

James X. Dempsey Statement (April 8, 2015)

The following statement reflects prepared text. Comments as delivered may differ slightly.

I am pleased to support this plan for the next phase of the Board's work regarding counterterrorism activities conducted under Executive Order 12333. It took longer for us to get to this point than I would have preferred, but we have ended up in a good place, and with this plan the Board is well positioned to make a positive contribution to a relatively unexplored area within its jurisdiction.

This work plan actually represents the third phase of the Board's work with respect to E.O. 12333. Eighteen months ago, we noted that the Attorney General guidelines called for under the E.O. were, in the case of a number of agencies, very outdated.¹ Because the E.O. is of necessity broad and high-level in its requirements and policies, the Attorney General guidelines are crucial in translating into reality the E.O.'s promise of respect for civil liberties. In August 2013, the Chairman wrote to the Attorney General and the Director of National Intelligence urging them to expedite the process of updating those guidelines. Unfortunately, little progress has been made in that regard. In February of this year, we published a short report summarizing the outdated status of the AG guidelines.²

A second phase of our work has occurred over the past six to eight months, as the Board has been working to obtain an overview understanding of E.O. 12333 activities. That phase is drawing to a close, as we have received or will soon receive briefings from all of the agencies that comprise the Intelligence Community. These briefings have helped the Board understand the breadth of activities conducted under E.O. 12333, which reach well beyond counterterrorism and many of which do not implicate the civil liberties of Americans at all.

Now we are entering this new phase, which will be based on two deep dives into specific activities or types of activities conducted for counterterrorism purposes under E.O. 12333. We will adopt in this work plan explicit criteria for selecting programs for those in-depth examinations, focusing on activities affecting the rights of Americans and limited to activities that have a significant counterterrorism purpose.

A word about what it means to be looking at counterterrorism programs or activities under E.O. 12333. This E.O. provides the framework in which all of the government's foreign

¹ https://www.pclob.gov/library/Letter-DNI_AG_12333_Guidelines.pdf.

² <https://www.pclob.gov/newsroom/20150219.html>.

intelligence and counterintelligence activities are conducted. Basically, everything the intelligence agencies do fits within the E.O. 12333 architecture. Therefore, a large percentage of the programs and activities that the Board will look at in the course of its existence will fall to some extent under E.O. 12333.

When we talk today about examining activities under E.O. 12333, the Board is referring primarily to activities that are not regulated by a statute such as FISA. Those activities not regulated by statute are regulated by Attorney General guidelines and procedures, often very detailed, issued by agency heads for specific functions or programs or types of activity. All of those guidelines, regulations and procedures trace their legal source to the executive order. Primarily, when we are talking about activities under E.O. 12333 not regulated by statute, we are talking about activities occurring outside the United States. However, in this age of globalized commerce, when many Americans have business ties or family ties to people overseas, and especially when information and communications systems are globalized, intelligence activities overseas are more likely than ever to collect information about U.S. persons. That, and the fact that non-Americans also have a right to privacy under international treaties to which the U.S. government is a party, make it appropriate for us to look at activities not specifically targeting Americans to assess their privacy impact.

In our reports on Section 215 of the Patriot Act and Section 702 of FISA, the Board demonstrated that we prefer to deeply understand a program or activity before we seek to draw conclusions about it. That preference is even more important with respect to our review of activities conducted for counterterrorism purposes under E.O. 12333. The deep dives on selected E.O. 12333 activities will provide a grounding for any general conclusions we might draw about the E.O. 12333 framework and its implementing guidelines, regulations, and procedures.

I want to stress that the Board, at the same time it is undertaking this very important but delicate work, is also still working to establish the full panoply of procedures required of an independent agency within the executive branch. This is not easy. Our building here is scheduled to be torn down, so we are busy finding a new office space that meets both our security requirements and our statutory mandate to inform the public. We are subject to the Sunshine Act, which imposes serious burdens on the effective functioning of an agency. We are working diligently to clarify procedures defining how we approach the quite disparate roles Congress has assigned us, to provide advice within the Executive Branch, and to provide oversight of the Executive Branch. The staff and Board Members are laboring mightily to address these issues, at the same time that the challenges of the security

clearance process delay our efforts to bring on a permanent General Counsel and a congressional liaison.

Despite all of these difficulties, I hope that the Board, through its staff, can move quickly to identify the two deep dives that will be the focus of this next phase of our work so that we can begin to address the understandable public concerns about counterterrorism activities in this age of big data and globalized communications. Likewise, I hope that we will receive the same kind of cooperation from the Intelligence Community that we did during our inquiries into Section 215 and Section 702.