

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD  
PUBLIC MEETING

Proposed Project Plan for  
Review of  
Executive Order 12333

April 8, 2015

The public meeting was held at 2100 K Street,  
N.W., Room 214, Washington, D.C. 20427 commencing  
at 10:03 a.m.

Reported by: Lynne Livingston

<p style="text-align: right;">2</p> <p>1                                   <b>BOARD MEMBERS</b></p> <p>2</p> <p>3       <b>David Medine, Chairman</b></p> <p>4       <b>Rachel Brand</b></p> <p>5       <b>Elisebeth Bridget Collins</b></p> <p>6       <b>James Dempsey</b></p> <p>7       <b>Patricia Wald</b></p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">4</p> <p>1       Executive Order 12333.</p> <p>2                Last July, PCLOB announced that it was</p> <p>3       going to engage in oversight of counterterrorism</p> <p>4       activities conducted under Executive Order 12333.</p> <p>5                Executive Order 12333 establishes the</p> <p>6       overall framework for the conduct of intelligence</p> <p>7       activities by U.S. intelligence agencies.</p> <p>8                The purpose of today's meeting is for</p> <p>9       the Board to consider and vote on a proposed plan</p> <p>10       of action for oversight of counterterrorism</p> <p>11       activities conducted under 12333.</p> <p>12                The Board has already received briefings</p> <p>13       from the majority of the elements of the</p> <p>14       Intelligence Community to provide an overview of</p> <p>15       their implementation of 12333, and within the</p> <p>16       next few months it will receive complete</p> <p>17       briefings with the remaining Intelligence</p> <p>18       Community elements.</p> <p>19                In addition, the Board has held follow-</p> <p>20       up briefings with some of the most significant</p> <p>21       collecting agencies, including the CIA, NSA, FBI,</p> <p>22       and Defense Intelligence Agency. These follow-up</p>
<p style="text-align: right;">3</p> <p>1                                   <b>PROCEEDINGS</b></p> <p>2                <b>CHAIRMAN MEDINE:</b> Good morning. This is</p> <p>3       a meeting of the Privacy and Civil Liberties</p> <p>4       Oversight Board. The time is 10:03 a.m., on</p> <p>5       April 8th, 2015. We are meeting at 2100 K</p> <p>6       Street, N.W., Room 214, in Washington, D.C.</p> <p>7                This meeting was announced in the</p> <p>8       Federal Register on March 27th, 2015. As</p> <p>9       Chairman, I called this meeting and will be the</p> <p>10       presiding officer.</p> <p>11                All five Board members are present and</p> <p>12       there is a quorum. The Board members are Rachel</p> <p>13       Brand, Elisebeth Collins, James Dempsey and</p> <p>14       Patricia Wald.</p> <p>15                I'd now call the hearing to order. All</p> <p>16       in favor of opening the meeting, please say aye.</p> <p>17                (Vote Taken)</p> <p>18                <b>CHAIRMAN MEDINE:</b> Upon receiving</p> <p>19       unanimous consent to proceed, we will now</p> <p>20       proceed.</p> <p>21                The Board is convened today to discuss</p> <p>22       and vote on a proposed project plan for review of</p>	<p style="text-align: right;">5</p> <p>1       briefings have focused more closely on the</p> <p>2       specific counterterrorism activities that those</p> <p>3       agencies conduct pursuant to the executive order.</p> <p>4                The Board has also received and examined</p> <p>5       the Attorney General-approved procedures and</p> <p>6       other implementing materials that govern 12333</p> <p>7       activities of these agencies.</p> <p>8                Given the range of counterterrorism</p> <p>9       activities conducted under 12333, the Board</p> <p>10       expects to be conducting oversight of those</p> <p>11       activities long after the work covered by today's</p> <p>12       proposed plan is completed.</p> <p>13                After I've briefly described the key</p> <p>14       points of this proposed plan, each Board member</p> <p>15       will be given the opportunity to express their</p> <p>16       views, after which a recorded vote will be taken.</p> <p>17                As a preliminary matter, the Board is</p> <p>18       very cognizant that its jurisdiction is over</p> <p>19       efforts to protect the nation from terrorism and</p> <p>20       that E.O. 12333 covers activities going well</p> <p>21       beyond counterterrorism. The proposed plan is</p> <p>22       accordingly limited to counterterrorism-related</p>

