

PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

PUBLIC MEETING

Report on the Telephone Records Program

Conducted under Section 215

Of the USA PATRIOT Act

And on the Operations of the
Foreign Intelligence Surveillance Court

January 23, 2014

The public meeting was held at George Washington
University, Marvin Center, Room 309, 800 21st,
Street, NW, Washington, D.C. 20052 commencing
at 1:00 p.m.

Reported by: Lynne Livingston

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BOARD MEMBERS

David Medine, Chairman
Rachel Brand
Patricia Wald
James Dempsey
Elisebeth Collins Cook

1 PROCEEDINGS

2 MR. MEDINE: Good afternoon. Welcome to
3 an open meeting of the Privacy and Civil Liberties
4 Oversight Board. It's 1:00 p.m., and the date is
5 January 23rd, 2014.

6 We're at the George Washington University
7 Marvin Center, room 309, located at 800 21st
8 Street, N.W., Washington, D.C.

9 (Interruption in the proceedings)

10 MR. MEDINE: The meeting was announced in
11 a Federal Register notice on January 16th, 2014.

12 As Chairman, I will be the presiding
13 officer.

14 All five Board members are present and
15 there is a quorum. The Board members are Rachel
16 Brand, Elisebeth Cook, James Dempsey and Patricia
17 Wald.

18 I will now call the hearing to order.
19 All in favor of opening the Report say aye.

20 (Aye)

21 MR. MEDINE: Upon receiving unanimous
22 consent to proceed, we will now proceed. The

1 Board has convened today to formally adopt its
2 Report on the telephone records program conducted
3 under Section 215 of the USA PATRIOT Act, and on
4 the operations of the Foreign Intelligence
5 Surveillance Court.

6 Now before starting our discussion of the
7 Report, the Board has conducted a many months
8 study of two NSA programs and had an opportunity
9 to interact extensively with the intelligence
10 community.

11 I want to emphasize that we have found
12 nothing but a dedicated group of men and women
13 working in the intelligence community who are
14 dedicated to protecting the country and protecting
15 our civil rights.

16 We have not found evidence of misconduct
17 during the course of our investigation. We have
18 comments about the programs as they operate, but
19 we believe the individuals who operate the
20 programs have operated in good faith.

21 We have also received extensive
22 cooperation from the executive branch in providing

1 access to the classified materials we've
2 requested, and briefings as appropriate.

3 As background, in response to
4 congressional and presidential requests in June of
5 this year, the Privacy and Civil Liberties
6 Oversight Board undertook an in-depth study of
7 Section 215 and Section 702 programs, as well as
8 the operations of the FISA court.

9 The report on Section 702, which will be
10 unclassified, will follow in the next several
11 months.

12 This study of the two programs and the
13 FISA court included briefings with officials from
14 the Office of the Director for National
15 Intelligence, the NSA, the Department of Justice,
16 the Federal Bureau of Investigations, and the
17 Central Intelligence Agency.

18 Board members also met with White House
19 staff, a former presiding judge of the FISC,
20 academics, privacy and civil liberties advocates,
21 technology and communication companies, and trade
22 associations.

1 The Board has been provided access to
2 classified opinions of the FISC, of various
3 Inspector General reports, and additional
4 classified documents relating to the operation and
5 effectiveness of the programs.

6 As part of its study consistent with its
7 statutory mandate to operate publicly where
8 possible, the Board held two public forums.

9 In order to ensure the accuracy of our
10 report, the Board provided a draft copy of the
11 description of the operations of the Foreign
12 Intelligence Surveillance Court to the court staff
13 to verify the statements that were made.

14 The Board also provided draft analysis of
15 the efficacy of the Section 215 program, but not
16 the conclusions and recommendations, to the
17 intelligence community to ensure that our factual
18 statements were correct and complete.

19 While the Board's Report was subject to
20 classification review, none of the changes
21 resulting from that process affected our analysis
22 or recommendations.

1 As an indication of the Board's
2 independence, there was no outside review of the
3 substance of the Board's analysis and
4 recommendations.

5 Pursuant to the Board's statutory duty to
6 advise the President and elements of the executive
7 branch to ensure that privacy and civil liberties
8 are appropriately considered in the development
9 and implementation of legislation and policies,
10 and to provide advice on proposals to retain or
11 enhance a particular power, the PCLOB and the
12 staff met with White House senior staff to discuss
13 the Board's tentative conclusions on December 5th.

14 On January 8th, the full Board met with
15 the President, Vice President and senior staff to
16 present the Board's conclusions and views of
17 individual members before the President's speech
18 last week.

19 To give you the bottom line of our
20 Report, the majority of the Privacy and Civil
21 Liberties Oversight Board believes that the 215
22 program is inconsistent with the statute that

1 authorizes it on a number of grounds.

2 First, the telephone records acquired
3 under the program have no connection to a specific
4 FBI investigation at the time of their collection.

5 Second, because the records are collected
6 in bulk, potentially encompassing all telephone
7 records across the nation, they cannot be regarded
8 as relevant to a particular investigation or to
9 any investigation of the FBI.

10 Third, the program operates by putting
11 telephone companies under an obligation to furnish
12 new calling records, as opposed to the statute's
13 requirement that they only provide existing
14 records and not ongoing production.

15 Fourth, the statute only authorizes the
16 FBI to collect information from the telephone
17 providers, and yet it's the NSA that receives the
18 information.

19 We also looked at the Electronic
20 Communications Privacy Act that restricts
21 telephone providers from providing information to
22 the government except under certain specific

1 exceptions. There is no exception for the 215
2 program.

3 And finally, we considered whether
4 Congress's extension of the deadline for the
5 expiration of the 215 program on two occasions
6 indicated congressional approval of the operation
7 of that program, and a majority of the Board
8 concluded that that was not the case.

9 So again, the majority of the Board takes
10 the view that the 215 program is not authorized by
11 statute, that it raises serious constitutional and
12 privacy concerns and has not demonstrated
13 sufficient effectiveness to continue in operation
14 on a permanent basis.

15 Based on legal, constitutional and policy
16 reasons, a majority of the Board recommend that it
17 be discontinued in its current form.

18 Going forward, telephone metadata could
19 be obtained directly from providers under other
20 legal authorities, but the Board does not
21 recommend imposing additional retention
22 requirements on those providers.

1 The Board unanimously recommends some
2 immediate changes be made to the program. First,
3 that records be kept for only three years and not
4 the current five years, that only two hops instead
5 of three hops be permitted in doing record
6 searches, that reasonable, articulable suspicion
7 determinations, the RAS determinations, be
8 provided that justifies the search of records, be
9 provided to the FISC court after the fact for the
10 FISC court to review and determine whether those
11 were appropriate searches, and that the records
12 maintained by the NSA be only subject to searches
13 based on reasonable, articulable suspicion, even
14 if they're in the database of the NSA.

15 On the Foreign Intelligence Surveillance
16 Court we unanimously recommend the creation of a
17 Special Advocate drawn from a panel of private
18 attorneys who appear when invited by the FISC
19 judges in cases involving novel and significant
20 applications or other matters where the judge
21 would find such additional views helpful.

22 We also want to recommend expanding the

1 opportunities for appellate review of FISC
2 decisions to the Foreign Intelligence Surveillance
3 Court of Review, as well as to the Supreme Court.

4 We've also focused on transparency of
5 government in the operations of these programs,
6 and going forward we recommend declassification of
7 FISC decisions on an ongoing basis so the public
8 benefits from the court's reasoning in approving
9 particular programs.

10 And we also recommend going back and
11 declassifying significant FISC decisions, but
12 recognizing that involves significant resources,
13 and have that kept in mind in terms of the process
14 and the time frame for declassifying those
15 decisions.

16 We also, a majority of the Board also
17 believes that the scope of legal surveillance
18 authorities affecting Americans should be made
19 public and determined from the face of the
20 statutes.

21 I'm going to go through the twelve
22 specific recommendations that the Board makes in

1 its report.

2 The first, again, is the government
3 should end its 215 bulk telephone records program.

4 Second, the government should immediately
5 implement additional privacy safeguards in
6 operating the 215 bulk program.

7 Third, Congress should enact legislation
8 enabling the court, Foreign Intelligence
9 Surveillance Court to hear independent views.

10 Fourth, Congress should enact legislation
11 to expand opportunities for appellate review of
12 those court's decisions.

13 Fifth, the court should take full
14 advantage of existing authorities to obtain
15 technical assistance and expand opportunities for
16 legal input from outside parties.

17 Sixth, to the maximum extent possible
18 consistent with national security, the government
19 should release new decisions, and as I mentioned
20 before, declassify prior decisions of the court.

21 And I'm sorry, that's also seventh.

22 Eight, the Attorney General should

1 regularly and publicly report information
2 regarding the operation of the Special Advocate
3 program to ensure that it's being used
4 effectively.

5 Ninth, the government should work with
6 Internet service providers and other companies
7 that regularly receive FISC, FISA production
8 orders to develop rules permitting those companies
9 to voluntarily disclose certain statistical
10 information about the government's requests,
11 keeping in mind the need to protect national
12 security.

13 Ten, the Attorney General should inform
14 the Privacy and Civil Liberties Oversight Board of
15 the government's activities under FISA.

16 Eleven, the Board urges the government to
17 begin developing principles and criteria for
18 transparency.

19 And twelve, the scope of surveillance
20 authorities affecting Americans should be made
21 public.

22 At this point I'll give individual Board

1 members an opportunity to express their views.

2 Mr. Dempsey.

3 MR. DEMPSEY: Thank you, Mr. Chairman.

4 And I want to express my appreciation to all the
5 other members of the Board. We've worked
6 remarkably hard with a tiny staff over the course
7 of the past six or seven months since these
8 programs were brought to public attention.

9 And we've received, as the Chairman said,
10 throughout the process we've received the full
11 cooperation of the executive branch and of the
12 intelligence agencies. And I would say we've met
13 many, many fine people who are working every day
14 to keep us all safe, and nothing in our report is
15 intended in any way as a criticism of them.

16 In fact, we offer our report in the
17 spirit that we found from these public servants,
18 which was their desire to live within the law
19 while protecting the national security. And
20 that's our goal here as well.

21 When I first heard last June about the
22 fact that the FISA court had authorized bulk

1 collection of information about all domestic and
2 international phone calls of essentially all
3 Americans my initial reaction was, well, the
4 court's authorized it so it must be legal. And
5 it's logical to assume that it would be effective
6 if we have all this data, the bad guys clearly use
7 telephones to communicate with each other, and
8 it's only logical that we can find the unknowns
9 and find otherwise undetectable connections that
10 would help disrupt plots and provide critical
11 information to the counterterrorism mission.

12 After months of studying the program
13 however, and after our staff conducted what is the
14 most exhaustive analysis yet done of the statutory
15 basis for the program, and the most in-depth
16 analysis ever done that we're aware of, of the
17 results of the program, I found, and the majority
18 of the Board has concluded that there are really
19 two immovable objects, two things that you just
20 can't get around.

21 One, the statute that's cited for the
22 program does not support it.

1 And secondly, the results of the program
2 have been limited, falling far short of the highly
3 desirable outcome promised for it.

4 Faced with the overwhelming disconnect
5 between the statute and the program as conducted
6 and given the limited results, we concluded that
7 the program should be ended, allowing for a
8 transition period, as the President has called
9 for.

10 Now we spent a lot of time looking at the
11 statutory analysis. Thirty-eight judges over the
12 past seven years -- I'm sorry, 37 times over the
13 past seven years, 17 federal judges have examined
14 this issue and found the program to be legal, but
15 until the Snowden leaks not one of them had
16 written an opinion explaining how the program fit
17 into the statute.

18 And still to this day no judge has
19 addressed all of the problems we identified in our
20 statutory analysis.

21 At this point proponents and opponents of
22 the program have the same problem, the program has

1 been shoe-horned into a statute not designed for
2 it.

3 And now, given the President's
4 announcement last week, we, the Congress, the
5 executive branch, the court are looking for a new
6 program, with a lot of room for debate about what
7 it should look like.

8 I do not think we should just accept bulk
9 collection as a given and layer on additional
10 protections. We have to go back to the
11 fundamental question, should we be collecting bulk
12 data and under what legal standards.

13 Now despite the highest respect that I
14 have for the decent people working under pressure
15 who brought this program under the statute and who
16 have shaped it over the past twelve years, or the
17 past seven years, I think the policy process was
18 flawed.

19 The process took the word relevant and
20 expanded it into a new meaning that it never had
21 before. It took the concept of a subpoena, which
22 was intended as a limiting concept, and gave it a

1 meaning that it has never had before.

2 And then faced with the question of
3 effectiveness we've said, or defenders of the
4 program have said that it can be justified because
5 its negative results provide a peace of mind, or
6 because it reaffirms what we already know, or it
7 might work someday.

8 As a matter of policy the concept of
9 relevance is not the right basis for big data
10 collection. The analogy of a grand jury subpoena,
11 which I believe was meant to limit the scope of
12 this authority, is not the right analogy for an
13 ongoing collection program.

14 The standard of peace of mind is not the
15 right standard for assessing the effectiveness of
16 a program like this.

17 And finally, the process that Congress
18 went through here, again, absolutely with the best
19 of intentions and working very hard to keep us all
20 safe, the process was flawed.

21 There was a private understanding of what
22 the program was and how it would work and what its

1 elements were that was not at all reflected in the
2 public record.

