities. And I think it's necessary to not confine oneself strictly to the four walls of 702. Because surveillance tends to take the path of least resistance. And so in a way you sort of can't modify one thing in isolation without causing ripple effect elsewhere in the system. You only recall when the intelligence committee was gravely concerned about the expiration of vital counterterrorism and counterterrorism authority. I don't know when the last time you heard the IC talking about how previously impacted they've been by the last several years ago now of the authority is, and that's not something I think civil liberties advocate should take great solace in. So in so far as that most of the alternatives to 215 for acquiring sort of information covered there involve substantially less judicial oversight subject to lower standards. So yeah, to the extent we are narrowing the aperture narrowing some of the aperture is necessary to consider where else that data is at flow and ensure you're not creating a system, a situation where you are you know sort of playing against a three card monte where, you know maybe inadvertently you end up creating incentives to move to less rigorously overseeing avenues in that collection.

- What about the change in threat? Do you have anything you'd like to add to that in terms of your own view of what that means for this reauthorization period including?

- Okay, I'll say two things there. One is that, this is again a pattern we've seen for the totality of the war on terror and you know, stretching back well before that, whenever Title three wire taps come up, we hear about kidnappings and murders. When the vast majority of title three wire taps are for narcotic investigations. A lot of Patriot Act authorities never see any warrants were pushed through on the rational of necessary covertness to spy on. Again those were mostly used for narcotics and weapons funds. And here again we have a case where we have an authority that was sold primarily on the grounds of the inter counterterrorism authority We know it chiefly being used for other purposes. I think it's problematic for a couple of reasons. One is in terms of public legitimacy, right? There's this pattern of authorities asked for one reason being sort of shoehorned into another purpose. And you know I think when given the secrecy that surrounds these things, I think it's dangerous from a public legitimate perspective. To sort of assume that if you can construe an authority such that it allows me to do something radically different from what was conceptualized by the framers that oh, maybe from a legal perspective able to justify that. But I think that's you know from a democratic legitimate perspective not on. And also because right there are different considerations that may require different kinds of safeguards in different areas. So you know now we hear about the importance of 702 as a cybersecurity measure something that was certainly not front and center when we discussed, you know

initially the rationale for creating the FA authority and you know, it may be that there are particular agencies, involved in monitoring for cybersecurity threats. That demand more flexibility than more conventional surveillance authorities provide. But there are also bestowed risks and it seems like it would be really preferable in these cases if instead of you sort of like evolution, adapting a wing to a fin taking an existing authority and you know, pushing a program they wanna do into the of the existing authority living there. You know, and sort of go back to Congress and establish an authority tailored in a way to the specific needs of that new demand with the corresponding safeguards appropriate to the nature of that kind of collection.

- Yeah, as you know, I think could have written in those limitations in 2008. So that if it really wanted to constrain and certainly has that opportunity now I suppose or to itself acknowledge that the threat picture has changed and certainly there are plenty members of Congress who have recalled, so recognized the threat has changed. But I take your point and actually that's kind of a great segue to you Alex, because of so much of your work in the data area and cyber area. So can you comment on any and all of the above.