6	<p>1 matters.</p> <p>2       There are three key elements to the</p> <p>3 proposed plan. First, the Board will conduct</p> <p>4 examination of deep dives of two specific</p> <p>5 activities undertaken pursuant to 12333. In</p> <p>6 other words, based on what it learns in the</p> <p>7 briefings it has had and will receive, the Board</p> <p>8 will select two counterterrorism activities</p> <p>9 focusing on the NSA and CIA for in-depth</p> <p>10 examination and consideration of whether the need</p> <p>11 for the activity is appropriately balanced with</p> <p>12 the need to protect privacy and civil liberties.</p> <p>13       These examinations will be analogous to</p> <p>14 the work that the Board has done in its review of</p> <p>15 the 215 and 702 programs. The goal is to</p> <p>16 complete the two examinations and prepare reports</p> <p>17 on each of these by the end of 2015.</p> <p>18       While we anticipate that the deep dives</p> <p>19 may have to be largely or entirely classified</p> <p>20 given the nature of the activities being</p> <p>21 examined, the Board will assess whether to seek</p> <p>22 public interest declassification of sufficient</p>	8
7	<p>1 classified information to permit a public report</p> <p>2 to be issued on either or both of the deep dives.</p> <p>3       Second, the Board will produce a public</p> <p>4 report explaining just what 12333 is and how its</p> <p>5 legal framework and implementing procedures</p> <p>6 govern the collection and the use of information</p> <p>7 about Americans.</p> <p>8       The Board may also use the information</p> <p>9 obtained during the course of the two in-depth</p> <p>10 examinations to inform its public report.</p> <p>11       To the extent possible and appropriate</p> <p>12 in an unclassified document, the Board may seek</p> <p>13 to rely on these examinations for descriptive</p> <p>14 examples of how 12333 and its implementing</p> <p>15 procedures provide limits on some activities,</p> <p>16 authorization for others, impose procedural</p> <p>17 requirements, and protect privacy and civil</p> <p>18 liberties.</p> <p>19       Third, as appropriate and to the extent</p> <p>20 the Board can draw conclusions based on its two</p> <p>21 in-depth reviews and the information it receives</p> <p>22 from the rest of the Intelligence Community, the</p>	9
6	<p>1 Board's public report will also assess the</p> <p>2 adequacy of E.O. 12333's safeguards in protecting</p> <p>3 privacy and civil liberties.</p> <p>4       I favor adoption of the plan. I believe</p> <p>5 that doing two deep dives on the particular</p> <p>6 counterterrorism activities is important to</p> <p>7 developing the Board's understanding of how such</p> <p>8 activities are conducted under 12333. Focusing</p> <p>9 on two agencies, the CIA and NSA, will give us</p> <p>10 different perspectives on those activities.</p> <p>11       It's also consistent with our mission to</p> <p>12 educate the public. Despite the importance of</p> <p>13 Executive Order 12333, remarkably few people</p> <p>14 understand just what it is or how it shapes the</p> <p>15 Intelligence Community's activities.</p> <p>16       Therefore, the Board now has the</p> <p>17 opportunity to serve a valuable educational</p> <p>18 function by exploring in a public report what</p> <p>19 12333 is all about and what implications it has</p> <p>20 for privacy and civil liberties.</p> <p>21       However, the Board's mission is not just</p> <p>22 to describe what it finds, but to thoroughly</p>	8
7	<p>1 conduct meaningful oversight. The Board's job is</p> <p>2 to apply its expertise and independent</p> <p>3 perspective to analyzing and reviewing</p> <p>4 counterterrorism actions to ensure that the need</p> <p>5 for such actions is balanced with the need to</p> <p>6 protect privacy and civil liberties, including,</p> <p>7 as appropriate, whether the safeguards found</p> <p>8 under 12333 in this context are adequate.</p> <p>9       Accordingly, I hereby move adoption of</p> <p>10 proposed 12333 plan, and I now turn to my fellow</p> <p>11 Board members to express their views on the</p> <p>12 proposed plan, after which a vote will be taken.</p> <p>13       I'm starting with Board member Rachel</p> <p>14 Brand.</p> <p>15       MS. BRAND: Thank you, Mr. Chairman.</p> <p>16       I first would like to thank the staff of</p> <p>17 the Board for all their hard work on this</p> <p>18 project. It can be challenging to serve a</p> <p>19 multi-member body, and I know that this project</p> <p>20 was no exception.</p> <p>21       Before I express my views on the</p> <p>22 particular document before the Board, I would</p>	9