3 In fact, the public record would have led
4 you to believe that Section 215 meant something
5 quite different. And the plain words of the
6 statute would lead you to believe that it was
7 about something different.

8 So in my view we have to dig ourselves
9 out of that hole. We have to have the debate, and
10 the President has called for the debate about
11 whether we should have, in my opinion, bulk
12 collection and then what the standard should be
13 for it.

14 I'll say one thing, two ideas have
15 emerged, which is the idea that the program would
16 be okay if the data were held by another entity,
17 either by the telephone companies themselves or by
18 some third party that would be created.

19 And certainly if the idea would be that
20 the phone companies would be required to hold
21 data, or if a third party were created to hold the
22 data, I see no privacy benefit to that at all.

1 And I think it's important to recognize that at
2 the get-go, that there's no easy out on this
3 program.

4 Saying let somebody else other than the
5 government hold it does not answer any of the
6 questions that need to be answered, how much, how
7 long, who gets it, under what standard, how do you
8 protect the security of it, how do you enforce it,
9 who oversees compliance, what liability measures
10 apply, etcetera.

11 So I'm pleased that we're here today. We
12 all have to recognize that this is one way station
13 in a long journey. The President has said that he
14 wanted to resolve this by the end of March when
15 the current orders expire. I don't think there's
16 any way that we can have the debate that's
17 necessary and resolve these questions by the end
18 of March, but as a member of this Board I look
19 forward to participating in that debate as it
20 occurs.

21 MR. MEDINE: Thank you. Judge Wald.

22 MS. WALD: Let me just pick up a few end

1 pieces here about what I think are the important
2 things in the report in case all of you don't get
3 to read all 237 pages of it.

4 First, on the legality, which I think is
5 probably one of the, I know is one of the most
6 controversial aspects of our Report. We have two
7 dissenters on our Board on that subject. The
8 question has even been raised, why do we get into
9 the legality and why didn't we just stick to the
10 policy.

11 And I think the answer to that is an
12 important one to think about, and that's that our
13 mandate in our statute is to look at whether or
14 not the programs are and are implemented in a way
15 to be consistent with law.

16 And I think that a real civil liberties
17 question arises if a law, no matter how fairly it
18 is implemented, turns out not to have been
19 authorized at all to begin with.

20 And for all the reasons which I won't go
21 into, I agree with the majority analysis that the
22 wording in 215, paraphrasing some words the

1 Supreme Court has used in other cases where it
2 says an agency has over-read the statute and was
3 not authorized to do something under the statute
4 that it did.

5 The words like relevant simply don't bear
6 the weight of what's been put upon them. When you
7 add that to the fact that there was no public
8 discussion whatsoever, you could read the
9 legislative history until you're blue in the face
10 and you wouldn't have any idea that this was a
11 program that was going to be authorized by it.

12 So I think it was very important that we
13 do discuss the legality. I believe we discussed
14 it in more detail than any other authority that I
15 know about. And obviously some people may not be
16 convinced, but we certainly were.

17 Now the reason we have a
18 constitutionality section in there, I think even
19 though we don't come out with a result saying it
20 is constitutional or it is not constitutional, we
21 say that the authorities, certainly under existing
22 law had the right to proceed on the basis that

1 there was precedent in the law to undergird the
2 program.

3 On the other hand, I think it was
4 important for the fact that Congress is going to
5 be considering an overhaul of the law that the
6 constitutional arguments, the trends be at least
7 elaborated on, and I think we did do that.

8 The fact of whether or not you can depend
9 upon Smith v. Maryland and the Miller cases, which
10 go back twenty or more years, twenty, twenty-five
11 years, in light of not new precedent exactly on
12 the point, but cases like Jones, which dealt with
13 the global location instruments, that actually at
14 least many members, some members of the Supreme
15 Court are concerned about the fact that you might
16 without warrants be able to track indefinitely all
17 the movements, in that case it was the movements.

18 But the telephone numbers could, in the
19 opinion of many experts that we heard in our
20 various public forums, also be the basis for the
21 same kind of information.

22 So that I think the constitutional law

1 discussion, while we didn't come out with a
2 recommendation we're saying this is an
3 unconstitutional program, which one judge has
4 already said, but we did not follow that, I think,
5 I hope is a contribution to the congressional
6 legislation that will come up.

7 I don't think the law is going to stand
8 still on those old cases, which really dealt with
9 individual situations and not with taking the
10 telephone numbers over a period of five years of
11 everybody in the United States.

12 When we got to the policy discussion,
13 which at least I think everybody agrees was the
14 reason we were set up, no dissents on that, I
15 think the thing that I would emphasize was that,
16 although as Chairman Medine pointed out, we
17 certainly found no evidence of any kind of
18 intentional misuse of the program.

19 Some inadvertent uses were found by the
20 FISC court itself in released decisions, but
21 nothing suggesting that people were looking to
22 privately exploit or to politically intimidate

1 anybody with this information.

2 Nonetheless, I think our discussion about
3 the potential danger emphasizes what I think is
4 the big question underlying 215, which is going to
5 come up again and again and again, and that is the
6 differentiation between collection and use.

7 Because the collection of the information, which
8 many of our experts suggested the collection
9 itself changes things, even if it's the fact that
10 the government has this mass of information even
11 if it doesn't use it in any way detrimental to
12 anybody, it changes the power structure.

13 It has the potential down the road, I
14 mean these people are wonderful and honest and
15 stuff, but I'm probably the oldest person in the
16 room and I could go back a couple of decades, and
17 it is possible when administrations change,
18 etcetera, to have, if you've got that big -- it's
19 like build a field and they will come kind of
20 thing, as to it's there for the use.

21 Now what I think the reply to all of that
22 is that there are all kinds of controls on the

1 use, and there are some controls on the use, and
2 there's some good controls on the use. We might
3 tinker with them and change some of them, but
4 basically there is a control for the use.

5 But I think this basic notion as the
6 government seeks to, when it does, collect more
7 and more databanks on the citizens, the whole
8 basic question, which 215 raises, of the
9 collection itself versus the misuse. So I think
10 that's there.

11 I won't say -- two other points I'll
12 mention, only very briefly. One, I think we did
13 come to a consensus on the FISC court and I think
14 it's a good one. It's not as extreme as some of
15 the proposals for putting a whole new institution
16 akin to the public defenders in there. We thought
17 that because the FISC court actually handles,
18 handles very well and without anybody raising any
19 controversy about it, hundreds, whatever it is, of
20 individual, individual applications for warrants
21 based upon some kind of particularized statutory
22 criteria, they only have, we were told by one of

1 the judges, one of the former judges, about ten or
2 twelve cases that raise the kind of questions that
3 are in 215.

4 So we thought having a core of expert
5 private attorneys who could be called in. And we
6 also found, perceived we found a willingness on
7 the part of the FISC judges, if that were ready
8 there, to call upon them when they needed it.

9 Remember, the statistic was raised by Jim
10 about however many opinions, however many judges,
11 I've forgotten now, but none of those judges had
12 the benefit of an adversary. The only two cases
13 in which we've had 215 looked at have been the
14 district court judges who came to opposite
15 conclusions, in which case there were adversaries.

16 So I think the notion of having an
17 adversary available, and it's one we could all
18 agree upon, including mechanisms for appeal.
19 There have only been in the history of the FISC
20 court in, what is it, thirty years now, more than
21 thirty years, there have only been two appeals to
22 review court. So I think we wanted to expedite

1 those.

2 Finally, my last point is actually I
3 think one of the more important things. It's one
4 I'm sorry to say we're not completely in agreement
5 on, is the transparency section. We have some
6 parts of it I think we all agree, greater
7 transparency for FISC.

8 But I do think it's very important for
9 the future that there be a culture of making, when
10 a law is passed that is going to be used, or when
11 its use comes about after the law has passed, that
12 is going to affect a huge group of Americans about
13 whom there's no suspicion at all, not even an
14 affiliation with anybody or any contact with
15 anybody, but it's going to blanket it and provide
16 information, which while it may not be as explicit
17 as content still does have some informative value,
18 that the framework of that law and its purpose,
19 without the operational details, be made a matter
20 of record in the public debate.

21 Obviously people are worried about
22 national security and they don't want operational

1 details, but I think we have to watch out that we
2 don't let a kind of secret law regime creep into
3 our jurisprudence, except for a few instances
4 where it may be absolutely, absolutely necessary.

5 MR. MEDINE: Beth Cook.

6 MS. COLLINS COOK: Thank you. I also
7 commend the work of my colleagues and our plucky
8 staff. And I've assured them that the phrase
9 plucky is the highest compliment that I can give.

10 I also appreciate the opportunity to
11 express my own views and I have also set forth
12 these views in a short separate statement
13 accompanying the majority's Report.

14 As previously indicated, I agree with ten
15 of the twelve recommendations of the Report.
16 First, I agree with the careful recommendations we
17 have made with respect to the FISA court, as well
18 as additional transparency about our legal
19 framework. I believe both of these will increase
20 public confidence in our national security
21 efforts.

22 I hope we can work with the agencies and

1 with Congress going forward to implement these
2 unanimous recommendations in a responsible way.

3 Specifically, I join the recommendation
4 for a Special Advocate because participation of
5 that advocate in a given case or a given appeal is
6 left to the discretion of the court, and because
7 we have recognized that our recommendations must,
8 quote, take into account the imperative of secrecy
9 in the application of some of the nation's most
10 sensitive intelligence collection techniques, the
11 importance of speed in responding to often
12 fast-breaking events posing severe risk to the
13 national security, the resource limits faced by
14 the court and its judges, and constitutional
15 issues.

16 Similarly, I join the transparency
17 recommendations, except recommendation 12, only
18 because of our caution that they should be
19 implemented to the, quote, extent possible
20 consistent with national security.

21 Second, given the potential risks to
22 privacy of bulk data collection on this scale

1 weighed against the potential benefits of the
2 program, I agree with the majority's
3 recommendations to modify the operations of the
4 Section 215 program.

5 I view the development of this modified
6 program as an ideal opportunity for the Board to
7 fulfill its statutory advisory role.

8 More broadly, bulk collection of data on
9 this scale raises serious questions, but given the
10 increasing threats we see, including in the cyber
11 arena, we are only at the beginning of a
12 discussion of how best to answer those questions.

13 As I noted however, I do not join the
14 majority's legal analysis, either statutory or
15 constitutional, its discussion of the efficacy of
16 the program, or its recommendation to shut down
17 the Section 215 program.

18 First, I believe that the program rests
19 on a permissible interpretation of the statute and
20 so far as I am aware every federal judge to have
21 considered the question has reached the same
22 conclusion.

1 And I would add as an example as to one
2 point that is of concern to the majority, the
3 relevance analysis. That analysis has always been
4 a contextual analysis, and the statute tells you
5 to look at the investigations as the cornerstone
6 for the relevance analysis.

7 Here these authorized investigations that
8 are the statutory touchstone for the statutory
9 analysis are unlike any investigations we have
10 ever seen. So it stands to reason that the
11 interpretation of relevance could likewise be
12 unlike what we have previously seen.

13 By the same token, I consider much of the
14 Board's constitutional analysis to be speculative
15 and unnecessary, focused on potential changes to
16 Fourth Amendment jurisprudence or the First
17 Amendment implications of programs that do not
18 exist.

19 I think the program itself represented a
20 good faith effort to subject a potentially
21 controversial program to both judicial and
22 legislative oversight and should be commended.

1 The program was authorized by federal judges and
2 subject to meaningful executive, judicial and
3 congressional oversight.

4 Although the NSA made mistakes, the court
5 and Congress were notified, corrective action was
6 taken and the program repeatedly reauthorized.

7 I also take a different view from the
8 majority as to the efficacy and utility of the
9 Section 215 program. In today's world of never-
10 ending and varied threats, I believe a tool such
11 as Section 215 that allows investigators to triage
12 and focus on those who are more likely to be doing
13 harm to or in the United States, or allows
14 investigators to dismiss potential homeland
15 connections to ongoing terror threats or plots is
16 valuable.

17 And as the majority has also indicated,
18 Section 215 has been used in conjunction with
19 other authorities to identify additional leads and
20 supply confirming or supplemental information
21 about our adversaries, which makes it a valuable
22 program.

1 In other words, Section 215 has and will
2 allow us to connect the dots and paint a fuller
3 picture of our adversaries.

4 As I noted in my separate statement
5 however, I would urge the government to think very
6 seriously about how to evaluate and explain the
7 relative value of its various counterterrorism
8 authorities and programs.

9 So where do we go from here? Although
10 the program does involve vast amounts of data,
11 that data does not include the content of
12 communications, nor does it include the identity
13 of the individuals associated with the call
14 records collected.

15 Let me repeat that. The identities of
16 the individuals are not associated with the call
17 records when those call records are sent to the
18 NSA. So no content, no identities.

19 Given those facts and my own
20 understanding of the statute, I do not believe
21 that the program poses the same types of risk to
22 privacy as does the majority and would not shut

1 down the program for either legal or policy
2 reasons.

3 However, as I noted before, bulk
4 collection does raise privacy concerns and it is
5 based on these concerns that I have joined the
6 unanimous recommendations to modify the operation
7 of the program.

8 I would also support an alternative that
9 poses fewer risks to privacy, but I echo my
10 colleague's words here, that this is not a simple
11 question nor a simple answer.

12 In that regard I too would sound a note
13 of caution about alternatives that have been
14 mentioned to date.

15 I would have concerns about counting on
16 the providers to hold the records as an adequate
17 substitute. The same amount of information would
18 likely not be available and less and less will
19 likely be available over time. Companies do not
20 want this and I am hard pressed to see how this
21 would help with their customers' concerns.

