



Privacy and Civil Liberties Oversight Board

SEMI-ANNUAL REPORT

Working to ensure that efforts by the Executive Branch to protect the nation from terrorism appropriately safeguard privacy and civil liberties.

July 2019

Privacy and Civil Liberties Oversight Board • PCLOB.gov • info@pclob.gov

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

**Semi-Annual Report
July 2019**

Report Distribution

In accordance with Section 801 of the Implementing Recommendations of the 9/11 Commission Act of 2007, the Privacy and Civil Liberties Oversight Board (PCLOB or the Board) is providing this Semi-Annual Report, which covers the period from January-July 2019, to the President and the Members of Congress listed below.

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U.S. Senate Committee on Appropriations

The Honorable Patrick Leahy
Vice Chairman
U.S. Senate Committee on Appropriations

The Honorable Ron Johnson
Chairman
U.S. Senate Committee on Homeland Security and Governmental Affairs

The Honorable Gary C. Peters
Ranking Member
U.S. Senate Committee on Homeland Security and Governmental Affairs

The Honorable Richard Burr
Chairman
U.S. Senate Select Committee on Intelligence

The Honorable Mark Warner
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The Honorable Lindsey Graham
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The Honorable Jim Jordan
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U.S. House of Representatives Committee on Oversight and Government Reform

The Honorable Jerrold Nadler
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The Honorable Doug Collins
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U.S. House of Representatives Committee on the Judiciary

The Honorable Nita M. Lowey
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The Honorable Kay Granger
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U.S. House of Representatives Committee on Appropriations

The Honorable Bennie G. Thompson
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The Honorable Mike Rogers
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U.S. House of Representatives Committee on Homeland Security

The Honorable Adam Schiff
Chairman
U.S. House of Representatives Permanent Select Committee on Intelligence

The Honorable Devin Nunes
Ranking Member
U.S. House of Representatives Permanent Select Committee on Intelligence

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Introduction

The Privacy and Civil Liberties Oversight Board returned to a quorum upon the confirmation by the Senate and appointment by the President of three new Members in October 2018. On June 27, 2019, the Senate confirmed new Board Members Aditya Bamzai and Travis LeBlanc and also confirmed current Board Member Edward Felten to a full six-year term. These appointments return the Board to a full complement for the first time since July 2016.

During the period covered by this report, the Board initiated several new oversight projects, completed one advice project, and initiated one new advice project. To inform the public about this work, the Board held two public forums during the reporting period. The Board also recently released a public inventory of its active projects, the first since 2014. That document, which is available on the Board's website, will be updated biannually.¹

The Board also continued to strengthen its institutional capacity. In particular, the Board has increased its staffing level by 60 percent since emerging from its recent sub-quorum period, hired an expert technologist to assist the Board in evaluating the implications of new and emerging technologies, and implemented various technical controls to increase the security and efficiency of its IT infrastructure.

These developments reflect the Board's ongoing commitment to providing timely, relevant, and actionable advice and oversight and to ensuring efficient, professional agency operations.

Board Background and Authorities

The Board is an independent agency within the Executive Branch, established in its current form by the Implementing Recommendations of the 9/11 Commission Act of 2007. The bipartisan, five-member Board is appointed by the President and confirmed by the Senate. The Board's mission is to ensure that the Executive Branch's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties.

The Board's enabling statute, 42 U.S.C. § 2000ee, authorizes it to review and analyze actions the Executive Branch takes to protect the nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties, and to ensure that liberty concerns are considered in the development and implementation of laws, regulations, and policies related to efforts to protect the nation from terrorism.

Under the statute, the Board has two primary functions: oversight and advice.

¹ Privacy and Civil Liberties Oversight Board, Active Oversight Projects and Other Engagements: July 2019, <https://www.pclob.gov/library/Agenda%20July%202019.pdf>.

