

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

PUBLIC MEETING

July 23, 2014

The public meeting was held at the JW Marriott
Hotel, 1331 Pennsylvania Avenue NW, Washington,
D.C. 20004, commencing at 1:05 p.m.

Reported by: Lynne Livingston

1 BOARD MEMBERS

2 David Medine, Chairman

3 Rachel Brand

4 Patricia Wald

5 James Dempsey

6 Elizabeth Collins Cook

7 Public Comments

8 Shahid Buttar, Executive Director, Bill of Rights
9 Defense Committee

10 Tom Devine, Legal Director, Government
11 Accountability Project

12 Robert S. McCaw, Government Affairs Manager,
13 Council on American-Islamic Relations (CAIR)

14 Gregory T. Nojeim, Director, Project on Freedom,
15 Security & Technology, Center for Democracy and
16 Technology (CDT)

17 Jeramie Scott, National Security Counsel,
18 Electronic Privacy Information Center (EPIC)

19 John Napier Tye, Legal Director, Avaaz, formerly
20 Section Chief for Internet Freedom in the Bureau
21 of Democracy, Human Rights and Labor, U.S.

22 Department of State

1 PROCEEDINGS

2 MR. MEDINE: Good afternoon. This is a
3 meeting of the Privacy and Civil Liberties
4 Oversight Board. It is 1:05 p.m. The date is
5 July 23, 2014. We're at the JW Marriott Hotel at
6 1331 Pennsylvania Avenue NW, Washington, D.C.

7 This meeting was announced in the
8 Federal Register on July 9th, 2014, and as
9 Chairman, I will be the presiding officer. All
10 five Board members are present and there is a
11 quorum.

12 I now call meeting to order. All in
13 favor of opening the meeting say aye.

14 (Aye)

15 MR. MEDINE: Upon receiving unanimous
16 consent to proceed, we will now proceed.

17 There are three item of business for
18 today's meeting. The first is to vote on the
19 Board's semiannual report. The second is to
20 announce the Board's short-term agenda of
21 projects, and the third is to receive public
22 input.

1 There are a number of people who
2 submitted a request to speak at this meeting with
3 regard to suggestions about the Board's midterm
4 and long-term agenda.

5 So the first order of business is the
6 Board's semiannual report. The report covers the
7 period from September 2013 through March 2014,
8 and addresses the statutory requirement that the
9 Board report no less than twice a year to the
10 President and Congress.

11 The report summarizes the Board's
12 activities during that period, including the
13 completion of it's 215 Report and the substantial
14 work it had done as of then on the 702 Report,
15 which of course was issued on July 2nd.

16 It also discusses the consultation the
17 Board has had with the Department of Homeland
18 Security on cybersecurity, their cybersecurity
19 report, and notes the increase in the Board's
20 staff, and for the development of its website.

21 There is information on the Board's
22 findings, conclusions, and recommendations

1 resulting from its oversight and advice
2 functions, as well as minority views on any
3 findings, conclusions, and recommendations of the
4 Board resulting from its oversight and advice.

5 Unless there's any comment or
6 discussion, I would move the adoption of the
7 semiannual report. All in favor of adopting the
8 report say aye.

9 (Aye)

10 MR. MEDINE: Upon receiving unanimous
11 consent to adopt the report, the report is now
12 final. Copies are available in the room and
13 copies are also available online later at the
14 Board's website, www.pclob.gov.

15 Moving on to the next agenda item is the
16 Board's short-term agenda of projects. The list
17 that I'm about to go through of projects is not
18 the only things the Board is working on. The
19 Board is also considering other matters that are
20 still in progress in terms of the Board's
21 consideration of what to proceed on.

22 And also, I'm not giving a list in order

1 of importance. It's simply a list of the
2 activities the Board plans on engaging in, in the
3 short-term now that the Board has completed its
4 215 and 702 reports.

5 The first thing I'm going to mention is
6 PPD-28. On January 17th of this year, President
7 Obama signed the Presidential Policy Directive 28
8 on Signals Intelligence, which addresses the
9 extent to which non-U.S. persons should be
10 afforded the same protections as U.S. persons
11 under U.S. surveillance laws.

12 The President encouraged our Board to
13 provide him with a report that assesses the
14 implementation of any matters contained within
15 the directive that fall within the Board's
16 mandate.

17 During the coming year, the Board will
18 be assessing the PPD-28 implementation and
19 providing a report to the President, as
20 requested.

21 Next is training. It's one thing for
22 the government to have good policies but if they

1 don't get translated into action and awareness by
2 the people on the front lines, they're not as
3 meaningful as they should be, particularly in the
4 area of privacy and civil liberties, and so
5 training is a key connection between policy and
6 implementation.

7 And so the Board has reached out to the
8 intelligence community to develop an inventory of
9 training materials and to better understand how
10 those materials are being utilized.

11 So the Board will continue to work with
12 the intelligence community to ensure that
13 training on privacy and civil liberties is
14 effective.

15 Next is cybersecurity. Cyber attacks
16 continue to pose a threat to both the private
17 sector and the government. The President's
18 Executive Order on Cybersecurity, issued on
19 February 12th of last year, called for the
20 agencies involved, including Homeland Security
21 and the Department of Justice, to conduct
22 assessments of those agencies' activities and

1 provide those assessments to the Department of
2 Homeland Security for annual report.

3 The agencies are to consider the
4 assessments and recommendations in that report in
5 implementing their privacy and civil liberties
6 protections with regard to cybersecurity.

7 The executive order calls for the
8 Department of Homeland Security's Privacy and
9 Civil Liberties offices to consult with the
10 Privacy and Civil Liberties Oversight Board
11 regarding the report, and during the coming year
12 the Board looks forward to working with the
13 Department of Homeland Security and the other
14 agencies involved in the cyber report.

15 Next is, what is privacy. As a Privacy
16 and Civil Liberties Oversight Board one of the
17 fundamental issues that we have to address is
18 what is privacy, for purposes of balancing
19 privacy and civil liberties with national
20 security.

21 In the coming months we plan on having a
22 forum in which we seek public input and dialogue

1 and discussion of what is privacy, particularly
2 in the context of national security and our
3 Board's operations.

4 And obviously we will announce that and
5 give people an opportunity to comment on it. We
6 think there will be a very productive dialogue.

7 Executive Order 12333 is next. It
8 establishes the overall framework for the conduct
9 of intelligence activities by the U.S.
10 intelligence agencies. It provides that they can
11 only collect, retain, and disseminate information
12 about U.S. persons if permitted by the agency's
13 attorney general guidelines, something that,
14 before I joined the Board, the Board had
15 identified that some of the attorney general
16 guidelines implementing 12333 were outdated, to
17 say the least, some as many as three decades old,
18 preceding text messaging, and email just getting
19 started.

20 Obviously there have been dramatic
21 technology changes, not to mention the very
22 substantial debate that's gone on over the past

1 year on surveillance issues. And so we're going
2 to continue to encourage the updating of those
3 guidelines and offer our advice as part of that
4 process of updating the AG guidelines.

5 In addition, the Board is also exploring
6 how to approach 12333 more broadly than its
7 current efforts regarding the AG guidelines and
8 we will be considering staff recommendations
9 about how to look at the operations of 12333.

10 And I believe that some of the speakers
11 later in the program, I think, will also be
12 addressing 12333 issues.

13 Next is the nationwide Suspicious
14 Activity Reporting, or SAR initiative, which
15 builds on what law enforcement agencies have been
16 doing for years, which is gathering information
17 about behaviors of people who may be associated
18 with criminal activity, and establishes a
19 standardized process whereby that information can
20 be shared among agencies to help detect and
21 prevent counterterrorism.

22 The Director of National Intelligence

1 has Information Sharing Environment. The program
2 manager has published functional standards for
3 state and local law enforcement agencies to use
4 to report suspicious activities to fusion centers
5 and to the intelligence community. So we will be
6 evaluating those functional standards' impact on
7 privacy and civil liberties.