22 I think the end result will be

1 significant pressure to impose a data retention
2 requirement which potentially poses more threats
3 to privacy.

4 Similarly, keeping the records at a third
5 party would also raise serious concerns.

6 Providing sufficient security for the information
7 would necessitate a framework that would be the
8 functional equivalent of the government holding
9 the data. Thank you.

10 MR. MEDINE: Rachel Brand.

11 MS. BRAND: Thank you, Mr. Chairman. I'd
12 like to start by commending the rest of the Board
13 and our tiny staff for getting this Report out
14 while we still work to set up our brand new
15 federal agency. It has not been an easy task.

16 I have published a short separate
17 statement of my views, which is included in the
18 Board's Report, which is available to you in the
19 back of the room. I'll try to be brief in
20 summarizing those views here.

21 I concur in almost all of the Board's
22 recommendations, and I am pleased that so many of

1 them were unanimous.

2 Most importantly, I join the Board's
3 recommendations for immediately modifying the
4 Section 215 program because I believe those
5 changes will reduce privacy concerns without
6 sacrificing the operational value of the program.

7 However, I dissent from two of the
8 Report's recommendations, including its
9 recommendation to shut down the Section 215
10 program without establishing an adequate
11 alternative.

12 My dissent results in part from two
13 overarching concerns. First, I'm concerned the
14 Report gives insufficient weight to the need for a
15 proactive approach to combating terrorism.

16 Second, I hope the Report will not
17 contribute to the wild swings of the pendulum that
18 occur too often in policy-making on national
19 security issues.

20 After a terrorist attack the public
21 points fingers at the government for failing to
22 prevent it. As memory fades or after an

1 unauthorized leak of classified information, the
2 public demands that the government pull back its
3 counterterrorism efforts.

4 The pendulum seems to be going back in
5 that direction now, but I have no doubt that if
6 there is another large scale terrorist attack on
7 the United States the public will demand to know
8 why the government did not prevent it. This
9 dynamic is nothing new, but it's an unfortunate
10 way to craft national security policy.

11 Turning to my reasons for dissenting from
12 the Board's recommendation to shut down the
13 Section 215 program.

14 First, I do not agree with the Board that
15 the program is not statutorily authorized. The
16 question of whether the language of Section 215
17 authorizes the metadata program is a difficult
18 one, I will grant that.

19 But the government's interpretation of
20 the statute is reasonable and was made in good
21 faith by numerous officials in two administrations
22 of different parties, who take seriously their

1 responsibility to protect the American people from
2 terrorism.

3 In any event, it's been upheld by every
4 single federal judge to have considered the
5 statutory question, both in the FISA court and in
6 regular U.S. district court.

7 As an institutional matter I do not
8 believe this is a question on which this Board can
9 meaningfully contribute. This legal question will
10 be resolved in the courts, not by us. We are much
11 better equipped to assess whether the program is
12 sound as a policy matter.

13 Turning to the program's
14 constitutionality, I agree with the Board's
15 ultimate conclusion that the program is
16 constitutional under governing Supreme Court case
17 law. I don't see the need to join on to its
18 analysis in light of that.

19 Of course the government must seriously
20 consider whether it should operate this program,
21 even if it can do so.

22 Whether the program is good policy is a

1 question squarely within this Board's core
2 mandate, but I do not agree with the Board's
3 conclusion on that question either. Whether it
4 should continue boils down to whether its
5 potential intrusion on privacy interests is
6 outweighed by the national security value of the
7 program.

8 Starting with the privacy question, on
9 the one hand, any collection program on this scale
10 gives me pause. Metadata can be revealing.
11 Whenever the government possesses this much
12 information it could theoretically be used for
13 dangerous purposes in the wrong hands without
14 adequate oversight.

15 And even if there is no actual privacy
16 violation if information is collected but never
17 viewed, as is true of the vast majority of the
18 information collected by this program, collecting
19 this much data creates at least a risk of a
20 serious privacy intrusion.

21 This is why I joined the Board's
22 recommendation for immediately modifying the

1 program if it continues.

2 On the other hand, the government has not
3 collected content of any communication under this
4 program. It does not collect any personally
5 identifying information at all. What seems to
6 have gotten lost in the debate is what Beth
7 mentioned early, which is that this program is
8 literally a system of numbers with no names
9 associated with any of them.

10 In addition, the program operates within
11 remarkably strict safeguards and limitations
12 already. The Board's report and my separate
13 statement discuss them and I won't repeat them
14 here. But with those safeguards already in place
15 and with the additional safeguards the Board
16 recommends, I think the actual intrusion on
17 privacy interests will be quite small.

18 On the other side of the equation is the
19 national security value of the program. I don't
20 agree that there's little, if any, value to the
21 program. There is no easy way to calculate the
22 value of this program. There is no clear test,

1 but the test cannot be whether it has already been
2 the key factor in thwarting a previously unknown
3 terrorist attack. Assessing the benefit of a
4 preventive program like this one requires a
5 longer-term view.

6 Most of this data is never used at all
7 but its immediate availability if it is needed is
8 the program's primary benefit. Its usefulness may
9 not be fully realized until we face another a
10 large-scale terrorist plot. But if that happens,
11 analysts' ability to very quickly scan records
12 from multiple service providers at the same time
13 to establish connections or avoid wasting precious
14 time on futile leads could be critical in
15 thwarting the plot.

16 Considering the evidence of the data from
17 this program could be the key to preventing the
18 next terrorist attack. I cannot recommend
19 shutting it down without an adequate alternative
20 already in place, especially in light of what I
21 view to be the relatively small actual intrusion
22 on privacy interests.

1 That said, if an adequate alternative
2 that reduces privacy concerns can be identified,
3 by all means the government should adopt it.

4 The administration is working on a plan
5 to transfer custody of the data to a third party.
6 I doubt I could support that particular approach.
7 In my view it would make sense only if it both
8 served as an effective alternative and assuaged
9 privacy concerns, and I'm skeptical it could do
10 either.

11 I don't think it could be an effective
12 alternative without requiring the telephone
13 companies to hold the data longer than they
14 otherwise would, but that would create new privacy
15 concerns if the data then became available for a
16 large number of purposes other than national
17 security and would raise a host of other difficult
18 questions.

19 So in my opinion it would be wiser to
20 leave the program as it is with the NSA than to
21 transfer it to the telephone service providers.
22 Thank you.

1 MR. MEDINE: Thank you. Based upon the
2 Board's review of the telephone records program
3 under Section 215 and the operation of the Foreign
4 Intelligence Surveillance Court, we'll now move
5 toward adoption of the Board's recommendations and
6 Report. All in favor of adopting Report
7 recommendations 2 through 11, please say aye.

8 (Aye)

9 MR. MEDINE: Unanimous. All in favor of
10 adopting the Report recommendations 1 and 12,
11 please say aye.

12 (Aye)

13 MR. MEDINE: Opposed?

14 (Nay)

15 MR. MEDINE: Three to two.

16 All in favor of issuing the full Report
17 with additional Board members' statements, please
18 say aye.

19 (Aye)

20 MR. MEDINE: Unanimous. Upon receiving
21 unanimous consent to issue the full Report with
22 the additional Board statements, the Report is now

1 final and will be available on pclob.gov, our
2 website.

3 The Board's activities for the day are
4 now complete. After we adjourn, individual
5 members will be available to meet with members of
6 the press who wish to talk to them.

7 The Board again encourages all interested
8 parties to review our Report online at pclob.gov.
9 A transcript of today's proceedings will also be
10 posted at pclob.gov.

11 I will now call the meeting to adjourn.
12 All in favor of adjourning say aye.

13 (Aye)

14 MR. MEDINE: Upon unanimous consent to
15 adjourn, we are now adjourned. The time is 1:45.

16 (Off the record)

17 Question and Answer Session

18 AUDIENCE MEMBER: Seventeen judges came
19 to 38 opinions or decisions, whatever phrase you
20 used. Why did they come to uphold (inaudible)?
21 Did they not see something that you're seeing?

22 MR. DEMPSEY: Well, 37 of the times were

1 FISA court judges issuing the repeated renewal
2 orders for the programs. So I think if you take
3 38 and divide it by 4, you'll get 6 or 7 years.
4 So that's the length of the program.

5 So it's been repeatedly renewed by the
6 judges, and that's often cited as saying, well, 17
7 judges of the FISA court have looked at it 38
8 times and have approved it.

9 Until after the Snowden leaks not one of
10 those judges had written an opinion, not one of
11 those judges had laid out a legal analysis of the
12 statute.

13 AUDIENCE MEMBER: So you think they did
14 it illegally, is that what you're suggesting?

15 MR. DEMPSEY: No, the judges acted
16 properly. They issued orders which they believed
17 they were authorized to do.

18 What we're saying is their legal analysis
19 was incomplete, at best. And even after the
20 leaks, even after the program became public, the
21 judges who have addressed the statute did not
22 address all of the problems that we have

1 identified, did not address all of the disconnects
2 between the statute and the program.

3 That's why we conclude, with all respect
4 to those judges and with all respect to the
5 government lawyers who presented the arguments to
6 them, we conclude that this statute does not
7 provide an adequate foundation for the program.

8 MR. MEDINE: I just want to add to that
9 in none of those FISA cases was there an adversary
10 to the government in the form of the Special
11 Advocate that we're recommending, someone who
12 could say there are statutory issues here, someone
13 who could say there are constitutional issues
14 here. And none of that was litigated in those
15 FISA decisions.

16 And that was one reason why the court,
17 having not had the benefit of those arguments, may
18 have more easily approved the legality of the
19 program.

20 MS. WALD: And pointing out in the only
21 two cases where you had federal district court
22 judges, one said yes and one said no.

1 AUDIENCE MEMBER: And what does it say --

2 MR. MEDINE: Why don't we give somebody
3 else a chance --

4 MS. BRAND: No, I'm sorry, Pat, that's
5 actually not right. As a matter of statutory
6 construction, only one district judge has looked
7 at it as a matter of statutory construction and
8 has upheld it.

9 MS. WALD: Yes, I know, but the other one
10 denied constitutional --

11 MS. BRAND: It's not statutory --

12 MS. WALD: The other one denied
13 constitutional --

14 MS. BRAND: I'd also want to point out
15 that it's not as though opposing views are never
16 taken into account in the process of bringing a
17 position to the FISA court. There's extensive
18 quasi-adversarial briefing and debate and
19 argumentation inside the executive branch in what
20 used to be called OIPR, and it's now called
21 something else.

22 But it is not as though the FISA court is

1 an echo chamber. You know, the FISA court
2 consists of senate-confirmed regular district
3 judges sitting by designation on this court.

4 They take briefing. They can call on
5 third parties if they wish, although that has
6 rarely happened in the past, which is part of the
7 reason why we recommend beefing up that process.
8 But nothing reaches the FISA court unless it's
9 already been extensively vetted and debated within
10 the executive branch.

11 MS. COLLINS COOK: And one final point on
12 this question of the absence of an adversarial
13 process. I would direct you to our criminal
14 courts where search warrants and other types of
15 investigative process is routinely issued without
16 adversarial process.

17 That information or evidence obtained can
18 be tested if criminal charges are brought, just as
19 under the structure of FISA, to the extent that
20 information obtained pursuant to FISA is used
21 there is a use provision that information be
22 defended and the defendant must be notified of

1 that. And if criminal charges are brought, the
2 defendant would have the opportunity to challenge
3 the collection of that information.

4 MS. WALD: I just have to add something
5 to Beth's two points. In the first case,
6 virtually every time that a criminal subpoena is
7 issued there will be a chance down the line to
8 contest that, sometimes immediately, sometimes
9 when the evidence is actually entered because
10 you're in the middle of a criminal process.

11 The likelihood that a FISA thing will
12 eventuate in a criminal process is much, much
13 lower. I mean it's almost infinitesimal in terms
14 of the fact.

15 And secondly, it was only last year that
16 finally I think the interpretation was accepted
17 that, in fact, the government had to inform
18 somebody in a criminal division about the
19 derivative value or the derivative source of it.
20 So I don't think the two are comparable at all.

21 AUDIENCE MEMBER: Let me --

22 MR. MEDINE: You've had a lot of

1 questions.

2 AUDIENCE MEMBER: Yeah, I have two quick
3 questions. One is the notion that under your
4 legal analysis this program was never properly
5 statutorily authorized. What are the consequences
6 of that in practical terms?

7 The second is for Ms. Cook and Ms. Brand.
8 With regard to your comments on this being the
9 beginning of the conversation given the cyber
10 threats we face, I'd like to hear you expand on
11 that.

12 MR. MEDINE: Well, the consequences of
13 the legality is that the Board is recommending
14 that the program be terminated.

15 We understand, as courts often do, we're
16 not a court and so we don't make a final decision,
17 but that's our recommendation, that there is a
18 transition period to give the government a chance
19 with added privacy protections to transition to a
20 different program.

21 MR. DEMPSEY: The statute's a hundred
22 percent clear that the telephone companies, for

1 example, are not liable. They complied with a
2 court order and under the statute compliance with
3 a court order immunizes you against liability.

4 And we're saying that the government
5 officials acted in the best of intentions. But it
6 does happen, I mean Judge Wald has sat on
7 hundreds, if not thousands of cases literally
8 where she found, and other judges found, sometimes
9 after many, many years, that some governmental
10 action was not properly legally founded. And
11 that's what we are finding here, that's all. It's
12 time to push the reset button.