- 1) In its oversight role, the Board is charged with continually reviewing the regulations, policies, and procedures of the Executive Branch, as well as other actions to protect the nation from terrorism, to ensure that such actions (i) protect privacy and civil liberties; and (ii) are consistent with governing laws, regulations, and policies regarding privacy and civil liberties.²
- 2) Under the Board's advice function, Executive Branch agencies are able to consult with the Board at an early stage in the development of new policies, programs, guidelines, or regulations, to ensure that privacy and civil liberties protections are factored into their initial design.³

The Board also has designated roles under the following authorities:

- **Executive Order 13636.** Improving Critical Infrastructure Cybersecurity, issued in February 2013, calls upon multiple agencies to develop and implement a Cybersecurity Framework to minimize the risk of a cyberattack on critical infrastructure.⁴ Section 5 of the Executive Order requires the Department of Homeland Security (DHS) to prepare a report, in consultation with the Board, recommending ways to mitigate the privacy and civil liberties risks created by cybersecurity measures adopted under the order. The report must be reviewed on an annual basis and revised as necessary.
- **Coordinating Privacy Officers.** Section 803 of the Implementing Recommendations of the 9/11 Commission Act of 2007 requires certain Executive Branch departments and agencies to designate at least one senior official as a privacy and civil liberties officer and issue reports about their activities.⁵ The Board's authorizing statute directs the Board to make recommendations to these Privacy Officers regarding their activities and to coordinate those activities on relevant interagency matters.⁶
- **Presidential Policy Directive 28 (PPD-28).** PPD-28 articulates principles to guide how the United States conducts signals intelligence activities for authorized foreign intelligence and counterintelligence purposes.⁷ In the directive, the President encouraged the Board to provide him with an assessment of the implementation of any matters contained in the directive that fall within the Board's mandate. In response, the Board issued a report on PPD-28, which was released in unclassified form in October 2018. The Board continues to monitor the status of the recommendations made in that report.

² 42 U.S.C. § 2000ee(d)(2).

³ *Id.* § 2000ee(d)(1).

⁴ E.O. 13636, Improving Critical Infrastructure Cybersecurity (Feb. 12, 2013).

⁵ Pub. L. No. 110-53 § 803 (2007), codified at 42 U.S.C. § 2000ee-1(a). The entities covered are the Office of the Director of National Intelligence, the Central Intelligence Agency, National Security Agency, Federal Bureau of Investigation, and the Departments of Defense, Health and Human Services, Homeland Security, Justice, and Treasury; *Id.* § 2000ee-1(f). Before its amendment in 2014, the statute required quarterly reports.

⁶ *Id.* § 2000ee(d)(3). In addition, the Board may designate new departments, agencies, or elements of the Executive Branch for coverage by the requirements of Section 803. *See id.* § 2000ee-1(a).

⁷ PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

Executive Summary of Board Activities During the Reporting Period

This section provides highlights of the Board’s oversight activities, provision of advice to other federal agencies, and organizational and managerial activities during the period covered by this report. These activities are described in greater detail in parts III and IV of this report.

Oversight. The Board continued to conduct vigorous oversight of efforts by the Executive Branch to protect the nation against terrorism. Most notably, the Board is conducting oversight of the collection of call detail records under the USA FREEDOM Act of 2015, in advance of that authority’s impending sunset in December 2019. The Board held a public forum on May 31, 2019 to receive information from outside experts as part of this review.

The Board also approved several other new oversight projects, including an examination of the use of facial recognition and other biometric technologies in aviation security, the use of passenger name records, and the FBI’s querying and compliance practices conducted under Section 702 of FISA and related authorities. The Board also continued to work on other oversight projects previously approved by the Board, including its review of the NSA’s use of XKEYSCORE as an analytic tool and other classified activities conducted under Executive Order 12333.

Advice. During the reporting period, the Board issued advice to one Executive Branch agency. The Board accepted one new request for advice and continued to work on two other, previously approved, advice engagements.