- Okay, thank you. And I appreciate the opportunity to be here. Is this on? Yes. It's interesting cause when I talk. I am so glad to be out of government, I gotta tell you. Being here my heart rate gone up. I feel all the stress that I used to feel 14 years at the open night. I was there when the Protect America Act place and then the FISA effect, all the reauthorizations, so. Alright. I had to get that outta my system. So I have so many different thoughts. I will say I was there when, you know, Snowden had his disclosure. So there was a huge crisis of trust in the intelligences community. We didn't know how we would get our way outta it, right? And we did, you know, if I would boil it down into simplicity, it was really first we tried to enhance transparency, tried to explain more about what the authorities were and how we were using those authorities. And then we actually put in place reforms, changes. And ultimately, you know, president Obama first announced, you know, people I think kind of forget that President Obama came out initially and from an executive branch perspective, started cutting back on some of these authorities and then supported congressional reform efforts. And that really liberated us in the intelligence community and the executive branch to have direct conversations with people in civil society about how do we have a measured and balanced set of reforms that we can deal with. I think we're at another one of those moments. And I know how hard people inside the intelligence community are working and how hard inside the government, inside the Department of Justice. They have so many different things to focus on, so many different issues to deal with. This is of course a very high priority one, but I'm hopeful that at some point there can be a direct discussion with civil society experts, folks on the hill, on how do we address the specific concerns that people have missed. So I hope we get to that and I hope we get to that soon. Because I shiver even though I'm outta government, the midnight of December, oh my God, you know like I please spare us, let's not do that. And then all these last minute bills, you know, let's extend it for 30 days. Let's extend it for 90 days. What does that mean? What does that mean for existing authorities? Where is this going?

- Like the budget, like the budget.

- I hope we don't do that. And these are complicated issues and you know, we've heard this debate play itself out so perfectly here today and what I tell my students these days, is in a democracy, the intelligence framework has to do two things equally well. It has to authorize the agencies to protect national security and it has to constrain those agencies at the same time to protect people's privacy and civil liberties and figuring out how to do both is tough. Not easy and I don't have the answers, but it's a constant process. Like, so we sometimes think, oh well we fixed this back in 2008. No we fixed it in 2015 you know, with the USA, we never fixed it, right? It's always going to be changing and evolving and it's equilibrium point will be different. And that's okay, that's fine. That is as to be expected. So on your threat issue and just talk about the threat thing specifically I will say, you know having been there, if I understand that in terms of how it gets portrayed, it certainly seems like, oh they're just raising terrorism 'cause they think that the authorities, I'm not saying that's wrong either, but that is a way to get people's attention. But from the inside, the intelligence community was actually focused on counterterrorism. That was the huge overriding threat. And these days the threat picture has gotten so much more complicated. It was always complicated but you know, we had this pressing need to respond to the terrorist threat to prevent another one from it happening. And now the world is continued to evolve. If you look at the worldwide threat report, terrorism is, not only is it not top on the list, it is a subset of treason. It doesn't even have its own category anymore. It's a subcategory, you know and that's been, you start seeing that trend years back. We start following the worldwide threat report. I'll stop there.

- Okay. So I wanna switch gears into sort of some of the proposals that are out there and just take a minute to just run through some of the things. There was a coalition letter from 14 civil society organizations and I think the heading of that letter will give you a little bit of a taste of the tone of it. It was called, "702, A Foreign Intelligence Law Turned Domestic Spying Tool." So obviously, and Les is as well, I think maybe you even came up with that title, I don't know. But some of the reforms in there, and I'm not gonna go into great detail cause we just don't have time, are, wow you'll be surprised to hear this one. Require a warrant for US person queries. Strengthen provisions and provide access to more information for the amicus. Established legislative protections. And this was also discussed for any 12333 surveillance that contacts Americans, including limits on bulk collection, warrant requirements for US persons, searches of 12333 data, et cetera. And oversight, I should think that required judicial oversight. And then codifying limits on the scope of surveillance of foreigners abroad who pose no threat. There's also been proposals that you may have read about some that were put forth by Adam Klein, the former chair of the Privacy and Civil Liberties oversight board. And he takes a somewhat of a different approach. He does talk about adding to FISA a definition, and this was also somewhat referred to earlier, and it seems like actually some of this might be already embedded in FBI's internal reforms, but in designation in the statute of sort of a sensitive investigative matter or a highly sensitive matter that would then be subject to higher level of scrutiny. He also talks about expansion of the amethyst provisions to require, you know, a appointment of an amicus in situations where it's not a shall a point now. Where it's more optional. He talks about requiring executive branch to match any remedies that are available to non-citizens with the same remedy available to citizens. And also reforming the renewal process among other things. So where I wanna start, although hopefully we can talk about a number of these, but I just really wanna start on the one that you know, has been getting the most attention,