13 MS. COLLINS COOK: I'm happy to answer
14 the other part of the question. We are a new
15 Board. We have a mandate that directs us to
16 advise and conduct oversight with respect to
17 actions taken to protect the United States against
18 terror. That is part of what I meant by us being
19 at the beginning of the conversation.

20 We are just coming to maturity as a
21 Board, but we hope to be involved in conversations
22 about bulk collection in the future. And I would

1 note there are many who take the position that
2 cyber will require either access to or collection
3 of vast amounts of data.

4 AUDIENCE MEMBER: Thank you. Spencer
5 Ackerman (phonetic) with the Guardian.

6 Given your descriptions of the value of
7 the 215 program at its most expansive, even
8 considering the dissents, it seems to be more
9 prospective or ephemeral than it is in terms of
10 preventing an actual terrorist attack.

11 Do you feel that government officials
12 since the Snowden leaks began have been honest in
13 their presentation of the benefits to the public
14 with this program?

15 And for Ms. Cook and Ms. Brand, given
16 your skepticism that a private sector alternative
17 is workable and might, in fact, make the situation
18 worse, Ms. Brand sort of got into this a bit, do
19 you think there is really any alternative to
20 leaving the metadata collection with the NSA?

21 MS. BRAND: I wouldn't want to rule that
22 out. I mean I wouldn't think that my own

1 imagination represents the bounds of what's
2 possible, but I have not yet heard a proposal that
3 is better than keeping it with the NSA, with the
4 additional safeguards that we discussed. And
5 perhaps there are more safeguards that would
6 further protect privacy and still leave the
7 program operational.

8 But I don't think, I agree with Beth,
9 what Beth said earlier that a third party
10 alternative, something other than the service
11 providers that has been suggested, I don't see any
12 possible way that that could work.

13 And in terms of the providers themselves,
14 I think that just creates a whole host of legal
15 questions about the nature of the data,
16 responsibility for the data, liability of
17 companies, and additional privacy concerns. I
18 mean what if you want to get it for your divorce
19 proceeding, what's to keep you from subpoenaing
20 the provider?

21 I mean there are all kinds of questions
22 like that, that are raised and not answered

1 necessarily by transferring.

2 MS. WALD: Can I give a try at the first
3 part of your question?

4 AUDIENCE MEMBER: Please.

5 MS. WALD: It seems to me what you are
6 seeing is just a different philosophy, rather
7 than, at least it's my perception, rather than
8 somebody trying in the intelligence community to
9 mislead people as to the value of the program.

10 I think there's a sincere belief on the
11 part of many, and this is a value judgement which
12 I think the majority of us think needs to be made,
13 more so by the public than it has been in the
14 past, as to the way of it.

15 For instance, you know, we've heard
16 people describe, inside the intelligence community
17 say it's like fire insurance. You may never use
18 it but you ought to have the fire insurance on the
19 one out of, you know, a thousand chances that your
20 house is going to catch on fire, etcetera.

21 So this is, there's really a notion that
22 if something bad comes on down the line, or the

1 one in a hundred or thousand chances, that is a
2 value judgment, that it's worth collecting all of
3 this data with what some of us think down the line
4 could have a potential risk to privacy versus some
5 who think that the so-called, like, one percent,
6 one percent calculus is just not worth it. It's
7 really a balancing thing.

8 And I think some people, not all, some
9 people in the intelligence community think that it
10 is, and some of us think that it is not.

11 MR. MEDINE: Yes.

12 AUDIENCE MEMBER: Hi, Andrea Pierson
13 (phonetic) with the Washington Post. So actually
14 it's a little bit of a follow-up on Spencer's
15 question about third parties.

16 Generally that's how the question's been
17 interpreted in Obama's suggested changes to the
18 program. My understanding of what the three
19 members of this Board voting to, or recommending
20 that the program be terminated, and two of them
21 expressing severe concerns about the practicality
22 or possibility of that proposal working, that no

1 one on the board thinks that that's a very good
2 idea? Actually each of you individually speak to
3 that.

4 MR. DEMPSEY: I think the third party
5 idea is a terrible idea. It just replicates all
6 the problems that are unanswered, who is it, how
7 long do they keep it, who else gets it, how do
8 they secure it, what security requirements are
9 their employees subject to, who oversees it, is it
10 subject to the Constitution, where's the risk of
11 mission creep?

12 To me, you just take all the same
13 questions and you have to answer them all over
14 again from scratch. So I honestly do not see
15 that. It sounds to some people like an easy out.
16 It is not an easy out.

17 MS. WALD: I have a somewhat more
18 flexible attitude. So far people have just
19 talked, as I understand the review group, they had
20 no specific third parties that they were talking
21 about. I haven't heard anything come out.

22 I wouldn't knock down forever more the

1 notion that somebody somewhere could come up with
2 a scheme that made sense. I think for all the
3 reasons we don't have one now, and I wouldn't see
4 handing it over to somebody we manufactured for
5 the purposes.

6 The only person, and I'm joking, I'm not
7 saying seriously, but I had thought to myself, in
8 government, where is the only place I think you
9 could probably, you know, protect? And I kept
10 thinking, well, the Census Bureau is pretty good.
11 They have a lot of terrific information about
12 people, and so far as I know, they've never
13 (inaudible). That's a joke. That's not --

14 But other than that, I can't think of
15 anybody. But we are in such an early state in
16 this whole business about use and collection of
17 data that for me, I don't rule anything out
18 absolutely till we rule on specific proposals.
19 Not rule on, but.

20 MR. MEDINE: I would just add,
21 aggregating sensitive personal information for
22 hundreds of millions of Americans in one place

1 doesn't solve the problem that we're facing now of
2 having the government have access to that
3 information.

4 It's far better to access the information
5 on an as-needed basis where there's some
6 indication. We'd have to start by creating a
7 whole new legal structure for that, liability, and
8 it just doesn't seem to address the concerns that
9 we've raised.

10 Other questions?

11 AUDIENCE MEMBER: I had a question about
12 the Special Advocates program. How would that be
13 structured? Based on any (inaudible) programs?
14 How would the pool of adversaries be decided?

15 MR. MEDINE: I think it's a somewhat
16 novel approach, but what we tried to accomplish is
17 to have an outside voice in the court who could
18 address privacy and civil liberties concerns, not
19 somebody who's institutionalized as part of the
20 court or part of the executive branch but someone
21 who could independently come in to cases and
22 express the concerns of the type that could have

1 been raised about the 215 program in future cases
2 where broad programs are being adopted or novel
3 legal issues are being considered.

4 Our proposal is that the court would
5 choose from a panel of qualified attorneys who
6 have appropriate security clearances or are able
7 to get the security clearances.

8 The court would provide space for them to
9 work in a secure facility to handle classified
10 information, and that they would be part of the
11 cases and have an opportunity to raise objections
12 to the government's requests and ultimately to
13 request an appeal if the government's request is
14 approved.

15 Yes?

16 AUDIENCE MEMBER: Ray Thomas, Jr.,
17 Department of Commerce, Trademark Public Advisory
18 Committee.

19 Mr. Chairman, I have perhaps what will be
20 the easiest question of the afternoon. You all
21 are handing some very serious issues and so I can
22 only imagine how big the workload is. I heard at

1 least two Board members mention how thin your
2 staff is. And I know you're building the Agency,
3 and I also know that there was a job posting for
4 attorney advisors. If you're at liberty to say,
5 how many attorney advisors are you looking to
6 bring on and what's your time frame?

7 MR. MEDINE: Not really a press question,
8 but I will say that we're looking to hire three or
9 four people. We've received over a thousand
10 applications and we're about to dig into them.

11 But we have a tremendous small staff now
12 that has produced a voluminous report, but we are
13 hoping to ease the burden on them in the near
14 future by hiring people.

15 Let's take maybe two or three more
16 questions.

17 AUDIENCE MEMBER: I told you it would be
18 the easiest question.

19 AUDIENCE MEMBER: What do you think of
20 the President's recommendations?

21 MS. WALD: We like his FISC
22 recommendation because it's the same as ours,

1 basically. Ours is fleshed out.

2 AUDIENCE MEMBER: I mean did you think it
3 was insufficient in any way or it covered its
4 bases, or what?

5 MR. DEMPSEY: Well, two things. He
6 didn't answer the question of what does the new
7 program look like. He kicked that down the road.

8 And he, in my view, hasn't fully grappled
9 with the problem that the statute that's currently
10 on the books and that currently serves as the
11 basis for the program doesn't fit with the
12 problem, doesn't fit with the way the program is
13 being operated.

14 The President called for, said we need to
15 have a national debate on this question of how do
16 we collect large quantities of data. But it was
17 not clear whether he fully appreciated the need to
18 go back to some basics.

19 I think part of the speech made it sound
20 like you could add some additional protections to
21 the existing program and gloss over the
22 fundamental question.

1 The trouble with that is then what's the
2 next program, and the next program, and the next
3 program? Because once we say 215 is the basis for
4 bulk collection on this broad interpretation of
5 relevance and on this ongoing basis, I think
6 that's the fundamental question that really we've
7 never had a public debate about, and to leap over
8 that question I think is a mistake.

9 MS. WALD: There's no limiting principle
10 in it.

11 MS. BRAND: Jake, I just want to make
12 clear that the Board has no position on the
13 President's speech because -- other than I mean
14 we've addressed a couple of the subjects that were
15 the subjects of his speech but most of the
16 recommendations that he made touch on subjects we
17 have not studied as a Board.

18 We obviously have to operate by majority
19 vote after studying and so forth, and I as an
20 individual Board member wouldn't been ready to
21 opine on the subjects that we have not yet studied
22 without talking to the government and doing a lot

1 more study.

2 MR. MEDINE: All right, let's take one
3 more question from this press over here. Yes?

4 AUDIENCE MEMBER: Mr. Dempsey, you
5 mentioned a flaw in the congressional process
6 where there was a tacit agreement about how to
7 interpret this statute versus what was presented
8 publicly.

9 I wonder if you could just elaborate on
10 where that gap occurred, on Congress's side or on
11 the Agency's side, and if the rest of the panel
12 also saw that kind of problem.

13 MR. DEMPSEY: Well, the problem occurred
14 initially in 2005, 2006, when Congress was
15 debating the reauthorization of the PATRIOT Act,
16 Section 215, talked about it publicly as if it
17 were a particularized collection program for
18 individual records when, in fact, it knew that
19 there was a bulk collection program and that the
20 government was seeking to bring that under Section
21 215.

22 It was compounded when that provision

1 came up for sunset re-examination, I think in 2009
2 and 2011, and again Congress, by then at least the
3 intelligence committees and the judiciary
4 committees were fully aware of the program and
5 were fully aware that it was being conducted under
6 Section 215, but there was not a hint of that in
7 the public debate. And there's not a hint of
8 that, in my view, in the words of the statute.

9 And it was I think a mistake going to
10 democratic accountability for Congress to believe
11 it was blessing a program that could not be
12 discerned from a plain reading of the statute.

13 Now we concluded that their so-called
14 ratification or re-enactment was actually not
15 effective. You cannot cure, by Congress
16 re-passing a statute knowing how it's being
17 interpreted, you cannot bless that interpretation
18 and you cannot infuse that interpretation into the
19 statute if the interpretation is so contrary to
20 the words of the statute.

21 MR. MEDINE: Okay, thank you.

22 MS. COLLINS COOK: I'm sorry, I don't

1 think you asked whether or not the other Board
2 members agree that there was a flaw in the system.

3 I do not agree that there was a flaw in
4 the system. I think we live in a representative
5 democracy and I think our foundational document,
6 the Constitution, explicitly contemplates secret
7 proceedings. I'd direct you to Article 1 Section
8 5 of the Constitution.

9 I think that any requirement that would
10 require a detailed legislative discussion about
11 our most sensitive national security programs is
12 unworkable. We've never had that understanding.
13 I do not sign on to such an understanding.

14 MS. WALD: The constitutional basis, like
15 I say, is a debatable proposition, referring you
16 to the Federalist Papers.

17 MR. MEDINE: There is clearly a debate
18 but that will not continue here.

19 (Laughter)

20 (Whereupon, at 2:05 p.m., the meeting was
21 adjourned)

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CERTIFICATION

I, LYNNE LIVINGSTON, A Notary Public of
the State of Maryland, Baltimore County, do hereby
certify that the proceedings contained herein were
recorded by me stenographically; that this
transcript is a true record of the proceedings.

I further certify that I am not of
counsel to any of the parties, nor in any way
interested in the outcome of this action.

As witness my hand and notarial seal this
_____ day of _____, 2013.