8 Next is efficacy. As noted in our 702
9 Report, the efficacy of any particular
10 counterterrorism program is very difficult to
11 assess because the programs serve a variety of
12 functions and can be evaluated both on
13 qualitative and quantitative bases.

14 We will be working with the intelligence
15 community to see if we can develop a methodology
16 for assessing the effectiveness of programs, both
17 in terms of thwarting terrorism, and in terms of
18 whether they're appropriate uses of budget or
19 whether alternative programs would be equally or
20 more effective, particularly with respect to
21 honoring privacy and civil liberties concerns.

22 And then lastly, the 803 Reports. Eight

1 federal agencies are required, by statute, to
2 submit to the Privacy and Civil Liberties
3 Oversight Board, for review, quarterly reports on
4 the number of public or internal complaints that
5 they receive, the types of advice and response
6 that resulted, and the nature of complaints and
7 their disposition.

8 For the most part, the 803 Reports are
9 not particularly informative, as they're mostly
10 quantitative summaries of complaints that were
11 received and not a qualitative evaluation of what
12 those summaries are about, what trends there are
13 in complaints, and the nature of those
14 complaints.

15 And so the Board has been and will
16 continue to work with the affected agencies and
17 see if there is an approach where we could
18 improve the meaningfulness, the transparency of
19 the 803 Reports so there's a better understanding
20 by the public of what kinds of complaints are
21 being filed with the agencies, what their nature
22 is, and how they're being handled.

1 The Board also has authority to add to
2 the agencies that are currently 803 reporters,
3 and we will certainly consider whether any agency
4 should be added to the 803 process, particularly
5 if it could be made more meaningful as we move
6 forward.

7 So I'm ready to move forward with the
8 speakers unless any Board members have any
9 additional comments.

10 Again, we have invited public comment
11 and six speakers submitted requests to appear.

12 Is Shahid Buttar here? Thank you.
13 Please have a seat. If you could identify
14 yourself, and for the benefit of the court
15 reporter speak more slowly than I've been
16 speaking so far.

17 MR. BUTTAR: Happy to. My name's Shahid
18 Buttar. I lead the Bill of Rights Defense
19 Committee.

20 There are a few issues here I just want
21 to expand the context, and I appreciate your
22 expression of the various fronts on which the

1 Board is investigating intelligence and
2 surveillance practices and the various threats
3 they pose to privacy. I want to expand the
4 context in a few different dimensions.

5 So the first, just to note, you at one
6 point referenced the debate that's taken place
7 over the last year, in the wake of the Snowden
8 revelations in particular.

9 Even before it, over the past decades
10 hundreds of American cities and eight states have
11 formally repudiated the very same PATRIOT Act
12 repudiated by its authors in the House and the
13 Senate since the Snowden revelations. So there
14 is a consensus that is long established that
15 these powers are un-American.

16 I just want to put that on the table to
17 frame the rest, both of my remarks, and to the
18 extent it informs your evaluation of these
19 programs, I think it's an important history not
20 to lose sight of in the conduct of your own
21 mission.

22 And in that context, the debate that has

1 happened in the last year has been both long
2 overdue and also very stilted, in the sense that
3 your mission is to investigate an iceberg, the
4 extent of which remains unknown to everyone
5 outside the agencies. Congress has no idea how
6 vast the iceberg is, you don't have any idea how
7 vast the iceberg is, the press certainly doesn't
8 have any idea how vast the iceberg is.

9 So there's a debate prompted by
10 pinpricks in a blanket of secrecy that persists.
11 And that's the context in which you're operating.

12 And so I would encourage you not to
13 rely, for instance, on the isolated voices of
14 whistleblowers to give you the very limited
15 instances of transparency that you do have behind
16 an institutional veil of secrecy that, to this
17 point, and for the first ten years of its
18 operation, hid the dragnet from the people who
19 enabled it in Congress even, right?

20 And even since then, think about the
21 statements of the Director of National
22 Intelligence on the record to Congress. There's

1 active obfuscation by the executive branch
2 continuing as to the basic facts of the issues
3 that you are charged to oversee. So again, just
4 to frame it there.

5 With respect to some particular issues,
6 and I think you addressed some of these, but I
7 want to add, particularly to the SAR discussion,
8 and then there were a few zones of surveillance
9 that I don't think it sounded like you were
10 considering yet, but I just want to encourage you
11 to examine.

12 So the first is the FBI's infiltration
13 and entrapment regime. Multiple reports,
14 including one by the National Coalition to
15 Protect Civil Freedoms have recently established
16 the pattern, I would daresay a modus operandi by
17 the FBI of contriving prosecutions by essentially
18 enabling, particularly terror plots that would
19 never be contemplated by the supposed
20 participants.

21 HBO has a documentary out, the Newburgh
22 Sting, about one of these particular cases in

1 upstate New York that very vividly tells the tale
2 of a particular example.

3 There's also the Fazaga litigation in
4 southern California you might look at as an
5 interesting example of institutional duplicity
6 and repeated lies, even to courts, by FBI agents
7 about the parameters of their investigations, one
8 of which included sexual blackmail by an FBI-sent
9 informant into multiple faith communities in
10 southern California, compounding offense upon
11 offense. And this has never been adequately
12 explored by Congress.

13 I could point you to a July 2010 Senate
14 Judiciary Committee hearing where the issue came
15 up in the abstract, both with respect to
16 religious profiling and political profiling. And
17 I'd give you as Exhibit A here would be the
18 Occupy movement.

19 There's current litigation and a FOIA
20 suit over the FBI and the Houston police
21 department's possession of an alleged document
22 that authorizes the assassination of nonviolent

1 political activists.

2 And I need not remind you of the fracas
3 when Senator Paul resisted the CIA Director's
4 nomination over precisely that issue, the
5 assassination of Americans without trial. And
6 that's something that you should absolutely be
7 examining, I think, and factoring into your
8 assessment of the landscape of these issues
9 beyond the individual trees in that forest.

10 In the vein of infiltration, beyond the
11 FBI there's a very recent case in the Ninth
12 Circuit that you should examine, the Tawery case
13 involving the Pentagon infiltrating nonviolent
14 peace groups. And it's also doubly offensive
15 because it interlaces with the SAR network.

16 The individual, a civilian Defense
17 Department employee who infiltrated a series of
18 peace groups, was himself an intelligence analyst
19 working in a fusion center as a military
20 representative.

21 And it demonstrates not only the
22 susceptibility of the infrastructure to being

1 undermined from within, but also the inability of
2 courts to exercise effective checks in this
3 arena, especially to address prior restraints.

4 You mentioned suspicious activity
5 reports and the extent to which they've been used
6 potentially as a tool to track political
7 affiliation. There are also further problems
8 with respect particularly to racial and religious
9 profiling that, to my knowledge at least, have
10 never been addressed.

11 And we've seen historical examples of
12 this dating back to 2008, 2009, involving some of
13 the very same actors that the NSA was recently
14 revealed to have been monitoring in the most
15 recent Snowden leaks and up to the present.

16 One particular veil of secrecy I
17 referenced before is important to recognize here
18 because the investigations of fusion centers to
19 this point, there have been none that are
20 independent.

21 The only time that Congress has
22 particularly spoken about this, it was a

1 bipartisan report out of the Senate that Senator
2 Coburn particularly authored that was very
3 sharply critical of the fusion center network for
4 its abject lack of transparency.

5 As far as I know, no one has even been
6 able to quantify the amount of money that they
7 cost, and that is, I dare say, egregious,
8 notwithstanding the civil liberties implications.

9 There is not at all, widely appreciated,
10 an implication of immigration enforcement for the
11 biometric privacy of U.S. citizens. The next
12 generation initiative that the FBI aspires
13 towards building on the back of immigration
14 enforcement, particularly the secure communities
15 initiative, is terrifying quite frankly, and
16 particularly because the immigration debate is
17 frothing at the moment on other dimensions.

18 This body's examination of its
19 implications for U.S. citizen privacy could add a
20 great deal to the discussion. And I'm happy to
21 point you to more information here.

