



PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

SEMI-ANNUAL REPORT

SEPTEMBER 2012 – MARCH 2013

June 27, 2013

In accordance with Section 801 of the Implementing Recommendations of the 9/11 Commission Act, 42 U.S.C. Section § 2000ee, I am pleased to present the first Semi-Annual Report of the Privacy and Civil Liberties Oversight Board. This Semi-Annual Report is being provided to the President and the following Members of Congress:

The Honorable Barbara A. Mikulski
Chairwoman, U.S. Senate Committee on Appropriations

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

The Honorable Thomas R. Carper
Chairman, U.S. Senate Committee on Homeland Security and Governmental Affairs

The Honorable Tom Coburn
Ranking Member, U.S. Senate Committee on Homeland Security and Governmental Affairs

The Honorable Dianne Feinstein
Chairman, U.S. Senate Select Committee on Intelligence

The Honorable Saxby Chambliss
Vice Chairman, U.S. Senate Select Committee on Intelligence

The Honorable Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary

The Honorable Charles Grassley
Ranking Member, U.S. Senate Committee on the Judiciary

The Honorable Hal Rogers
Chairman, U.S. House of Representatives Committee on Appropriations

The Honorable Nita M. Lowey
Ranking Member, U.S. House of Representatives Committee on Appropriations

The Honorable Michael McCaul
Chairman, U.S. House of Representatives Committee on Homeland Security

The Honorable Bennie G. Thompson
Ranking Member, U.S. House of Representatives Committee on Homeland Security

The Honorable Mike Rogers
Chairman, U.S. House of Representatives Permanent Select Committee on Intelligence

The Honorable C.A. "Dutch" Ruppersberger
Ranking Member, U.S. House of Representatives Permanent Select Committee on Intelligence

The Honorable Bob Goodlatte
Chairman, U.S. House of Representatives Committee on the Judiciary

The Honorable John Conyers, Jr.
Ranking Member, U.S. House of Representatives Committee on the Judiciary

The Honorable Darrell E. Issa
Chairman, U.S. House of Representatives Committee on Oversight and Government Reform

The Honorable Elijah Cummings
Ranking Member, U.S. House of Representatives Committee on Oversight and Government Reform

Inquiries relating to this report may be directed to Diane Janosek, Chief Legal Officer, at (202) 331-1986.

Sincerely,



David Medine
Chairman, on behalf of the Board

Privacy and Civil Liberties Oversight Board

David Medine, Chairman

Rachel Brand

Elisabeth Collins Cook

James Dempsey

Patricia Wald



PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD

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I. EXECUTIVE SUMMARY

The Privacy and Civil Liberties Oversight Board (Board) is pleased to submit its first semi-annual report, as required by law. This report covers the Board's major activities from September 2012 – the first full month in which a quorum of Board members was appointed and serving – through March 2013.

During that period, organizational, outreach, and informational activities dominated the Board's attention. The Board believes that these activities provided a critical foundation for the efficient and effective pursuit of its statutory mandate. While working to establish an operational capability with long-term viability as quickly as possible, the Board also began to develop an understanding of critical government counterterrorism initiatives so that it could appropriately perform its oversight and advisory roles. The Board appreciates the time and effort members of the public, congressional staff, and counterterrorism officials have taken to assist its efforts in this regard.

During the reporting period, the Board began the process of oversight of implementation of the Foreign Intelligence Surveillance Act, with a specific focus on Section 702. After receiving an initial briefing on Section 702 in January, 2013, the Board requested additional information and that process was ongoing in early June when information was publicly disclosed about Section 702. In a letter to Senators dated June 20, 2013, the Board stated that it would continue its inquiry into Section 702 and would inquire as well into activities conducted under Section 215 of the USA PATRIOT Act. The Board stated that it had made this review a top priority and that it would, to the greatest extent possible, provide a report on these matters in unclassified form.

The Board is an independent agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act,¹ signed into law in August 2007. The Board is comprised of four part-time members and a full-time chairman and has two primary purposes:

- 1) To analyze and review actions the executive branch takes to protect the United States from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and

¹ Pub. L. 110-53, § 801(a).

- 2) To ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.²

The Board's first four members, all part-time special government employees, were sworn into office in late August 2012.³ Board members immediately began the work of establishing the Board as an independent executive branch agency, focusing on three areas: organization and administration; outreach; and issue identification.