10	<p>1 like to take a step back and make some comments</p> <p>2 about where this project fits within the Board's</p> <p>3 broader mission.</p> <p>4 As the first members of this Board, we</p> <p>5 have a responsibility to establish the</p> <p>6 credibility and effectiveness of this</p> <p>7 institution. All of our individual projects,</p> <p>8 including the one before the Board today, must be</p> <p>9 undertaken with this long-term view.</p> <p>10 To be an effective institution we will</p> <p>11 need credibility, not only with the public but</p> <p>12 with Congress and with the intelligence agencies</p> <p>13 we are directed to oversee and advise.</p> <p>14 A lack of credibility with the</p> <p>15 Intelligence Community agencies in particular</p> <p>16 would significantly limit the likelihood that our</p> <p>17 recommendations will be adopted.</p> <p>18 This would be a shame, because we can</p> <p>19 add real value where we can convince the agencies</p> <p>20 to make concrete changes that better protect</p> <p>21 privacy and civil liberties without compromising</p> <p>22 national security.</p>	12	<p>1 a particular intelligence program.</p> <p>2 The second was an ability to be</p> <p>3 independent and critical without being a</p> <p>4 reflexive antagonist of the Intelligence</p> <p>5 Community.</p> <p>6 The fact that the government has already</p> <p>7 implemented or begun to implement almost all of</p> <p>8 our recommendations demonstrates the power of</p> <p>9 well-considered, targeted recommendations to</p> <p>10 effect change.</p> <p>11 This leads me to the matter at hand,</p> <p>12 which is the Board's review of certain collection</p> <p>13 activities conducted under Executive Order 12333.</p> <p>14 Last July, the Board announced it would</p> <p>15 begin to look at Executive Order 12333. Because</p> <p>16 we did not qualify that statement in any way, we</p> <p>17 gave some in the public and the agencies the</p> <p>18 impression that we intended to conduct an omnibus</p> <p>19 review of everything the government does under</p> <p>20 the executive order. This was mistaken for at</p> <p>21 least three reasons.</p> <p>22 First, much, perhaps most of the</p>
11	<p>1 Our institutional credibility is even</p> <p>2 more important to our success in discharging our</p> <p>3 statutory advice function. We are an independent</p> <p>4 agency. Because we do not sit within an</p> <p>5 Intelligence Community element observing the flow</p> <p>6 of daily business, programs to which our advice</p> <p>7 would be relevant will not come to our attention</p> <p>8 unless agencies choose to seek out our advice.</p> <p>9 They will do so only if they view us as</p> <p>10 a serious, thoughtful body committed to helping</p> <p>11 them both protect national security and preserve</p> <p>12 liberty.</p> <p>13 We took this approach in our reports on</p> <p>14 the program under Section 702 of FISA and the</p> <p>15 bulk telephony metadata program under Section 215</p> <p>16 of the Patriot Act.</p> <p>17 Although I disagreed with and voted</p> <p>18 against two central conclusions of the Board's</p> <p>19 report on the Section 215 program, I believe that</p> <p>20 the combination of these reports demonstrated two</p> <p>21 things. One was the capacity to be</p> <p>22 simultaneously focused and thorough in reviewing</p>	13	<p>1 activity governed by Executive Order 12333 is</p> <p>2 outside the Board's statutory jurisdiction. The</p> <p>3 Board, as the Chairman just mentioned, is limited</p> <p>4 to reviewing the government's counterterrorism</p> <p>5 activities.</p> <p>6 Executive Order 12333, however, governs</p> <p>7 not just counterterrorism activities, but all</p> <p>8 foreign intelligence-related activities,</p> <p>9 including those that serve foreign relations,</p> <p>10 counterintelligence, counterproliferation, and</p> <p>11 traditional defense functions.</p> <p>12 Second, it would be impossible for the</p> <p>13 Board to review everything that happens under</p> <p>14 Executive Order 12333 because it governs</p> <p>15 literally everything the Intelligence Community</p> <p>16 does, from signals intelligence, to military</p> <p>17 intelligence supporting combat operations, to</p> <p>18 covert action, and on and on.</p> <p>19 Executive Order 12333 is not a discrete</p> <p>20 collection program like the Section 215 and 702</p> <p>21 collection programs. It is not a program at all.</p> <p>22 It does not even provide legal authority in the</p>