22 One liner, even the U.S. Postal Service

1 is spying on Americans en mass. And I haven't
2 heard that come up yet, but pervasive tracking of
3 metadata extends into snail mail as well.

4 And just to tie those things together,
5 as you evaluate the state of privacy and civil
6 liberties in the United States and how to protect
7 it, it's worth noting that there is a confluence
8 between a high tech panopticon of the sort that
9 the NSA is exercising through the phone and the
10 Internet dragnets and a low tech Stasi-like sort
11 of surveillance that the FBI and local police
12 departments are implementing through the SAR
13 program and the infiltration regime.

14 And that is a very dangerous
15 combination, the likes of which has never been
16 seen in human history, and we are flirting with a
17 very dangerous set of implications there.

18 The last thing I want to offer is a
19 strategy to establish this Board's independence
20 going forward. Your first report on telephony
21 metadata demonstrated a very relieving degree of
22 independence, particularly the legal analysis and

1 the finding of the illegality of the Section 215
2 interpretation that multiple senators had alluded
3 to before.

4 Your second report on 702 was profoundly
5 disappointing. I dare say it bordered on
6 sycophancy. The acceptance of facts from
7 agencies that have already been caught lying to
8 Congress on the public record, and the extent of
9 your investigation, especially when there are
10 whistleblowers out there -- so let's just start
11 there.

12 The easiest thing you might do is give a
13 microphone to and hear from the many NSA
14 whistleblowers who have tried to brief Congress
15 on multiple occasions. Snowden, obviously would
16 be hard. Thomas Drake lives down the street,
17 right? William Binney, Mark Klein, bring in
18 James Bamford. There are many people who could
19 give you a great deal of insight into the agency,
20 from whom, as far as I know, you have not heard.
21 That would be a very low hanging fruit, you might
22 say, in the efforts to establish the institution.

1 There's a further opportunity here
2 beyond the whistleblowers to engage the
3 whistleblowers from other agencies. I'm thinking
4 the only one in particular comes to mind off the
5 top of my head is John Kiriakou, who doesn't
6 quite fit because he blew a whistle on torture at
7 the CIA, which is not necessarily within your
8 ambit, as far as I know. If it is, I would
9 encourage you to talk to him.

10 But think about, for instance, the
11 survivors of institutional assaults, and I have
12 in mind, for instance, there is in many families
13 in the HBO documentary about the Newburgh sting,
14 who have suffered with their loved ones basically
15 being bribed into plots that the FBI initiated.
16 It would be very compelling for this Board to
17 examine them.

18 And these are people from communities
19 that you might not often think of as implicated
20 by these issues, right, low income, black
21 neighborhoods in bedroom communities in New York,
22 for instance, among others.

1 There's a very compelling mother of a
2 young, mentally challenged young man who was
3 basically brainwashed by an NYPD agent into
4 saying something stupid that landed him in
5 counterterrorism.

6 These are the examples, other pinpricks
7 in the veil of secrecy that you might actively
8 avail yourself of.

9 And the last thing I would just say is
10 not to take the agency's word for what they say
11 and to do what you can to be independent. Thank
12 you.

13 MR. MEDINE: Thank you for your comments
14 and for keeping right on time, which is ten
15 minutes. So we appreciate that.

16 Tom Devine? And again, if you could
17 identify yourself and your affiliation.

18 MR. DEVINE: Pardon?

19 MR. MEDINE: Identify yourself and who
20 you're with, who you're appearing upon or if
21 you're by yourself.

22 MR. DEVINE: Oh, yes, I work at the

1 Government Accountability Project. We're a
2 whistleblower support NGO, nonprofit,
3 nonpartisan.

4 We've led the campaign, been a leader in
5 campaigns to pass or defend nearly all the
6 federal whistleblower laws since 1978. And my
7 presentation complements Shahid's remarks.

8 I asked to speak to the Board for the
9 purpose of advocacy to seek protection for
10 whistleblowers and other witnesses who
11 communicate with the Board.

12 This is not an unprecedented type of
13 move for organizations such as your own. It's
14 based on rights to communicate with Congress
15 safely that have been in place since 1912. It's
16 been on other independent boards and agencies.

17 In my own experience, the Commission on
18 Research Integrity that I participated in had a
19 rule to protect our witnesses against
20 retaliation. It doesn't require statutory
21 authorization.

22 For example, the EPA has, through

1 regulations, whistleblower protection for those
2 who have to enforce its pesticide program in the
3 absence of a statutory mandate.

4 But nearly all whistleblower laws since
5 2002 covering the private sector have had these
6 protections.

7 And Congress just enacted them for
8 federal workers in the Intelligence Authorization
9 Act. But that act only protects them for
10 disclosures within specified internal channels or
11 to the select committees on intelligence. It
12 would not give them rights to provide information
13 to the Board.

14 Probably the first thing to do, besides
15 sharing that this isn't a unique precedent, is to
16 share the justification based on the
17 whistleblower's role in exposing the issues that
18 are the Board's mission.

19 I think our first significant
20 disclosures of questionable domestic surveillance
21 came from a corporate whistleblower, Matt Klein
22 from AT&T, who exposed a channel to the NSA.

1 A second whistleblower, Babak Pasdar,
2 exposed a Quantico connection where everything on
3 Verizon's system was being forwarded to Quantico,
4 Virginia.

5 A third whistleblower, Thomas Tamm from
6 the Justice Department, exposed the NSA's
7 domestic surveillance program, Operation Stellar
8 Wind.

9 Three whistleblowers from the National
10 Security Agency, Thomas Drake, Kirk Wiebe, and
11 Bill Binney, exposed the full scope of unfiltered
12 surveillance in trying to analyze the data and
13 their frustration at attempts to restrict the
14 screening so that it would only be for lawfully
15 entitled information. They completely hit the
16 wall in favor of NSA's system to analyze
17 everything that came in.

18 And then of course Mr. Snowden's
19 disclosures have sort of taken it beyond the he
20 said, she said debate of the prior dialogue to
21 eliminate the uncertainty that this practice
22 exists.

1 We would still be flying blind without
2 whistleblowers, and we need them if we're not
3 going to crash into mountains as we continue our
4 journey to deal with this issue. And there's a
5 real justification based on need for them to have
6 some dedicated rights to communicate with the
7 Board.

8 Currently their rights are limited to,
9 if they exist at all, they're limited to the
10 inspectors general and the select committees on
11 intelligence in Congress. These have not been
12 effective outlets to have a monopoly on
13 disclosures. The IGs have not been responsible,
14 and in fact, have abused their authority to
15 initiate retaliation against the whistleblowers
16 who tried to work within that channel.

17 In the NSA case, although the three or
18 four whistleblowers, plus a congressional staffer
19 who participated in the NSA and Department of
20 Defense investigations of domestic surveillance,
21 worked through channels, worked through the IG
22 system, donated literally hundreds of hours of

1 time to work responsibly through proper channels,
2 they were then referred to the Department of
3 Justice as suspects for Mr. Tamm's leak.

4 All of them enjoyed simultaneous FBI
5 raids of 10 to 20 people at daybreak where their
6 homes were ransacked, their property was widely
7 confiscated and still hasn't been returned.
8 Their families were terrorized.

9 One, Bill Binney, he said good morning
10 to a pistol pointed at his head in the shower by
11 an FBI agent. This was trying to work through
12 the IG system.

13 It's not surprising that Mr. Snowden
14 said I'd rather leak than try that approach. It
15 wasn't a trustworthy approach.

16 The policy perspective of the select
17 intelligence committees in their efforts to, on
18 the House side, eliminate whistleblower rights,
19 or on the Senate side to maximize agency
20 discretion for surveillance, have left them as a
21 remote prospect for whistleblowers to
22 sufficiently trust to open up and communicate

1 with.

2 That means that the Board has a unique
3 opportunity to establish an independent, legally
4 safe channel to get this evidence to where it's
5 needed, both in terms of establishing rights and
6 in terms of enforcement.