- *Organization and Administration.* As a new agency, the Board has addressed a variety of administrative matters in its first months. These included securing office space and information technology/telecommunications support, obtaining payroll and financial management services, developing a budget, identifying personnel and security requirements, adopting required operational policies and procedures, and addressing a myriad of other issues that are required to ensure smooth start-up and long-term functioning of the organization.
- *Outreach.* The Board consulted with Congressional Committees and engaged in informational sessions with federal agencies to better understand counterterrorism related programs and responsibilities. In addition, the Board held two public meetings in accordance with the Government in Sunshine Act of 1976, 5 U.S.C. §552b (Sunshine Act).
- *Issue Identification.* Based on information obtained through outreach and informational efforts, the Board identified several potential areas of focus, including training and transparency. Over the next several months, the Board will continue to evaluate other potential areas of focus.

² Pub. L. 108-458, § 1061(c) as amended by Pub. L. 110-53, § 801(a). Section 1061 is codified at 42 U.S.C. § 2000ee.

³ The members received security clearances on December 17, 2012.

II. INTRODUCTION

The Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act),⁴ which created the Privacy and Civil Liberties Oversight Board as an independent agency within the executive branch, requires the Board to report not less than semi-annually to the President and Congress. By law, the report must include:⁵

- (a) a description of the major activities of the Board during the preceding period;
- (b) information on the findings, conclusions, and recommendations of the Board resulting from its advice and oversight functions;
- (c) the minority views on any findings, conclusions, and recommendations of the Board resulting from its advice and oversight functions;
- (d) each proposal reviewed by the Board that:
 - (i) the Board advised against implementation; and
 - (ii) notwithstanding such advice, actions were taken to implement; and
- (e) for the preceding period, any requests for the issuance of a subpoena that were modified or denied by the Attorney General.

The Board's first four members, all part-time special government employees, were confirmed by the Senate on August 2, 2012 and were appointed by the President and sworn in to office later that month. With a quorum in place,⁶ Board members immediately began to establish the Board as an independent agency.

During its first several months of operation, the Board focused on establishing a solid organizational foundation. In an effort to stand up operations as quickly and efficiently as possible, the Board targeted three initial priorities: agency organization and administration, outreach, and issue identification. Board members reached out to relevant Committees of Congress and to the public to raise awareness of the Board's status and mission and to solicit input on the Board's areas of focus. The Board also began discussions with the Office of Management and Budget and other executive branch entities to integrate the Board into executive branch policy development processes. (The full nature and scope of the Board's participation in those processes remains to be determined.) After Board members obtained the

⁴ Pub. L. 110-53, § 801(a).

⁵ Pub. L. 108-458, § 1061(e)(2), *as amended by* Pub. L. 110-53, § 801(a).

⁶ Three members of the Board constitute a quorum. *See* Pub. L. 108-458, § 1061(h)(5), *as amended by* Pub. L. 110-53, § 801(a); 5 U.S.C. § 552b.

necessary security clearances, they began a series of substantive informational briefings from key agencies to gain a baseline understanding of significant executive branch counterterrorism-related programs. While the administrative burdens have been substantial, the Board made significant progress toward establishing a sound foundation for functioning as an independent agency. The Board is pleased that, despite the lack of a Chairman during this reporting period, it was able to take initial steps to fulfill the substantive aspects of its mission.

III. HISTORY AND MISSION

A. History

The Privacy and Civil Liberties Oversight Board today is in its third iteration.

In July 2004, the National Commission on Terrorist Attacks on the United States (9/11 Commission)⁷ recommended that “there should be a board within the Executive Branch to oversee adherence to the guidelines . . . and the commitment the government makes to defend our civil liberties.”⁸ In August 2004, President George W. Bush created the President’s Board on Safeguarding Americans’ Civil Liberties (President’s Board) by Executive Order.⁹ The President’s Board was chaired by the Deputy Attorney General and consisted of 22 representatives from the Departments of State, Defense, Justice, Treasury, Health and Human Services and Homeland Security; the Office of Management and Budget, and the Intelligence Community. During its tenure, the President’s Board met six times.

The President’s Board ceased to meet upon the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),¹⁰ which created the Privacy and Civil Liberties Oversight Board within the Executive Office of the President.¹¹ As chartered under IRTPA, the Board was comprised of two Board members (the Chairman and Vice Chairman) appointed by the President by and with the advice and consent of the Senate, and three additional Board members appointed by the President.¹² Of the five Board members, the Chairman served full-time; the remaining members were part-time special government employees.

