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Comments by OpenTheGovernment.org to the Privacy and  
Civil Liberties Oversight Board on the Board's Agenda  
August 29, 2014

OpenTheGovernment.org, a coalition of organizations dedicated to promoting openness and transparency in the federal government, welcomes the opportunity to submit written comments regarding the Privacy and Civil Liberty Board's (PCLOB's) research agenda. One of the most important public services the Board has performed thus far has been to successfully seek declassification of information about the telephone records program under section 215 of the USA PATRIOT Act, and surveillance under Section 702 of the Foreign Intelligence Surveillance Act. We hope that PCLOB places a similar emphasis on seeking declassification of information about surveillance conducted under the authority of Executive Order 12333. We also ask the Board to investigate and seek declassification of information about the United States' overseas targeted killing program.

**1. Investigation Into Surveillance Conducted Under Executive Order 12333**

PCLOB has announced that it "will examine EO 12333 and its implications for privacy and civil liberties." OpenTheGovernment.org welcomes this decision, as far too much information about surveillance conducted under this Executive Order remains classified. We hope that the Board's review will provide answers to the questions below:

*a) What binding legal interpretations and regulations exist, and what bulk or programmatic surveillance programs operate, pursuant to Executive Order 12333?*

The text of Executive Order 12333 is broad and ambiguous. It authorizes agencies to collect intelligence overseas on United States persons only in accordance with the Constitution, the Foreign Intelligence Surveillance Act and other statutes, and under "procedures established by the head of the agency concerned and approved by the Attorney General." But those Attorney General-approved procedures are either heavily redacted or (in most cases) classified in their entirety. Any legal opinions or interpretations that discuss the constitutional and statutory limits on 12333 collection are also secret, as are the executive branch directives to carry out surveillance.

According to news stories and leaked documents, the NSA uses its authority under Executive Order 12333 to collect:

- “hundreds of millions of contact lists from personal e-mail and instant messaging accounts around the world, many of them belonging to Americans”<sup>1</sup>
- Over 180 million records in a month from the links between Google and Yahoo servers overseas, including Americans’ email communications and metadata as well as foreigners’ information<sup>2</sup>
- “nearly 5 billion records a day on the whereabouts of cell phones around the world”<sup>3</sup>
- recorded audio of every telephone call in the Bahamas and one other country, for up to one month at a time.<sup>4</sup>

The PCLOB should investigate whether these news reports are accurate, and what other Executive Order 12333 programs collect communications and metadata on a similarly massive scale.

*b) Do Executive Order 12333 minimization guidelines protect Americans from having their communications or metadata collected, retained, searched or otherwise analyzed, or transmitted to law enforcement because of First Amendment-protected activities?*

National security journalists, human rights researchers, and attorneys who represent accused terrorists have described in detail their fears that they will be subjected to government surveillance for doing their jobs.<sup>5</sup> American Muslims have expressed similarly credible fears about being surveilled because of their religion.<sup>6</sup>

The NSA’s publicly available guidelines on Executive Order 12333 do very little to assuage these fears, in part because they are heavily redacted.<sup>7</sup> U.S. persons’ account identifiers cannot be used as “selectors”—but this is a relatively weak protection if the NSA can collect information from email addresses, telephone numbers, or IP addresses “two hops”, “three hops” or more from a selector. (It is not known whether the NSA is authorized to do this under Executive Order 12333.) Moreover, analysts can run content searches using terms they know are likely intercept U.S. persons’ communications as long there is reason to believe the searches will also generate “foreign intelligence.” “Foreign intelligence” is defined as any information “relating to” foreign powers, organizations, or citizens—a definition broad enough to sweep in a large number of private, domestic communications. U.S. persons may be identified in NSA reports to other agencies if there is intelligence indicating they may be “engaged in the unauthorized disclosure of classified information” or “may be involved in a crime”, which would certainly include many reporters’ sources, and might include the reporters themselves.

<sup>1</sup> [http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html)

<sup>2</sup> [http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html). See also <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/04/how-we-know-the-nsa-had-access-to-internal-google-and-yahoo-cloud-data/>

<sup>3</sup> [http://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html)

<sup>4</sup> <https://firstlook.org/theintercept/2014/05/19/data-pirates-caribbean-nsa-recording-every-cell-phone-call-bahamas/>

<sup>5</sup> E.g. <http://www.hrw.org/reports/2014/07/28/liberty-monitor-all>

<sup>6</sup> E.g. <https://www.aclu.org/national-security/civil-rights-groups-ask-administration-explain-nsa-surveillance-american-muslims>

<sup>7</sup> <http://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf>.

Dissemination of privileged lawyer-client communications must be reviewed by the NSA's General Counsel, but it is not forbidden.<sup>8</sup>

PCLOB should carefully consider the chilling effect that Executive Order 12333 surveillance has on Americans' First Amendment rights—as the Board's Section 215 phone records report did, and its section 702 report did not. The current NSA guidelines contain too many loopholes, redactions, and ambiguities to provide strong protections.

*c) What access do agencies other than the NSA have to Executive Order 12333 data?*

Some of the most crucial revelations in PCLOB's section 702 report concerned the access that the CIA and FBI had to raw NSA data collected under section 702's PRISM program. A recent *New York Times* article stated that "for now, the N.S.A. does not share raw 12333 intercepts with other agencies, like the F.B.I. or the C.I.A., to search for their own purposes. But the administration is drafting new internal guidelines that could permit such sharing."<sup>9</sup> Increasing FBI and CIA access to raw, bulk 12333 data has major, disturbing implications for Americans' rights to privacy and free speech. Such a change should not be made in secret.