7 While you don't have statutory authority
8 to punish people, you can engage in disclosures
9 of retaliation against your witnesses to all the
10 relevant congressional committees, call for
11 briefings by the agencies that are responsible,
12 and pursue oversight of this issue. There can be
13 referrals to the Office of Special Counsel or to
14 the Office of the Director of National
15 Intelligence, OIG, which has a whistleblower
16 ombudsman to deal with the associated
17 retaliation.

18 And they'd have a much better chance if
19 it were a referral from the Board rather than
20 just knocking on the door and asking for help.

21 There also could be voluntarily systems
22 to set up arbitration to deal with associated

1 disputes or questions about what could be
2 disclosed.

3 While you don't have statutory teeth,
4 there's a lot that this Board can do to protect
5 its witnesses and enhance the free flow of
6 information for your oversight. Thanks for
7 hearing me out.

8 MR. MEDINE: Thank you, Mr. Devine, for
9 your comments.

10 Robert McCaw?

11 MR. DEMPSEY: I just have a question.
12 So really it's to both witnesses and all the
13 witnesses.

14 Tom, you gave us a lot there. It would
15 be very helpful to get this in writing.

16 Shahid, please as well, because you
17 threw a lot of cases and so on at us.

18 It seemed to me that you had there the
19 outlines of what would be a whistleblower, maybe
20 you'd call it protection, but at least a
21 whistleblower response process for the Board.

22 MR. DEVINE: Yes.

1 MR. DEMPSEY: So if you could write that
2 up as what would be your view of what would be
3 sort of the ideal that the Board could do, as you
4 say, within our existing authority without
5 statutory change, what should it say, that would
6 be very helpful for us.

7 MR. DEVINE: I'd be very pleased to
8 write it up and more pleased to follow through
9 working with you and your staff.

10 MR. MEDINE: Let me just add to
11 Mr. Dempsey's comment. There is already
12 statutory whistleblower protection for those who
13 come to the Privacy and Civil Liberties Oversight
14 Board, and so I'd appreciate any thoughts as to
15 whether you believe that statutory protection is
16 adequate or more protection is needed for
17 whistleblowers.

18 And then again, sort of more broadly,
19 the record for comments and suggestions about the
20 Board's agenda will stay open until the end of
21 August, I believe. And so for those who didn't
22 submit requests to appear, we'd be very happy and

1 look forward to receiving any written comments,
2 both of those who appeared and those who did not
3 have the opportunity to appear today.

4 MR. DEVINE: Thank you. And my analysis
5 will be primarily directed towards enforcement.

6 MR. MEDINE: Do you have a question?
7 Okay, thank you very much.

8 Mr. McCaw, and if you could identify
9 yourself and your organization.

10 MR. MCCAWE: Thank you and good
11 afternoon. My name is Robert McCaw. I am the
12 Government Affairs Department Manager for the
13 Council on American-Islamic Relations, the
14 nation's largest Muslim civil liberties and
15 advocacy organization.

16 CAIR appreciates this opportunity to
17 address PCLOB and provide its views and
18 recommendations on what civil liberties issues
19 with national security implications the Board
20 should address in its midterm and short-term
21 agenda.

22 A number of the recommendations I make

1 here today reflect the civil liberty concerns of
2 post-9/11 affected minority communities, Arabs,
3 South Asians, Sikhs, and Muslim-Americans.

4 I'm also happy or pleased to hear that
5 the Board is going to take on suspicious activity
6 reports, SARs, and also civil liberty
7 implications of trainings for law enforcement and
8 national security agencies.

9 So concerning watchlist issues, CAIR
10 recommends PCLOB review DHS and DOJ redress
11 policies and procedures regarding racial and
12 religious profiling and questions at points of
13 entry along the U.S. border by CBP, and U.S.
14 airports by TSA, including inappropriate FBI
15 placement of U.S. citizens on traveler's
16 watchlists, including the no-fly list and the
17 list for secondary security screening selection,
18 SSSS.

19 CAIR also asks the Board to review
20 numerous reports of the FBI placing American
21 citizens on the no-fly list while they're
22 traveling abroad.

1 This is a form of extrajudicial exile,
2 often for the purpose of coercing these citizens
3 into submitting to interviews with FBI agents or
4 foreign law enforcement officers while being
5 denied legal counsel.

6 Just to note, at the time these
7 individuals are also pressured as a means of
8 returning home to become spies on their own
9 religious communities, or informants, if you
10 would.

11 In June a federal district court judge
12 in Oregon ruled that the no-fly list was
13 unconstitutional in that it violated the due
14 process, the procedural due process rights of
15 those watchlisted by providing no meaningful way
16 to contest their designation.

17 CAIR strongly recommends PCLOB review
18 these interconnected federal watchlisting issues
19 to provide recommendations to the administration,
20 Congress, DOJ, and DHS on how to adequately
21 develop watchlist redress procedures which
22 satisfy federal court concerns over potential

1 procedural violations of citizens' due process
2 rights.

3 Specifically CAIR believes that the
4 federal watchlist system needs to be repaired to
5 ensure that people on the no-fly list and other
6 watchlists are provided notice of the fact that
7 they are on a list, a statement of reasons in
8 sufficient and specific detail to meaningfully
9 challenge their inclusion, and a hearing before a
10 neutral fact-finder at which they can contest the
11 government's evidence against them and present
12 their own.

13 In the event of adverse decision, these
14 watchlisted people should be entitled to a
15 federal judicial review.

16 Also, the ability to confirm an
17 individual's designation on such watchlists
18 subsequent to a person's filing for a redress
19 through DHS TRIP or experiencing a
20 watchlist-based deprivation, and allow
21 individuals to challenge the terrorist screening
22 center's listing in federal district court

1 directly, and access and review any claims or
2 evidence used in their designation.

3 Concerning profiling guidelines, CAIR
4 recommends that PCLOB review guidelines on the
5 use of race in federal law enforcement and by
6 federal law enforcement and national security
7 agencies.

8 DOJ and DHS guidelines are supposed to
9 prohibit profiling but they've been
10 inappropriately used to target Muslims in
11 counterterrorism investigations and Latinos for
12 immigration investigations.

13 CAIR believes that the DOJ and DHS
14 should revise existing guidelines banning the use
15 of racial profiling to include nationality and
16 religion as protected characteristics, as well as
17 eliminate any loopholes that permit profiling at
18 U.S. borders or for reasons of national security.

19 Such a Board review should also target
20 the Attorney General guidelines for domestic FBI
21 operations, the AGG and FBI's domestic
22 investigations and operation guideline, DIOG,

1 which permit the FBI to engage in racial and
2 ethnic profiling in certain contexts to initiate
3 investigations and to use intrusive investigative
4 techniques, absent of any suspicion or
5 wrongdoing.

6 A Board review should also be completed
7 on how these guidelines in DIOG impact law
8 enforcement practices in Muslim communities and
9 others, and could help the Attorney General to
10 better understand the harmful effects of these
11 policies.

12 Concerning the FBI and NSA spying on
13 Muslim leaders, this past month CAIR joined a
14 broad coalition of 45 organizations led by the
15 ACLU in insisting that President Obama provide a
16 full public accounting of surveillance practices
17 of American Muslim leaders.

18 According to new revelations by Glenn
19 Greenwald and Murtaza Hussain, CAIR's own
20 National Executive Director was among those U.S.
21 Muslim leaders reported to be targeted by the FBI
22 and NSA surveillance under FISA.

1 Also among those leaders spied on was
2 Faisal Gill, an American citizen, U.S. Navy
3 veteran, and former Bush Administration DHS
4 official. Of particular concern, Mr. Gill's
5 nationality was marked unknown on a leaked FISA
6 recapped document.

7 Addressing FBI and NSA targeting of
8 American Muslim leaders, CAIR stated it was an
9 outrageous continuation of civil rights era
10 surveillance of minority community leadership by
11 government elements who see threats in all
12 patriotic dissent.

13 CAIR strongly recommends that PCLOB
14 reviews these allegations to ensure that the
15 government surveillance works within the bounds
16 of law and Constitution.

