



Privacy and Civil Liberties Oversight Board

SEMI-ANNUAL REPORT

Working to ensure that efforts by the executive branch to protect the nation from terrorism are balanced with the need to protect privacy and civil liberties.

December 2018

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PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

**Semi-Annual Report
December 2018**

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 to the President and the Members of Congress listed below.

This report covers the period from October 2016-December 2018. From January 2017 until October 2018, the Board had too few Senate-confirmed Members to constitute a quorum, leaving it unable to issue Semi-Annual reports. Having regained its quorum, the Board is pleased to renew the practice of issuing Semi-Annual Reports.

The Honorable Richard Shelby, Chairman
U.S. Senate Committee on Appropriations

The Honorable Patrick Leahy,
Ranking Member
U.S. Senate Committee on Appropriations

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

The Honorable Claire McCaskill,
Ranking Member
U.S. Senate Committee on Homeland Security and
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The Honorable Richard Burr, Chairman
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The Honorable Rodney Frelinghuysen, Chairman
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The Honorable Nita M. Lowey,
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The Honorable Devin Nunes, Chairman
U.S. House of Representatives Permanent Select
Committee on Intelligence

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

The Honorable Jerry Nadler
Ranking Member
U.S. House of Representatives
Committee on the Judiciary

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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. For the previous 20 months, beginning in January 2017, the Board had too few Senate-confirmed Members to constitute a quorum, rendering it unable to issue the statutorily required Semi-Annual reports during that period. For that reason, this is the Board's first Semi-Annual Report since the reporting period ending September 2016.

During the sub-quorum period, Board staff and Board Member Elisebeth Collins preserved the Board's ability to operate as a federal agency and carried forward its statutory mission, despite the limitations imposed by sub-quorum status and the lack of a full-time Chairman. Board staff continued to work on oversight projects previously approved by the Board, and Board Member Collins was able to provide advice requested by Executive Branch agencies in her individual official capacity. In addition, Board staff and Board Member Collins carried forward the Board's agency-building efforts and managed the Board's compulsory relocation, which was completed under budget. The Board thanks Board Member Collins and Board staff for their efforts and accomplishments during the sub-quorum period.

These achievements have placed the Board on a sound footing for long-term success. Now, with a renewed quorum, and with the Board's first full-time Chairman since 2016, the Board is once again able to carry out the full panoply of responsibilities conferred by its statute. Two additional nominees named by the President in August 2018 would, if confirmed, provide the Board with a full complement of five members. The Board thanks the President for those nominations and the Senate for its consideration of the nominees.

With this report, the Board is pleased to renew the practice of issuing Semi-Annual Reports. With its quorum restored, the Board looks forward to continuing to keep Congress fully and currently informed of its activities and informing the American people about its work.

I. 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) 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.¹

- 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.²

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.³ 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.
- **Presidential Policy Directive 28 (PPD-28)** articulates principles to guide why, whether, when, and how the United States conducts signals intelligence activities for authorized foreign intelligence and counterintelligence purposes.⁴ In the directive, the President encourages 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.
- **Section 803 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("Section 803")** requires certain Executive Branch departments, agencies, and elements to designate at least one senior official as a privacy and civil liberties officer ("P/CL officer").⁵ Each agency's P/CL officer must issue Semi-Annual Reports on the discharge of each of his or her functions under the statute.⁶ These Section 803 Reports are to be submitted to the head of the P/CL officer's agency, designated congressional committees, and the Board.⁷ To the greatest extent possible, the reports must be in unclassified form and made available to the public.⁸

In addition to receiving and reviewing the P/CL officers' Semi-Annual Reports, the Board is directed by statute to make recommendations, when appropriate, to P/CL officers regarding their activities and to coordinate those activities on relevant interagency matters.⁹

¹ 42 U.S.C. § 2000ee(d)(2).

² *Id.* § 2000ee(d)(1).

³ E.O. 13636, Improving Critical Infrastructure Cybersecurity (Feb. 12, 2013).

⁴ PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

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.

⁶ *Id.* § 2000ee-1(f). Before its amendment in 2014, the statute required quarterly reports.

⁷ *Id.* § 2000ee-1(f)(1)(A).

⁸ *Id.* § 2000ee-1(f)(1)(B), (g)(1).

⁹ *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).

II. 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 perform its oversight function, despite the limitations imposed by an extended sub-quorum period. Early in the reporting period, before losing its quorum, the Board completed one classified report as part of the Board's examination of certain activities within the Board's jurisdiction conducted pursuant to Executive Order 12333. Board staff continued to work on the remaining E.O. 12333 projects during the sub-quorum period.