Operations and Management. The Board has continued to strengthen its operations and internal management capacity. The Board hired a full-time Internal Controls Officer, completed its first financial-statement audit, and engaged expert accounting support to implement the audit’s findings. The Board has launched a Trusted Access program to ensure the security of classified information and prevent insider threats and continues to strengthen its technical controls to ensure compliance with the Department of Homeland Security’s Cross-Agency Priority Goals for cybersecurity.

Activities of the Board During the Reporting Period

Oversight Function

USA FREEDOM Act

Three national security provisions modified or extended by the USA FREEDOM Act of 2015 are scheduled to sunset on December 15, 2019. One notable expiring provision concerns the collection of call detail records, a topic the Board examined in a 2014 report on the telephone records program as it existed at the time.

As part of its ongoing oversight of the telephone records program, the Board and its staff have received briefings from elements of the Intelligence Community and Department of Justice to better understand the government’s use of that provision in the USA FREEDOM Act.

As part of this work, the Board hosted a public forum in May to hear from a range of experts on the USA FREEDOM Act. The discussion focused the history and implementation of the USA FREEDOM Act, present challenges, and the path ahead. The panelists included academics, former government officials, and representatives from non-governmental organizations.

New Oversight Projects

Facial Recognition and Other Biometric Technologies Used in Aviation Security

The Board voted to review how facial recognition and other biometric technologies are used to verify identity at each phase of an air travel journey, considering both the operational benefits and privacy and civil liberties concerns.

Passenger Name Records

The Board voted to conduct an oversight project related to the use of airline passenger name records.

FBI Querying, Compliance, and Information Technology

The Board is reviewing the FBI’s querying of data obtained pursuant to Section 702 of the Foreign Intelligence Surveillance Act and related authorities. The review will also examine the procedures and technology used to record queries, or searches, and ensure compliance with applicable rules.

Other Active Oversight Projects

The Board continues to press forward on a number of oversight projects previously approved by the Board. These projects examine programs within the Board’s jurisdiction conducted by several federal agencies and relate to data aggregation and access, watchlists, and the use of open-source data. Board staff have continued to work on these projects, conducting in-person and phone meetings, receiving briefings, and obtaining project-related documents for further review.

Earlier this month, the Board released a full inventory of its active oversight projects for the first time since 2014. A copy is included with this report as Appendix A. Notably, the release disclosed the subject of the Board’s “deep dive” review of a classified activity conducted by the NSA. The Board continues to anticipate that work related to this deep dive will remain classified. The inventory also describes several previously unannounced projects approved by the Board in early 2017.

Attaining the greatest possible transparency was one of the five “strategic goals” in the Board’s 2019-2022 Strategic Plan. To achieve that goal, the Board committed in the Strategic Plan that it would “seek to identify publicly the subjects of its oversight reviews.” Publicly describing all of the Board’s active oversight projects reflects the Board’s commitment to giving the public and other stakeholders the greatest possible insight into the Board’s work, consistent with the need to protect classified information and with other applicable law. The Board intends to update the inventory biannually.

Advice Function

The Board has continued to perform its advice function, which entails providing pre-decisional advice to agencies involved in efforts to protect the nation against terrorism. During the reporting period, the Board voted to finalize and issue advice to one Executive Branch agency. The Board continues to work on two other, previously approved advice engagements. The Board also voted to accept one new advice engagement at the request of an Executive Branch agency.

Experience suggests that the Board’s advice is valued by Executive Branch agencies. Since regaining its quorum in October 2018, the Board has accepted four requests from other Executive Branch agencies for advice on matters within its jurisdiction. Notably, the Board has provided advice, or is currently providing advice, on every significant revision or re-issuance by an Intelligence Community element of its Attorney General-approved guidelines governing the handling of U.S.-person information collected under Executive Order 12333. The Board also provided advice on the first-ever procedures governing the dissemination of raw signals intelligence by the NSA. Those procedures were issued by ODNI, in coordination with the Secretary of Defense, on January 3, 2017.