which is how to address the number of US person inquiries and also the compliance issues with respect to US person inquiries, especially with respect to the F2 requirement, in limited circumstances where the inquiry is made solely for criminal investigative purposes not related to national security. That's where a warrant currently is supposed to be required. And we learned at the earlier panel that no such warrants had been obtained. Now we heard from Mike some of the reasons for that at least with respect to sort of the hundred as a big number. And so I guess I'm wondering, And I guess I'll start with you Alex, just sort of what do you should be on the table there and are you buying into the government's response that, you know a warrant for every single US person inquiry not only is not legally required by the Fourth Amendment, but also would be utterly impractical.

- So I agree that the impracticality stuff is gonna be a huge problem if they have the same volume as per . I guess what I would prefer to do is not focus on the fourth amendment issue, which sounds crazy, right? But I think reasonable people disagree. People will continue to argue about that. It kind of triggers certain responses from everybody who argues about it. And I don't know that we're gonna reach a resolution by the time reauthorization has to happen. Obviously if it's a fourth amendment then you need warrant if it's not a fourth amendment as you know. So then the question is, I'm not, I don't wanna get drawn into that discussion.

- We could talk about Keith and question whether it's even obvious you need a warrant. But anyway, fourth amendments unreasonable reason. That's for another reason.

- Another reason why I want to avoid the conversation, other people are free to have it. Yes, I know. So I think if you look at. What I would, one way to think about this authority, is to what I think of as value tested, right? Which is the part of the authority that's most important and why? And which of the part of the authority is not as important and why not? And just practically in terms of getting change, you are much more likely to get change if you focus on part of the authority that doesn't seem to be used that much, you know then you're just keeping it there in case it might get used, which is you know a reason that can have validity to it. So the evidence of a crime queries, we talked about, well there were, I think in the transparency report there were 12 or so, these are evidence of a crime that are unrelated to, that are not a national security crime, this is some other crimes. So for that's at one end of the spectrum doesn't seem to be that value. Well it raises I think the most significant issues. Like why are you using the support to do this part of it? It won't get a lot of bang for the buck for people who want, you know, broader reform. But let's think about that. And then I also heard a lot about victim querying for victims. That seems to me to be, I don't know that people would seriously argue that has to be, you know aspecific kind of search warrant thing. Maybe not, I don't know. But that one seems to be, well yeah, I think they should be, I think people should be able to query to see who the victim was in order to provide some kind of notification to the victim and to take other action to protect Americans. And then you have in the middle you have the sort of the national security kinds of queries. And there, you know I would urge us to take a strong look how valuable they are, how well has the case been made and what else can we do to shore up the protections there. And in terms of protections, the way I think of it is it's really four levels, right? What is the rule? What is the compliance mechanism for the rule? What is the



oversight over the compliance mechanism for the rule? And then what is the transparency around all of that? And I think for US person for you can look at each one of them. Is the rule, the right rule that we put, put it in the right place. We've obviously had compliance problems. Well let's you know, can we codify some of the measures that have been taken? And we do things that will make sure that whatever we have greater confidence that the compliance is gonna work. Did we invest in the compliance mechanisms? Have we given the agency money that's specifically focused on making sure that their compliance mechanisms are robust? What about reporting? Is the privacy and civil liberties oversight board, is the Fisk, is Congress, do they have enough insight into what's happening at a granular level to carry out oversight? So I would look at each one of those levels and then is there something that we can be more transparent about on a regular basis? We found these incidents, let's have a report. I know that people kind of dismiss reports, but I'll tell you inside being intelligence's community, if you're working on compliance, those reports are a great mechanism to drive compliance behavior. Because if I have to write a report and that report's gonna go to Congress the report could be public, you'll get a lot more focus on making sure that the reports are telling the story of, you know, a compliant organization doing its best as opposed to a non-compliant organization having problems.