The Board also completed the oversight report requested by Presidential Policy Directive 28. After working with the Intelligence Community, an unclassified version of that report was released to the public in October 2018.

Before losing its quorum in January 2017, the Board approved new oversight projects involving efforts to protect the country against terrorism and their implications for privacy and civil liberties. Board staff continued to work on those projects during the sub-quorum period.

The Board has announced that it will hold a public forum on February 8, 2019, to inform the Board as it develops its oversight agenda for 2019 and beyond. Going forward, the Board intends to hold regular public events, consistent with its statute and Board Members' commitment to transparency.

Advice. The Board continued to provide advice to other Executive Branch agencies. Early in the reporting period, before losing its quorum, the Board completed three advice projects. During the sub-quorum period, Board Member Elisebeth Collins issued advice in her individual official capacity on two occasions. Since regaining its quorum, the Board has voted to accept three requests from other Executive Branch agencies for advice on matters within its jurisdiction.

Operations and Management. During the reporting period, the Board continued to strengthen its capacity to operate as a federal agency. Most notably, the Board completed its compulsory relocation to a new permanent location in Washington, DC. The Board also continued to focus on updating its internal policies and procedures, implementing effective internal financial controls, strengthening cybersecurity, and ensuring robust protection of classified information.

Statutory Enhancements. Finally, two statutory changes made by the FISA Amendments Reauthorization Act of 2017 have enhanced the Board's capacity to operate and carry out its mission as a federal agency. First, in the absence of a Chairman, the Act empowers the remaining Board Members to exercise the Chairman's hiring authority; previously, the PCLOB could not hire when the Chairman position was vacant. Board Member Elisebeth Collins used this newly conferred authority to hire two employees during the recently concluded sub-quorum period. Second, the Act exempted the PCLOB from the Government in the Sunshine Act,

enabling Board Members to confer efficiently and flexibly while preserving the significant transparency requirements in the Board’s own statute. These legislative actions will strengthen the Board’s institutional capacity and enable it to execute its mission in an efficient and transparent manner in the future.

III. Oversight and Advice Activities of the Board During the Reporting Period

Signals Intelligence Activities: PPD-28

In Presidential Policy Directive 28, issued in January 2014, the President “encouraged” the Board “to provide me with a report that assesses the implementation of any matters contained within this directive that fall within its mandate.”¹⁰

In December 2016, after conferring with representatives from all elements of the Intelligence Community (IC), the Board completed a classified report on PPD-28 and submitted it to the National Security Council. The report assesses the implementation of PPD-28 as it relates to counterterrorism efforts and the protection of privacy and civil liberties.

After working with the Intelligence Community to shepherd the report through the classification-review process, an unclassified version of the PPD-28 report was released to the public in October 2018. That document is available on the Board’s website, at <https://www.pclob.gov/oversight-reports/>.

Executive Order 12333

During the sub-quorum period, the Board continued its examination of certain counterterrorism-related activities conducted by the intelligence community under E.O. 12333, building upon the significant work that has been done to date.¹¹

This review has included meetings and briefings with elements of the intelligence community, review of relevant procedures and policies, and input from the public, including academic experts, former government officials, and non-governmental organizations. The Board and its staff have worked with the National Security Agency and the Central Intelligence Agency to gather information and documents in support of in-depth examinations of three specific counterterrorism-related activities conducted pursuant to E.O. 12333, one at the NSA and two at the CIA. In January 2017, one of the two examinations of CIA activities concluded with a classified report by the Board.

During the sub-quorum period, Board staff continued to work on the remaining elements of the Board’s previously approved E.O. 12333 work plan. Having regained its quorum, the Board plans to review the work conducted during the sub-quorum period and bring each project to an appropriate conclusion.

¹⁰ PPD-28, Signals Intelligence Activities (Jan. 17, 2014).

¹¹ E.O. 12333, United States Intelligence Activities (Dec. 4, 1981), as amended.

Other Oversight Projects Initiated in 2016 and 2017

During the reporting period, before losing its quorum in early 2017, the Board approved new oversight projects, which 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. During the sub-quorum period, 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. Having regained its quorum, the Board plans to review the work previously conducted and bring each project to an appropriate conclusion, issuing any reports publicly to the greatest extent consistent with the protection of classified information.

Cybersecurity: Executive Order 13636

Executive Order 13636 requires DHS 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.

During the reporting period, all agencies covered by the Executive Order reported that there were no substantial changes to their E.O. 13636 programs. During the sub-quorum period, Board staff reviewed these reports and responded to each agency on behalf of Board Member Elisebeth Collins in her individual official capacity.

