



PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD
The Hon. Rachel Brand, Member

April 8, 2015

Thank you, Mr. Chairman.

I would like to thank the staff of the Board for all their hard work on this project. It can be challenging to serve a multi-member body, and I'm sure this project was no exception.

Before I express my views on the particular document before the Board, I would like to take a step back and make some comments about where this project fits within the Board's broader mission.

As the first members of this Board, we have a responsibility to establish the credibility and effectiveness of this institution. All of our individual projects, including the one before the Board today, must be undertaken with this long-term view.

To be an effective institution, we will need credibility not only with the public, but with Congress and with the intelligence agencies we are directed to oversee and advise. A lack of credibility with the Intelligence Community agencies in particular would significantly limit the likelihood that our recommendations will be adopted. This would be a shame, because we can add real value where we can convince the agencies to make concrete changes that better protect privacy and civil liberties without compromising the national security.

Our institutional credibility is even more important to our success in discharging our statutory advice function. We are an independent agency. Because we do not sit within an Intelligence Community element, observing the flow of daily business, programs on which our advice would be relevant will not come to our attention unless agencies choose to seek out our advice. They will do so only if they view us as a serious, thoughtful body committed to helping them both protect national security and preserve liberty.

We took this approach in our reports on the program under Section 702 of FISA and the bulk telephony metadata program under Section 215 of the Patriot Act. Although I disagreed with and voted against two central conclusions of the Board's report on the Section 215 program, I



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believe that the combination of these reports demonstrated two things. One was a capacity to be simultaneously focused and thorough in reviewing a particular intelligence program. The second was an ability to be independent and critical without being a reflexive antagonist of the Intelligence Community. The fact that the government has already implemented or begun to implement almost all of our recommendations demonstrates the power of well-considered, targeted recommendations to effect change.

This leads me to the matter at hand, which is the Board's review of certain collection activities conducted under Executive Order 12333.

Last July, the Board announced it would begin to look at Executive Order 12333. Because we did not qualify that statement in any way, we gave some in the public and the agencies the impression that we intended to conduct an omnibus review of everything the government does under the Executive Order. This was mistaken for at least three reasons.

First, much - perhaps most - of the activity governed by Executive Order 12333 is outside the Board's statutory jurisdiction. The Board is limited to reviewing the government's counter-terrorism activities. Executive Order 12333, however, governs not just counter-terrorism activities, but all foreign intelligence-related activities, including those that serve foreign relations, counterintelligence, counterproliferation, and traditional defense purposes.

Second, it would be impossible for the Board to review everything that happens under Executive Order 12333 because it governs literally everything the Intelligence Community does, from signals intelligence to military intelligence supporting combat operations to covert action. Executive Order 12333 is not a discrete collection program like the Section 215 and Section 702 collection programs. It is not a program at all. It does not even provide legal authority in the way that Sections 215 and 702 do. Rather, it is a foundational document that provides a construct for the Intelligence Community. Its primary provisions divide responsibilities among the intelligence agencies, dictating, for example, that NSA has the lead on signals intelligence and CIA has the lead on human intelligence. But Executive Order 12333 is not the basis for the agencies' authority to conduct signals intelligence or human intelligence. It also provides that



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agencies must protect information collected about U.S. persons and requires the Attorney General and the agencies to adopt further guidelines and rules to protect U.S. persons.

The third reason why it was a mistake to leave the impression that the Board was about to conduct one omnibus review of Executive Order 12333 is that reviewing activities governed by the Executive Order should not be just one short-term project for the Board. Because many of the counter-terrorism activities that fall within the Board's jurisdiction are governed by the Executive Order, reviewing such programs is something the Board will be doing for the long-term, while also conducting other projects. We should not be in a rush to bite it off all at once to satisfy some external demand that we "review Executive Order 12333." That would not further our goal of establishing the Board's long-term credibility.

In my view, we should begin to review 12333-governed programs, one or two at a time, while we also continue to review counter-terrorism programs conducted under FISA or programs that fall outside of Executive Order 12333 because they are conducted by non-Intelligence-Community agencies. We should do the same kind of thorough review of those programs as we did of the Section 215 and 702 programs. When our study of each program is complete, we should analyze the privacy and civil liberties implications of that particular program and make recommendations for changes to that program, if we find any to be necessary.

I am happy to note that the document before the Board today does several things with which I agree. First, it states that reviewing programs under Executive Order 12333 will be part of the Board's ongoing work and makes clear that we need not tackle all 12333-governed activity in one report. It also states that, in the short-term, we will identify two specific programs for in-depth review and report.

Importantly, it makes clear that we will not exceed our statutory limitation to the government's counter-terrorism activities.

It also makes clear that we will focus on collection programs with attributes that have civil liberties or privacy implications.



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And it acknowledges that the Board's reports on these programs are likely to be largely, if not wholly, classified due to their sensitive nature.

For these reasons, on its face, this document is fairly close to something I could support.

However, I will vote against the document because it does not foreclose some directions in which this project could go.

My primary concern is with the third report contemplated by this document, which is a more general report about Executive Order 12333 and its implementing structures. The exact nature and purpose of this third report remain unclear to me. The text of the document before the Board today leaves open the possibility that the third report might attempt to make judgments about the overall adequacy of the privacy and civil liberties protections in Executive Order 12333 and its implementing rules. I could not support that.

It simply would not be possible to analyze, for example, the adequacy of oversight mechanisms for all 12333-governed activities -- many of which fall outside our statutory jurisdiction -- after having reviewed only two programs. We could certainly analyze the adequacy of oversight mechanisms in each program we reviewed. But if we tried to extrapolate from our reviews of two programs to arrive at more general conclusions, we would risk being incomplete or simply wrong. We also would risk undermining the institutional credibility that I believe we have a duty to establish and steward. I would have liked this document to clarify that the third report will not do that. The fact that that clarification was not included in this document gives me significant pause.

I am also concerned about the document's statement that the third report will be public. Whether or not the report can be written unclassified will depend on its contents. If, as the document before the Board contemplates, the Board drew upon examples from the classified programs we reviewed, then it is not clear that this third report could be published entirely unclassified. This Board's ability to effect concrete change in particular programs will be



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diminished if we foreclose the possibility of making classified recommendations to the agencies and to the President.

I hope that my concerns will not be borne out, and that all three reports contemplated by this document will turn out to be reports that I can support. I look forward to working with my colleagues in reviewing programs governed by Executive Order 12333 and in drafting the resulting reports, and I hope that I will be able to vote to adopt those reports when the time comes.

My final point is procedural. The Board continues to lack basic internal processes. It has been extremely challenging to start a new agency from scratch with no parent entity, but the time has come to finalize procedures that will enable us to operate as a mature organization. This must be a top priority for the Board in the near term. As the Board works to adopt these important procedures, it will be essential not only that they provide a workable mechanism for arriving at a clear Board decision, but that they recognize and respect the rights and responsibilities of each Board Member as an independent, Senate-confirmed officer. Again, I look forward to working with my colleagues to that end.

Thank you.