- Yeah, that's I think great insight in into way one way of looking at this and approaching what's otherwise a pretty difficult topic and still is a difficult topic even with your framing, which I think is helpful. And I guess one thing I wanna hold on now to, now that the FBI did release on Monday, its actual query guidance from 2021 and we match that up now with the dramatic 94% reduction in US person queries from 3.4 million to something like 210,000 in that period of time when these reforms took place. I guess I'm curious, and I'd ask you Julian if you think that, you know that's significant and that changes the way we should be thinking about this debate or even if it means codifying those things. It sounds like some of those things are things I'd seen in proposals for reform anyway, things that are automated things, right? Like make sure that the federated searches that you don't end up seeing that sneak peak of 702 without knowing you're gonna see 702 and making sure you comply with the requirements for 702, things like the opt-in, so some of these things seem like they've been able to be pieces of them addressed through changes in computer software and computer technology and things. But I'm curious of whether you think that's sufficient or there's more required and obviously if the fourth amendment is a different issue then you know is that sufficient? Yeah.

- Yeah, I mean I think, I mean more broadly would be there with the codify requirement that legal rules be inactive through technical access controls. I think a repeating pattern through line and lot of compliance issues we've seen stretching back with this authority and others is, you know when you look at the details of what happened. I don't want to rehash what the previous panel went through, but you know my first thought of this was you know well why weren't they better training? But why does the system permit this to happen in the first place? I mean it was in many cases it sort of feels like they've forgotten to put password on email account, they wonder why people are reading each other's email. You know, you genuinely you have cases where it is mind boggling to me that the system permitted the types and the volume of queries, you know automated access by other tools to systems that add court ordered rules about the conditions that had to be met. Before the things could be queried. And the system is not checking, you know on a kind of honor system basis access whether those things are

satisfied. And it'd be nice to have them verified on a better than honor system basis. So yeah, I think at a minimum codifying that not just with respect to these particular guidelines, but more broadly that as you know proposed statutory restrictions and restrictions opposed by the FISC you know need to be reflected not just in trainings, that seems to continuously not quite get through, but in hard controls.

- And what about the approach more generally to this issue of US person inquiries and some of the things that Alex suggested about sort of doing, sort of separating it up by the value proposition for the various pieces reasons why you might do a US person inquiry.

- Yeah, I mean again, this is you know why I think in many cases you want to bespoke authorities when something that was a system that was created for one purpose is adapted for one not contemplated by the people who structured that authority, right? So yeah, cybersecurity has a sort of much more commonly right, involves the problem of, you know people who are not themselves bad actors, but who are being used by botnets or otherwise compromised. And so there's a sort unusual situation where you need information about someone who's a victim. You're not obviously gonna show that they are themselves involved in crime. That seems like a situation that, you know needs it some set of rules. I would say in terms of the practicality, look, I don't think we should take for granted the volume of queries and then say, you know well will the system make it practical to conduct that volume of queries, right? Oh gosh, how can we possibly execute the study of people? We have to try that. What an appropriate standard is and say, look you know the right, the correct volume of queries is the volume that's consistent with the standard that we think is appropriate. I will say that, you know, I'm glad to hear there's a reduction from 3.4 million to something in the vicinity of 200,000. But so first I think everyone's sort acknowledges that 3.4 million was a high ball number by, you know maybe by a pretty significant margin. So I don't know how serious to take well is that really a 93% reduction, I don't know how many people that is. But also hey 200,000 warrantless queries of the private communications of United States persons is a massive number that is, you know a hundred times more FISA warrants that are issued every year. In order of magnitude more than a year. So, you know I don't think we should allow a kinda anchoring effect where we say, well relative to 3 million, that doesn't seem like a lot, but you know relative to every other authority by which we review the wire communications or a inheritance, it's pretty huge.

- So I'm wondering if Rita or Eric, either one of you have anything you can comment about sort of this particular issue and the potential for reform there, what you think is, you know within the art of the possible or likely if you can.