Lynne Livingston

Notary Public

My commission expires: December 10, 2014

A	54:4,17 62:20	afternoon 3:2	31:14 32:3,3,4	47:18 60:14
ability 42:11	address 46:22	60:20	32:6,9,14	approving 11:8
able 23:16 60:6	47:1 59:8,18	agencies 14:12	39:18 46:11,18	arena 31:11
absence 49:12	addressed 16:19	29:22	51:4	argumentation
absolutely 18:18	46:21 63:14	agency 5:17	analysts 42:11	48:19
29:4,4 58:18	adequate 35:16	22:2 36:15	Andrea 56:12	arguments 23:6
academics 5:20	37:10 40:14	61:2	announced 3:10	47:5,17
accept 17:8	42:19 43:1	Agency's 64:11	announcement	arises 21:17
accepted 50:16	47:7	aggregating	17:4	Article 66:7
access 5:1 6:1	adjourn 45:4,11	58:21	answer 20:5	articulable 10:6
53:2 59:2,4	45:15	agree 21:21	21:11 31:12	10:13
accompanying	adjourned	27:18 28:6	35:11 45:17	as-needed 59:5
29:13	45:15 66:21	29:14,16 31:2	52:13 57:13	asked 66:1
accomplish	adjourning	38:14 39:14	62:6	aspects 21:6
59:16	45:12	40:2 41:20	answered 20:6	assess 39:11
account 30:8	administration	54:8 66:2,3	54:22	assessing 18:15
48:16	43:4	agreement 28:4	anybody 25:1	42:3
accountability	administrations	64:6	25:12 26:18	assistance 12:15
65:10	25:17 38:21	agrees 24:13	28:14,15 58:15	associated 34:13
accuracy 6:9	adopt 4:1 43:3	akin 26:16	appeal 27:18	34:16 41:9
Ackerman 53:5	adopted 60:2	allow 34:2	30:5 60:13	associations
acquired 8:2	adopting 44:6	allowing 16:7	appeals 27:21	5:22
Act 1:6 4:3 8:20	44:10	allows 33:11,13	appear 10:18	assuaged 43:8
64:15	adoption 44:5	alternative 35:8	appellate 11:1	assume 15:5
acted 46:15 52:5	advantage 12:14	37:11 42:19	12:11	assured 29:8
action 33:5	adversarial	43:1,8,12	application 30:9	attack 37:20
52:10 67:11	49:12,16	53:16,19 54:10	applications	38:6 42:3,18
actions 52:17	adversaries	alternatives	10:20 26:20	53:10
activities 13:15	27:15 33:21	35:13	61:10	attention 14:8
45:3	34:3 59:14	Amendment	apply 20:10	attitude 57:18
actual 40:15	adversary 27:12	32:16,17	appreciate	attorney 12:22
41:16 42:21	27:17 47:9	American 39:1	29:10	13:13 61:4,5
53:10	advice 7:10	Americans	appreciated	attorneys 10:18
add 22:7 32:1	advise 7:6 52:16	11:18 13:20	62:17	27:5 60:5
47:8 50:4	advisors 61:4,5	15:3 28:12	appreciation	AUDIENCE
58:20 62:20	advisory 31:7	58:22	14:4	45:18 46:13
added 51:19	60:17	amount 35:17	approach 37:15	48:1 50:21
addition 41:10	advocate 10:17	amounts 34:10	43:6 59:16	51:2 53:4 55:4
additional 6:3	13:2 30:4,5	53:3	appropriate 5:2	56:12 59:11
9:21 10:21	47:11	analogy 18:10	10:11 60:6	60:16 61:17,19
12:5 17:9	advocates 5:20	18:12	appropriately	62:2 64:4
29:18 33:19	59:12	analysis 6:14,21	7:8	authorities 9:20
41:15 44:17,22	affect 28:12	7:3 15:14,16	approval 9:6	11:18 12:14
	affiliation 28:14	16:11,20 21:21	approved 46:8	13:20 22:21

33:19 34:8 authority 18:12 22:14 authorized 9:10 14:22 15:4 21:19 22:3,11 32:7 33:1 38:15 46:17 51:5 authorizes 8:1 8:15 38:17 availability 42:7 available 27:17 35:18,19 36:18 43:15 45:1,5 avoid 42:13 aware 15:16 31:20 65:4,5 aye 3:19,20 44:7 44:8,11,12,18 44:19 45:12,13	63:3,5 66:14 bear 22:5 beefing 49:7 began 53:12 beginning 31:11 51:9 52:19 belief 55:10 believe 4:19 18:11 19:4,6 22:13 29:19 31:18 33:10 34:20 37:4 39:8 65:10 believed 46:16 believes 7:21 11:17 benefit 19:22 27:12 42:3,8 47:17 benefits 11:8 31:1 53:13 best 18:18 31:12 46:19 52:5 Beth 29:5 41:6 54:8,9 Beth's 50:5 better 39:11 54:3 59:4 big 18:9 25:4,18 60:22 bit 53:18 56:14 blanket 28:15 bless 65:17 blessing 65:11 blue 22:9 board 1:1 2:1 3:4,14,15 4:1,7 5:6,18 6:1,8,10 6:14 7:14,21 9:7,9,16,20 10:1 11:16,22 13:14,16,22 14:5 15:18 20:18 21:7	31:6 36:12 38:14 39:8 41:15 44:17,22 45:7 51:13 52:15,21 56:19 57:1 61:1 63:12,17,20 66:1 Board's 6:19 7:1 7:3,5,13,16 32:14 36:18,21 37:2 38:12 39:14 40:1,2 40:21 41:12 44:2,5 45:3 boils 40:4 books 62:10 bottom 7:19 bounds 54:1 branch 4:22 7:7 14:11 17:5 48:19 49:10 59:20 brand 2:4 3:16 36:10,11,14 48:4,11,14 51:7 53:15,18 53:21 63:11 brief 36:19 briefing 48:18 49:4 briefings 5:2,13 briefly 26:12 bring 61:6 64:20 bringing 48:16 broad 60:2 63:4 broadly 31:8 brought 14:8 17:15 49:18 50:1 build 25:19 building 61:2 bulk 8:6 12:3,6 14:22 17:8,11	19:11 30:22 31:8 35:3 52:22 63:4 64:19 burden 61:13 Bureau 5:16 58:10 business 58:16 button 52:12	Chairman 2:3 3:12 14:3,9 24:16 36:11 60:19 challenge 50:2 chamber 49:1 chance 48:3 50:7 51:18 chances 55:19 56:1 change 25:17 26:3 changes 6:20 10:2 25:9,12 32:15 37:5 56:17 charges 49:18 50:1 choose 60:5 cited 15:21 46:6 citizens 26:7 civil 1:1 3:3 4:15 5:5,20 7:7,20 13:14 21:16 59:18 classification 6:20 classified 5:1 6:2,4 38:1 60:9 clear 41:22 51:22 62:17 63:12 clearances 60:6 60:7 clearly 15:6 66:17 colleague's 35:10 colleagues 29:7 collect 8:16 26:6 41:4 62:16 collected 8:5 34:14 40:16,18 41:3
B			C	
back 11:10 17:10 23:10 25:16 36:19 38:2,4 62:18 background 5:3 bad 15:6 55:22 balancing 56:7 Baltimore 67:5 based 9:15 10:13 26:21 35:5 44:1 59:13 bases 62:4 basic 26:5,8 basically 26:4 62:1 basics 62:18 basis 9:14 11:7 15:15 18:9 22:22 23:20 59:5 62:11			calculate 41:21 calculus 56:6 call 3:18 27:8 34:13,16,17 45:11 49:4 called 16:8 19:10 27:5 48:20,20 62:14 calling 8:12 calls 15:2 careful 29:16 case 9:8 21:2 23:17 27:15 30:5 39:16 50:5 cases 10:19 22:1 23:9,12 24:8 27:2,12 47:9 47:21 52:7 59:21 60:1,11 catch 55:20 caution 30:18 35:13 Census 58:10 Center 1:15 3:7 Central 5:17 certain 8:22 13:9 certainly 19:19 22:16,21 24:17 CERTIFICA... 67:1 certify 67:6,9	

collecting 17:11 40:18 56:2	5:21 41:3	concur 36:21	Constitution 57:10 66:6,8	51:7 52:13 53:15 65:22
collection 8:4 15:1 17:9 18:10,13 19:12 25:6,7,8 26:9 30:10,22 31:8 35:4 40:9 50:3 52:22 53:2,20 58:16 63:4 64:17,19	communicatio... 8:20 34:12 community 4:10 4:13 6:17 55:8 55:16 56:9 companies 5:21 8:11 13:6,8 19:17,20 35:19 43:13 51:22 54:17	conduct 52:16 conducted 1:5 4:2,7 15:13 16:5 65:5 confidence 29:20 confirming 33:20 Congress 12:7 12:10 17:4 18:17 23:4 30:1 33:5 64:14 65:2,10 65:15	constitutional 9:11,15 22:20 22:20 23:6,22 30:14 31:15 32:14 39:16 47:13 48:10,13 66:14 constitutional... 22:18 39:14 construction 48:6,7 contact 28:14 contained 67:6 contemplates 66:6 content 28:17 34:11,18 41:3 contest 50:8 contextual 32:4 continue 9:13 40:4 66:18 continues 41:1 contrary 65:19 contribute 37:17 39:9 contribution 24:5 control 26:4 controls 25:22 26:1,2 controversial 21:6 32:21 controversy 26:19 convened 4:1 conversation 51:9 52:19 conversations 52:21 convinced 22:16 Cook 2:7 3:16 29:5,6 49:11	cooperation 4:22 14:11 copy 6:10 core 27:4 40:1 cornerstone 32:5 correct 6:18 corrective 33:5 counsel 67:10 counterterror... 15:11 34:7 38:3 counting 35:15 country 4:14 County 67:5 couple 25:16 63:14 course 4:17 14:6 39:19 court 1:8 4:5 5:8 5:13 6:12,12 10:9,10,16 11:3,3 12:8,9 12:13,20 14:22 17:5 22:1 23:15 24:20 26:13,17 27:14 27:20,22 29:17 30:6,14 33:4 39:5,6,16 44:4 46:1,7 47:16 47:21 48:17,22 49:1,3,8 51:16 52:2,3 59:17 59:20 60:4,8 court's 11:8 12:12 15:4 courts 39:10 49:14 51:15 covered 62:3 craft 38:10 create 43:14
Collins 2:7 29:6 49:11 52:13 65:22 combating 37:15 come 22:19 24:1 24:6 25:5,19 26:13 45:20 57:21 58:1 59:21 comes 28:11 55:22 coming 52:20 commencing 1:16 commend 29:7 commended 32:22 commending 36:12 comments 4:18 51:8 Commerce 60:17 commission 67:17 Committee 60:18 committees 65:3 65:4 communicate 15:7 communication	comparable 50:20 complete 6:18 45:4 completely 28:4 compliance 20:9 52:2 complied 52:1 compliment 29:9 compounded 64:22 concept 17:21 17:22 18:8 concern 32:2 concerned 23:15 37:13 concerns 9:12 35:4,5,15,21 36:5 37:5,13 43:2,9,15 54:17 56:21 59:8,18,22 conclude 47:3,6 concluded 9:8 15:18 16:6 65:13 conclusion 31:22 39:15 40:3 conclusions 6:16 7:13,16 27:15	congress 12:7 12:10 17:4 18:17 23:4 30:1 33:5 64:14 65:2,10 65:15 Congress's 9:4 64:10 congressional 5:4 9:6 24:5 33:3 64:5 conjunction 33:18 connect 34:2 connection 8:3 connections 15:9 33:15 42:13 consensus 26:13 consent 3:22 44:21 45:14 consequences 51:5,12 consider 32:13 39:20 considered 7:8 9:3 31:21 39:4 60:3 considering 23:5 42:16 53:8 consistent 6:6 12:18 21:15 30:20 consists 49:2	Constitution 57:10 66:6,8 constitutional 9:11,15 22:20 22:20 23:6,22 30:14 31:15 32:14 39:16 47:13 48:10,13 66:14 constitutional... 22:18 39:14 construction 48:6,7 contact 28:14 contained 67:6 contemplates 66:6 content 28:17 34:11,18 41:3 contest 50:8 contextual 32:4 continue 9:13 40:4 66:18 continues 41:1 contrary 65:19 contribute 37:17 39:9 contribution 24:5 control 26:4 controls 25:22 26:1,2 controversial 21:6 32:21 controversy 26:19 convened 4:1 conversation 51:9 52:19 conversations 52:21 convinced 22:16 Cook 2:7 3:16 29:5,6 49:11	cooperation 4:22 14:11 copy 6:10 core 27:4 40:1 cornerstone 32:5 correct 6:18 corrective 33:5 counsel 67:10 counterterror... 15:11 34:7 38:3 counting 35:15 country 4:14 County 67:5 couple 25:16 63:14 course 4:17 14:6 39:19 court 1:8 4:5 5:8 5:13 6:12,12 10:9,10,16 11:3,3 12:8,9 12:13,20 14:22 17:5 22:1 23:15 24:20 26:13,17 27:14 27:20,22 29:17 30:6,14 33:4 39:5,6,16 44:4 46:1,7 47:16 47:21 48:17,22 49:1,3,8 51:16 52:2,3 59:17 59:20 60:4,8 court's 11:8 12:12 15:4 courts 39:10 49:14 51:15 covered 62:3 craft 38:10 create 43:14

