S. HRG. 113–676

THE REPORT OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD ON REFORMS TO THE SECTION 215 TELEPHONE RECORDS PROGRAM AND THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

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THE REPORT OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD ON REFORMS TO THE SECTION 215 TELEPHONE RECORDS PROGRAM AND THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

WEDNESDAY, FEBRUARY 12, 2014

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Richard Blumenthal, presiding.

Present: Senators Blumenthal, Whitehouse, Franken, Grassley, and Hatch.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. I am very pleased to begin this hearing of the Senate Judiciary Committee on the report of the Privacy and Civil Liberties Oversight Board on Reforms to Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court. I appreciate your being here today—all five members of the Board are here—and most important, your extraordinarily impressive report, which is all the more so because of the less-than-ideal conditions under which you did it, with very few staff and high time pressure.

I am struck by the thoughtful analysis, which is exceptional—exceptional in its quality, but also exceptional in the fact that this issue has received so little thoughtful analysis over the time that this surveillance and intelligence-gathering program has proceeded. And, of course, for years the program has been hidden from the public, and the legal justification of it was not available to anyone. In fact, the legal justification was not done, and that is more shocking even than the hiding and secrecy involved in the program.

Since the program was made public, we have seen legal justifications from the executive branch and opinions from the judiciary, but none of the publicly available analysis has addressed all of the crucial questions that you discuss in your report. So I thank you for that contribution, among others.

I am absolutely shocked and deeply disturbed that eight years after this metadata program, the bulk collection program, was authorized, the courts have still not carefully and thoroughly worked through the issues that surround the program. In our American legal system, we expect that there will be such analysis, such review of legal issues before the executive branch acts. And here

there apparently was none. Even the two members of your Board who dissented from the legal analysis acknowledged that the Board has raised significant legal issues which could divide reasonable people, reasonable lawyers.

The American people essentially deserve better, and that is one of the reasons that we are here today. They deserve better than to have the executive branch engaging in conduct that even its defenders say might be illegal.

The second major achievement of this report is that it sheds light on the history of the bulk telephone metadata program. We learned from your report that a judge authorized the collection of phone records on potentially every American without so much as issuing a written opinion, which is incredible, absolutely shocking.

In 2006, Judge Howard issued an extensive order allowing the government to collect phone records of law-abiding Americans with no known connection to any crime, telephone records on every American who was not even suspected of committing any crime. And he chose not even to provide a sentence explaining his legal reasoning.

That is all the more disturbing when you consider the legal context. In 2006, the Attorney General was required by law to pass along to Congress any major ruling, any major legal ruling from the FISA Court, Foreign Intelligence Surveillance Court, but only if the FISA Court wrote an opinion. So when Judge Howard decided he was not going to write an opinion, the decision prevented Congress from learning the legal basis for a massive change in the government's claim to surveillance authority, which is an important—in fact, essential—point. There are some, maybe in this audience, some Americans certainly who agree that the FISA Court should have an adversarial process, but they will allow it only if the FISA Court judge asks for it. And yet it appears that the judge who first signed off on the bulk metadata program, a program that even its supporters acknowledge raises significant legal issues, did not think that the issue warranted an opinion.

So I am not blaming Judge Howard for this submission. Judges really are not expected to decide what is important and, in fact, often cannot do so without a lawyer raising an issue and highlighting it and arguing it and saying that it is crucial. All the more reason that the adversarial process has to involve a constitutional advocate, in my opinion, and the legal basis for this order was not only not conveyed but the lack of an opinion prevented Congress from learning about it.

There are also reasons in your report to question the effectiveness of the bulk metadata program, and, in fact, we have learned more recently that perhaps only 30 percent, actually, of the phone calls were collected. Only a proportion of the supposedly comprehensive collection of phone calls was actually absorbed or collected by the government, which undercuts and contradicts representations made to the courts in justification of the program itself. Representations made by the President are undercut by that potential fact. So it appears that the effectiveness of the program may be in question also, which is an issue raised in your report and, again, highly significant.