<p style="text-align: right;">14</p> <p>1 way that Sections 215 and 702 do.  2 Rather, it is a foundational document  3 that provides a construct for the Intelligence  4 Community. Its primary provisions divide  5 responsibilities among the intelligence agencies,  6 dictating, for example, that NSA has the lead on  7 signals intelligence and CIA has the lead on  8 human intelligence. But Executive Order 12333 is  9 not the basis for the agency's authority to  10 conduct signals intelligence or human  11 intelligence.  12 The executive order also provides that  13 agencies must protect information collected about  14 U.S. persons and requires the Attorney General  15 and the agencies to adopt further guidelines and  16 rules to protect U.S. persons.  17 The third reason why it was a mistake to  18 leave the impression that the Board was about to  19 conduct one omnibus review of Executive Order  20 12333 is that reviewing activities governed by  21 the executive order should not be just one short-  22 term project for the Board.</p>	<p style="text-align: right;">16</p> <p>1 and make recommendations for changes to that  2 program if we find any to be necessary.  3 I'm happy to note that the document  4 before the Board today does several things with  5 which I agree.  6 First, it states that reviewing programs  7 under Executive Order 12333 will be part of the  8 Board's ongoing work, and it makes clear that we  9 need not tackle all 12333-governed activity in  10 one report. It also states that in the  11 short-term we will identify two specific programs  12 for in-depth review and report. Importantly, it  13 makes clear that we will not exceed our statutory  14 limitation to the government's counterterrorism  15 activities.  16 It also makes clear that we will focus  17 on collection programs with attributes that have  18 civil liberties or privacy implications. And it  19 acknowledges that the Board's reports on these  20 programs are likely to be largely, if not wholly,  21 classified due to their sensitive nature.  22 For these reasons, on its face, this</p>
<p style="text-align: right;">15</p> <p>1 Because many of the counterterrorism  2 activities that fall within the Board's  3 jurisdiction are governed by the executive order,  4 reviewing such programs is something the Board  5 will be doing for the long-term, while also  6 conducting other projects. We should not be in a  7 rush to bite it off all at once to satisfy an  8 external demand that we review Executive Order  9 12333. That would not further our goal of  10 establishing the Board's long-term credibility.  11 In my view, we should begin to review  12 12333-governed programs one or two at a time,  13 while we also continue to review counterterrorism  14 programs conducted under FISA or programs that  15 fall outside of Executive Order 12333 because  16 they are conducted by non-Intelligence Community  17 agencies. We should do the same kind of thorough  18 review of those programs as we did of the Section  19 215 and 702 programs.  20 When our study of each program is  21 complete, we should analyze the privacy and civil  22 liberties implications of that particular program</p>	<p style="text-align: right;">17</p> <p>1 document is fairly close to something I could  2 support. However, I will vote against the  3 document because it does not foreclose some  4 directions in which this project could go.  5 My primary concern is with the third  6 report contemplated by this document, which is a  7 more general report about Executive Order 12333  8 and its implementing structures.  9 The exact nature and purpose of this  10 third report remain unclear to me. The text of  11 the document before the Board today leaves open  12 the possibility that the third report might  13 attempt to make judgements about the overall  14 adequacy of the privacy and civil liberties  15 protections in Executive Order 12333 and its  16 implementing rules.  17 I could not support that. It simply  18 would not be possible to analyze, for example,  19 the adequacy of oversight mechanisms for all  20 12333-governed activities, many of which fall  21 outside our statutory jurisdiction, after having  22 reviewed only two programs. We could certainly</p>

<p style="text-align: right;">18</p> <p>1 analyze the adequacy of oversight mechanisms in  2 each program we reviewed, but if we tried to  3 extrapolate from our reviews of two programs to  4 arrive at more general conclusions, we would risk  5 being incomplete or simply wrong. We would also  6 risk undermining the institutional credibility  7 that I believe we have a duty to establish and  8 steward. I would have liked this document to  9 clarify that the third report will not do that.  10 The fact that that clarification was not included  11 in this document gives me significant pause.  12 I am also concerned about the document's  13 statement that the third report will be public.  14 Whether or not the report can be written  15 unclassified will depend on its contents.  16 If, as the document before the Board  17 contemplates, the Board drew upon examples from  18 the classified programs we reviewed, then it is  19 not clear that the report could be published  20 entirely unclassified.  21 This Board's ability to effect concrete  22 change in particular programs will be diminished</p>	<p style="text-align: right;">20</p> <p>1 adopt these important procedures, it will be  2 essential not only that they provide a workable  3 mechanism for arriving at a clear Board decision,  4 but that they recognize and respect the rights  5 and responsibilities of each Board member as an  6 independent, Senate-confirmed officer. Again, I  7 look forward to working with my colleagues to  8 that end.  9 Thank you.  10 CHAIRMAN MEDINE: Ms. Collins.  11 MS. COLLINS: So first and foremost, I  12 wanted to recognize our agency staff for the  13 hours of work that have led up to the meeting  14 this morning and our consideration of a proposed  15 work plan.  16 I would also like to thank my fellow  17 Board members for their dedication to developing  18 a workable path forward in this important area.  19 Before I record my vote this morning, I  20 would like to offer a brief explanation as to why  21 I can support this proposal, and also say a few  22 words about what I believe must be our highest</p>
<p style="text-align: right;">19</p> <p>1 if we foreclose the possibility of making  2 classified recommendations to the agencies and to  3 the President.  4 I hope that my concerns will not be  5 borne out and that the three reports contemplated  6 by the document will turn out to be reports that  7 I can support.  8 I look forward to working with my  9 colleagues in reviewing the programs governed by  10 Executive Order 12333 and in drafting the  11 resulting reports, and I hope that I will be able  12 to vote to adopt those reports when the time  13 comes.  14 My final point is procedural. The Board  15 continues to lack basic internal processes. It  16 has been extremely challenging to start a new  17 agency from scratch with no parent entity, but  18 the time has come to finalize procedures that  19 will enable us to operate as a mature  20 organization.  21 This must be a top priority for the  22 Board in the near term. As the Board works to</p>	<p style="text-align: right;">21</p> <p>1 priority going forward, which is regularizing our  2 internal processes and our interactions with the  3 agencies within the Intelligence Community, the  4 White House, and our congressional committees of  5 oversight.  6 It is unfortunate that our path forward  7 was arrived at in spite of our ad hoc process,  8 rather than pursuant to clear and consistent  9 procedures appropriate for a permanent executive  10 branch agency governed by five independent Board  11 members.  12 Last July, we announced as part of our  13 agenda that we would be looking at Executive  14 Order 12333. We had just completed reports on  15 two discrete programs authorized pursuant to the  16 Foreign Intelligence Surveillance Act and it was  17 time to transition the agency to its longer term  18 mission and goals.  19 This agenda item reflected the reality  20 that authority for significant portions of what  21 the intelligence agencies do derives from  22 congressional enactments, or reflects the</p>