In 2007, the 9/11 Commission Act¹³ reconstituted the Board in its current form as an independent agency within the executive branch. The Act required that all five Board members be appointed by the President, by and with the advice and consent of the Senate, for staggered six-year terms. The 9/11 Commission Act also terminated, effective January 30, 2008, the terms of the individuals then serving as Board members within the Executive Office of the President.

⁷ The 9/11 Commission was a bipartisan panel established to “prepare a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks” and provide “recommendations designed to guard against future attacks.” See *Nat'l Comm'n on Terrorist Attacks on the United States*, available at <http://9-11commission.gov/about/index.htm> (last visited March 26, 2013).

⁸ THE 9/11 COMMISSION REPORT 395 (2004).

⁹ EO 13353, *Establishing the President's Board on Safeguarding American's Civil Liberties* (Aug. 27, 2004).

¹⁰ Pub. L. 108-458.

¹¹ *Id.*, § 1061.

¹² IRTPA, § 1061(e)(1).

¹³ Pub. L. 110-52, § 801(a).

The Board's four part-time members were confirmed by the Senate on August 2, 2012, and were appointed by the President and sworn into office later that month for the following terms:

- *Rachel L. Brand*, for a term ending January 29, 2017;
- *Elisabeth Collins Cook*, for a term ending January 29, 2014;
- *James X. Dempsey*, for a term ending January 29, 2016; and
- *Patricia M. Wald*, for a term ending January 29, 2013.¹⁴

On January 22, 2013, the President re-nominated David Medine to serve as the Board's Chairman and its only full-time member. Mr. Medine's nomination was confirmed by the Senate on May 7, 2013, and he was appointed and sworn in later that month.

B. Mission

The Board is vested with two fundamental authorities: (1) to analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties; and (2) to ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.¹⁵

To meet its mission, the Board must provide advice to the President and executive branch agencies and departments on policy development and implementation; oversee certain actions, regulations, policies, and procedures of the executive branch (including information sharing practices) to ensure that privacy and civil liberties are protected; and, when appropriate, coordinate the activities of federal agency privacy and civil liberties officers on relevant interagency matters.

When necessary to carry out its statutory duties, the Board is authorized to access all relevant executive agency records, reports, audits, reviews, documents, papers, recommendations, or other relevant materials, including classified information, and interview, take statements from, or take public testimony from any executive branch officer or employee. In addition, the Board

¹⁴ Patricia Wald's term was extended through the end of the 113th Session pursuant to the holdover provisions set forth in IRTPA, § 1061(h)(4)(B), as amended by Pub. L. 110-53, § 801(a). The President submitted her re-nomination to the U.S. Senate on March 21, 2013, where it is currently pending consideration by the Senate Committee on the Judiciary.

¹⁵ IRTPA, § 1061(c), as amended by Pub. L. 110-53, § 801(a).

may, by written request to the Attorney General, require, by subpoena, persons (other than departments, agencies, and elements of the executive branch) to produce relevant information.¹⁶

The Board must conduct business in accordance with the Government in the Sunshine Act,¹⁷ which requires that the public be provided notice of any meetings at which the Board deliberates to determine official action. The Board also is subject to the Freedom of Information Act,¹⁸ including its requirements to make certain information available to the public through a website.¹⁹

In addition to those authorities and responsibilities contained in the Board's enabling legislation, the President's Executive Order 13636 dated February 12, 2013, *Improving Critical Infrastructure Cybersecurity*, provides that the Department of Homeland Security (DHS) shall consult with the Board in producing a report that assesses the privacy and civil liberties risks associated with the activities undertaken by federal agencies under the Order.

¹⁶ IRPTA, § 1061(g), as amended by Pub. L. 110-53, § 801(a).

¹⁷ 5 U.S.C. § 552b. The Sunshine Act requires that these meetings be open to the public, unless the Board decides, by majority vote, to close the meeting based on one of permitted bases for closing a meeting in the Sunshine Act.

¹⁸ 5 U.S.C. § 552; 42 U.S.C. 2000ee(l)(1).

¹⁹ 5 U.S.C. § 552(a)(2). The Board is working diligently to establish a website and will post the information required by the FOIA, and other information that may be of interest to the public, on its website as soon as practicable.