These kinds of issues deserve to be aired and analyzed more effectively and comprehensively than they have been, and one of the reasons we are having this hearing is to give you an opportunity to continue your conversation with the American public about these critical issues. I want to again thank you, not only on my behalf but also for Chairman Leahy, who has provided a written statement. I am not going to read it, but if there is no objection, I will ask that it be made part of this record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator BLUMENTHAL. I will now turn to the Ranking Member, Senator Grassley.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I have a statement I am going to read. Before I do that, I want to say that I have the same concerns that Senator Blumenthal has just expressed. But I also want to make it very clear that—and if I did not have those same concerns, I would not be upholding my oath to the Constitution and the Fourth Amendment. But, also, I think I would take into consideration a balance between our number one responsibility of the Federal Government, which is national security, and the requirements of our civil liberties.

First of all, thank you for joining us, and thank you, Mr. Chairman, for holding this hearing, and I welcome the Board members that are with us, the entire Board.

It is good that the Committee has held many hearings on these surveillance authorities. The Committee will undoubtedly hold more. The most important responsibility of the Federal Government is to protect national security, while at the same time preserving our civil liberties. The NSA continues to be of great concern to my constituents in Iowa and obviously across the country.

Over the last few months, I have grown more concerned about why the Department of Justice has not prosecuted any of the few NSA employees who willfully abused their surveillance authorities. We do have examples of where it has been abused and referred to the Justice Department. I have not had an answer yet. I did write a letter to the Attorney General about this back in October. Still no response.

A few weeks ago at a hearing, I pressed the Attorney General for an answer. He did not have one. He committed to getting me a response, but I am still waiting. It is good that these abuses have occurred only on a few occasions. But the American people need to know if the Department is taking these referrals seriously.

A month or so ago, the President finally weighed in on these important surveillance reform matters. It was past time for our Commander in Chief to become engaged on this issue. After all, surveillance authorities are critical to our national security.

Some of the reforms in his speech concerned me, like the idea that we would recognize privacy rights of potential foreign terrorists. I do not quite understand that.

On the other hand, other reforms the President announced seem very promising. For example, to the extent that it does not com-

promise national security, increased transparency can help to restore the public's confidence in our intelligence community.

Indeed, not long after his speech, the administration announced new rules that will permit companies to be far more transparent with their customers about FISA Court orders and directives.

The President also announced reforms to the government's handling and use of the telephone metadata that it collects under 215.

The government is now required to obtain a separate court order every time it seeks to access or search metadata, except in emergency situations. This is a significant additional safeguard against the potential abuses of the metadata.

Additionally, the President announced a change to the program that will require the metadata to be held by the telephone companies. He apparently believes that this can be done without compromising the program's operational value. There are many questions about whether such an arrangement is desirable or even possible. But the administration is currently exploring options implementing this change, and it is my understanding they are supposed to have a report ready by March 28th.

It was against this landscape that this Board before us issued its report a few weeks ago. The report contains a number of recommendations that I am interested in hearing more about.

For example, many of the recommendations in the report concern increased transparency—a very worthy goal. All but one of these transparency recommendations was adopted unanimously by the Board reporting today to us. Moreover, they are similar to the reforms that the President proposed.

Additionally, the report recommends that the FISA Court be able to call upon a pool of advocates from outside the government. These advocates would provide an independent perspective, but only in cases that the judge decides present novel or significant issues. This recommendation was also adopted unanimously. It is also similar to the President's proposal, as well as the approach in the bill that passed out of our Senate Intelligence Committee.

The Board's remaining conclusion, however, was that the Section 215 metadata program is illegal and should be terminated. Of course, this recommendation received the most media attention. It was adopted by only a bare majority of the Board before us on a 3–2 party-line vote.

The Board's conclusion on this point is striking, given that it is inconsistent with the opinions of so many other authorities that have evaluated the lawfulness of the Section 215 program.

For instance, the Board's conclusion is contrary to the opinion of the President of the United States, who, as you know, proudly says, and legitimately so, that he is a former constitutional law professor, as well as even the Department of Justice taking that same position.

It is contrary to the opinion of the prior administration that initiated the program.

It is contrary to the opinion of the 15 FISA Court judges who have reauthorized the program over the years.

It is contrary to the opinion of two of the three district court judges who do not serve on the FISA Court but who have nonetheless considered the issue.

And, of course, it is contrary to the opinion of two of the Board's members.

Nevertheless, as we consider these various reforms, I welcome hearing a wide range of views. I thank the Board for their contribution to public service on this very important issue that is obviously a constitutional issue.

Thank you.