- So I think, I think to echo Alex a little bit, I mean I think balance is really key. The threats of an overpowered intelligence service and underpowered empowered intelligence are both fairly substantial. And I think FISA tries to strike that balance. As we've gone through multiple reauthorization cycles now. We've perfected and refined the balance that the law reflects. I know not to everyone's satisfaction, but a lot of these are issues that have come up during each reauthorization cycle. And so I think you need to

be careful that as we try to improve the compliance and as we try to improve protections for privacy and similarities, we're not, not inadvertently undermining efficacy of the law itself. So I think on that point, it just as on the query issue, I agree is gonna be the centerpiece issue. I would break it down into some categories. There's US person inquiries as performed by the intelligence committee. There's US person inquiries as performed by FBI. which are somewhat more controversial and most controversial I think are US person inquiries as performed by FBI solely for purposes of identifying evidence for crime. And I think it's worth looking at each of those in some ways separately, the first two US person inquiries and US person inquiries as performed by FBI, I think we've heard that the value proposition there is real. And I think if you put yourselves in the shoes of an FBI analyst who has identified a cyber threat to a US person or a US company, or another kind of threat, you can imagine why it would be useful for the FBI to wanna do a what tech essentially amounts to a keyword search. In control F in a the Microsoft document of the collection that they have. And by the way, I think as Mike mentioned in the first panel, it's not all 702, it's a less than 5% subset of 702 that searched by the FBI and my understanding is they don't even search that. So you can understand why the analyst in that position would wanna be able to quickly identify that other things they have in their holding that speak to that threat. I think, you know there's been a number of conditions over time that have basically pointed out that the value of collection is done by the IC is determined to a great degree by the tools that they have available, put connections together. And if they can't respond to the, and analyze the collection at speed and scale and then respond to the threats. It's kinda worthless to have all that information in the first place. So on the first two, I think there's real value there and I think the reasons we've heard, If you require individualized court orders whether or not the standard is probable cause cause you're not gonna be able to do lot of these queries and you're going to lose that value. And ultimately the agencies work for the American public. So you know that we can decide collectively whether we think that value proposition is worth it. But there's a reason why they didn't The third I think is really worth a close look. The current rule that you have to get an F2 court order only after you've done the query, but before you look at the content for evidence of a crime. And it only applies if it's part of an investigation and doesn't apply, it's not part to investigation. And I encourage you guys to read the ASTR like this is a really messy rule. I think that is ripe for a very hard luck. Again, I wanna reserve judgment on what we're gonna do, but that feels to me like something you should be close look at.

- Yeah, I mean, so I also think that it's too soon to really know exactly how you know things are gonna turn out on each of these, you know under the various categories that we've discussed and Alex's has discussed and were raised on the earlier panel under each of those categories, you know there are a dozen or more specific reforms that have been proposed. There's been legislation introduced and even passed in previous congresses on each of those. And so we are taking a close look at all of you know this whole range of reform proposals that are out there under each of these categories. And of course we're also trying to really get a firm understanding of what the impact would be and what the concerns are that the IC has about each of those reform proposals. So I'd say we're like right in the thick of that process right now. Where as it maybe we part ways a little bit, I don't know it's sort of what we're talking about when we say that, you know we have to be careful about impeding the efficacy or efficiency of the authorities as they stand right now. And the sort of like piggybacking on Julian's analogy here, but like sure it's a lot more efficient or maybe efficacious if you don't bother with trials. So I think we have to think about the efficacy question in a different way that is not just about the numbers of you

know how many of these searches can you do efficiently and effectively, but looking at it a bit more holistically,

- One thing we didn't just discuss as we were talking about this particular area of 702 right before reform is this notion of, although it is embedded in sort of the FBI's internal requirements now, but this notion of designating, statutorily designating sensitive investigations or sensitive matters for some sort of different treatment. And I don't know, I guess I'll just kind of open this up to anyone who's thought about that and would like to add any thoughts about whether you think that's something, I certainly think just from what has happened over the last several years that people in Congress are thinking about sensitive investigations that involve political candidates, those associated with political candidates, you know religious organizations, political organizations, et cetera. So maybe in particular Rita and Eric, but also in interested in others' views. Is that something you think that is also gonna be very much a focus of the members?