<p style="text-align: right;">22</p> <p>1 President's inherent Article II authority.</p> <p>2 These activities are conducted within</p> <p>3 the framework of E.O. 12333, which, for lack of a</p> <p>4 better phrase, provides both the rules of the</p> <p>5 road for agencies conducting foreign intelligence</p> <p>6 activities and also provides an initial framework</p> <p>7 for privacy protections of U.S. persons.</p> <p>8 E.O. 12333 is not a program like the</p> <p>9 Section 215 or Section 702 programs, nor do we</p> <p>10 intend to approach it as such.</p> <p>11 We began our transition away from</p> <p>12 assessing the 215 and 702 programs with</p> <p>13 comprehensive briefings from agencies within the</p> <p>14 Intelligence Community about the scope of their</p> <p>15 foreign intelligence activities.</p> <p>16 And here, I would like to take a moment</p> <p>17 to thank those agencies for their cooperation</p> <p>18 throughout that initial process. I hope we can</p> <p>19 have that same level of cooperation going</p> <p>20 forward.</p> <p>21 Our work plan sets forth our next steps,</p> <p>22 and I support that plan for several reasons.</p>	<p style="text-align: right;">24</p> <p>1 or that there will be recommendations made at the</p> <p>2 end of the review.</p> <p>3 Third, the work plan acknowledges that</p> <p>4 the activities we anticipate assessing are highly</p> <p>5 classified. We therefore do not commit to a</p> <p>6 public report on specific activities, or commit</p> <p>7 to pushing for declassification.</p> <p>8 Instead, we reserve those decisions for</p> <p>9 the end of our review to ensure that any</p> <p>10 decisions made on public disclosure will have the</p> <p>11 benefit of a full and comprehensive study.</p> <p>12 Finally, I support the proposal as</p> <p>13 drafted because I believe there is a public value</p> <p>14 in potentially clarifying, or demystifying</p> <p>15 popular misconceptions about Executive Order</p> <p>16 12333, as we did through our work with respect to</p> <p>17 the Section 702 program.</p> <p>18 The 12333 framework has been the</p> <p>19 approach of numerous Presidents to organizing and</p> <p>20 dividing responsibility in the Intelligence</p> <p>21 Community, and restricting those activities, and</p> <p>22 the American people should understand the</p>
<p style="text-align: right;">23</p> <p>1 While our work in this area may have begun with</p> <p>2 an effort to obtain foundational knowledge as to</p> <p>3 the broader activities, this proposal recognizes</p> <p>4 that the scope of our assessment needs to fit</p> <p>5 soundly within the Board's enabling statute,</p> <p>6 which is limited to advice and oversight with</p> <p>7 respect to federal government actions taken to</p> <p>8 protect the nation against terror.</p> <p>9 So the proposal appropriately sets forth</p> <p>10 an anticipated review of specified</p> <p>11 counterterrorism activities, reflecting our</p> <p>12 limited role in the executive branch oversight</p> <p>13 infrastructure.</p> <p>14 Relatedly, we have identified an</p> <p>15 anticipated focus on specified key aspects of</p> <p>16 those activities. For example, the potential for</p> <p>17 incidental collection of U.S. person information</p> <p>18 through non-targeted acquisition is one aspect of</p> <p>19 interest to us.</p> <p>20 Second, our approach recognizes that</p> <p>21 objective oversight must be conducted without any</p> <p>22 preconceived notion of what our findings may be,</p>	<p style="text-align: right;">25</p> <p>1 framework.</p> <p>2 Moreover, the American people should</p> <p>3 understand that we are, as far as I know, unique</p> <p>4 in the world in having such a framework that</p> <p>5 explicitly recognizes and protects privacy</p> <p>6 interests.</p> <p>7 That said, we are not purporting to</p> <p>8 undertake in the first instance a comprehensive</p> <p>9 review of all activities implicating Executive</p> <p>10 Order 12333, or implying that we will be in a</p> <p>11 position to draw generalized conclusions about</p> <p>12 those activities or the 12333 framework itself.</p> <p>13 In short, this is not a fishing</p> <p>14 expedition or a means to deliver pre-ordained</p> <p>15 solutions in search of a problem, nor are we</p> <p>16 setting expectations that we will be completing</p> <p>17 our work on 12333-related activities any time in</p> <p>18 the near future.</p> <p>19 Instead, this work plan recognizes that</p> <p>20 we will be looking at counterterrorism activities</p> <p>21 conducted within the 12333 framework for the life</p> <p>22 of our agency, and this is simply a first step.</p>