Senator BLUMENTHAL. Thank you, Senator Grassley.

I do not know whether Senator Franken has any remarks that he would like to make at the outset.

Senator FRANKEN. I will wait until the questioning.

Senator BLUMENTHAL. Very good. Thanks.

I would like to ask the panel to please rise and be sworn, as is the custom of our Committee. Do you affirm that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MEDINE. I do.

Judge WALD. I do.

Ms. BRAND. I do.

Mr. DEMPSEY. I do.

Ms. COOK. I do.

Senator BLUMENTHAL. Thank you.

I understand that you have a brief opening statement, but before that, let me just introduce the panel, if I may.

David Medine, the Chairman of the PCLOB, has been the Board's Chairman since May 2013. Before becoming the Chair, he worked as an Attorney Fellow at the Securities and Exchange Commission and a Special Counsel at the Consumer Financial Protection Bureau. He was previously a partner focusing on privacy and data security at Wilmer Hale, a Senior Adviser to the White House National Economic Council, and Associate Director for Financial Practices focusing on privacy issues at the Federal Trade Commission, and also was a professor at Indiana University and George Washington University Law Schools. He has a B.A. from Hampshire College and a J.D. from the University of Chicago.

Rachel Brand is chief counsel for regulatory litigation for the United States Chamber of Commerce. Ms. Brand has held a number of positions at the Department of Justice during the President George W. Bush administration, including Assistant Attorney General and Principal Deputy Assistant Attorney General for Legal Policy and Regulatory Policy Officer. She worked in the White House Counsel's Office and clerked for Justice Anthony Kennedy and justice Charles Fried of the Supreme Judicial Court of Massachusetts. She has also practiced law at Wilmer Hale and at Cooper Carvin Rosenthal in Washington, DC. She has a B.A. from the University of Minnesota and a J.D. from the Harvard Law School.

Elisebeth Collins Cook is counsel in the regulatory controversy and regulatory and government affairs departments in the Washington, DC, office of Wilmer Hale. Ms. Cook previously served as the Republican Chief Counsel on Supreme Court Nominations for the Senate Judiciary Committee and as an Assistant Attorney General for Legal Policy at the Department of Justice at the end of the Bush administration. She served as a member of the Board of Governance of the Terrorist Screening Center and co-chair of the Sub-

committee of the President's Identity Theft Task Force. She was a law clerk to Justice Laurence Silberman of the United States Court of Appeals for the DC Circuit and to Judge Lee Rosenthal of the United States District Court for the Southern District of Texas. She holds a B.A. from the University of Chicago and a J.D. from Harvard Law School.

James Dempsey is vice president for public policy at the Center for Democracy & Technology, a nonprofit focused on privacy, surveillance, and other Internet issues. Mr. Dempsey previously served as deputy director of the nonprofit Center for National Security Studies and as special counsel to the National Security Archive. Prior to that, he was Assistant Counsel to the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights and an associate at Arnold & Porter. He, too, was a law clerk, in his instance for Judge Robert Braucher of the Massachusetts Supreme Judicial Court. He served as a member of several bodies addressing these issues, including the Industry Advisory Board for the National Counter-Terrorism Center, and the Transportation Security Administration's Secure Flight Working Group, among others. He has a B.A. from Yale University and a J.D. from Harvard Law School.

And, finally, but certainly not least, I am particularly proud and pleased to welcome a native of Connecticut, Judge Wald, who has served with extraordinary distinction for 20 years on the United States Court of Appeals for the District of Columbia, including five years as chief judge. She has also continued her public service as a judge on the International Criminal Tribunal for the Former Yugoslavia and a member of the President's Commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. She served in President Carter's administration as the Assistant Attorney General for Legislative Affairs in the Department of Justice. She also previously worked as an attorney at the Mental Health Law Project, the Center for Law and Social Policy, the Neighborhood Legal Services Program, the Office of Criminal Justice at the Department of Justice, and co-director of the Ford Foundation Drug Abuse Research Project. Judge Wald clerked for Judge Jerome Frank on the United States Court of Appeals for the Second Circuit. She received her B.A. from the Connecticut College for Women and her J.D. from Yale Law School. And I might just say she has been inducted into the Connecticut Women's Hall of Fame.

We welcome all of you. We thank you for being here. I understand you have a brief introductory statement that will be submitted by the Chairman, and please proceed. Thank you.