- I would put that in a category sort of like creative solutions that, you know we're taking a look at.

- So I'll just jump in and out and I think that there's a couple of broader themes that can be tied to that one issue. So one of them is that it's already present in FBI guidelines, in their dialogue, et cetera, but that doesn't mean Congress shouldn't consider codify. Or again, broadening it across the board. I think it's an excellent idea. I don't think the intelligence community wants to be involved in sensitive investigative measures, to just put it bluntly unless they have a lot of top coat right? So you don't wanna be in business and if there are reform proposals that make it clear that the intelligence community's focused on intelligence and it's not focused on political stuff, that's great and I'm all in favor of as many of those provisions as people wanna put out there. I don't think you need that many, but you do. I think it's very helpful. The other thing, the other theme is that, and I'm just gonna speak practically here, if you want to codify something, it's always helpful to start with something that the agencies are already doing because of an executive order or a guideline or whatever it might be. It's great to start there. You still might get agencies saying, you know, please don't codify this cause it's gonna, you're gonna mess it up in the congressional process and who knows what's gonna come out at the other end.

- You don't mess anything up

- No, I know, I'm just hearing this in the hallway so.

- Unfortunately, so.

- But I think it's a great place to start. You know the agency say they're doing it already, let's codify it and let's not just cookie cutter but look at it and then say, well this is too vague, you know, let's understand what you mean about it. Let's clarify it, let's strengthen it. But to me that's a great place.

- I mean think it's important principle part because if those rules are used as part of this public rationale for reauthorization, then they should be baked into the nature of the authority. I mean naturally, right? Architectures of surveillance are stickier than policy documents and executive words. And so I think it's dangerous to create a robust and participant architecture for monitoring and a much more mutable set of controls around it. If you're gonna use those controls as the base for assuring the public matters you should require, you know an actual legislative act to depart from them.

- I wanna break outta 702 specific reforms now 'cause we're already rapidly getting through our hour and you know, there were a lot of the things on the list I just sort of read off that were beyond 702 specifically. What do we think, and again I guess I'm gonna go and start with Rita and Eric, what do you think are the most likely on the table for sort of beyond strict 702 reform?

- Well, I mean, so as a principal matter, queries and strengthening and broadening in aren't strictly 702 issues in theory.

- I think certain.

- And I hadn't even raised them 'cause I figured that was gonna come up in this part of the discussion.

- So I mean the short answer to your question is amicus. I mean you mentioned before got a lot of support in 2020 and so I think that's something that's absolutely gonna be on the table. I'm sure there will be along the lines, Alex mentions an effort to deal with heightened protections for sensitive investigative matters. And I think each in general could line some of the things that FBI's already implemented is gonna be on the table as well.

- So Beyond 702 in for example in the title one.

- Yeah, and you know, there were a number of provisions that passed both the House and Senate in 2020. I think we could see some of those come back around, for example, additional transparency measures, accelerated timeline for ensuring that you opinions of the court that are a public they are all hopefully on the table.

- Well as one of the amicus, if there's gonna be a lot more coming, like I'm gonna have to like quit my day job I think and so will Laura. And so I think that really I'm being facetious here to say there would've to be a lot more resources put into it to expand it as well, so. Rita.

- Yeah, I mean I would have on a list all the ones that Eric just mentioned and sort of you know any ideas that you know are coming to us in those sort of broad categories of transparency, accountability, oversight, compliance. I think, you know one of the ones that came up in the earlier panel that I didn't hear on that list was trying to get at the similar impacts on American's privacy that are happening outside of the 702 context. So there was a lot in discussion the last panel about collection your EO 12333, but that has either a similar and perhaps a much greater impact on America's privacy where their communications can then be searched and reviewed under that authority. You know whether there is something created or practical that Congress can do on that front is something that, you know I think folks are looking at and certainly are bringing to us.