IV. MAJOR ACTIVITIES: SEPTEMBER 2012 – MARCH 2013

A. Organization and Administration

Under its enabling legislation, the Board may transact business with a quorum of three members. Accordingly, the Board began start-up operations in September 2012, immediately after the four part-time members were sworn in. The Board dedicated much of its efforts during the initial months of operation to establishing an organizational and administrative framework. As an independent agency, the Board has no affiliation with or support structure provided by any existing federal agency or department. This has presented an enormous challenge since the Board must simultaneously establish the necessary infrastructure to run a small agency and address its advice and oversight responsibilities. At the same time, the Board is subject to the full range of generally applicable laws and regulations regarding executive branch functions, including the Government in the Sunshine Act, the Freedom of Information Act, the Privacy Act, and others. The Board, nonetheless, has made significant progress in these areas.

As a new agency, the Board has been addressing a variety of organizational and administrative matters. These include securing office space and information technology and telecommunications support, obtaining payroll and financial management services, developing a budget, identifying personnel and security requirements, adopting required operational policies and procedures, and addressing a myriad of other issues that are required to ensure smooth start-up and functioning of the organization. Since September 2012, the Board:

- consulted with various federal agencies, such as the National Archives and Records Administration, the Office of Management and Budget, the Office of Government Ethics, and the Office of Personnel Management, about legal and operational requirements applicable to federal agencies;
- worked with the Department of the Treasury and the Office of Management and Budget to access funds appropriated to the Board;
- engaged two support personnel (a Chief Administrative Officer and Legal Counsel) as detailees from other federal agencies;
- acquired necessary security clearances for Board members;
- adopted several policies related to the Board's internal operations;
- entered into fee-for-service agreements with the General Services Administration (GSA) for human resources and financial services support;
- pursued the acquisition of information technology services, including a website; and

- secured agreements with GSA and others to allow for the occupancy by the end of the year of fully furnished and equipped office space that meets the security requirements applicable to an agency that regularly handles classified information.

By law, only the Chairman may appoint and fix the compensation of an Executive Director and other staff necessary for the Board to carry out its functions.²⁰ The law, however, allows for a federal employee to be detailed to the Board from other federal agencies.²¹ In order to allow the Board to function at an initial operating capability, the Board has and will continue to recruit a limited number of employees from other federal agencies on detail assignments.

There are numerous statutes, regulations, and executive orders that the Board must comply with due to its status as a federal agency. This, in turn, has required the Board to adopt various policies and procedures. Since engaging two detailees in mid-December 2012, the Board has progressed in both identifying this array of requirements and adopting the necessary policies and procedures. As of the end of March 2013, the Board had:

- Approved a No FEAR Act Notice,²² published it in the *Federal Register* on February 26, 2013. This is a notice that all federal agencies must provide past, present and future employees about their rights under federal whistleblower and anti-discrimination laws;
- Adopted a policy on Personally Identifiable information (PII) Breach Reporting and Response. This policy, required of all federal agencies, provides for the Board's internal procedures for assessing any breaches involving PII maintained by the Board;²³
- Adopted a security policy as required under its enabling legislation;²⁴
- Adopted a hiring and compensation policy as required under its enabling legislation;
- Approved a Notice of Proposed Rulemaking for its Freedom of Information Act, Privacy Act and Sunshine Act procedures;
- Developed a rulemaking delegating certain operational authorities to the Chairman and other staff.

²⁰ IRTPA, § 1061(j)(1), as amended by Pub. L. 110-53, § 801(a).

²¹ *Id.* § 1061(j)(2).

²² In addition to publication in the *Federal Register*, the Board made the No FEAR Act notice available to the public at its March 5, 2013 meeting.

²³ The Board made the PII Breach Reporting and Response Policy available to the public at its March 5, 2013 meeting.

²⁴ The Board adopted the security policy, hiring compensation policy, delegation rulemaking, and Notice of Proposed Rulemaking at its March 5, 2013 meeting.

The Board has identified and is currently drafting other organizational policies, including one on ethics and one on records management. The Board's Legal Counsel will continue to identify other obligations.

The 9/11 Commission Act authorized funding for the Board through fiscal year 2011.²⁵ Congress appropriated funds for the Board for Fiscal Years 2012 and 2013²⁶ (\$900,000 for each Fiscal Year). Once a quorum of Board members was appointed in August 2012, their immediate priority was to work with the Department of Treasury and the Office of Management and Budget to access those funds.