26	<p>1 I hope and expect that now we will turn</p> <p>2 to our internal operating procedures and</p> <p>3 standardizing our interactions with Intelligence</p> <p>4 Community agencies and our congressional</p> <p>5 committees of oversight.</p> <p>6 As a permanent agency of the United</p> <p>7 States government, we need our own rules of the</p> <p>8 road designed to clarify how we will fulfill our</p> <p>9 oversight and advice functions, which may</p> <p>10 sometimes be in tension, and how the governing</p> <p>11 structure of our agency can be organized to lead</p> <p>12 to decisions that are most likely to reflect the</p> <p>13 best of our diverse set of viewpoints and</p> <p>14 backgrounds.</p> <p>15 It is simply good government to</p> <p>16 regularize our interactions and procedures, and</p> <p>17 it is now overdue, given the increased size of</p> <p>18 our agency and our expanding efforts to fulfill</p> <p>19 both the oversight and advice functions.</p> <p>20 Thank you.</p> <p>21 CHAIRMAN MEDINE: Mr. Dempsey.</p> <p>22 MR. DEMPSEY: Thank you, Mr. Chairman.</p>	28	<p>1 requirements and policies, the Attorney General</p> <p>2 guidelines, and the even more detailed procedures</p> <p>3 and regulations promulgated under them, are</p> <p>4 crucial in translating into reality the executive</p> <p>5 order's promise of respect for civil liberties.</p> <p>6 The Chairman wrote to the Attorney</p> <p>7 General and the Director of National Intelligence</p> <p>8 in August 2013, urging them to expedite the</p> <p>9 process of updating these guidelines.</p> <p>10 Unfortunately, little progress has been</p> <p>11 made in that regard. In February of this year,</p> <p>12 we issued a short report summarizing the outdated</p> <p>13 status of the Attorney General guidelines.</p> <p>14 A second phase of our work has occurred</p> <p>15 over the past six to eight months as the Board</p> <p>16 has been working to obtain an overview</p> <p>17 understanding of 12333 activities. That phase is</p> <p>18 drawing to a close, as we have received or soon</p> <p>19 will receive briefings from all of the agencies</p> <p>20 that comprise the Intelligence Community.</p> <p>21 These briefings have helped the Board</p> <p>22 understand the breadth of activities conducted</p>
27	<p>1 Thank you for your leadership in bringing us to</p> <p>2 this point, and for the hard work of the staff</p> <p>3 and the other Board members as well, as we've</p> <p>4 sharpened our focus here.</p> <p>5 I'm pleased to support this plan for the</p> <p>6 next phase of our work regarding counterterrorism</p> <p>7 activities under Executive Order 12333.</p> <p>8 It took longer for us to get to this</p> <p>9 point than I would have wanted, but we ended up</p> <p>10 in a good place, and with this plan the Board is</p> <p>11 well-positioned to make a positive contribution</p> <p>12 to some relatively unexplored areas within its</p> <p>13 jurisdiction.</p> <p>14 This work plan actually represents the</p> <p>15 third phase of the Board's work with respect to</p> <p>16 Executive Order 12333.</p> <p>17 Eighteen months ago, we noted that the</p> <p>18 Attorney General guidelines called for under the</p> <p>19 executive order were, in the case of a number of</p> <p>20 agencies, very outdated.</p> <p>21 Because the executive order is of</p> <p>22 necessity broad and high level in its</p>	29	<p>1 under 12333, which reach well beyond</p> <p>2 counterterrorism, and many of which do not</p> <p>3 implicate the civil liberties of Americans at</p> <p>4 all.</p> <p>5 Now we are entering this new phase,</p> <p>6 which will be based on two deep dives into</p> <p>7 specific activities or types of activities</p> <p>8 conducted for counterterrorism purposes under</p> <p>9 12333.</p> <p>10 We will adopt in this work plan specific</p> <p>11 criteria for selecting programs for these</p> <p>12 in-depth examinations, and I think those criteria</p> <p>13 are relevant to ongoing activities and</p> <p>14 examinations beyond the two at this phase,</p> <p>15 focusing on activities affecting the rights of</p> <p>16 Americans and limited to activities that have a</p> <p>17 significant counterterrorism purpose.</p> <p>18 A word about what it means to be looking</p> <p>19 at counterterrorism programs or activities under</p> <p>20 E.O. 12333. As other Board members have noted,</p> <p>21 this executive order provides the framework in</p> <p>22 which all of the government's foreign</p>