Cybersecurity: Executive Order 13636

Executive Order 13636 requires the Department of Homeland Security to consult with the Board in producing a public report, required by Section 5(c) of the order, that assesses the privacy and civil liberties implications of the functions and programs undertaken by agencies covered by the order. The Board has continued to engage with the Department of Homeland Security during this reporting period. As required by Executive Order 13636, DHS periodically updates the Board on the progress of agencies’ cybersecurity information-sharing activities. The Board has received six of eight agencies’ reports thus far and expects to receive the remaining two by the reporting deadline. Board staff will continue to consult with DHS and provide necessary guidance for the final, consolidated Executive Order 13636 Privacy and Civil Liberties Assessment Report for Fiscal Year 2019.

Coordination of Executive Branch Privacy and Civil Liberties Activities

Section 803 of the Implementing Recommendations of the 9/11 Commission Act of 2007 requires agencies’ Privacy Officers to issue Semi-Annual Reports about their activities to their respective agency heads, Congress, and the Board. The Board regularly receives and reviews Section 803 reports from federal departments and agencies.

The Board's authorizing statute also instructs the Board to advise covered agencies on their efforts to protect privacy and civil liberties and to coordinate those activities on relevant interagency matters. Since regaining its quorum, the Board has reestablished regular meetings with agency Privacy Officers. Among other things, these meetings promote information sharing and privacy best practices.

Organizational and Managerial Activities During the Reporting Period

During the reporting period, the Board continued to strengthen its institutional capacity, bolstering its workforce, financial management, and cybersecurity.

Workforce

The Board continues to pursue a workforce equipped with the skills required to achieve its mission, despite lingering personnel challenges resulting from its lengthy sub-quorum period. Through an active recruitment effort, the Board made significant progress in filling key vacant positions, with staffing now approaching its previous peak of July 2016. During Fiscal Year 2019, the Board's head count has increased 60 percent. Notably, during the reporting period, the Board appointed an expert technologist to advise and assist the Board on issues related to new and emerging technologies. The Board also established a Summer Fellow program to provide experience in privacy, civil liberties, and national security to qualified law-school and graduate-school students and to further develop its hiring pipeline.

In addition, during the reporting period, Chairman Klein appointed Lynn Parker Dupree to serve as the Board's Executive Director. For five years prior to this appointment, Ms. Parker Dupree served as the Board's Deputy General Counsel.

The Board actively continues to seek highly qualified candidates to fill its remaining positions. The Board will continue to ensure that its staff encompasses a broad range of professional backgrounds, including experience in intelligence, counterterrorism, privacy and civil liberties, oversight and investigations, and technology.

Nominations

On June 27, 2019, the Senate confirmed Aditya Bamzai and Travis LeBlanc to serve as members of the Board. With these confirmations, the Board has a full slate of members for the first time since 2016. The Senate also confirmed the re-nomination of Board Member Edward Felten to a new six-year term. The Board is grateful to the White House for these nominations and the Senate for its consideration of these nominees.

IT Systems

During the reporting period, the Board's information-technology staff continued to work on strengthening the agency's cybersecurity posture, by:

- Completing the Authorization to Operate after the PCLOB's office relocation, validating compliance with National Institute of Standards and Technology controls;
- Implementing the Security Information and Event Management platform to centralize log collection and reduce impact of security events;
- Responding to Department of Homeland Security Binding Operational Directive 19-01 to mitigate domain name system infrastructure tampering;
- Conducting a disaster recovery exercise to validate data recovery tools and processes;
- Implementing the Board's hosted mobile communications solution to increase staff productivity; and
- Enhancing network infrastructure by implementing redundant components to increase network availability and efficiency.

The Board continues to leverage shared service providers and contractor support to enhance its boundary protection. The Board's IT staff implemented, maintained, and documented technical controls to comply with federal standards and the Department of Homeland Security's Cross-Agency Priority Goals for cybersecurity. These goals include managing asset security, protecting networks and data, and limiting personnel access. In the coming months, the Board will continue to focus its efforts on the cybersecurity Cross-Agency Priorities and conduct an incident response exercise.