created 19:18 19:21 creates 40:19 54:14 creating 59:6 creation 10:16 creep 29:2 57:11 criminal 49:13 49:18 50:1,6 50:10,12,18 criteria 13:17 26:22 critical 15:10 42:14 criticism 14:15 culture 28:9 cure 65:15 current 9:17 10:4 20:15 currently 62:9 62:10 custody 43:5 customers 35:21 cyber 31:10 51:9 53:2	day 14:13 16:18 45:3 67:13 deadline 9:4 dealt 23:12 24:8 debatable 66:15 debate 17:6 19:9 19:10 20:16,19 28:20 41:6 48:18 62:15 63:7 65:7 66:17 debated 49:9 debating 64:15 decades 25:16 December 7:13 67:17 decent 17:14 decided 59:14 decision 51:16 decisions 11:2,7 11:11,15 12:12 12:19,20 24:20 45:19 47:15 declassification 11:6 declassify 12:20 declassifying 11:11,14 dedicated 4:12 4:14 defendant 49:22 50:2 defended 49:22 defenders 18:3 26:16 demand 38:7 demands 38:2 democracy 66:5 democratic 65:10 demonstrated 9:12 Dempsey 2:6 3:16 14:2,3	45:22 46:15 51:21 57:4 62:5 64:4,13 denied 48:10,12 Department 5:15 60:17 depend 23:8 derivative 50:19 50:19 describe 55:16 description 6:11 descriptions 53:6 designation 49:3 designed 17:1 desirable 16:3 desire 14:18 despite 17:13 detail 22:14 detailed 66:10 details 28:19 29:1 determinations 10:7,7 determine 10:10 determined 11:19 detrimental 25:11 develop 13:8 developing 13:17 development 7:8 31:5 different 19:5,7 33:7 38:22 51:20 55:6 differentiation 25:6 difficult 38:17 43:17 dig 19:8 61:10 direct 49:13	66:7 direction 38:5 directly 9:19 Director 5:14 directs 52:15 discerned 65:12 disclose 13:9 disconnect 16:4 disconnects 47:1 discontinued 9:17 discretion 30:6 discuss 7:12 22:13 41:13 discussed 22:13 54:4 discussion 4:6 22:8 24:1,12 25:2 31:12,15 66:10 dismiss 33:14 disrupt 15:10 dissent 37:7,12 dissenters 21:7 dissenting 38:11 dissents 24:14 53:8 district 27:14 39:6 47:21 48:6 49:2 divide 46:3 division 50:18 divorce 54:18 document 66:5 documents 6:4 doing 10:5 33:12 63:22 domestic 15:1 dots 34:2 doubt 38:5 43:6 draft 6:10,14 drawn 10:17 duty 7:5 dynamic 38:9	E earlier 54:9 early 41:7 58:15 ease 61:13 easiest 60:20 61:18 easily 47:18 easy 20:2 36:15 41:21 57:15,16 echo 35:9 49:1 effective 15:5 43:8,11 65:15 effectively 13:4 effectiveness 6:5 9:13 18:3,15 efficacy 6:15 31:15 33:8 effort 32:20 efforts 29:21 38:3 Eight 12:22 either 19:17 31:14 35:1 40:3 43:10 53:2 elaborate 64:9 elaborated 23:7 Electronic 8:19 elements 7:6 19:1 Eleven 13:16 Elisebeth 2:7 3:16 emerged 19:15 emphasize 4:11 24:15 emphasizes 25:3 employees 57:9 enabling 12:8 enact 12:7,10 encompassing 8:6 encourages 45:7
---	---	--	---	---

ended 16:7	51:10	facts 34:19	29:17 39:5	27:6,6 52:8,8
enforce 20:8	expanded 17:20	factual 6:17	46:1,7 47:9,15	foundation 47:7
enhance 7:11	expanding	fades 37:22	48:17,22 49:1	foundational
ensure 6:9,17	10:22	failing 37:21	49:8,19,20	66:5
7:7 13:3	expansive 53:7	fairly 21:17	50:11	founded 52:10
entered 50:9	expedite 27:22	faith 4:20 32:20	FISC 5:19 6:2	four 61:9
entity 19:16	expert 27:4	38:21	10:9,10,18	Fourth 8:15
ephemeral 53:9	experts 23:19	falling 16:2	11:1,7,11 13:7	12:10 32:16
equation 41:18	25:8	far 16:2 31:20	24:20 26:13,17	frame 11:14
equipped 39:11	expiration 9:5	57:18 58:12	27:7,19 28:7	61:6
equivalent 36:8	expire 20:15	59:4	61:21	framework
especially 42:20	expires 67:17	fast-breaking	fit 16:16 62:11	28:18 29:19
essentially 15:2	explain 34:6	30:12	62:12	36:7
establish 42:13	explaining	favor 3:19 44:6	five 3:14 10:4	fulfill 31:7
establishing	16:16	44:9,16 45:12	24:10	full 7:14 12:13
37:10	explicit 28:16	FBI 8:4,9,16	flaw 64:5 66:2,3	14:10 44:16,21
etcetera 20:10	explicitly 66:6	federal 3:11	flawed 17:18	fuller 34:2
25:18 55:20	exploit 24:22	5:16 16:13	18:20	fully 42:9 62:8
evaluate 34:6	express 14:1,4	31:20 33:1	fleshed 62:1	62:17 65:4,5
event 39:3	29:11 59:22	36:15 39:4	flexible 57:18	functional 36:8
events 30:12	expressing	47:21	focus 33:12	fundamental
eventuate 50:12	56:21	Federalist 66:16	focused 11:4	17:11 62:22
everybody	extension 9:4	feel 53:11	32:15	63:6
24:11,13	extensive 4:21	fewer 35:9	follow 5:10 24:4	furnish 8:11
evidence 4:16	48:17	field 25:19	follow-up 56:14	further 54:6
24:17 42:16	extensively 4:9	Fifth 12:13	Foreign 1:8 4:4	67:9
49:17 50:9	49:9	final 45:1 49:11	6:11 10:15	futile 42:14
exactly 23:11	extent 12:17	51:16	11:2 12:8 44:3	future 28:9
examined 16:13	30:19 49:19	finally 9:3 18:17	forever 57:22	52:22 60:1
example 32:1	extreme 26:14	28:2 50:16	forgotten 27:11	61:14
52:1		find 10:21 15:8	form 9:17 47:10	
exception 9:1	F	15:9	formally 4:1	G
exceptions 9:1	face 11:19 22:9	finding 52:11	former 5:19	gap 64:10
executive 4:22	42:9 51:10	fine 14:13	27:1	General 6:3
7:6 14:11 17:5	faced 16:4 18:2	fingers 37:21	forth 29:11	12:22 13:13
33:2 48:19	30:13	fire 55:17,18,20	63:19	Generally 56:16
49:10 59:20	facility 60:9	first 8:2 10:2	forums 6:8	George 1:14 3:6
exhaustive	facing 59:1	12:2 14:21	23:20	get-go 20:2
15:14	fact 10:9 14:16	21:4 29:16	forward 9:18	getting 36:13
exist 32:18	14:22 19:3	31:18 32:16	11:6 20:19	give 7:19 13:22
existing 8:13	22:7 23:4,8,15	37:13 38:14	30:1	29:9 48:2
12:14 22:21	25:9 50:14,17	50:5 55:2	found 4:11,16	51:18 55:2
62:21	53:17 64:18	FISA 5:8,13	14:17 15:17	given 16:6 17:3
expand 12:11,15	factor 42:2	13:7,15 14:22	16:14 24:17,19	17:9 30:5,5,21

31:9 34:19 51:9 53:6,15 gives 37:14 40:10 global 23:13 gloss 62:21 go 11:21 17:10 21:20 23:10 25:16 34:9 62:18 goal 14:20 going 9:18 11:6 11:10,21 22:11 23:4 24:7 25:4 28:10,12,15 30:1 38:4 55:20 65:9 good 3:2 4:20 26:2,14 32:20 38:20 39:22 57:1 58:10 gotten 41:6 governing 39:16 government 8:22 11:5 12:2 12:4,18 13:5 13:16 20:5 25:10 26:6 34:5 36:8 37:21 38:2,8 39:19 40:11 41:2 43:3 47:5 47:10 50:17 51:18 52:4 53:11 58:8 59:2 63:22 64:20 government's 13:10,15 38:19 60:12,13 governmental 52:9 grand 18:10 grant 38:18	grappled 62:8 greater 28:6 grounds 8:1 group 4:12 28:12 57:19 Guardian 53:5 guys 15:6 <hr/> H hand 23:3 40:9 41:2 67:12 handing 58:4 60:21 handle 60:9 handles 26:17 26:18 hands 40:13 happen 52:6 happened 49:6 happens 42:10 happy 52:13 hard 14:6 18:19 35:20 harm 33:13 hear 12:9 51:10 heard 14:21 23:19 54:2 55:15 57:21 60:22 hearing 3:18 held 1:14 6:8 19:16 help 15:10 35:21 helpful 10:21 Hi 56:12 highest 17:13 29:9 highly 16:2 hint 65:6,7 hire 61:8 hiring 61:14 history 22:9 27:19 hold 19:20,21	20:5 35:16 43:13 holding 36:8 hole 19:9 homeland 33:14 honest 25:14 53:12 honestly 57:14 hope 24:5 29:22 37:16 52:21 hoping 61:13 hops 10:4,5 host 43:17 54:14 house 5:18 7:12 55:20 huge 28:12 hundred 51:21 56:1 hundreds 26:19 52:7 58:22 <hr/> I idea 19:15,19 22:10 57:2,5,5 ideal 31:6 ideas 19:14 identified 16:19 43:2 47:1 identify 33:19 identifying 41:5 identities 34:15 34:18 identity 34:12 illegally 46:14 imagination 54:1 imagine 60:22 immediate 10:2 42:7 immediately 12:4 37:3 40:22 50:8 immovable 15:19	immunizes 52:3 imperative 30:8 implement 12:5 30:1 implementation 7:9 implemented 21:14,18 30:19 implications 32:17 importance 30:11 important 20:1 21:1,12 22:12 23:4 28:3,8 importantly 37:2 impose 36:1 imposing 9:21 in-depth 5:6 15:15 inadvertent 24:19 inaudible 45:20 58:13 59:13 include 34:11,12 included 5:13 36:17 including 27:18 31:10 37:8 incomplete 46:19 inconsistent 7:22 increase 29:19 increasing 31:10 indefinitely 23:16 independence 7:2 independent 12:9 independently 59:21	indicated 9:6 29:14 33:17 indication 7:1 59:6 individual 7:17 13:22 24:9 26:20,20 45:4 63:20 64:18 individually 57:2 individuals 4:19 34:13,16 infinitesimal 50:13 inform 13:13 50:17 information 8:16,18,21 13:1,10 15:1 15:11 23:21 25:1,7,10 28:16 33:20 35:17 36:6 38:1 40:12,16 40:18 41:5 49:17,20,21 50:3 58:11,21 59:3,4 60:10 informative 28:17 infuse 65:18 initial 15:3 initially 64:14 input 12:16 inside 48:19 55:16 Inspector 6:3 instance 55:15 instances 29:3 institution 26:15 institutional 39:7 institutionaliz...
---	--	---	---	--

59:19 instruments 23:13 insufficient 37:14 62:3 insurance 55:17 55:18 intelligence 1:8 4:4,9,13 5:15 5:17 6:12,17 10:15 11:2 12:8 14:12 30:10 44:4 55:8,16 56:9 65:3 intended 14:15 17:22 intentional 24:18 intentions 18:19 52:5 interact 4:9 interested 45:7 67:11 interests 40:5 41:17 42:22 international 15:2 Internet 13:6 interpret 64:7 interpretation 31:19 32:11 38:19 50:16 63:4 65:17,18 65:19 interpreted 56:17 65:17 Interruption 3:9 intimidate 24:22 intrusion 40:5 40:20 41:16 42:21 investigation 4:17 8:4,8,9	investigations 5:16 32:5,7,9 investigative 49:15 investigators 33:11,14 invited 10:18 involve 34:10 involved 52:21 involves 11:12 involving 10:19 issue 16:14 44:21 issued 46:16 49:15 50:7 issues 30:15 37:19 47:12,13 60:3,21 issuing 44:16 46:1 <hr/> J Jake 63:11 James 2:6 3:16 January 1:10 3:5,11 7:14 Jim 27:9 job 61:3 join 30:3,16 31:13 37:2 39:17 joined 35:5 40:21 joke 58:13 joking 58:6 Jones 23:12 journey 20:13 Jr 60:16 judge 5:19 10:20 16:18 20:21 24:3 31:20 39:4 48:6 52:6 judgement	55:11 judges 10:19 16:11,13 27:1 27:1,7,10,11 27:14 30:14 33:1 45:18 46:1,6,7,10,11 46:15,21 47:4 47:22 49:3 52:8 judgment 56:2 judicial 32:21 33:2 judiciary 65:3 June 5:4 14:21 jurisprudence 29:3 32:16 jury 18:10 Justice 5:15 justified 18:4 justifies 10:8 <hr/> K keep 14:14 18:19 54:19 57:7 keeping 13:11 36:4 54:3 kept 10:3 11:13 58:9 key 42:2,17 kicked 62:7 kind 23:21 24:17 25:19 26:21 27:2 29:2 64:12 kinds 25:22 54:21 knew 64:18 knock 57:22 know 18:6 21:5 22:15 38:7 48:9 49:1 55:15,19 58:9	58:12 61:2,3 knowing 65:16 <hr/> L laid 46:11 language 38:16 large 38:6 43:16 62:16 large-scale 42:10 Laughter 66:19 law 14:18 21:15 21:17 22:22 23:1,5,22 24:7 28:10,11,18 29:2 39:17 lawyers 47:5 layer 17:9 lead 19:6 leads 33:19 42:14 leak 38:1 leaks 16:15 46:9 46:20 53:12 leap 63:7 leave 43:20 54:6 leaving 53:20 led 19:3 left 30:6 legal 9:15,20 11:17 12:16 15:4 16:14 17:12 29:18 31:14 35:1 39:9 46:11,18 51:4 54:14 59:7 60:3 legality 21:4,9 22:13 47:18 51:13 legally 52:10 legislation 7:9 12:7,10 24:6 legislative 22:9	32:22 66:10 length 46:4 let's 61:15 64:2 liability 20:9 52:3 54:16 59:7 liable 52:1 liberties 1:1 3:3 5:5,20 7:7,21 13:14 21:16 59:18 liberty 61:4 light 23:11 39:18 42:20 likelihood 50:11 likewise 32:11 limit 18:11 limitations 41:11 limited 16:2,6 limiting 17:22 63:9 limits 30:13 line 7:19 50:7 55:22 56:3 literally 41:8 52:7 litigated 47:14 little 41:20 56:14 live 14:18 66:4 Livingston 1:20 67:4,15 located 3:7 location 23:13 logical 15:5,8 long 20:7,13 57:7 longer 43:13 longer-term 42:5 look 17:7 20:18 21:13 32:5 62:7
--	---	--	--	---

