

Comments to the
Privacy and Civil Liberties Oversight Board
By the Center for National Security Studies
On the Board's Mid-Term and Long-Term Agenda
August 28, 2014

Pursuant to notice dated July 9, 2014 in the Federal Register.

Agency/Docket Numbers:

Notice-PCLOB-2014-04

Docket No. 2014-0001

Sequence 4

Document Number:

2014-16155

The Center for National Security Studies is a think tank and civil liberties organization that for almost 40 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights and that respect for our constitutional system of government will accomplish that.

The Board has asked for suggestions about what matters it should address in the future and several other organizations have made suggestions which the Center supports. In addition to those suggestions, we respectfully suggest that the Board also undertake the following.

1. Follow-up reports regarding the Board's recommendations in its reports concerning surveillance under sections 215 and 702. The Board should undertake an examination and prepare public reports on the status of its recommendations. The follow-up report concerning its section 215 recommendations should be issued in time for consideration of the upcoming sunset of 215 authority in June 2015, assuming that sunset is not extended in the next few weeks. Such follow-up reports should include: what actions the executive and legislature have taken to fulfill the recommendations; what recommendations have not been implemented; and what reasons the executive branch has advanced for not fulfilling the recommendations.

2. Examination of NSA's actual minimization practices. The Board should undertake an examination/audit of whether in fact the NSA has destroyed personal information on Americans as required by applicable minimization rules and issue a public report on its findings.

3. Investigation of allegations by Washington Post concerning the scope of surveillance. The Board should undertake to investigate the allegations reported by the *Washington Post* shortly after issuance of the Board's report on section 702 surveillance: "In NSA-intercepted data, those not targeted far outnumber the foreigners who are," by Barton Gellman, Julie Tate and Ashkan Soltani, *The Washington Post*, July 5, 2014, http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html. That investigation should include whether the Board was completely and fully informed by the intelligence community in its examination of the section 702 program.

4. The Board should consider how to best inform the public concerning how current government surveillance authorities fit together. The Board should begin to address the lack of public understanding that has resulted from the complex and interlocking authorities concerning when the government may collect information on Americans for "foreign intelligence" purposes, what it may do with that information, and whether and for how long the government may keep it.

As part of that effort to breach the current discussion silos -- e.g. addressing collection under sections 215, 702 or E.O. 12,333 as separate and unrelated subjects --, the Board should undertake the following.

5. Disclose whether there is authority outside section 215, which the government could use for bulk collection of telephone metadata? The Board should call upon the executive to immediately declassify whether the Justice Department has opined that authorities other than section 215 (and related sections addressed in the USA Freedom Act) could authorize the NSA's bulk collection of telephone metadata. There is considerable reason to worry that the Justice Department has done so in a still secret OLC opinion. See *Just Security*, "Would the USA Freedom Act End All Authorities for Bulk Collection?" <http://justsecurity.org/12970/guest-post-usa-freedom-act/>.

6. Obtain comprehensive report of the Executive's view of its authorities and programs. As we have urged previously, the Board should recommend that the Executive Branch prepare a comprehensive public report concerning government collection and use of information about Americans for national security or foreign intelligence purposes. The report should detail:

- All the statutory authorities, agency rules and guidelines for such collection, use, data-mining, sharing and retention of information about Americans;
- Which agencies may exercise which authorities, e.g., FBI, DHS, etc. and what information may be shared between each agency; and
- The scope of the collection of Americans' information, including the kinds of information, the amount of information collected and the approximate number of Americans whose information has been collected.

This information is crucial for the upcoming debate on renewal of the Foreign Intelligence Surveillance Act Amendments. The report needs to outline the Executive's views of its authorities and as a consequence is probably more easily prepared by the Executive than the Board.

7. Report on Watch-listing. The Board should undertake an examination and prepare a public report on the use of "watch-listing" of U.S. persons, including the use of such watch-lists to deny or inhibit travel or to evaluate job or license applications. The purpose of such a report should be to provide the public the necessary information for a public debate on the practice. After issuance of such a report, the Board should seek further public input before deciding whether to issue a second report evaluating or making recommendations concerning the watchlisting of U.S. persons.

8. As we have suggested previously, the Board should undertake a report on how to ensure that individuals are accorded judicial review of whether government surveillance has violated their statutory or constitutional rights. This subject is worthy of extensive examination by the Board. In 1978 and again in 1994, FISA provided that government could conduct secret searches and seizures of Americans' information without ever notifying the targeted individuals that the government had searched their personal effects or seized their personal information and without those individuals ever having the opportunity to bring a judicial challenge to such searches and seizures (unless they were subsequently indicted). That authority was enacted as a narrow exception to the usual right to judicial review. With the expansion of foreign intelligence authorities and capabilities directed against Americans' information, a reexamination of this expanded exception is overdue. (We note that the current proposals to create a new advocate before the FISA court do not address this problem.)

Thank you for consideration of these comments.

August 28, 2014

Submitted by Kate Martin, on behalf of the Center for National Security Studies, Washington, D.C. cnss@cnss.org