Next, in coordination with the Office of Management and Budget, the Board developed a budget request and justification for Fiscal Year 2014 in the amount of \$3,100,000. Fiscal Year 2014 will be a critical year for the Board since it will be the first full fiscal year in which the Board will function with a Chairman and the addition of non-detailee staff. It also will be the first full fiscal year in which the Board anticipates operating with a fully developed agenda. The budget is designed to both finance the completion of start-up activities and sustain the on-going substantive operations of the Board, within the limits of fiscal constraints. It covers the salaries and related costs necessary to support a small staff needed to maintain an efficient level of operations. The Fiscal Year 2014 appropriation request represents an increase of \$2,200,000 above the Fiscal Year 2013 enacted level of \$900,000, and is based on an estimated spend plan that includes Board member compensation, limited other personnel, facilities lease, administrative services, security, and information technology.

B. Outreach

In addition to the myriad of organizational challenges associated with the stand-up of an independent agency, the Board initiated a variety of efforts to acquaint itself with the important substantive aspects of its mandate.

The Board obtained multiple in-depth briefings and reviewed key documents about several of the most significant executive branch counterterrorism programs. Through the end of March 2013, these included briefings from the National Security Agency on implementation of the Foreign Intelligence Surveillance Act Amendments Act (FAA); the Program Manager for the Information Sharing Environment (ISE); the National Counterterrorism Center (NCTC) and the Department of Homeland Security (DHS) on the implementation of the 2012 *Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center and other Agencies of Information in Datasets Containing Non-Terrorism Information*; the Federal Bureau of Investigation (FBI) on the FBI's implementation of *The Attorney General Guidelines for*

²⁵ Pub. L. 110-53, § 801(a) (authorizing \$5,000,000 for Fiscal Year 2008, \$ 6,650,000 for Fiscal Year 2009, \$ 8,300,000 for Fiscal Year 2010, and \$10,000,000 for Fiscal Year 2011).

²⁶ Pub. L. 112-74; Pub. L. 113-6.

Domestic FBI Operations; and the Department of Justice (DOJ) on *The Attorney General Guidelines on Domestic FBI Operations* and other Attorney General guidelines implementing Executive Order 12333.

The Board also engaged in a series of introductory meetings, including meetings with Congressional Committees and executive agency privacy and civil liberties officers, to integrate the Board into executive branch processes, raise awareness of the Board's status and mission, and solicit input on the Board's future areas of focus..

From September 2012 to March 2013, Board members participated in the following briefings, introductory meetings, or informational sessions:

- | | |
|---------------------------|--|
| <i>September 27, 2012</i> | 1) U.S. Senate Select Committee on Intelligence staff, introductory meeting;
2) U.S. Senate Committee on the Judiciary staff, introductory meeting;
3) U.S. House of Representatives Committee on the Judiciary staff, introductory meeting |
| <i>October 18, 2012</i> | Intelligence Community Civil Liberties and Privacy Officer Focal Points Group, introductory meeting |
| <i>October 31, 2012</i> | Peter Schaar, Federal Commissioner for Data Protection and Freedom of Information, Federal Republic of Germany, informational meeting at Mr. Schaar's request |
| <i>October 31, 2012</i> | U.S. House of Representatives Committee on Appropriations staff, introductory meeting |
| <i>December 17, 2012</i> | Office of Management and Budget, introductory meeting and overview of the budget process |
| <i>December 17, 2012</i> | The Director of National Intelligence; Director, National Counterterrorism Center; Program Manager, Information Sharing Environment; Office of the Director of National Intelligence (ODNI) General Counsel; and the Director, ODNI Civil Liberties and Privacy Office, introductory meeting |
| <i>December 17, 2012</i> | National Security Staff, Executive Office of the President: Executive Order on Improving Critical Infrastructure Cybersecurity |
| <i>January 15, 2013</i> | 1) Senate Homeland Security and Government Affairs/Permanent Subcommittee on Investigations: Report on Fusion Centers, introductory meeting |

2) House Permanent Select Committee on Intelligence,
introductory meeting

January 17, 2013

Program Manager, Information Sharing Environment (ISE): ISE-sponsored programs, including a separate session with the ODNI, Department of Homeland Security, and Department of Justice co-chairs of the ISE Privacy and Civil Liberties Subcommittee of the Information and Sharing and Access Interagency Policy Committee