27:13 46:7 48:6 looking 16:10 17:5 24:21 61:5,8 lost 41:6 lot 16:10 17:6 50:22 58:11 63:22 lower 50:13 Lynne 1:20 67:4 67:15	53:22 54:18,21 62:2 63:13 meaning 17:20 18:1 meaningful 33:2 meaningfully 39:9 means 43:3 meant 18:11 19:4 52:18 measures 20:9 mechanisms 27:18 Medine 2:3 3:2 3:10,21 20:21 24:16 29:5 36:10 44:1,9 44:13,15,20 45:14 47:8 48:2 50:22 51:12 56:11 58:20 59:15 61:7 64:2 65:21 66:17 meet 45:5 meeting 1:2,14 3:3,10 45:11 66:20 member 20:18 45:18 46:13 48:1 50:21 51:2 53:4 55:4 56:12 59:11 60:16 61:17,19 62:2 63:20 64:4 members 2:1 3:14,15 5:18 7:17 14:1,5 23:14,14 44:17 45:5,5 56:19 61:1 66:2 memory 37:22 men 4:12	mention 26:12 61:1 mentioned 12:19 35:14 41:7 64:5 met 5:18 7:12,14 14:12 metadata 9:18 38:17 40:10 53:20 middle 50:10 Miller 23:9 millions 58:22 mind 11:13 13:11 18:5,14 misconduct 4:16 mislead 55:9 mission 15:11 57:11 mistake 63:8 65:9 mistakes 33:4 misuse 24:18 26:9 modified 31:5 modify 31:3 35:6 modifying 37:3 40:22 months 4:7 5:11 14:7 15:12 move 44:4 movements 23:17,17 multiple 42:12	29:20 30:13,20 37:18 38:10 40:6 41:19 43:16 62:15 66:11 nature 54:15 Nay 44:14 near 61:13 necessarily 55:1 necessary 20:17 29:4 necessitate 36:7 need 13:11 20:6 37:14 39:17 62:14,17 needed 27:8 42:7 needs 55:12 negative 18:5 never 17:20 18:1 33:9 40:16 42:6 48:15 51:4 55:17 58:12 63:7 66:12 new 8:12 12:19 17:5,20 23:11 26:15 36:14 38:9 43:14 52:14 59:7 62:6 Ninth 13:5 notarial 67:12 Notary 67:4,16 note 35:12 53:1 noted 31:13 34:4 35:3 notice 3:11 notified 33:5 49:22 notion 26:5 27:16 51:3 55:21 58:1 novel 10:19	59:16 60:2 NSA 4:8 5:15 8:17 10:12,14 33:4 34:18 43:20 53:20 54:3 number 8:1 43:16 numbers 23:18 24:10 41:8 numerous 38:21 NW 1:16
<hr/> M <hr/> maintained 10:12 majority 7:20 9:7,9,16 11:16 15:17 21:21 32:2 33:8,17 34:22 40:17 55:12 63:18 majority's 29:13 31:2,14 making 28:9 mandate 6:7 21:13 40:2 52:15 manufactured 58:4 March 20:14,18 Marvin 1:15 3:7 Maryland 23:9 67:5 mass 25:10 materials 5:1 matter 18:8 21:17 28:19 39:7,12 48:5,7 matters 10:20 maturity 52:20 maximum 12:17 mean 25:14 50:13 52:6		<hr/> N <hr/> N.W 3:8 names 41:8 nation 8:7 nation's 30:9 national 5:14 12:18 13:11 14:19 28:22		<hr/> O <hr/> Obama's 56:17 objections 60:11 objects 15:19 obligation 8:11 obtain 12:14 obtained 9:19 49:17,20 obviously 22:15 28:21 63:18 occasions 9:5 occur 37:18 occurred 64:10 64:13 occurs 20:20 offer 14:16 Office 5:14 officer 3:13 officials 5:13 38:21 52:5 53:11 OIPR 48:20 okay 19:16 65:21 old 24:8 oldest 25:15 once 63:3 ongoing 8:14 11:7 18:13 33:15 63:5 online 45:8

open 3:3	outside 7:2	57:20 67:10	56:13	possible 6:8
opening 3:19	12:16 59:17	parts 28:6	phrase 29:8	12:17 25:17
operate 4:18,19	outweighed	party 19:18,21	45:19	30:19 54:2,12
6:7 39:20	40:6	36:5 43:5 54:9	pick 20:22	Post 56:13
63:18	over-read 22:2	57:4	picture 34:3	posted 45:10
operated 4:20	overarching	passed 28:10,11	pieces 21:1	posting 61:3
62:13	37:13	Pat 48:4	Pierson 56:12	potential 25:3
operates 8:10	overhaul 23:5	Patricia 2:5	place 41:14	25:13 30:21
41:10	oversees 20:9	3:16	42:20 58:8,22	31:1 32:15
operating 12:6	57:9	PATRIOT 1:6	plain 19:5 65:12	33:14 40:5
operation 6:4	oversight 1:1	4:3 64:15	plan 43:4	56:4
9:6,13 13:2	3:4 5:6 7:21	pause 40:10	please 44:7,11	potentially 8:6
35:6 44:3	13:14 32:22	PCLOB 7:11	44:17 55:4	32:20 36:2
operational	33:3 40:14	pclob.gov 45:1,8	pleased 20:11	power 7:11
28:19,22 37:6	52:16	45:10	36:22	25:12
54:7	overwhelming	peace 18:5,14	plot 42:10,15	practical 51:6
operations 1:7	16:4	pendulum 37:17	plots 15:10	practicality
4:4 5:8 6:11		38:4	33:15	56:21
11:5 31:3	P	people 14:13	plucky 29:7,9	precedent 23:1
opine 63:21	p.m 1:17 3:4	17:14 22:15	point 13:22	23:11
opinion 16:16	66:20	24:21 25:14	16:21 23:12	precious 42:13
19:11 23:19	pages 21:3	28:21 39:1	28:2 32:2	present 3:14
43:19 46:10	paint 34:2	55:9,16 56:8,9	48:14 49:11	7:16
opinions 6:2	panel 10:17 60:5	57:15,18 58:12	pointed 24:16	presentation
27:10 45:19	64:11	61:9,14	pointing 47:20	53:13
opponents	Papers 66:16	perceived 27:6	points 26:11	presented 47:5
16:21	paraphrasing	percent 51:22	37:21 50:5	64:7
opportunities	21:22	56:5,6	policies 7:9	President 7:6,15
11:1 12:11,15	part 6:6 27:7	perception 55:7	policy 9:15	7:15 16:8
opportunity 4:8	37:12 49:6	period 16:8	17:17 18:8	19:10 20:13
14:1 29:10	52:14,18 55:3	24:10 51:18	21:10 24:12	62:14
31:6 50:2	55:11 59:19,20	permanent 9:14	35:1 38:10	President's 7:17
60:11	60:10 62:19	permissible	39:12,22	17:3 61:20
opposed 8:12	participating	31:19	policy-making	63:13
44:13	20:19	permitted 10:5	37:18	presidential 5:4
opposing 48:15	participation	permitting 13:8	politically 24:22	presiding 3:12
opposite 27:14	30:4	person 25:15	pool 59:14	5:19
order 3:18 6:9	particular 7:11	58:6	poses 34:21 35:9	press 45:6 61:7
52:2,3	8:8 11:9 43:6	personal 58:21	36:2	64:3
orders 13:8	particularized	personally 41:4	posing 30:12	pressed 35:20
20:15 46:2,16	26:21 64:17	philosophy 55:6	position 48:17	pressure 17:14
ought 55:18	parties 12:16	phone 15:2	53:1 63:12	36:1
outcome 16:3	38:22 45:8	19:20	possesses 40:11	pretty 58:10
67:11	49:5 56:15	phonetic 53:5	possibility 56:22	prevent 37:22

38:8	17:17,19 18:17	21:14 32:17	19:2,3 22:7	54:21 57:13
preventing	18:20 48:16	34:8 46:2	23:20 26:16	59:10 61:16
42:17 53:10	49:7,13,15,16	59:13 60:2	28:20 29:20	quick 51:2
preventive 42:4	50:10,12 64:5	66:11	37:20 38:2,7	quickly 42:11
previously	produced 61:12	promised 16:3	46:20 53:13	quite 19:5 41:17
29:14 32:12	production 8:14	properly 46:16	55:13 60:17	quorum 3:15
42:2	13:7	51:4 52:10	63:7 65:7 67:4	quote 30:8,19
primary 42:8	program 1:4 4:2	proponents	67:16	
principle 63:9	6:15 7:22 8:3	16:21	publicly 6:7	R
principles 13:17	8:10 9:2,5,7,10	proposal 54:2	13:1 64:8,16	Rachel 2:4 3:15
prior 12:20	10:2 12:3,6	56:22 60:4	published 36:16	36:10
privacy 1:1 3:3	13:3 15:12,15	proposals 7:10	pull 38:2	raise 27:2 35:4
5:5,20 7:7,20	15:17,22 16:1	26:15 58:18	purpose 28:18	36:5 43:17
8:20 9:12 12:5	16:5,7,14,16	proposition	purposes 40:13	60:11
13:14 19:22	16:22,22 17:6	66:15	43:16 58:5	raised 21:8 27:9
30:22 34:22	17:15 18:4,13	prospective 53:9	pursuant 7:5	54:22 59:9
35:4,9 36:3	18:16,22 19:15	protect 13:11	49:20	60:1
37:5 40:5,8,15	20:3 22:11	20:8 39:1	push 52:12	raises 9:11 26:8
40:20 41:17	23:2 24:3,18	52:17 54:6	put 22:6	31:9
42:22 43:2,9	31:2,4,6,16,17	58:9	putting 8:10	raising 26:18
43:14 51:19	31:18 32:19,21	protecting 4:14	26:15	rarely 49:6
54:6,17 56:4	33:1,6,9,22	4:14 14:19		RAS 10:7
59:18	34:10,21 35:1	protections	Q	ratification
private 10:17	35:7 37:4,6,10	17:10 51:19	qualified 60:5	65:14
18:21 27:5	38:13,15,17	62:20	quantities 62:16	Ray 60:16
53:16	39:11,15,20,22	provide 7:10	quasi-adversa...	re-enactment
privately 24:22	40:7,9,18 41:1	8:13 15:10	48:18	65:14
proactive 37:15	41:4,7,10,19	18:5 28:15	question 17:11	re-examination
probably 21:5	41:21,22 42:4	47:7 60:8	18:2 21:8,17	65:1
25:15 58:9	42:17 43:20	provided 6:1,10	25:4 26:8	re-passing 65:16
problem 16:22	44:2 46:4,20	6:14 10:8,9	31:21 35:11	reached 31:21
59:1 62:9,12	47:2,7,19 51:4	provider 54:20	38:16 39:5,8,9	reaches 49:8
64:12,13	51:14,20 53:7	providers 8:17	40:1,3,8 45:17	reaction 15:3
problems 16:19	53:14 54:7	8:21 9:19,22	49:12 52:14	read 21:3 22:8
46:22 57:6	55:9 56:18,20	13:6 35:16	55:3 56:15	reading 65:12
proceed 3:22,22	59:12 60:1	42:12 43:21	59:11 60:20	ready 27:7
22:22	62:7,11,12,21	54:11,13	61:7,18 62:6	63:20
proceeding	63:2,2,3 64:17	providing 4:22	62:15,22 63:6	reaffirms 18:6
54:19	64:19 65:4,11	8:21 36:6	63:8 64:3	real 21:16
proceedings 3:1	program's	provision 49:21	question's 56:16	realized 42:9
3:9 45:9 66:7	39:13 42:8	64:22	questions 20:6	really 15:18
67:6,8	programs 4:8	public 1:2,14	20:17 27:2	24:8 53:19
process 6:21	4:18,20 5:7,12	6:8 11:7,19	31:9,12 43:18	55:21 56:7
11:13 14:10	6:5 11:5,9 14:8	13:21 14:8,17	51:1,3 54:15	61:7 63:6