<p style="text-align: right;">30</p> <p>1 intelligence and counterintelligence activities  2 are conducted. Basically everything, or  3 essentially everything the intelligence agencies  4 do fits within the 12333 architecture.</p> <p>5 Therefore, a large percentage of the  6 programs and activities that the Board will look  7 at in the course of its existence will fall to  8 some extent under 12333.</p> <p>9 When we talk today about examining  10 activities under 12333, the Board is primarily  11 referring to activities that are not regulated by  12 a statute such as FISA. These activities not  13 regulated by statute are regulated by Attorney  14 General guidelines, as I referenced, and  15 procedures, often very detailed, issued by agency  16 heads for specific functions, or programs, or  17 types of activity. All of these guidelines,  18 regulations, and procedures trace their legal  19 source to the executive order.</p> <p>20 Primarily, when we are talking about  21 activities under 12333 not regulated by statute,  22 we are talking about activities occurring outside</p>	<p style="text-align: right;">32</p> <p>1 activities conducted for counterterrorism  2 purposes under Executive Order 12333.</p> <p>3 The deep dives on selected 12333  4 activities that we will conduct as part of this  5 phase of our work will provide a grounding for  6 any general conclusions we might draw about the  7 12333 framework and its implementing guidelines,  8 regulations, and procedures.</p> <p>9 I want to stress, as other Board members  10 have, that at the same time the Board is  11 undertaking this important but delicate work, we  12 are also still working to establish the full  13 panoply of procedures required of an independent  14 agency within the executive branch.</p> <p>15 This is not easy. Our building here is  16 scheduled to be torn down, so we are busy finding  17 new office space that meets both our security  18 requirements and our mandate to inform the  19 public.</p> <p>20 We are subject to the Sunshine Act,  21 which imposes serious burdens on the effective  22 functioning of an agency.</p>
<p style="text-align: right;">31</p> <p>1 the United States.</p> <p>2 However, in this age of globalized  3 commerce when many Americans have business ties  4 or family ties to people overseas, and especially  5 when information and communication systems are  6 globalized, intelligence activities overseas are  7 more likely than ever to collect information  8 about U.S. persons.</p> <p>9 That, and the fact that non-Americans  10 also have a right to privacy under international  11 treaties to which the U.S. government is a party,  12 make it appropriate for us to look at activities  13 not specifically targeting Americans to assess  14 the privacy impact of those programs or  15 activities.</p> <p>16 In our reports on Section 215 and  17 Section 702 of FISA, the Board demonstrated that  18 we prefer, as other Board members have noted, to  19 deeply understand a program or activity before we  20 seek to draw conclusions about it.</p> <p>21 That approach is, if anything, even more  22 important with respect to our review of</p>	<p style="text-align: right;">33</p> <p>1 We are working diligently to clarify  2 procedures defining how we approach the quite  3 disparate, and as one Board member indicated,  4 sometimes in tension, roles that Congress has  5 assigned to us to provide advice within the  6 executive branch, and to provide oversight of the  7 executive branch.</p> <p>8 Staff and Board members are laboring  9 mightily to address these issues, at the same  10 time that the challenges of the security  11 clearance process delay our efforts to bring on a  12 permanent general counsel and a congressional  13 liaison.</p> <p>14 Despite all these difficulties, I hope  15 that the Board, through its staff, can move  16 quickly to identify the two deep dives that will  17 be the focus of this next phase of our work so  18 that we can begin to address the understandable  19 public concerns about counterterrorism activities  20 in this age of big data and globalized  21 communications.</p> <p>22 Likewise, I hope that we will receive</p>

<p style="text-align: right;">34</p> <p>1 the same kind of cooperation from the 2 Intelligence Community on this phase of our work 3 as we did during our inquiries into Section 215 4 and Section 702.</p> <p>5 Again, Mr. Chairman and members of the 6 Board, thank you very much, and I look forward to 7 voting in favor of this plan.</p> <p>8 CHAIRMAN MEDINE: Ms. Wald.</p> <p>9 MS. WALD: Thank you. I intend to vote 10 enthusiastically in favor of this project 11 description.</p> <p>12 My colleagues have covered the territory 13 very adequately, and I'm going to make only four 14 very brief points.</p> <p>15 The first would be that I think we need 16 at this point to approve this project description 17 in order to get on with our inquiry.</p> <p>18 I believe that we have followed the 19 mandates of the Sunshine Act in scheduling and 20 conducting this particular meeting, and I hope 21 that a majority of the Board will approve the 22 description.</p>	<p style="text-align: right;">36</p> <p>1 But I do think that it would not satisfy 2 our statutory mandate to keep the public informed 3 if we omitted any description of the legal 4 framework which surrounds the invocation and use 5 of 12333 for counterterrorism programs that we 6 are studying.</p> <p>7 I personally believe that clarifying 8 that legal framework may indeed help, not hurt 9 the Intelligence Community as far as 10 misconceptions that are already out there about 11 its scope and its limits.</p> <p>12 The fourth point is that I do emphasize 13 that this is only a project description. My 14 colleagues can, and I know they will, watchdog 15 the process of inquiry as it progresses, and of 16 course they will be able to vote decisively on 17 any final report that's issued.</p> <p>18 But I think it is time that we got going 19 on this project. We have been discussing the 20 contents of this brief document for months, both 21 inside PCLOB, and here I want to echo the 22 commendations to our staff, which has been not</p>
<p style="text-align: right;">35</p> <p>1 I do not perceive any of my colleagues' 2 differences, all of which are very thoughtful, 3 but I do not perceive any differences as to the 4 substance of this memorandum as critical to its 5 usefulness in acting as a general guide to our 6 future inquiries.</p> <p>7 My second point is I do believe, 8 however, that there are a few points which I 9 believe must appear in this project description 10 so as not to mislead either the Intelligence 11 Community, Congress, or the public as to what we 12 are attempting to do in our inquiry.</p> <p>13 One of those is the necessity to 14 describe the legal framework surrounding the use 15 of 12333 as the legal basis for counterterrorism 16 programs which are conducted pursuant to it.</p> <p>17 As my colleagues have stressed, we are 18 ever mindful of the focus of our statutory 19 jurisdiction and have made that point clear, both 20 to the Intelligence Community and to the 21 congressional staffs with whom we have discussed 22 our future project.</p>	<p style="text-align: right;">37</p> <p>1 only of enormous assistance, but enormously 2 tolerant during these discussions, but we've also 3 had discussions with the relevant Intelligence 4 Community agencies and with Hill staffers. So I 5 think that we are at the point where we should 6 move ahead.</p> <p>7 And finally, I just want to emphasize 8 there has been some discussion here about our 9 statutory functions, which of course are very 10 important. As one of the our colleagues reminded 11 us, the advice function can be very important and 12 it requires that we have the cooperation and the 13 trust of the intelligence agencies. The same 14 might well go for Congress, which has ultimate 15 statutory authority.</p> <p>16 But I also want to emphasize another 17 aspect of our existence and of our origins, which 18 I think we have to keep in mind, and that is that 19 we are an independent agency. We are within the 20 executive branch, but we are not required to get 21 their approval on what we do. And although we 22 report to Congress, we are not required to get</p>