January 17, 2013

ODNI Privacy and Civil Liberties Office: Overview of Intelligence Community Privacy and Civil Liberties processes and procedures

January 29, 2013

National Security Agency and interagency partners: Overview of FISA Amendments Act implementation

February 12, 2013

National Counterterrorism Center (NCTC): Overview of organization and operations; overview of implementation of the *2012 Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center and other Agencies of Information in Datasets Containing Non-Terrorism Information*

February 14, 2013

Department of Homeland Security Office of Intelligence & Analysis; Office of Privacy; Office of Civil Rights and Civil Liberties: Overview of organization and operations

March 7, 2013

Jacob Kohnstamm, Dutch Data Protection Bureau/Chair of the Article 29 Working Party, introductory meeting at Mr. Kohnstamm's request

March 12, 2013

Federal Bureau of Investigation: FBI's implementation of the AG Guidelines

March 29, 2013

Department of Justice (DOJ): AG Guidelines and oversight mechanisms

As part-time special government employees, four of the five Board members are limited in the number of days per year in which they may perform Board work. To ensure that the Board makes progress toward fulfillment of its statutory mandate while complying with these limits on days of service, Board members have reserved several days each month for information and outreach meetings. After the reporting period, the Board continued to engage in additional briefings and informational sessions, as well as follow up on some of the briefings already received.

In addition to these sessions, the Board held two public meetings, in accordance with the Government in the Sunshine Act.²⁷ The Board’s first public meeting was on October 31, 2012, for the purpose of receiving the public’s input on its forthcoming agenda. Written statements were submitted for the record and representatives of privacy and civil liberties organizations appeared and presented oral remarks. The following table summarizes the issues identified by witnesses and in the written submissions for potential inclusion on the Board’s agenda. The issues are presented in the table in order of the frequency with which they were mentioned in public testimony.

ISSUE	SUB-ISSUE(S)
Foreign Intelligence Surveillance Act (FISA)	<ul style="list-style-type: none"> • Examine and report on the information collection activities occurring under the authority provided by Section 215 of the USA PATRIOT Act • Examine and report on the government’s use of the FISA Amendments Act of 2008
Fusion Centers	<ul style="list-style-type: none"> • Evaluate the quality of information collected relative to the value added to counterterrorism efforts • Investigate potential abuses related to surveillance techniques and activities
Unmanned Aircraft Systems (UAS)	<ul style="list-style-type: none"> • Review of federal agency use of UAS for surveillance purposes and Privacy Act compliance • Review program guidelines and policies for the Administration’s “targeted killing” program
Cybersecurity	<ul style="list-style-type: none"> • Review any information gathering/surveillance activities related to federal cybersecurity programs
National Counterterrorism Centers	<ul style="list-style-type: none"> • Review amended 2012 <i>Guidelines for Access, Retention, Use, and Dissemination by the National Counterterrorism Center and other Agencies of Information in Datasets Containing Non-Terrorism Information</i>

²⁷ 5 U.S.C. § 552b.

Information Sharing Environment (ISE)/Suspicious Activity Reports	<ul style="list-style-type: none"> ● Evaluate the quality of information collected relative to the value-added to counterterrorism efforts ● Review suspicious activity reports (SARs) initiative
Data Mining	<ul style="list-style-type: none"> ● Assess the use of data mining for homeland security purposes ● Follow up on Department of Defense Technology and Privacy Advisory Committee report: “Safeguarding Privacy in the Fight Against Terrorism” ● Review federal government access to and use of databases created/maintained by commercial data aggregators ● Review federal government’s collection of data from third parties/(re)consider the privacy protections afforded to records held by third parties
Other issues related to surveillance	<ul style="list-style-type: none"> ● Government use of GPS tracking ● Border searches of electronic devices and other boarder surveillance ● Traveler “watch lists” ● Attorney General Guidelines on Domestic FBI Operations ● Facial recognition technology, including further discussion of the Federal Trade Commission’s report: <u>“Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies”</u> ● Warrantless wiretapping ● Privacy/civil liberties implications of government identification of individuals as “terrorists,” “illegal aliens,” or “persons of interest” ● DHS’s closed circuit television (CCTV) program; use of body scanners and similar systems, including the “Future Attribute Screening Technology”