17 Concerning the blanketed surveillance
18 and entrapment of Muslims, also addressed by
19 Shahid, CAIR fully supports law enforcement
20 counterterrorism training investigations that are
21 based on credible information, carried out to
22 prevent criminal acts of violence and halt

1 material support to would-be terrorists. CAIR
2 believes that responsible enforcement of
3 counterterrorism programs is what truly keeps
4 America safe.

5 Since September 11th, the FBI has made
6 preventing the next act of terrorism its biggest
7 priority. Out of its 8.2 billion a year budget,
8 3.3 billion is spent on counterterrorism
9 operations.

10 During the last decade the FBI has built
11 a network of 15,000 registered community
12 informants, many who are paid to infiltrate
13 American Muslim communities.

14 CAIR acknowledges the value of the FBI
15 -- acknowledges the value of FBI sting operations
16 in persecuting individuals who would attempt to
17 do our country harm. However, in recent years a
18 number of troubling details have emerged about
19 some informant-led plots.

20 According to Mother Jones Magazine, all
21 but three of the last decade's high profile
22 terror plots were informant driven FBI stings

1 that targeted suspects which had no actual ties
2 to overseas terrorist groups like Al-Qaeda.

3 Recent details about some of these cases
4 have CAIR and many other Muslim community
5 leaders, civil rights groups, and media
6 questioning whether most of these FBI stings were
7 geared towards preventing operational terrorists
8 or where were actually cases of financially
9 motivated informants going to great lengths over
10 long periods of time to radicalize, enable
11 unlikely, and at times mentally ill, individuals
12 to commit acts of scripted terrorism.

13 CAIR recommends PCLOB to investigate
14 civil rights groups and media allegations that
15 the FBI has engaged in unlawful or questionable
16 practices of entrapment in the American Muslim
17 community, as well as other religious
18 communities, politically left and right leaning
19 movements as well.

20 I would refer you to Human Rights
21 Watch's recent report, Illusion of Justice, as
22 well as the HBO documentary on the Newburgh four

1 which was recently released.

2 Concerning bias training by federal law
3 enforcement agents, recent headlines were also
4 made by the NSA's blatant use of -- NSA's
5 blatantly prejudiced use of the Mohammed Raghead
6 as a placeholder in an agency document describing
7 how to properly format surveillance
8 justification.

9 However, this came as no surprise in
10 light of Wired's 2011 reporting that the FBI and
11 Department of Defense were also using anti-Arab,
12 anti-Muslim training materials.

13 While most of these materials have since
14 been purged, the effects of such training still
15 linger and CAIR recommends the Board complete a
16 review of DOJ and DHS national security and
17 counterterrorism training programs and materials,
18 like you said earlier you would be doing, used to
19 educate agents and officers on minority
20 communities' cultural beliefs, practices, and in
21 addition to trainings on upholding civil rights
22 and liberties of American citizens and persons

1 residing in the U.S.

2 In its review, CAIR suggests PCLOB
3 consider the following reform measures,
4 standardize educational materials across all
5 departments and agencies about respective
6 minority cultures, beliefs, and practices with
7 involvement from Arab, South Asian, Sikh, and
8 Muslim organizations, and to ensure that the
9 First Amendment protected activities and
10 nonviolent civil disobedience is not improperly
11 equated with terrorism.

12 Create an ongoing system to ensure that
13 all training materials and intelligence products
14 that contain factually incorrect or biased
15 information continue to be removed from use.

16 Bar unqualified course instructors who
17 provide biased or inaccurate trainings and hold
18 these individuals accountable.

19 And call for transparency in how federal
20 national security and counterterrorism training
21 funds, grants are distributed to state and local
22 law enforcement agencies and to which trainers

1 these funds are provided to.

2 And finally, to retrain national
3 security and counterterrorism officers and agents
4 who, for the past decade, received such
5 inaccurate or biased instructions.

6 Finally, I'd just like to discuss issues
7 concerning the fusion centers. CAIR lastly
8 recommends PCLOB review the activities of state
9 and local intelligence fusion centers that
10 receive federal funding or operate under
11 voluntary DOJ or DHS guidelines to determine
12 whether they operate within the law, including
13 regulations governing the collection, retention,
14 and sharing of criminal intelligence information,
15 and whether these activities have a disparate
16 impact on minority communities, particularly
17 Arab, Middle Eastern, Muslim and South Asian
18 communities.

19 In particular, examine the fusion
20 centers' participation in federal suspicious
21 activity reporting, the SAR program, the
22 Information Sharing Environment, and the FBI

1 eGuardian program.

2 The sample of SAR released in litigation
3 or through open government requests revealed a
4 significant number that focused on perceived
5 race, ethnicity, national origin, and religion or
6 other First Amendment activities, such as
7 photography, rather than any objective facts to
8 suggest criminal or threatening behavior.

9 CAIR itself was actually included in a
10 SAR's report with a number of conspiracy theories
11 taken off the Internet about it, so there needs
12 to be better governance of these programs.

13 MR. MEDINE: Thank you very much
14 Ms. McCaw for your comments. Any questions?
15 Okay, thank you very much.

16 MR. MCCAWE: Thank you.

17 MR. DEMPSEY: Well, again, there was a
18 lot there. Training, it was on your list and
19 it's on our list, the SAR was on your list and
20 it's on our list. Would you be able to
21 prioritize from your list one or two items?

22 MR. MCCAWE: Sure. I mean I can do that.

1 We'll be entering our statement into the written
2 record tomorrow but I can correspond and
3 prioritize the two most important to CAIR.

4 MR. DEMPSEY: Okay, thank you.

5 MR. MEDINE: Thank you. Greg Nojeim.

6 MR. NOJEIM: Hi, my name is Greg Nojeim.
7 I'm with the Center for Democracy and Technology.
8 We're a 501(c)(3) organization in Washington,
9 D.C., dedicated to keeping the Internet open,
10 innovative, and free.

11 In the interests of full disclosure,
12 PCLOB member Jim Dempsey is the Vice President
13 for Policy of CDT. He did not have a hand in the
14 preparation of the statement.

15 MR. DEMPSEY: Remember, I'm no longer
16 vice president.

17 MR. NOJEIM: What's your title?

18 MR. DEMPSEY: Staff counsel, senior
19 counsel.

20 MR. NOJEIM: Staff counsel, senior
21 counsel at CDT. He didn't have a hand in the
22 preparation of these comments or in the positions

1 the CDT takes on matters before the PCLOB.

2 I have five items that I'd like to talk
3 about, but I'm only going to talk about two, then
4 I'm going to pause and invite your comments and
5 questions so we can have a discussion. If there
6 are none, I'll get to the others. So if you want
7 to keep your agenda no longer than you've already
8 made it, we could have a good discussion.

9 So I was pleased to hear that the PCLOB
10 is going to be looking at Executive Order 12333.
11 This is the order that governs the surveillance
12 and other intelligence gathering activities,
13 including human intelligence that targets
14 non-Americans outside the United States.

15 Executive Order 12333 was issued in
16 1981. It was modified in 2003, 2004, and most
17 recently in 2008 to accommodate the creation of
18 the ODNI.

19 As far as I know it hasn't been
20 significantly modified to account for changes in
21 technology or to protect privacy given those
22 changes in technology.

1 It's important as part of your review to
2 look also at the regulations that implement the
3 executive order, in particular, DOD regulation
4 5240.1-R issued in 1982. It is a public
5 document, it's available on the Internet, and it
6 interprets provision of the executive order, and
7 it governs Department of Defense surveillance
8 activities that could affect U.S. persons.

9 It's very troubling to me, and I would
10 think to other civil libertarians, that this
11 public document was secretly amended by an
12 interpretation by the Department of Justice, Ken
13 Wainstein, to permit contact chaining, or as a
14 legal matter to secretly permit compelled
15 collection by the NSA of calling records and
16 Internet transactional records of U.S. persons in
17 the U.S., even though the public regulation
18 prohibited that very conduct.

19 That's the kind of thing that we hope
20 your review will expose and we hope it will
21 prevent in the future going forward.