<p style="text-align: right;">38</p> <p>1 their pre-approval, too.</p> <p>2 I think this was something that we know</p> <p>3 it was created in the aftermath of 9/11, and it</p> <p>4 was created out of a real concern that there</p> <p>5 would be something that is unique actually in the</p> <p>6 world. I don't know of any other country which</p> <p>7 has an independent government agency with</p> <p>8 oversight over the Intelligence Community.</p> <p>9 So I think that's another element, apart</p> <p>10 from what I agree is a necessary component to the</p> <p>11 maximum extent getting the cooperation and</p> <p>12 behaving in a way that the Intelligence Community</p> <p>13 will trust us.</p> <p>14 So for all these reasons I intend to</p> <p>15 vote for the project description.</p> <p>16 CHAIRMAN MEDINE: Again, I want to</p> <p>17 reinforce the praise to our staff in bringing us</p> <p>18 here today, and I move to vote on the proposed</p> <p>19 12333 project plan.</p> <p>20 Each member will vote independently,</p> <p>21 separately indicating aye or nay whether they</p> <p>22 approve or disapprove of the plan, starting with</p>	<p style="text-align: right;">40</p> <p>1 CERTIFICATION</p> <p>2</p> <p>3</p> <p>4 I, LYNNE LIVINGSTON, A Notary Public of</p> <p>5 the State of Maryland, Baltimore County, do</p> <p>6 hereby certify that the proceedings contained</p> <p>7 herein were recorded by me stenographically; that</p> <p>8 this transcript is a record of the proceedings.</p> <p>9 I further certify that I am not of</p> <p>10 counsel to any of the parties, nor in any way</p> <p>11 interested in the outcome of this action.</p> <p>12 As witness my hand and notarial seal</p> <p>13 this _____ day of _____,</p> <p>14 2015.</p> <p>15 _____</p> <p>16 Lynne Livingston</p> <p>17 Notary Public</p> <p>18 My commission expires: January 5, 2019</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
<p style="text-align: right;">39</p> <p>1 Board member Brand.</p> <p>2 MS. BRAND: Nay.</p> <p>3 CHAIRMAN MEDINE: Ms. Collins.</p> <p>4 MS. COLLINS: Yes.</p> <p>5 CHAIRMAN MEDINE: Yes.</p> <p>6 MR. DEMPSEY: Yes.</p> <p>7 MS. WALD: Yes.</p> <p>8 CHAIRMAN MEDINE: The plan is approved</p> <p>9 by a vote of 4 to 1. The Board's activities for</p> <p>10 today are now complete.</p> <p>11 A transcript of today's activities will</p> <p>12 be posted on our website www.pclob.gov, as well</p> <p>13 as a copy of the plan will be posted there later</p> <p>14 today.</p> <p>15 I move for adjournment of the meeting.</p> <p>16 All in favor of adjourning the meeting say aye.</p> <p>17 (Vote Taken)</p> <p>18 CHAIRMAN MEDINE: Upon receiving</p> <p>19 unanimous consent to adjourn, we will now</p> <p>20 adjourn. It is 10:35 a.m. Thank you.</p> <p>21 (Whereupon, at 10:35 a.m., the hearing was</p> <p>22 adjourned.)</p>	

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