Section 803 Report Recommendations

Section 803 requires agencies' P/CL officers to issue Semi-Annual Reports about their activities to their respective agency heads, Congress, and the PCLOB. Ten federal departments and agencies are required to submit these reports. The statute instructs the PCLOB to advise these agencies on their efforts to protect privacy and civil liberties.

In June 2016, the PCLOB released a set of recommendations, which were approved unanimously by the Board, to provide guidance to help federal agencies improve the reports they file under Section 803. These recommendations, which can be found on the Board's website, are aimed at promoting transparency and making Section 803 reports more informative and accessible. During the sub-quorum period, the PCLOB continued to receive and review agency Section 803 Reports. Board staff have also conducted ongoing engagement with agency P/CL offices as they implement the Board's June 2016 recommendations.

Advice Function

The Board has also continued to perform its advice function, providing pre-decisional advice to agencies involved in efforts to protect the nation against terrorism. 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.

During the reporting period, the Board completed three advice projects before losing its quorum in early 2017. During the sub-quorum period that followed, Board staff continued to engage with agencies pursuant to the Board's advice function, and Board Member Elisebeth Collins provided advice in her individual official capacity on two occasions. Since regaining its quorum, the Board has voted to accept three requests from other Executive Branch agencies for advice on matters within its jurisdiction.

IV. Organizational and Managerial Activities During the Reporting Period

During the sub-quorum period that began in January 2017, Board staff and Board Member Elisebeth Collins continued to undertake the multiple functions necessary to operate as a federal agency. Most notably, in April 2018 the Board completed its compulsory relocation to new office space, described further below. With the confirmation and appointment of three new Board Members in October 2018, the Board is well-positioned to execute its mission and continue developing its institutional capacity.

Workforce and Nominations

The Board has continued to pursue a workforce equipped with the skills required to achieve its mission, despite facing significant personnel challenges during the sub-quorum period. Following the resignation of its previous Chairman on July 1, 2016, the Board was not authorized to hire new staff members, though it was able to accept details from other federal agencies.

The FISA Amendments Reauthorization Act of 2017, passed by Congress in January 2018, empowered the remaining Board Members to exercise the Chairman's hiring authority in the absence of a Chairman.¹² During the sub-quorum period, Board Member Collins used this authority to hire a Systems Administrator and a Human Resources Specialist. Since the confirmation of a full-time Chairman by the Senate in October 2018, the Board has hired two attorneys and currently has active job postings for Executive Director, Attorney Advisor, Technologist, Program Analyst, Operations Director, and Internal Controls Officer. The Board seeks 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.

In August 2018, the President nominated two more individuals to serve on the Board. If confirmed, these nominees would provide the Board with a full complement of five members for the first time since July 1, 2016. The Board thanks the President for those nominations and the Senate for its consideration of the nominees. The Board looks forward to working with the President and Senate on the renomination and Senate consideration in the 116th Congress of these nominees, and of current Board Members as their present terms expire.

¹² See 42 U.S.C. § 2000ee(j)(2).

Relocation of the Board's Offices

During the reporting period, the Board's office relocated to a new permanent location in Washington, DC. This compulsory relocation became necessary after the building that housed the Board's previous space, 2100 K Street NW, was scheduled for demolition in late 2016.

The Board does not have independent leasing authority and therefore worked with GSA to identify a new headquarters location. The PCLOB's work must be conducted within a Sensitive Compartmented Information Facility (SCIF), which limited the available options. The PCLOB consulted with GSA to identify a new location, but was unable to locate existing office space that was available and built to SCIF standards. The GSA thus identified vacant space and negotiated a ten-year lease (with an additional five-year option) so that the PCLOB could construct a SCIF to serve as the Board's permanent location. This lease was secured through the GSA procurement process and was awarded based on the lowest cost to the government.

Throughout the construction process, Board staff and Board Member Collins focused on ensuring that the compulsory relocation was conducted in a cost-efficient manner. As a result, the PCLOB completed the relocation under budget in April 2018.

IT Systems

During the reporting period, the Board's information-technology staff focused on strengthening the agency's cybersecurity posture while relocating the Board's IT infrastructure to its new permanent office space. Board staff undertook the following additional activities to enhance the agency's cybersecurity posture:

- Enhanced the agency's boundary protection by implementing Managed Trusted Internet Protocol Service (MTIPS).
- Completed the first agency FISMA Independent Audit of NIST 800-53 controls to identify weaknesses and enhance security posture.
- Implemented the DHS Continuous Diagnostics and Mitigation (CDM) platform to identify cybersecurity risks and prioritize remediation based on potential impacts.
- Commissioned an independent network assessment to validate security controls and test phishing-response training.