Financial Controls and Contracting

During the reporting period, the Board continued to focus on strengthening its internal controls and responding to its first financial audit. The Board completed its first financial statement audit during this reporting period. The audit, which covered Fiscal Year 2018, found no fraud, waste, or abuse. The audit also identified five areas that required audit remediation through corrective action plans. To build its internal financial management and respond to the audit findings, the Board hired a full-time Internal Controls Officer and contracted for accounting support to assist the Board's Finance Office. The Board is confident that these steps will enable the Board, despite its small size, to achieve the highest standards of federal financial management.

Protecting Classified and Sensitive Information

The Board is committed to ensuring the security of the information with which it is entrusted. In accordance with Executive Order 13587, which requires federal agencies that operate or access classified computer networks to establish an insider threat program, the Board drafted an Insider Threat Implementation Plan, Insider Threat Policy, and Insider Threat Awareness Training. In its initial assessment of the Board's Trusted Access Program, the National Insider Threat Task Force noted that the program met 17 of the 23 minimum requirements. The Board will continue to develop its Trusted Access Program to meet the remaining requirements of Executive Order 13587.

Additionally, the Board’s Chief Security Officer participates in various working groups, enabling the Board to maintain awareness of security trends identified by larger agencies. During the next reporting period, the Board will remain focused on the protection of classified information. Specifically, the Board intends to:

- Continue to leverage the security expertise of larger agencies in the Intelligence Community and Department of Defense;
- Meet the remaining requirements for agency Insider Threat policies;
- Implement its Controlled Unclassified Information program; and
- Maintain its robust self-inspection program.

Outreach to the Public, Congress, and Other Federal Agencies

The Board is committed to ensuring that its work is available and useful to the public, Congress, and other federal agencies. The Board’s statute requires it to “hold public hearings and otherwise inform the public of its activities, as appropriate and in a manner consistent with the protection of classified information and applicable law.”⁸ Since regaining its quorum, the Board has held two public events.

On February 8, 2019, the Board held a public forum titled, “Countering Terrorism While Protecting Privacy and Civil Liberties: Where do We Stand in 2019?” At this event, experts on privacy, civil liberties, and counterterrorism helped inform the Board as it developed its agenda.

On May 31, 2019, the Board held a public forum to examine the collection of call detail records under the USA FREEDOM Act of 2015. The Board and expert panelists discussed the USA FREEDOM Act’s history and implementation, as well as present challenges and the path ahead. During this forum, the Board announced that it is engaged in a review of the operation of the call detail records program. After completing this review, the Board will provide information to Congress to support its consideration of the sunseting USA FREEDOM Act provisions.

To foster a better understanding of its mission and work, Board Members and staff have continued the past practice of speaking at events hosted by other government agencies, as well as by a variety of groups and organizations, including bar associations, business organizations, educational institutions, and non-governmental organizations. Board Members also continued its past practice of meeting with representatives of non-governmental organizations, the private sector, international counterparts, and other entities with interest in issues within the Board’s jurisdiction.

Board Members and staff have also prioritized efforts to meet periodically with Members of Congress and congressional staff to update them on the Board’s work and receive input on the

⁸ 42 U.S.C § 2000ee(f)(2).

Board's activities and agenda. Board Members also remain available to provide congressional testimony when requested.

Conclusion

The Board is moving vigorously to carry out its statutory mission, initiating new oversight and advice projects that address important issues related to efforts to protect the nation against terrorism, privacy, and civil liberties.

The Board looks forward to engaging with Congress, the public, and other stakeholders as it continues to identify future oversight projects and transparency initiatives. The Board appreciates the continued collaborative efforts of Congress, the Executive Branch, nongovernmental organizations, private-sector entities, and members of the public who have engaged with the Board in support of its mission.