Board's Role/Operations	<ul style="list-style-type: none"> • Adopt strong transparency measures for Board operations, including a record keeping system designed to support proactive disclosures and a website • Consider questions beyond the legality of a particular program or activity to the broader policy questions, like “What is ‘privacy’ in the age of the Internet?” • Conduct regular meetings • Engage the Departments’ privacy and civil liberties officers • Promote “privacy by design” in counterterrorism measures
Other Issues	<ul style="list-style-type: none"> • Review prosecution of individuals for leaks of intelligence information and the impact of these efforts on national security whistleblowers • Provide input on efforts to reform the classification system • Investigate abuses of grand jury subpoenas to jail political and social activists • Investigate surveillance abuses committed by local law enforcement • Consider need to clarify Section 1012 of the National Defense Authorization Act of 2012 • Audit DHS to determine if its activities/programs exceed its authorities • Review the uncontrolled aggregation of personal data by companies like MyLife and Spokeo

The Board held its second public meeting on March 5, 2013, to conduct business related to stand up and to provide a status report on the Board’s activities. The Board intends to hold further public meetings to consider particular issues in greater depth and has proposed a series of subject-matter specific public meetings. The Board will use its website, once established, to notify the public about upcoming meetings and post the minutes from previous meetings. The Board also intends to post online materials and information useful to federal agencies and to educate the general public and specialized audiences about privacy and civil liberties concerns related to the terrorism programs of the U.S. Government.

C. Issue Identification

In the period covered by this report, the Board began the process of evaluating the array of federal counterterrorism programs to determine where it should focus its oversight responsibilities, particularly in light of limited staff and resources. The outreach and informational briefings in which the Board engaged and will continue to engage are a critical step in this process as is the public input as to the counterterrorism programs or issues on which the Board should focus. Additionally, the Board intends to hold one or more public hearings on the scope of its program reviews. This will likely include consideration of issues such as defining “privacy” and “civil liberties” in the context of the federal government’s counterterrorism programs.

Based on its statutory mandate and information received as of the end of the reporting period, the Board anticipated focusing on issues related to:²⁸

- The FISA Amendments Act (FAA);
- The Information Sharing Environment;
- NCTC and other federal agency implementation of the AG Guidelines on the sharing and use of information in datasets containing non-terrorism information;
- FBI and DHS domestic intelligence activities as they relate to terrorism;
- Cyber security issues as they relate to terrorism; and
- Support to federal agency privacy civil rights/civil liberties officers as they exercise oversight of terrorism related programs of the U.S. Government.

In addition to these specific matters, the Board identified two cross-cutting issues for its focus: public transparency and the training of analysts and other personnel in privacy and civil liberties. These items will be discussed in more detail in the next section.

²⁸ These potential areas of focus may be revised in view of the Board’s to-be-developed issue analysis methodology and with input from the Chairman.

V. FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

A. Findings, conclusions, and recommendations of the Board resulting from its advice and oversight functions

Through March 31, 2013, most of the attention of the Board was focused on establishing its initial operational capacity and gaining a baseline understanding of the major counter-terrorism programs of the federal government that might affect privacy and civil liberties. The Board did submit suggestions and comments to the Executive Office of the President regarding the Executive Order on cybersecurity²⁹ focused specifically on clarifying Section 5 of the Order, “Privacy and Civil Liberties Protections.”

The Board has been integrated in part into the executive branch’s legislative coordination and clearance process (LRM), as specified in Office of Management and Budget Circular A-19.³⁰ The Board anticipates that its participation in this process will augment its outreach efforts to further assimilate the Board into executive branch review processes and facilitate additional opportunities for the Board to provide advice and counsel.

As mentioned in the previous section, the Board identified two areas that cut across the federal government on which it plans to conduct further work: transparency and training. At its March 5, 2013 public meeting, the Board discussed these areas and determined that further Board involvement in these issues would be warranted and consistent with its statutory mandate.

With respect to transparency, at its March 5 meeting, the Board indicated that it would examine whether it can assist with enhancing public understanding of certain counter-terrorism programs that have been the focus of public concern and criticism. The Board noted that federal agencies have undertaken some efforts and made progress in providing greater transparency about certain counterterrorism-related operations and activities. The Board is fully aware of and sympathetic to the significant challenges involved in achieving a greater degree of public transparency on matters affecting national security and, therefore, intends to consult closely with federal agencies as to whether further steps toward transparency can be responsibly taken.³¹

²⁹ Executive Order 13636, *Improving Critical Infrastructure Cybersecurity* (Feb. 12, 2013).

