

SELECT COMMITTEE ON
INTELLIGENCE

UNITED STATES SENATE



Post-Hearing Questions for the Record for

John Dever

Upon his nomination to be

General Counsel of the Office of the Director of National Intelligence

Questions from Vice Chairman Warner

QUESTION 1: You testified that you believed the Director of National Intelligence (DNI)'s actions were legal, when she installed a "Senior Advisor" in the Intelligence Community Inspector General (IC IG)'s office without the IC IG's consent, who reports to the DNI but works in the IG's office spaces, and when she fired the IC IG's counsel. Please provide your understanding of the legal basis for these actions.

I have not advised the DNI on this matter and thus am not privy to all of the facts related to the appointment of a Senior Advisor to the IC IG's office. However, my understanding is that the Senior Advisor serves as a liaison between the DNI and the IC IG. Such a role seems consistent with the DNI's employment authorities under the National Security Act. Based on that construct, the Senior Advisor remains under DNI's authority and control, coordinates matters between ODNI and the IC IG, but is not involved in matters that require the exercise of IC IG authorities, such as investigations of fraud and misuse of government resources.

QUESTION 2: In response to a question from the Chairman, you testified that foreign spies do not enjoy any Constitutional rights while inside the United States, to include Fourth Amendment protections. However, the Federal Courts have consistently held that certain Constitutional rights apply to "all persons" inside the United States, including rights guaranteed by the Fifth and Sixth Amendments. For example, in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court held that "[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."

In addition, Titles I and III of Foreign Intelligence Surveillance Act of 1978 (FISA) are premised, in significant part, on the assumption that persons in the United States generally possess Fourth Amendment rights that protect them from unreasonable searches and seizures, regardless of nationality. Among other things, enforcing such rights ensures that government assertions that an individual is a "foreign spy" are tested by the courts.

According to the Office of the Director of National Intelligence's Annual Statistical Transparency Report, in 2024 the government obtained court orders pursuant to Titles I and III of FISA to conduct electronic surveillance or physical searches within the United States targeting an estimated 543 non-U.S. persons, to include agents of foreign powers engaged in clandestine intelligence activities in the United States.

A. Please describe the circumstances in which you believe the government

may deprive persons inside the United States of Constitutional rights that the Supreme Court or other Federal Courts have determined apply to “all persons”.

B. Under what circumstances should the government be permitted to conduct searches and seizures targeting persons in the United States without court authorization or probable cause?

Thank you for the opportunity to clarify my testimony during the hearing.

Both Title I and Title III of FISA allow the Attorney General to authorize electronic surveillance or physical searches without a court order against foreign powers, to include *property under the exclusive control or use of a foreign power*, for foreign intelligence purposes within the United States. This is contrary to the general requirement under the Fourth Amendment for a court order, in recognition that *such* property is immune from U.S. jurisdiction and therefore not subject to the Fourth Amendment protections. Similarly, in *Verdugo-Urquidez*, the Supreme Court held that individuals must have sufficient connection with the United States in order to enjoy Fourth Amendment protections. Thus, the specific rights to which an individual is entitled can be fact-specific.

Because the question referred to the individual in the hypothetical as a foreign spy, my understanding of the question was that the individual in question would have already undergone trial and have been convicted of espionage by a jury of their peers. Of course, as noted, all individuals in the United States are entitled to due process and the criminal procedure protections afforded by Fifth and Sixth Amendments. Moreover, FISA extends many Fourth Amendment protections from criminal procedure into the national security space. Individuals in the United States, including those accused of espionage, thus have both Constitutional and statutory protections.

Questions from Senator Wyden

QUESTION 3: The Intelligence Community Inspector General’s authorities for “personnel decisions concerning personnel permanently assigned to the Office of Inspector General” (50 U.S.C. §3033(j)(3)(B)) were included in S. 1494, the Intelligence Authorization Act for Fiscal Year 2010 (P.L. 111-259). The report accompanying that bill (S. Rept. 111-55) noted that the Senate Intelligence Committee added that language following passage of the Inspector General Reform

Act of 2008 (P.L. 110-409). As the Committee report stated: “In light of this recent determination by the Congress to protect and augment the authority of Inspectors General throughout the Government, the Committee has provided for conforming changes in the IG provision it is now reporting.” The Inspector General Reform Act of 2008 established that “each Office of Inspector General shall be considered to be a separate agency” and “the Inspector General who is the head of an office... shall, with respect to such office, have the functions, powers, and duties of an agency head or appointing authority under such provisions.” In light of this legislative history, do you agree that the IG’s authorities related to “personnel permanently assigned to the Office of Inspector General” apply to all OIG personnel not detailed from another agency?

The ODNI Office of General Counsel would principally rely on the statutory language in the National Security Act when advising on IC IG authorities. If confirmed, I look forward to reviewing ODNI OGC’s current interpretation of these provisions and to collaborate with IC IG counsel and this committee, as appropriate, to maximize those authorities and identify in necessary changes.

QUESTION 4: Do you agree that any interpretation of 50 U.S.C. §3033(j)(3)(B) that would grant the IG authorities related to some OIG personnel but not others (i.e., non-probationary employees but not probationary employees) is illogical and unworkable from an administrative and management perspective?

My understanding is that this interpretation relies upon ODNI Instruction 75.03 (2006-1), which establishes that all ODNI employees, including those assigned to the IC IG Office, must successfully complete a two-year trial period prior to certification as permanent career employees. Pursuant to that policy, an ODNI employee is not considered a permanent employee until the employee is certified out of the trial period. ODNI issued the instruction in 2006 pursuant to the DNI’s authorities, as codified in 50 U.S.C. §§ 3024(m) and 3036(e), which authorize the DNI to establish ODNI personnel policies.

50 U.S.C. §3033(j)(3)(B) states that the IC IG has final approval authority over “all other personnel decisions concerning personnel permanently assigned” to the IC IG Office other than security-based determinations. Thus, while the interpretation adds a level of complexity to the personnel management responsibilities of the IC IG with regards to probationary employees, it is consistent with the current statutory language that extends IC IG authorities only to permanently assigned personnel.