*d) What notice do criminal defendants receive of information derived from Executive Order 12333 being used against them?*

According to the same *New York Times* report on Executive Order 12333, the government avoids introducing evidence directly obtained from 12333 surveillance

so as not to have to divulge the origins of the evidence in court. But the officials contend that defendants have no right to know if 12333 intercepts provided a tip from which investigators derived other evidence.<sup>10</sup>

If criminal defendants do not receive notice of Executive Order 12333 surveillance-derived evidence being used against them, they cannot seek to suppress that evidence on grounds that it was obtained in violation of the Fourth Amendment. Given the government's success in arguing that civil plaintiffs lack standing to challenge classified surveillance programs, this effectively prevents independent judicial review of surveillance programs that Congress never authorized, and that have major implications for Americans' privacy rights.

*e) How many individuals and how many Americans' communications and metadata are collected under Executive Order 12333 programs?*

The intelligence community is likely to claim, as it did regarding section 702, that it is impossible to calculate or even estimate in good faith how many Americans' communications are "incidentally collected" under Executive Order 12333. But whether through sampling or some other means, it is essential to understand the scope of collection of Americans' information. We urge the Board to examine any intelligence community claims that it is impossible to provide information about the number of Americans whose communications it

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<sup>8</sup> Id.

<sup>9</sup> <http://www.nytimes.com/2014/08/14/us/politics/reagan-era-order-on-surveillance-violates-rights-says-departing-aide.html>

<sup>10</sup> Id.

collects more skeptically than it did in its 702 report. In any case, PCLOB should support disclosure of the total number of individuals' or unique accounts whose communications are swept up under 12333.

## 2. Investigation into Targeted Killing

As crucial as surveillance and privacy issues are, they are not the only ones the Board should address. OpenTheGovernment.org respectfully requests that PCLOB also investigate, and seek declassification of information regarding, the United States' overseas targeted killing program.

The United States government has acknowledged killing four U.S. citizens in drone strikes: Anwar al-Awlaki, Abdulrahman al-Awlaki, Samir Khan, and Jude Mohammed. According to Attorney General Eric Holder, of the four, only Anwar al-Awlaki was "specifically targeted" by the United States.<sup>11</sup>

Both before and after al-Awlaki's death, the United States government successfully avoided judicial review of the legality of the strike against him. The Department of Justice did recently release portions of two Office of Legal Counsel memoranda analyzing the legality of a strike against Anwar al-Awlaki. But those memos either omitted or redacted a great deal of crucial information about the legal justification, procedures, and evidentiary standards for targeting a U.S. citizen.<sup>12</sup> They also redacted the factual evidence against al-Awlaki.

Even less is known about the deaths of Khan, Abdulrahman al-Awlaki, and Jude Mohammed. The government has refused to provide other information about the circumstances of their deaths, and has successfully sought dismissal of a court case that sought answers.<sup>13</sup> The government has never officially disclosed the targets of the strikes that killed Abdulrahman al-Awlaki and Jude Mohammed—or whether they had individual targets or were "signature strikes". It has not revealed whether the United States had any knowledge of Khan's, Abdulrahman al-Awlaki's, or Mohammed's presence before the strikes that killed them, or whether it considers them militants or civilians. (In the case of the 16 year old Abdulrahman al-Awlaki, the public evidence suggests he was a civilian without any involvement in Al Qaeda in the Arabian Peninsula.)

Because the younger al-Awlaki, Mohammed, and Khan were not "specifically targeted" by the United States, there are presumably no OLC memoranda on whether it would be lawful to target them. But there are reportedly at least seven other OLC memos on the targeted killing program, which the Obama administration has never allowed a single member of Congress to read, let alone the public.<sup>14</sup>

Even if PCLOB believes that only lethal strikes on Americans fall within its mandate, it should review and seek disclosure of as much information as possible about all of the relevant OLC memos. Those memoranda are essential for understanding the drone program in general, the deaths of four Americans in drone strikes, and the possibility of future strikes that either target Americans or kill them by mistake.

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<sup>11</sup> <http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html>

<sup>12</sup> <http://classifiedsection.openthegovernment.org/2014/07/01/the-drone-memos-missing-due-process-analysis/>

<sup>13</sup> [https://www.aclu.org/files/assets/tk\\_2\\_opinion.pdf](https://www.aclu.org/files/assets/tk_2_opinion.pdf)

<sup>14</sup> <http://www.openthegovernment.org/Barron-Nomination-Second-Circuit-Drone-Case>

For example, President Obama has issued policy guidance stating that lethal strikes cannot occur without “near certainty that non-combatants will not be injured or killed.”<sup>15</sup> But it is not clear how this guidance, and other statements by U.S. officials claiming extremely low numbers of civilian casualties, can be reconciled with reports from journalists and human rights organizations about specific strikes. It is also unknown how the United States defines “non-combatant” status. There have been disturbing press reports that the government considers all “military aged males” in a strike zone to be combatants unless posthumously proved innocent.<sup>16</sup> The Obama administration has denied these reports, but has not provided any meaningful information about how it assesses combatant status.

Executive Branch officials, including the Director of the CIA and the President, have repeatedly said that they understand the need for greater transparency surrounding targeted killing, but have taken few steps towards this goal. Courts have accepted arguments against judicial review of strikes, before or after U.S. citizens’ deaths. Congressional oversight has been hampered by classification and invocations of privilege by the executive branch and lack of political will. PCLOB is uniquely positioned to independently review the program and press for a measure of transparency and democratic accountability.

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<sup>15</sup> [http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf)

<sup>16</sup> <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>