- I might add as a subset of that the acquisition of non-public data via data brokers, otherwise by purchase, which is largely unregulated. Something that widens whether it's not for sale act. We seek to address, I think falls within the scope of lets shift earlier, which surveillance tends to flow by the path of least resistance. So we're narrowing the aperture in one end. We know that this is something that the IC engages on a large scale and you know in many cases involves for example, fairly precise geolocation data. That's is something the Supreme Courts has held to be constitutionally protected notwithstanding sort of general presumption of the third party now. And I think we should, you know consider it perhaps that important, you know precisely the mechanism by which that kinda sensitive information was acquired. If they're saying this is information that people have, a recognizable privacy interest.

- I was only gonna throw some shade on . These are important issues and I promise you we will com back. One of the challenges when it comes to data brokers is restricting the IC's ability get that data, it kind of jumps over the questions whether privacy is better privacy legislation. If it's still available to our adversaries or just elaborating.

- Happy to do that too.

- And so I think, some of these more ambitious reforms are going to be difficult to see through. So I have no special connections to folks on the hill. I read the papers, I see what is being said at committee hearings. I don't see how this will just be focused on 702. I mean I think it's clearly gonna include Title One as well of FISA. And again, I would think as general principles there, look at rules, compliance, oversight and transparency. What are the rules in that area? Do we need to codify some of the things that FBI has been doing and reporting regularly to the court in terms of improving its situation there.

Would it be helpful to codify and clarify? The other thing I'll say is, regarding the amicus and other oversight and privacy focus institutions, I think now is the time. 'Cause I think this will affect trust and transparency across the board, including Title One and Title Three. Now is the time to look at that and say, are they adequately invested in? Do the amicus have enough staff, authorities, whatever, money to carry out their jobs effectively on a timely basis? Does the privacy and civil Liberties oversight board have enough money, staff? Maybe we should look at making members full-time. Right now it's one full-time chair, four part-time members. You can only do work when you're in the skiff. Is that what we want? I know that we would lose stuff and of course the existing part-time members are fantastic and they should be given the opportunity to go full-time. There should be transition period. But let's enhance the oversight mechanisms. You know, let's look again at the privacy civil liberties oversight board scope is a terrorism related scope. Under that scope, they've been able to look at a huge squat of activities because terrorism is of course a key part of a lot what the intelligence community does. But it would be helpful to align their scope to what the role we expect them to be playing, but also would be helpful to look at non-US person situations. And I know that FISA, to you know is explicitly focused on US persons, but it also has protections for non-US persons as the US government has repeatedly, assured our European partners FISA also protects other information, not just US persons. Now is a good opportunity to think about how to make that more explicit in the legislation. So I do think, just as a general rule, I think we need to think about the oversight structure generally and invest in, you know give people the resources to do this so that you know you're not asked to do something on your own. That affects the potential authorization of a huge program. The civil liberties and privacy officers and the privacy and Civilities Oversight Board isn't trying to string together, you know with inadequate resources, critical oversight for hugely important programs. Let's invest in.