reason 22:17 24:14 32:10 47:16 49:7	recommends 10:1 41:16	46:5	30:11	safeguards 12:5 41:11,14,15 54:4,5
reasonable 10:6 10:13 38:20	record 10:5 19:2 19:3 28:20 45:16 67:8	replicates 57:5	response 5:3	sat 52:6
reasoning 11:8	recorded 67:7	reply 25:21	responsibility 39:1 54:16	saw 64:12
reasons 9:16 21:20 35:2 38:11 58:3	records 1:4 4:2 8:2,5,7,12,14 10:3,8,11 12:3 34:14,17,17 35:16 36:4 42:11 44:2 64:18	report 1:4 3:19 4:2,7 5:9 6:10 6:19 7:20 12:1 13:1 14:14,16 21:2,6 29:13 29:15 36:13,18 37:14,16 41:12 44:6,6,10,16 44:21,22 45:8 61:12	responsible 30:2	saying 20:4 22:19 24:2 46:6,18 52:4 58:7
reauthorization 64:15	regard 35:12 51:8	Report's 37:8	rest 36:12 64:11	scale 30:22 31:9 38:6 40:9
reauthorized 33:6	regarded 8:7	Reported 1:20	restricts 8:20	scan 42:11
receive 13:7	regarding 13:2	reports 6:3	rests 31:18	scheme 58:2
received 4:21 14:9,10 61:9	regime 29:2	representative 66:4	result 22:19 35:22	scope 11:17 13:19 18:11
receives 8:17	Register 3:11	represented 32:19	resulting 6:21	scratch 57:14
receiving 3:21 44:20	regular 39:6 49:2	represents 54:1	results 15:17 16:1,6 18:5 37:12	seal 67:12
recognize 20:1 20:12	regularly 13:1,7	request 60:13 60:13	review 6:20 7:2 10:10 11:1,3 12:11 27:22 44:2 45:8 57:19	search 10:8 49:14
recognized 30:7	relating 6:4	requested 5:2	retain 7:10	searches 10:6,11 10:12
recognizing 11:12	relative 34:7	requests 5:4 13:10 60:12	retention 9:21 36:1	second 8:5 12:4 30:21 37:16 51:7
recommend 9:16,21 10:16 10:22 11:6,10 42:18 49:7	relatively 42:21	require 53:2 66:10	revealing 40:10	secondly 16:1 50:15
recommendat... 24:2 30:3,17 31:16 37:9 38:12 40:22 51:17 61:22	release 12:19	required 19:20	review 6:20 7:2 10:10 11:1,3 12:11 27:22 44:2 45:8 57:19	secrecy 30:8
recommendat... 6:16,22 7:4 11:22 29:15,16 30:2,7,17 31:3 35:6 36:22 37:3,8 44:5,7 44:10 61:20 63:16	released 24:20	requirement 8:13 36:2 66:9	right 18:9,12,15 22:22 48:5 64:2	secret 29:2 66:6
recommending 47:11 51:13 56:19	relevance 18:9 32:3,6,11 63:5	requirements 9:22 57:8	risk 30:12 34:21 40:19 56:4 57:10	section 1:5 4:3 5:7,7,9 6:15 19:4 22:18 28:5 31:4,17 33:9,11,18 34:1 37:4,9 38:13,16 44:3 64:16,20 65:6 66:7
	relevant 8:8 17:19 22:5	requires 42:4	risks 30:21 35:9	sector 53:16
	remarkably 14:6 41:11	requiring 43:12	road 25:13 62:7	secure 57:8 60:9
	Remember 27:9	reset 52:12	role 31:7	security 12:18 13:12 14:19 20:8 28:22 29:20 30:13,20
	renewal 46:1	resolve 20:14,17	room 1:15 3:7 17:6 25:16 36:19	
	renewed 46:5	resolved 39:10	rule 53:21 58:17 58:18,19	
	repeat 34:15 41:13	resource 30:13	routinely 49:15	
	repeated 46:1	resources 11:12	safe 14:14 18:20	
	repeatedly 33:6	respect 17:13 29:17 47:3,4 52:16	sacrificing 37:6	
		responding	safe 14:14 18:20	

36:6 37:19 38:10 40:6 41:19 43:17 57:8 60:6,7 66:11 see 19:22 31:10 35:20 39:17 45:21 54:11 57:14 58:3 seeing 45:21 55:6 seeking 64:20 seeks 26:6 seen 32:10,12 senate-confir... 49:2 senior 7:12,15 sense 43:7 58:2 sensitive 30:10 58:21 66:11 sent 34:17 separate 29:12 34:4 36:16 41:12 series 9:11 serious 31:9 36:5 40:20 60:21 seriously 34:6 38:22 39:19 58:7 servants 14:17 served 43:8 serves 62:10 service 13:6 42:12 43:21 54:10 Session 45:17 set 24:14 29:11 36:14 seven 14:7 16:12 16:13 17:17 Seventeen 45:18 seventh 12:21	severe 30:12 56:21 shaped 17:16 shoe-horned 17:1 short 16:2 29:12 36:16 shut 31:16 34:22 37:9 38:12 shutting 42:19 side 41:18 64:10 64:11 sign 66:13 significant 10:19 11:11,12 36:1 Similarly 30:16 36:4 simple 35:10,11 simply 22:5 sincere 55:10 single 39:4 sitting 49:3 situation 53:17 situations 24:9 six 14:7 Sixth 12:17 skeptical 43:9 skepticism 53:16 small 41:17 42:21 61:11 Smith 23:9 Snowden 16:15 46:9 53:12 so-called 56:5 65:13 solve 59:1 somebody 20:4 48:2 50:18 55:8 58:1,4 59:19 someday 18:7 somewhat 57:17	59:15 sorry 12:21 16:12 28:4 48:4 65:22 sort 53:18 sound 35:12 39:12 62:19 sounds 57:15 source 50:19 space 60:8 speak 57:2 Special 10:17 13:2 30:4 47:10 59:12 specific 8:3,22 11:22 57:20 58:18 Specifically 30:3 speculative 32:14 speech 7:17 62:19 63:13,15 speed 30:11 Spencer 53:4 Spencer's 56:14 spent 16:10 spirit 14:17 squarely 40:1 staff 5:19 6:12 7:12,12,15 14:6 15:13 29:8 36:13 61:2,11 stand 24:7 standard 18:14 18:15 19:12 20:7 standards 17:12 stands 32:10 start 36:12 59:6 starting 4:6 40:8 state 58:15 67:5 statement 29:12	34:4 36:17 41:13 statements 6:13 6:18 44:17,22 States 24:11 33:13 38:7 52:17 station 20:12 statistic 27:9 statistical 13:9 statute 7:22 8:15 9:11 15:21 16:5,17 17:1,15 19:6 21:13 22:2,3 31:19 32:4 34:20 38:20 46:12,21 47:2 47:6 52:2 62:9 64:7 65:8,12 65:16,19,20 statute's 8:12 51:21 statutes 11:20 statutorily 38:15 51:5 statutory 6:7 7:5 15:14 16:11,20 26:21 31:7,14 32:8,8 39:5 47:12 48:5,7,11 stenographica... 67:7 stick 21:9 Street 1:16 3:8 strict 41:11 structure 25:12 49:19 59:7 structured 59:13 studied 63:17,21 study 4:8 5:6,12 6:6 64:1	studying 15:12 63:19 stuff 25:15 subject 6:19 10:12 21:7 32:20 33:2 57:9,10 subjects 63:14 63:15,16,21 subpoena 17:21 18:10 50:6 subpoenaing 54:19 substance 7:3 substitute 35:17 sufficient 9:13 36:6 suggested 25:8 54:11 56:17 suggesting 24:21 46:14 summarizing 36:20 sunset 65:1 supplemental 33:20 supply 33:20 support 15:22 35:8 43:6 Supreme 11:3 22:1 23:14 39:16 surveillance 1:8 4:5 6:12 10:15 11:2,17 12:9 13:19 44:4 suspicion 10:6 10:13 28:13 swings 37:17 system 41:8 66:2,4 <hr/> T <hr/> tacit 64:6
--	---	---	--	---

take 12:13 30:8 33:7 38:22 46:2 49:4 53:1 57:12 61:15 64:2	tested 49:18 thank 14:3 20:21 29:6 36:9,11 43:22 44:1 53:4 65:21	Thirty-eight 16:11 Thomas 60:16 thought 26:16 27:4 58:7 thousand 55:19 56:1 61:9 thousands 52:7 threats 31:10 33:10,15 36:2 51:10 three 10:3,5 44:15 56:18 61:8,15 thwarting 42:2 42:15 till 58:18 time 8:4 11:14 16:10 35:19 42:12,14 45:15 50:6 52:12 61:6 times 16:12 45:22 46:8 tinker 26:3 tiny 14:6 36:13 today 4:1 20:11 today's 33:9 45:9 token 32:13 told 26:22 61:17 tool 33:10 touch 63:16 touchstone 32:8 track 23:16 trade 5:21 Trademark 60:17 transcript 45:9 67:8 transfer 43:5,21 transferring 55:1 transition 16:8	51:18,19 transparency 11:4 13:18 28:5,7 29:18 30:16 tremendous 61:11 trends 23:6 triage 33:11 tried 59:16 trouble 63:1 true 40:17 67:8 try 36:19 55:2 trying 55:8 Turning 38:11 39:13 turns 21:18 twelve 11:21 13:19 17:16 27:2 29:15 twenty 23:10,10 twenty-five 23:10 two 4:8 5:12 6:8 9:5 10:4 15:19 15:19 19:14 21:6 26:11 27:12,21 37:7 37:12 38:21 44:15 47:21 50:5,20 51:2 56:20 61:1,15 62:5 type 59:22 types 34:21 49:14	45:14 unanimously 10:1,16 unanswered 57:6 unauthorized 38:1 unclassified 5:10 unconstitutio... 24:3 undergird 23:1 underlying 25:4 understand 51:15 57:19 understanding 18:21 34:20 56:18 66:12,13 undertook 5:6 undetectable 15:9 unfortunate 38:9 United 24:11 33:13 38:7 52:17 University 1:15 3:6 unknown 42:2 unknowns 15:8 unnecessary 32:15 unworkable 66:12 upheld 39:3 48:8 uphold 45:20 urge 34:5 urges 13:16 USA 1:6 4:3 use 15:6 25:6,11 25:20 26:1,1,2 26:4 28:11 49:21 55:17
---	---	--	---	---

58:16	20:21,22 47:20	went 18:18	year 5:5 50:15	23 1:10
usefulness 42:8	48:9,12 50:4	whatsoever 22:8	years 10:3,4	237 21:3
uses 24:19	52:6 55:2,5	White 5:18 7:12	16:12,13 17:16	23rd 3:5
utility 33:8	57:17 61:21	wild 37:17	17:17 23:10,11	
	63:9 66:14	willingness 27:6	24:10 27:20,21	3
V	want 4:11 10:22	wiser 43:19	46:3 52:9	309 1:15 3:7
v 23:9	14:4 28:22	wish 45:6 49:5	Z	37 16:12 45:22
valuable 33:16	35:20 47:8	witness 67:12		38 45:19 46:3,7
33:21	48:14 53:21	women 4:12	0	4
value 28:17 34:7	54:18 63:11	wonder 64:9	1	4 46:3
37:6 40:6	wanted 20:14	wonderful		5
41:19,20,22	27:22	25:14	1 44:10 66:7	5 66:8
50:19 53:6	warrants 23:16	word 17:19	1:00 1:17 3:4	5th 7:13
55:9,11 56:2	26:20 49:14	wording 21:22	1:45 45:15	
varied 33:10	Washington	words 19:5	10 67:17	6
various 6:2	1:14,16 3:6,8	21:22 22:5	11 44:7	6 46:3
23:20 34:7	56:13	34:1 35:10	12 30:17 44:10	7
vast 34:10 40:17	wasting 42:13	65:8,20	16th 3:11	7 46:3
53:3	watch 29:1	work 13:5 18:7	17 16:13 46:6	702 5:7,9
verify 6:13	way 14:15 20:12	18:22 29:7,22	2	8
versus 26:9 56:4	20:16 21:14	36:14 54:12		800 1:15 3:7
64:7	25:11 30:2	60:9	2 44:7	8th 7:14
vetted 49:9	38:10 41:21	workable 53:17	2:05 66:20	
Vice 7:15	54:12 55:14	worked 14:5	2005 64:14	
view 9:10 19:8	62:3,12 67:10	working 4:13	20052 1:16	
31:5 33:7 42:5	we'll 44:4	14:13 17:14	2006 64:14	
42:21 43:7	we're 3:6 15:16	18:19 43:4	2009 65:1	
62:8 65:8	20:11 24:2	56:22	2011 65:2	
viewed 40:17	28:4 46:18	workload 60:22	2013 67:13	
views 7:16 10:21	47:11 51:15	world 33:9	2014 1:10 3:5,11	
12:9 14:1	52:4 59:1 61:8	worried 28:21	67:17	
29:11,12 36:17	61:10	worse 53:18	215 1:5 4:3 5:7	
36:20 48:15	we've 5:1 11:4	worth 56:2,6	6:15 7:21 9:1,5	
violation 40:16	14:5,9,10,12	wouldn't 22:10	9:10 12:3,6	
virtually 50:6	18:3 27:13	53:21,22 57:22	19:4 21:22	
voice 59:17	55:15 59:9	58:3 63:20	25:4 26:8 27:3	
voluminous	61:9 63:6,14	written 16:16	27:13 31:4,17	
61:12	66:12	46:10	33:9,11,18	
voluntarily 13:9	website 45:2	wrong 40:13	34:1 37:4,9	
vote 63:19	week 7:18 17:4	X	38:13,16 44:3	
voting 56:19	weighed 31:1	Y	53:7 60:1 63:3	
W	weight 22:6	Yeah 51:2	64:16,21 65:6	
Wald 2:5 3:17	37:14		21st 1:15 3:7	
	Welcome 3:2			