

Comments to the Privacy and Civil Liberties Oversight Board
By the Center for National Security Studies
On the role, processes and priorities of the Board.
October 26, 2012

Pursuant to the Federal Register Notice, Kate Martin, Director of the Center for National Security Studies requests an opportunity to address the Board in person at its scheduled meeting on October, 30, 2012.

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The Center for National Security Studies, an organization that has focused exclusively on civil liberties and human rights issues intersecting with national security for more than 30 years, submits these comments to the Privacy and Civil Liberties Oversight Board.

The Center appreciates this opportunity to present its views to the Board. As outlined in the presentations of other organizations, there are many very important issues concerning surveillance, privacy and the civil rights of Americans which have not been adequately addressed to date by policy-makers and on which issues the Board could make a significant contribution. These Comments will offer some suggestions on some issues relating to the overall role and approach the Board takes in carrying out its statutory responsibilities. Given the limited time available to prepare these comments, we offer them merely as an outline of suggestions, rather than in-depth proposals. We would welcome the opportunity to discuss these matters in more detail with the Board.

1. *Role of the Board:* Understanding and defining privacy and civil liberties: what criteria should be applied in examining the impact of government policies on privacy and civil liberties?
 - a. The Board should insure that it does not simply replicate the role of existing Executive branch officers and lawyers. In order to fulfill its statutory mandate it should do more than simply determine whether a particular proposal or outcome is likely to be upheld or struck down by the courts.
 - b. Rather the Board should develop a broader perspective for its work on the meaning of privacy and civil liberties. How to do this is not simple and merits greater discussion than is possible here. But the Board will not be addressing the meaning of these terms on a blank slate. An enormous amount of work has been done by civil society, by academics and by the international community looking at these questions. The Board should take into account the views of the civil liberties and privacy community; international standards; existing arguments made for development of or change in the law; and even common-sense consequences. The discussion below in paragraph 5 addresses two specific examples of questions for the Board in more detail: protection for third party records and what is meant by intrusions on privacy.
 - c. While we do not believe that it is the role of the Board to determine what the law is or how the courts are likely to rule, current law is of course relevant to the Board's consideration. In particular, we do not believe the Board should feel hamstrung by the proposition that where the Supreme Court does not currently recognize constitutional protections, the extent of protection to be provided by the law is merely a question of policy without taking into account where the law may or should go. The Board is a unique entity with a unique brief to protect civil liberties. One possibility is that the Board should start with the presumption that where there is a reasonable argument to be made, it will recognize the civil liberty interests at stake and ask whether those interests can be protected while meeting national security requirements.

2. *Objectives of the Board:*

- a. To facilitate public and congressional scrutiny and debate of policies affecting privacy and civil liberties. We hope the Board will make this effort among its top priorities.

The biggest challenge in this area has been and will continue to be that it is of necessity classified to some extent. The problem of how to make policies that affect the privacy and civil liberties of Americans when the subject matter of those policies is to some extent classified is a perennial problem. It was the genesis of the formation of the Select Intelligence Committees in Congress. The Board is not, nor can it be an alternative solution to this problem. It is not and cannot be a substitute for democratic decision-making by Congress with public debate on these issues. It can however, prove to be a valuable addition to current processes if it can achieve greater transparency in the public and congressional review and debate of these policies.

Thus, we would urge that the Board's first priority should be to work for the greatest possible transparency:

- Of proposed policy, rule and statutory changes before their adoption; and
- Of the underlying rationales and facts supporting such proposals.

We recognize that such information is frequently classified; but over the past thirty years, we have seen many instances where non-classified information could be disclosed so that a full and fair public evaluation of the proposals is possible. We urge the Board to make accomplishment of this a key priority. Over the past few years, it has been our experience that some government and national security officials have lost the experience and knowledge about how to publicly talk about policy choices without revealing information that needs to be classified. It is difficult but not impossible.

- b. To seek out and disseminate the views of those who are most at risk, most vulnerable, or most likely to be targeted by controversial policies.

There are many diverse groups or "stakeholders" especially regarding government surveillance policies, whose voices are present in Washington debates in different ways. But not all stakeholders most affected by these policies are widely heard. The Board would perform an important service by making a wider group of stakeholders part of the dialogue and by bringing their perspective to a greater degree into internal government deliberations. For example, the millions of undocumented workers in this country who face unique risks from government surveillance, are not always represented in policy debates; that is also true of other communities that have been historically been subjected to disproportionate surveillance.