22 Executive Order 12333 is the basis for

1 bulk collection that sweeps in the communications
2 of many Americans, including bulk collection
3 disclosed in documents released by Edward
4 Snowden.

5 For example, the collection of records
6 of cell phone location on a mass basis, literally
7 millions of records every year, was revealed, as
8 was the direct tapping into of underseas cables
9 to obtain in bulk the backup of information
10 between servers of U.S. companies like Google and
11 Yahoo.

12 Everyone knows that the communications
13 going over those cables will include both
14 communications of U.S. persons and non-U.S.
15 persons, because that's who those companies
16 serve. Probably more non-U.S. persons than U.S.
17 persons.

18 Nonetheless, the proportion of
19 Americans' communications being picked up in that
20 surveillance is quite high. And one of the tasks
21 that I hope PCLOB takes on is whether the
22 minimization procedures that govern that bulk

1 collection are adequate to the task of protecting
2 Americans' civil liberties.

3 Your review of Executive Order 12333
4 should also include an assessment of its scope.
5 Its scope is determined by the definition of
6 foreign intelligence information that is the
7 basis for which collection under 12333 can be
8 engaged in.

9 Foreign intelligence information is
10 defined as information relevant to the activities
11 and intentions of any foreign individual or
12 organization.

13 That is not a meaningful limitation on
14 this collection and we are asking that you look
15 at that closely and assess whether it makes sense
16 to continue to have such a broad -- how many
17 minutes left? To have such a broad, permissive
18 provision in the law, in the executive order.

19 MR. MEDINE: I'll take your bite on
20 asking questions. Do you have suggestions about
21 how the definition of foreign intelligence should
22 be narrowed?

1 MR. NOJEIM: Yes. One possibility is to
2 use the definition of foreign intelligence
3 information that is in FISA. It too is quite
4 broad, but not as broad as that.

5 The FISA definition of foreign
6 intelligence includes information relevant to,
7 let's see if I can do all of this, national
8 security, foreign affairs, and then it's got
9 three rather specific elements, like terrorism,
10 and then there's two others in the front part.
11 So that's one possibility.

12 But actually what I think might be a
13 better approach would be to say that for purposes
14 of intelligence surveillance, foreign
15 intelligence is X, and for purposes of human or
16 other kinds of collection foreign intelligence is
17 Y.

18 When we had discussion about this with
19 some folks in the intelligence community they
20 pointed out that the breadth of that definition
21 is necessary because EO 12333 governs not just
22 intelligence surveillance but also human

1 intelligence. So it might be appropriate to have
2 a bifurcated definition.

3 MR. DEMPSEY: Just quickly, how does
4 that play out? Because we're targeting the
5 intentions of a foreign leader. There are two
6 possibilities, one is to listen to the
7 communications to and from the foreign leader,
8 the other is to have a human source inside the
9 foreign leader's circle.

10 Why would you have different definitions
11 of the scope of collection?

12 MR. NOJEIM: Because one type of
13 surveillance -- let me put it this way --

14 MR. DEMPSEY: Because electronic has
15 incidental?

16 MR. NOJEIM: If it's electronic, yeah.

17 MR. DEMPSEY: And the thing is that
18 electronic includes incidental unavoidably.

19 MR. NOJEIM: Yes. Yes, well, and so
20 might the informant in the room I guess.

21 But certainly the way electronic is
22 being conducted the incidental collection is

1 quite high, so to offset that, one option is to
2 limit the class of communications that can be
3 collected in the first place.

4 MS. WALD: Could I ask you a another
5 question along those lines? The FISA definition
6 of foreign intelligence information is two
7 tiered. One, which you've given a summary of,
8 then it points out that if you're dealing with
9 U.S. persons it's got a slightly higher standard,
10 although it's unclear how that actually gets
11 implemented, if at all, saying it's got to be
12 necessary to, then it's security, etcetera,
13 etcetera.

14 Would that two tiered approach be
15 workable in your opinion, or what's your view on
16 this?

17 MR. NOJEIM: I would ask that the Board
18 look into what is the difference between those
19 two, how does the government interpret related to
20 versus necessary for?

21 I really don't know enough, and I don't
22 know that there's enough in the public materials

1 to make an assessment. I would think that that
2 would be the kind of thing that it would be okay
3 to make public after looking at it really
4 closely.

5 I have to say that we have, for purposes
6 of Section 702 surveillance, advocated a narrower
7 class of foreign intelligence information to be
8 used for that kind of surveillance.

9 In particular, we said that the part of
10 the foreign intelligence definition that governs
11 FISA surveillance, the part that goes to mere
12 relevance to U.S. foreign affairs should be
13 dropped for purposes of Section 702.

14 An even better approach might be for
15 using the carefully thought-out use restrictions
16 in PPD-28 to inform the scope of permissible
17 intelligence surveillance. I thought that aspect
18 of PPD-28 was pretty good.

19 Are there more questions about 12333?

20 MS. BRAND: A quick question just to
21 make sure I understand your suggestion that the
22 definition of foreign intelligence be different

1 for different types of collection, I just want to
2 make sure I understand.

3 Because the definition of foreign
4 intelligence relates to what type of information
5 you're trying to get, not so much how you get it,
6 and if I understand what you and the colloquy
7 that you and Jim were having, you want to limit
8 the way in which collection is done in the
9 electronic surveillance context because there's a
10 higher incidence of incidental collection.

11 But the type of information you're
12 trying to get is still the same, so I'm just
13 trying to figure out how changing the definition
14 of foreign intelligence would fix the problem
15 that you're identifying, if that makes sense.

16 MR. NOJEIM: Translated into the
17 domestic context, right, we have different
18 investigative techniques, and we regard
19 wiretapping, electronic surveillance as one of
20 the most intrusive ones. For that kind of
21 technique we require probable cause, we limit the
22 class of people to whom that technique can be

1 applied.

2 I'm suggesting a similar concept for
3 foreign intelligence gathering, that if it's
4 wiretapping here, it's wiretapping there and that
5 people abroad have rights that we need to
6 respect.

7 And one of the concepts in international
8 law is that we want to try to minimize the impact
9 on people who have no foreign intelligence value
10 of the collection, so you use a more restricted
11 scope when it comes to surveillance.

12 MS. BRAND: I thought that's what you
13 were getting at, and that makes sense. I think
14 that changing the definition of foreign
15 intelligence isn't the way to accomplish that
16 necessarily but maybe we can talk more about it
17 later. It's an interesting idea.

18 MS. WALD: Do you have also have
19 specific, you talked about possibly looking into
20 the need for change in the minimization rules as
21 to some of these categories. Do you have
22 specific proposals along those lines in writing?

1 MR. NOJEIM: We will. One thing that
2 struck me though is that a lot of minimization is
3 about masking the U.S. person's identity. And
4 when you look at PPD-28 and how minimization, how
5 dissemination and retention under PPD-28, the
6 rules that govern those concepts for U.S. persons
7 are to be applied to non-U.S. persons, one has to
8 wonder whether, first, how that's going to be
9 done, and secondly, whether that's adequate.

10 One type of minimization is to throw out
11 information after a certain amount of time.

12 MS. WALD: Yes, some of us have
13 recommended that, as you're aware.

14 MR. NOJEIM: And what I would have to do
15 is look a little more deeply at how minimization
16 is being done to see whether that retention idea
17 is a valid one.

18 MR. MEDINE: Do you have a question?

19 MS. COLLINS COOK: I do have a question,
20 and this is probably a question for the next
21 speaker as well, I believe is scheduled to talk
22 about 12333 as well.

1 Given that our mandate is
2 counterterrorism, how would you suggest that we
3 navigate what could certainly be perceived to be
4 a tension between our statutory mandate, which is
5 limited to counterterrorism, and for example, a
6 review of 12333 writ large, which is obviously
7 used for many, many purposes?

8 Or for example, an emphasis or a
9 suggestion from us to change the definition of
10 foreign intelligence, as against collection for
11 foreign affairs purposes.