- You know, I just would make a comment on the Amicus program. One of the things that I found most valuable is in addition to there being five attorneys who are part of the Amicus panel, there are also a number of technical amicus. And you know, as an attorney who is not a technical expert, I can tell you I've found that absolutely critical. And I think the judge in matters I've dealt with also found it critical. But another area that has been of interest to me as part of that Amicus panel, you know I was a government attorney for many, many years. I'm now a litigator. I normally, in my litigation, whether it was as a prosecutor or now as a civil litigator, I rarely do anything 100% on my own. I mean, I tried all my own cases, I argued all my own appeals and wrote my own briefs in the government. But I mean I would talk with my colleagues, right, about the legal issues and the arguments, how to respond to the arguments, et cetera. And there's a real kind of a siloed nature right now of the Amicus attorneys. And so, you know I certainly felt like, wow I'd really love to be able to just talk about the matter I'm assigned with another Amicus attorney. And you can do that. You have to then go to the court, you have to have the court actually do another appointment. And so that's an area, I know this is not really about reform, but like when we think about what makes for good lawyering, it's not usually one lawyer by themselves thinking of all the arguments. And so I think that kind of flexibility is something that also you know as just for me speaking for me, something that I think would make the program actually more useful, right? We all come into it with our own built in place we start from, my guess is Lars is different than mine. Shocking as that might be. So, you know I think we would all benefit from that as we're thinking through. So I think if that clocks right, we have about five minutes and I do wanna give the audience a chance to ask questions. Is there, I'm, can I start not with you? Okay, all right, right here in the middle.

- [Audience Member] Yeah I mean the question about statutory, like setting aside sensitive investigations and something that Congress qualifies. I guess my question is really like, why wouldn't a warrant capture that, right? Because like you have agencies that are self certifying as something as sensitive or Congress setting something sensitive. But that doesn't seem to be a solution to me in the way that I think Americans should have protections. Even if they're not in a religious minority group whatever it's, or not running for Congress. In fact, they need more protections since they're not as powerful. So it seems to me that like warrant just solve all of that.

- So lemme just make sure, and this is essentially an argument that creating a sensitive investigation category for heightened review is actually sort of equates. to a power imbalance. And then the people who are not political actors do not get the protections that others do, right.? Anyone wanna take that on?

- Actually, I think it's a great question. I think that the intent of that sort of reform though is to try to address the concern that we've seen amplified recently of the politicization of the Federal Government. And whether it's real or perceived it is acting in a way against the, you know that favors one political party over the other. That's the problem that's in, the warrant requirement I see as something else. And if it's not obvious by now, I would not associate myself with those who think that the Fourth Amendment requires these things. Certainly a warrant probable cause, Supreme Court hereon Fourth Amendment is reasonableness. But I think that's sort of a different privacy protective measure from the same approach.

- And I think some of these two are about specific First Amendment concerns to. Especially we're talking about religious organizations and stuff as well as the political ramifications.

- So yeah, I mean you're right. A warrant requirement is very, very protective, right? So the question is, if the warrant is not required by the Fourth Amendment, are there ways of preserving the intelligence value of the program but also enhancing the privacy safer? So for example, right now they have to document the reason for the queries and it's being reviewed. Some of them have to be reviewed and enhanced by an attorney. Should a record be made available after the fact to the FISA board so they can verify that those queries were done correctly? Should the privacy civil liberties board look at them? Should the Inspector General look at them? There's a lot of different ways that you can have protections for somebody's privacy to make sure that query was done correctly. You can also ask, is the rule too permissive? Like maybe this reasonably likely to return foreign intelligence permission for a US person query? You know, I think you could argue maybe that's too permissive. So you can look at that rule and decide, so there are things you can do short of a warrant requirement that might help address the concerns and issues.



- I would love to have another question, but I thank you, can we for get Laura a chance to say goodbye to everybody and vacate in time for the class that's coming in We're gonna have to wrap, but please thank you to our great panel.

- That was terrific. You know, I told my classes this week, actually last week. This is what is my dream conference. If I could dream up any conference and now I think you can see why to have this group of people engaging this seriously on such complex issues that impacts every single American every day and foreign non US persons as well. It's really heartening to see such a careful, thoughtful, and meaningful debate. There was a lot new today, I thought this was actually super helpful. So thank you all, all of the speakers. I'd like to thank them again for coming. and I'd like to thank the American Bar Association, particularly the standing committee on Law and National Security, is our co-sponsor for this and we've wouldn't able to do it without them. So thank you to the ADA and thank you to all of you for coming and especially thank you to our campus.