3. *Operations of the Board:*

It is not an inconsiderable problem that the list of substantive priority issues facing the Board is long and each of those issues is legally and technically complex. The Board has limited resources – lacking as you know better than we – even a Chair or Executive Director at the moment. And those government agencies whose rules and policies are subject to consideration by the Board are both much larger and have greater depth of experience with any particular issue. Most significantly perhaps, many of the policies are likely to be classified or rest on and be entwined with classified information; and the proponents of such policies are likely to be strongly convinced of their necessity to assure the national security. An ongoing question for the Board will be how can it make a contribution to the development of public policy in the face of such unequal resources. A few thoughts:

- a. The Board should develop strong relationships with privacy and civil liberties officers inside the different agencies and rely on them for knowledge and expertise.
- b. From the other perspective, the Board should also work to empower such individual officers and to ensure that they are themselves playing the same public advocate role as the Board.
- c. The Board should consider how greater transparency in the consideration and adoption of these policies might be institutionalized.
- d. The Board should consider whether it should first devote its efforts to those issues where it will be afforded a real seat at the table in considering policy options. That will vary depending on the agency and policy at issue.
- e. The Board should consider how to best assure that it is in fact provided a real seat at the policy-making table inside the Executive Branch. It may be that the Board's public reporting, at least in the beginning, should focus on the cooperation it receives from agencies in facilitating the Board's full participation in internal deliberations.

4. *Overarching Substantive issues.* The Board should consider whether there are some overarching policy issues that merit consideration before looking at any particular policy proposal, like amendments to the Foreign Intelligence Surveillance Act. At least two come immediately to mind.

- a. What is privacy? Many frequently argue that there is no such thing as privacy in the age of Facebook and Google tracking. We believe that in order to achieve its mission, the Board must reject this view. Instead it should consider those ways in which *government* access to personal information, even when that information may be somehow available on the internet, impacts those constitutional values of liberty, due process and individual autonomy that privacy is supposed to protect. An explication of those concerns, perhaps a written report, which would be available to government and congressional policy-makers, would contribute to the protection of civil liberties.

- b. In considering what constitutes privacy and civil liberties concerns, we urge the Board to look beyond the possibility of government or private individuals breaking laws or rules to access personal information, e.g. through identity theft. We believe that the more constitutionally significant understanding of privacy is that articulated by Senator Ervin, the chief architect of the Privacy Act:

“[D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.

Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom: the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.”¹

- c. The Board should consider the doctrine of third party records and how such records need to be protected given the Supreme Court’s refusal to protect third party records under the Fourth Amendment and the technological changes that have resulted in more and more private and personal information being held by third parties. The Supreme Court’s decision that there is no constitutionally protected interest in such information, e.g., *Smith v. Maryland*, only provides a starting point for considering such issue. Many legal scholars have criticized the holding and Congress has carved out certain kinds of third-party information for greater protection. The rapidly changing consumer technologies and the vastly expanding government surveillance technologies clearly call for new analysis of the issue.
- d. The Board should seek to understand how the current surveillance authorities of the government fit together. While it used to be fairly straightforward to understand when the government could collect information on an American for “foreign intelligence” purposes, what it could do with that information, who it could be shared with, and whether and for how long the government could keep it, those rules have now become enormously complex. One of the unreviewed issues is how the very complexity of the surveillance regimes

¹ Senator Samuel Ervin, June 11, 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976)

makes oversight difficult: to know what is happening, to know whether current authorities are effective, to evaluate possible less intrusive alternatives, or to weigh the overall effect of surveillance powers on civil liberties.²

- e. The Board should consider the feasibility of a mechanism to measure the fiscal costs of current and proposed surveillance measures.

5. Effect of the Board's review and conclusions concerning specific proposals.

One of the specific tasks of the Board is to review specific proposed rules and policies. The statute provides some guidance about doing that and about how potential disagreements between agencies and the Board might be dealt with by the Executive Branch. The statute also requires reports to Congress.

The statute however, does not spell out the role of the Board when the Board is satisfied in the end with proposed changes and those changes implicate for example classified information.

We would be pleased if the Board is able to make proposed policies more privacy and rights-protective. At the same time, we do not believe that the Board's judgment that the changes are sufficient should be seen as a substitute for the broader participation of the Congress and the public in such decisions. We urge the Board to be sensitive to this concern. We would be very disappointed if any administration sought to use classified reviews and considerations by the Board as a reason for arguing that no additional public or congressional scrutiny is needed.

Conclusion:

We are pleased that the Board is finally in place, although we hope that the Congress will not delay in confirming the Chair and providing adequate resources. We congratulate the Members on their confirmation and thank you for your service. We look forward to providing whatever assistance we can on the difficult work before you. Thank you for considering these comments.

² Some of these issues are laid out in some length in Priest, Dana and William M. Arkin, *Top Secret America: The Rise of the New American Security State*. New York: Little, Brown and Company, 2011.