12 So I think, you know, we've talked a lot
13 about this and what our mandate means and what
14 the limits of our mandate might mean, but I'm
15 curious to hear whether or not you've thought
16 about the implications of our mandate for a broad
17 review of 12333.

18 MR. NOJEIM: Well, you probably already
19 crossed that rubicon in the 702 Report because
20 the 702 surveillance is for foreign intelligence
21 purposes, and terrorism is among them, but not
22 the only one. So I would suggest kind of

1 muddling along in the same vein. I mean you're
2 not going to say we can't look at 12333 --

3 MS. COLLINS COOK: I think we can do
4 better than muddling, Greg, really, can you give
5 us something? It's a serious question.

6 MR. NOJEIM: What I would suggest is
7 that the Board discuss it and come to the
8 conclusion that it cannot do its counterterrorism
9 mission unless it examines intelligence gathering
10 authorities that go beyond terrorism. It has to.

11 MR. MEDINE: Your time has expired, but
12 thank you. We hope you will submit written
13 suggestions in addition to your comments. The
14 time has expired, thank you.

15 MR. NOJEIM: Thank you.

16 MR. MEDINE: Jeramie Scott?

17 MR. SCOTT: Good afternoon. My name is
18 Jeramie Scott. I'm the National Security Counsel
19 for the Electronic Privacy Information Center.

20 EPIC is a public interest research
21 institution in Washington, D.C. that was
22 established in 1994 to focus public attention on

1 emerging privacy and civil liberty issues, as
2 well as to protect constitutional values and the
3 rule of law.

4 EPIC has particular interest in issues
5 related to national security and surveillance.
6 EPIC regularly updates and maintains multiple
7 webpages to provide valuable information to the
8 public about current and developing issues
9 involving government surveillance authority and
10 programs.

11 In addition, EPIC contributes to the
12 government's understanding of these issues
13 through amicus briefs filed in the Supreme Court
14 and other courts across the country.

15 Various branches of the government,
16 including this Board have recognized EPIC's
17 expertise in these areas through invitations to
18 testify in matters of government surveillance.

19 I would like to thank the Privacy and
20 Civil Liberties Oversight Board for convening
21 this public meeting today and also acknowledge
22 the hard work of the Board over the past several

1 months in reviewing the use of Section 215 and
2 702 of the Foreign Intelligence Surveillance Act.

3 Today though I would like to urge the
4 Board to expand its agenda beyond Section 215 and
5 702, and specifically urge the Board to shift its
6 focus to Executive Order 12333.

7 President Ronald Reagan signed Executive
8 Order 12333 in September of 1981. It established
9 broad new surveillance authorities for the
10 intelligence community outside the scope of
11 public law with little to no oversight in place.

12 In a prepared statement before the
13 Senate Judiciary Committee, former Director of
14 the NSA, General Keith Alexander, stated the NSA
15 conducts the majority of its SIGINT activities
16 solely pursuant to the authority provided by
17 Executive Order 12333.

18 Through the disclosures over the past
19 year, the American public and the rest of the
20 world have begun to realize the extent of this
21 surveillance conducted under 12333.

22 For example, under executive order

1 authority the NSA's MYSTIC and RETRO programs
2 allow for the collection of a hundred percent of
3 a foreign country's telephone calls and the
4 subsequent retrieval of those calls at a later
5 date.

6 The NSA also has tapped directly into
7 the main communication links between Google and
8 Yahoo data centers located around the world in
9 order to scoop up massive amounts of data.

10 Additionally, it has been reported that
11 NSA has collected hundreds of millions of contact
12 lists from email and instant message accounts.

13 Undoubtedly, the NSA's mass surveillance
14 conducted under 12333 captures huge amounts of
15 data unrelated to the mission of national
16 security, including information on millions of
17 Americans.

18 Although 12333 requires a court order to
19 target a United States person, this is of little
20 comfort. Given the global nature of
21 communications, the indiscriminate mass
22 surveillance the NSA conducts overseas captures

1 the information of United States persons.

2 Furthermore, the government can use and
3 share this information without any order from a
4 judge or oversight from Congress.

5 As a matter of fact, the only check on
6 surveillance under 12333 comes from executive
7 oversight. This type of self-regulation has
8 proven to be ineffective at best in limiting
9 surveillance overreach.

10 The minimal oversight in place does not
11 even give the appearance of the checks and
12 balances provided by judicial or congressional
13 oversight. Congress has admitted to very little
14 oversight of the activities under 12333.

15 Additionally, Executive Order 12333 does
16 not fall within the purview of the Foreign
17 Intelligence Surveillance Court, thus no neutral
18 arbiter reviews 12333 surveillance for compliance
19 with the Fourth Amendment.

20 As the Chief Justice recently explained,
21 the Fourth Amendment was the founding
22 generation's response to the reviled general

1 warrants and writs of assistance of the colonial
2 era, which allowed British officers to rummage
3 through homes in an unrestrained search of
4 evidence of criminal activity.

5 It is clear that the surveillance
6 programs and activities under Executive Order
7 12333 require further scrutiny and these
8 activities fall squarely within the Board's
9 jurisdiction.

10 I urge the Board to review 12333 and
11 recommend the Board oversee, one, the extent to
12 which information on United States persons is
13 captured by surveillance conducted under 12333.

14 Two, the extent to which collection
15 under 12333 results in the retention and/or
16 dissemination of non-target data.

17 Three, the effectiveness of current
18 oversight and minimization procedures.

19 Furthermore, EPIC recommends a public
20 report of the Board's findings.

21 Thank you for the opportunity to appear
22 before the Board today.

1 MR. MEDINE: Thank you, Mr. Scott. Any
2 questions? Thank you very much.

3 The final speaker today will be John
4 Tye.

5 MR. TYE: Hello, my name is John Tye. I
6 used to work at the U.S. Department of State in
7 the Bureau of Democracy, Human Rights, and Labor.
8 I worked there from 2011 through April of this
9 year.

10 Now I work at an NGO called Avaaz, which
11 is a global civic organization with over thirty-
12 seven million members around the world.

13 While I was at the Department of State
14 actually my job was to work on Internet freedom
15 policies, so both freedom of expression, freedom
16 of assembly, association, but also privacy
17 rights. And while I was there, I had a clearance
18 to receive top secret information and sensitive
19 compartmented information, TS/SCI.

20 Part of my work in that capacity was,
21 included, you know, diplomatic efforts related to
22 the scope of privacy rights included in U.S.

1 treaty obligations, so the International Covenant
2 on Civil and Political Rights, for example. And
3 there were various resolutions at the U.N.
4 General Assembly, at the U.N. Human Rights
5 Council. That's sort of how I got to learn some
6 of the things I came to talk about today.

7 And really the reason I'm here today is
8 to talk about an untold story of constitutional
9 violations under Executive Order 12333.

10 And I actually wrote about this in the
11 Washington Post. It was published on Sunday and
12 some of you may have seen that.

13 Even after all of the disclosures of the
14 past year and all of the reforms announced by the
15 President in January, the American people still
16 haven't heard about the NSA activities that are
17 most intrusive to their privacy.

18 And in my view, based partly on
19 classified facts, Americans should be far more
20 concerned with the collection and storage of
21 their communications under 12333 than under the
22 PATRIOT Act or the Foreign Intelligence

1 Surveillance Act.

2 12333 is a legal loophole that allows
3 the NSA to collect a huge amount of domestic U.S.
4 communications to Americans, from Americans, by
5 Americans just so long as those communications
6 are collected outside the borders of the United
7 States.

8 Because of the structure of the global
9 Internet, a very large portion of Americans'
10 communications are available for collection
11 outside of our borders.

12 For example, we're here in Washington,
13 D.C. and we're just a couple of blocks from the
14 White House. Let's say hypothetically I was
15 using Gmail, or Yahoo, or another big email
16 provider, and sitting right here I sent an email
17 to the President at that White House just two
18 blocks away, it's almost certain that that email
19 would be stored on servers around the world. So
20 a lot of these server networks have mirror
21 servers in countries like Brazil, Japan, South
22 Korea, the United Kingdom, all over the world.