³⁰ Office Management and Budget, *Legislation Coordination and Clearance*, Circular No. A-19 (Sept. 20, 1979) This process is intended to “(a) assist the President in developing a position on legislation, (b) make known the Administration’s position on legislation for the guidance of the agencies and information of Congress, and (c) assure appropriate consideration of the views of all affected agencies, and (d) assist the President with respect to action on enrolled bills.”

³¹ For example, the March 2012 guidelines of the Attorney General and the Director of National Intelligence for NCTC access, retention, use and dissemination were written entirely in unclassified form and thus were publicly released, generating public awareness and comment.

As to training, the Board observed that civil rights and civil liberties training for analysts, agents, and other personnel was a common element of the often extensive internal procedures in place for counterterrorism programs at federal agencies. Under its statutory mandate, which requires that it continually review agency policies and procedures related to counterterrorism programs, the Board will conduct a review of these training programs.³²

Accordingly, at its March 5 public meeting, the Board determined that it would request that the Office of the Director of National Intelligence (ODNI) coordinate an inventory of privacy and civil liberties training provided to federal, state and local employees engaged in counterterrorism programs that receive funding from the federal government. Board staff was working with ODNI staff on the implementation of the Board's March 5 action.

B. Each proposal reviewed by the Board that: (i) the Board advised against implementation: and (ii) notwithstanding this advice, actions were taken to implement

For the period September 2012 to March 2013, the Board has no items to report under this section.

C. Requests for the issuance of subpoenas that were modified or denied by the Attorney General

For the period September 2012 to March 2013, the Board has no items to report under this section.

³² See IRPTA, § 1061(d)(2)(A) as amended by Pub. L. 110-53, § 801(a); see, e.g., 6 U.S.C. § 124h.

V. NEXT STEPS

The Board expects the following four priorities to guide its activities for the remainder of Fiscal Year 2013 and throughout Fiscal Year 2014:

- Continuation of stand-up to ensure full operational capability;
- Integration into relevant ongoing processes of the executive branch;
- Identification and examination of issues within the Board's mandate; and
- Provision of advice and guidance to the executive branch and transparency to the public.

In furtherance of these priorities, the Board intends to undertake (or continue) the following activities:

- Coordinate with federal agencies, former government officials, privacy and civil liberties advocates and experts, and members of the public to identify and examine privacy and civil liberties issues of concern, to include the terms "privacy" and "civil liberties" in the context of the Board's mission;
- Develop and implement an issue and process analysis methodology for use by the Board as a framework for analyzing the development, implementation, and operation of executive branch policies and programs related to efforts to protect the Nation against terrorism;
- Advise federal agency privacy, civil rights and civil liberties officers as they exercise oversight of terrorism-related programs of the U.S. Government;
- Establish a website and post online materials and information useful to federal agencies and material to educate the general public and specialized audiences about privacy and civil liberties concerns related to the terrorism programs of the U.S. Government;
- Develop a capability to respond to the media and general public regarding specific plans and projects pending before the Board;
- Ensure key congressional committees are apprised of the Board's progress;
- Acquire the information technology infrastructure necessary to support the Board's mission and improve overall operating efficiency;
- Enhance and promote greater public awareness and participation through use of internet technologies and services;
- Ensure the security of the Board's information and information systems through annual assessment of the Board's information security and related policies, procedures and practices;

- Move into leased office space; and
- Work with the General Services Administration to continue to strengthen the Board's financial management through the recurring review and refinement of internal controls and procurement processes.

VI. CONCLUSION

As noted by the Board's predecessors, standing up any new institution takes vision, energy, and commitment.³³ This is particularly true in light of the current Board's creation as a fully independent agency and the absence of a Chairman during the Board's first months of operation. With the value that may be gained through independence come significant challenges associated with building an agency infrastructure from the ground up, with no pre-existing support structure or staff. The four initial members of the new Board fully understand the importance of laying the groundwork to ensure the Board's longevity and effectiveness. The Board has made significant progress in establishing an organizational and operational infrastructure and is committed in the second half of its first year to a shift in focus from operational matters to the advice and oversight responsibilities that comprise its substantive mandate.

The Board is grateful to the federal agencies and congressional staff, special interest groups, and members of the public with whom it has met to gather information during this reporting period and looks forward to strengthening these relationships in furtherance of the Board's mission.

³³ Privacy and Civil Liberties Oversight Board, *First Annual Report to Congress* (Apr. 20, 2007).