The Board also hired a full-time Systems Administrator and engaged full-time Network Administration and Information Security Officer contractors. These new additions have been diligently assisting the Chief Information Security Officer in identifying key data resources and implementing technical controls to adhere to federal standards and to ensure that the Board is in full compliance with the Cybersecurity Cross-Agency Priority Goals. These goals include Information Security Continuous Monitoring, anti-phishing defenses, and malware defenses.

Information security will remain a top priority for the Board during the next reporting period. In the coming months, the Board will continue to focus on achieving the Cybersecurity Cross-Agency Priorities, enhancing boundary protection through implementation of MTIPS at the Board's Continuity of Operations location, and expanding Security Information and Event Management solutions across agency assets.

Financial Controls and Contracting

The Board is committed to establishing and maintaining robust, professional internal financial controls. During the reporting period, the Board instituted internal controls based on established federal financial standards promulgated by the Government Accountability Office, the Office of Management and Budget, and other relevant agencies. These include a Financial Resource Management Manual, Funds Control Guidelines, a Charge Card Manual, an Internal Controls Framework Manual, and a Senior Assessment Team Charter. These five documents establish the control activities (policies and procedures) that are necessary for an effective financial management and internal controls program.

To date, the Board has retained contractors to oversee the implementation of these internal controls. However, during the sub-quorum period, Board Member Elisebeth Collins used the hiring authority granted by the FISA Amendments Act Reauthorization Act to post a vacancy for a full-time Internal Controls Officer to oversee the Agency's audit readiness, financial controls, analysis of budgetary/financial data, and risk-management activities. The Board intends to hire a full-time Internal Controls Officer early in the next semi-annual reporting period.

As part of its efforts to ensure robust fiscal management and responsible stewardship of taxpayer resources, the Board awarded a contract for its first financial audit in June 2018. Work on the audit began shortly thereafter. This initial audit will run through March 1, 2019, with subsequent audits due in November of each of the next three years. As of the date of this report, the Board has completed the Planning Phase and is now in the Internal Controls Phase of the audit process. The Board looks forward to receiving the results of this first financial audit and using them to further strengthen the Board's financial management.

During the next reporting period, the Board will continue focusing on audit readiness, contracting for services related to the new headquarters, and using existing acquisition vehicles to automate travel services for its government personnel, including its two newly confirmed part-time Board Members who reside outside the DC area.

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 has drafted an Insider Threat Implementation Plan, Insider Threat Policy, and Insider Threat Awareness Training. In recognition of these efforts, the National Insider Threat Task Force highlighted the Board as an example of an agency able to meet the standards established by EO 13587 despite not having a counterintelligence mission. The Board has also drafted and begun implementing a policy on protecting Controlled Unclassified Information.

In light of the Board's size, the Board aims to leverage the expertise of larger agencies and entities to ensure a vigilant security posture attuned to the latest threats. During the reporting period, the Board sought and received approval from the Department of Defense to be recognized as a National Industrial Security Program agency, enabling the Board to directly hire cleared contractors. The Board's Chief Security Officer participates in various IC working

groups, enabling the Board, despite its relatively small size, 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 its implementation of Insider Threat and Controlled Unclassified Information programs and to maintain its robust self-inspection program, which ensures appropriate derivative classification.

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."¹³ Having regained its quorum, the Board has announced that it will hold a public forum on February 8, 2019, to inform the Board as it develops its oversight agenda for 2019 and beyond. At this event, the Board anticipates receiving information from governmental and non-governmental experts on privacy, civil liberties, efforts to protect the nation from terrorism, and other issues relevant to the Board's work. Going forward, the Board intends to hold regular public events, consistent with its statute and Board Members' commitment to transparency.

In addition, to foster a better understanding of its mission and work, Board Members and staff plan to continue Board Members' 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 look forward to 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 plan to prioritize efforts to meet periodically with Members of Congress and congressional staff to update them on the Board's work and receive input on the Board's activities and agenda. Board Members also remain available to provide congressional testimony when requested. During the reporting period, Board Member Elisebeth Collins testified before the Senate Judiciary Committee during a hearing on Section 702 of the Foreign Intelligence Surveillance Act. Her testimony is available on the Board's website, at <https://www.pcllob.gov/newsroom/2017/06/27/Collins-TestimonySJC.html>.

Finally, the Board is in the process of drafting its first Strategic Plan since 2015. The Board aims to submit this document to the Office of Management and Budget in January 2019. The Board will provide the new Strategic Plan to its congressional oversight committees and post the Plan on its website for public access as soon thereafter as possible.

¹³ 42 U.S.C § 2000ee(f)(2).

Conclusion

The Board is well-positioned to carry out its statutory mission in 2019. With its quorum restored, the Board can now exercise the full panoply of authorities conferred by its statute and initiate 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 formulates its agenda for 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.