1 So there's nothing in Executive Order
2 12333 that would prevent the NSA from collecting
3 that email from here, two blocks away, and all
4 such emails between U.S. persons in the United
5 States.

6 And the same thing is true for almost
7 every communication that Americans make, whether
8 it's an email, an instant message, a Skype
9 conversation, or even many phone calls.

10 12333 doesn't limit the volume of U.S.
11 person communications that can be collected under
12 its authority, and the Director of National
13 Intelligence has recently declassified a document
14 showing that the NSA is authorized to retain
15 Americans' communications for up to five years
16 when they're collected under 12333.

17 So in part based on classified facts
18 that obviously I couldn't discuss in this
19 setting, but that I lawfully had access to while
20 I was employed at the Department of State, I
21 filed a complaint with the Inspectors General at
22 both the Department of State and the National

1 Security Agency, and met with staffers in both
2 the House and Senate Intelligence Committees in
3 Congress.

4 One of the issues that's been noted by
5 previous speakers is there's basically no
6 meaningful oversight outside of the executive
7 branch of activities conducted under 12333.

8 In the USA FREEDOM Act, which of course
9 was passed by the House and is being debated in
10 the Senate, which some people hope will help to
11 address problematic NSA activities, would
12 actually do nothing to address this very large
13 legal loophole.

14 And so in my view, while the public
15 debate over the last year has focused largely, at
16 least with respect to U.S. person communications,
17 has focused largely on Section 215 and 702, 12333
18 is a much greater concern.

19 I hope that the President would revise
20 this executive order immediately to require the
21 NSA to purge U.S. person communications or data
22 as soon as it's incidentally collected so that it

1 can't be stored, it can't be queried.

2 That's actually the same thing, you all
3 are of course very familiar with the Review Group
4 on Intelligence and Communication Technologies.

5 In recommendation 12 of their report
6 they actually said the same thing, that
7 incidentally collected communications under 12333
8 should be immediately deleted. There's been no
9 public comment from the administration on that
10 recommendation.

11 I'd also suggest that Congress should
12 pass legislation setting minimum privacy
13 standards for U.S. persons across all of the
14 different intelligence authorities.

15 The last thing I'd like to say is, you
16 know, it's a little bit scary coming up here
17 talking in public about these issues. And you
18 know, it's true, I mean if I did say the wrong
19 thing I could go to prison, and it's a serious
20 thing, so you know, I've retained a lawyer and
21 other things just to make sure I'm following the
22 rules because I want to make sure I do that.

1 I will say, you know, for over a year
2 the President has been saying that whistleblowers
3 have legal options to raise their concerns
4 without illegally disclosing classified
5 information and I see my complaint as a chance
6 for the President to show that he means what he
7 says when he said that.

8 I haven't broken any laws. I haven't
9 disclosed classified information improperly. I
10 had my op-ed cleared by both the NSA and the
11 State Department in pre-publication review to
12 ensure that it contained no classified materials.

13 I guess the last thing before I take
14 questions would be if you all would like to meet
15 in a classified setting we could probably arrange
16 a way to do that and go into more detail.

17 Thanks.

18 (Applause)

19 MR. MEDINE: Thank you. Any questions?

20 MS. COLLINS COOK: I did have a question
21 actually, and it builds on something that we've
22 thought about, talked about and appeared in some

1 part in our 702 Report, particularly the separate
2 statements.

3 Your suggestion that all U.S. person
4 communications that are incidentally collected be
5 purged at collection, how would that work, that's
6 my question?

7 So, for example, would analysts be
8 required to review every communication, even
9 communications they wouldn't otherwise review to
10 determine whether or not these were U.S. person
11 communications and then purge them?

12 Would they have to do additional
13 investigation to determine they are U.S. person
14 communications?

15 I'm just curious as to, it is a
16 suggestion we've heard. It's something we've
17 considered. I find myself, I find it very hard
18 to get past some of these threshold questions and
19 whether it is more privacy protective, for
20 example, to require review of communications that
21 would not otherwise be reviewed in order to
22 determine whether or not they should then be

1 purged.

2 MR. TYE: It's a good question. I think
3 it depends some on the technical mechanism that
4 this is carried out with. And the truth is I
5 don't know all the details of those mechanisms.
6 I could speculate but I don't think I could give
7 you a helpful answer on that question.

8 MS. COLLINS COOK: Perhaps if you do
9 choose to do a written submission you could
10 expound a little bit on what you meant by your
11 recommendation that U.S. person communications be
12 purged at collection. I think it's a very, very
13 difficult question and I am interested in your
14 views as to how that might be implemented.

15 MR. TYE: Okay, thank you.

16 MS. WALD: If it's of any assistance to
17 you in responding to my colleague's request, you
18 might look at our separate statement in which we
19 looked at that, the Chairman and mine, the
20 specific question.

21 The usual justification for not doing
22 anything at all in reviewing was, well, somebody

1 can't tell that something that looks innocent
2 today might a year from now, or two years from
3 now somehow be part of a more intricate mosaic
4 and so therefore, you know, just forget about it.

5 I assume there could be a rule or we
6 suggested several outs on that, but there could
7 be a rule of reason. These analysts make
8 judgments all the time about what is intelligence
9 information and what is not. That's their job
10 and I'm sure that they're good at it.

11 And so the question about whether you
12 can make a reasonable decision about whether
13 something has foreign intelligence view, even if
14 you can't predict that there's a hundred percent
15 chance that in five years something might come up
16 that would make it more relevant, still you've
17 got to weigh the privacy implications against the
18 dangers that you have suggested in your op-ed
19 page in the Washington Post.

20 MS. COLLINS COOK: Could I make sure I
21 understand? Perhaps I misheard your
22 recommendation. I thought your recommendation

1 did not turn on whether or not there was foreign
2 intelligence information within the
3 communications. It was simply that to the extent
4 these are incidentally collected U.S. person
5 communications they should be purged, regardless
6 of potential value.

7 MR. TYE: Yeah.

8 MS. COLLINS COOK: That's your
9 recommendation?

10 MR. TYE: Yeah, so my recommendation is
11 the exact same one that the review group made in
12 recommendation 12.

13 MR. DEMPSEY: A quick question, you
14 filed a complaint with the State Department IG,
15 right?

16 MR. TYE: Yes, correct.

17 MR. DEMPSEY: And with NSA also.

18 MR. TYE: Well, so I first met with the
19 State Department Inspector General, then I met
20 with the two staffers from both of the
21 intelligence committees, then I left federal
22 employment and about maybe, I would have to go

1 back and look at the dates, but about a couple of
2 weeks later I was invited to meet with the NSA.

3 MR. DEMPSEY: And the complaint, was
4 that written?

5 MR. TYE: No, it was not in writing
6 because I didn't have access to a classified
7 system, computer system.

8 MR. DEMPSEY: You mean the one you did
9 when you were in government? So in other words,
10 if we asked to see a copy of the --

11 MR. TYE: There are presumably notes.

12 MR. DEMPSEY: Right, but not a paper
13 submission?

14 MR. TYE: I did not make a paper
15 submission, no.

16 MR. DEMPSEY: Okay, okay.

17 MS. BRAND: I don't have a question, but
18 I just want to make a quick comment. It seems
19 that you've taken great care in following the
20 applicable rules and procedures and laws in
21 pursuing your complaint, so without making any
22 statement about whether I agree with you, I

1 consent to adjourn, we are now adjourned. It is
2 2:20 p.m. Thank you.

3 (Whereupon, at 2:20 p.m., the meeting
4 was adjourned.)

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CERTIFICATION

I, LYNNE LIVINGSTON, A Notary Public of the State of Maryland, Baltimore County, do hereby certify that the proceedings contained herein were recorded by me stenographically; that this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any of the parties, nor in any way interested in the outcome of this action.

As witness my hand and notarial seal this _____ day of _____, 2014.

Lynne Livingston

Notary Public

My commission expires: December 10, 2014

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