STATEMENT OF THE HONORABLE DAVID MEDINE, THE HONORABLE PATRICIA M. WALD, THE HONORABLE RACHEL L. BRAND, THE HONORABLE JAMES X. DEMPSEY, AND THE HONORABLE ELISEBETH COLLINS COOK

Mr. MEDINE. On behalf of my fellow Privacy and Civil Liberties Oversight Board members, thank you, Mr. Chairman, Ranking Member Grassley, and Committee Members, for the opportunity to appear today.

PCLOB, or the Privacy and Civil Liberties Oversight Board, is an independent executive branch agency tasked with ensuring that our Nation's counterterrorism efforts are balanced with the need to protect privacy and civil liberties.

Before beginning my testimony, I want to state our respect and admiration for the men and women in the intelligence community who work tirelessly to protect this country while maintaining our values. We have the highest regard for them.

Last June, at the request of Members of Congress and the President, our Board initiated a study of the bulk telephone records program conducted by the National Security Agency under Section 215 of the *USA PATRIOT Act*. The study included classified briefings with officials from the Office of the Director of National Intelligence, the NSA, the Department of Justice, the FBI, and the CIA.

Board members also met with White House staff, a former presiding judge for the FISA Court, academics, privacy and civil liberties advocates, technology and communication companies, and trade associations.

In addition, the Board received a demonstration of the Section 215 program's operation and capabilities at the NSA.

The Board has been provided access to classified opinions by the FISA Court and classified documents relating to the operation and effectiveness of the program. At every step of the way, the Board has received the full cooperation of the intelligence agencies.

Consistent with our statutory mandate to operate publicly where possible, the Board held two public forums and solicited public comments. In our January 23 report, the Board concluded that the Section 215 bulk telephone records program lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. As a result, the Board recommends that the government end the program.

The majority concluded that particularized telephone record searches could be performed using other existing authorities. Two Board members declined to join the Board's legal conclusions, taking the position that the government's interpretation of the statute is a reasonable reading, made in good faith by numerous officials in two administrations of different parties, and constitutes a good-faith effort to subject a potentially controversial program to both judicial and legislative oversight.

The Board unanimously recommends that the government immediately implement several additional privacy safeguards to mitigate the privacy impact of the present Section 215 program. Specifically, the government should reduce the retention period for the bulk telephone records program from five years to three years; reduce the number of hops used in contact chaining from three to two; submit the NSA's reasonable, articulable suspicion, or RAS, determinations to the FISA Court for review after they have been approved by the NSA and used to query the data base; and require an RAS determination before analysts may submit queries to or otherwise analyze the corporate store, which contains the results of contact chaining queries to the full collection store.

Last week, at the Attorney General's request, the FISA Court modified its primary order to require prior judicial approval for reasonable, articulable suspicion determinations before the data base is queried, and consistent with the Board's recommendations, the Court reduced the permissible queries from three to two hops.

The Board's report also addressed the operation of the FISA Court. The Court's procedures have raised concerns that it does not take adequate account of positions other than those of the government.

The Board believes that some reforms are appropriate and would help bolster public confidence in the operation of the Court, including: creation of a panel of private attorneys, or Special Advocates, who can be brought into cases involving novel and significant issues by FISA Court judges; development of a process facilitating appellate review of FISA Court decisions; and increased opportunity for the Court to receive technical assistance and legal input from outside parties.

We believe that our proposal successfully ensures the ability of the Court to hear opposing views while not disrupting the Court's operation or raising constitutional concerns about the role of an advocate.

The Board also believes that to the maximum extent possible consistent with national security, declassified opinions of the FISA Court, with minimal reductions, should be made publicly available.

Finally, the Board believes that the scope of surveillance authorities affecting Americans should be public while sensitive operational details regarding the conduct of government surveillance programs remain classified. Two Board members declined to join this recommendation.

All of the Board's recommendations regarding the operation of the FISA Court and six of the seven regarding transparency are unanimous.

The Board thanks you for the opportunity to testify before the Senate Judiciary Committee today regarding our report. We would be happy to answer any questions the Committee members may have.

[The prepared statement of Mr. Medine and the other Board members appears as a submission for the record.]

Senator BLUMENTHAL. Thank you. I am happy to give other members of the panel an opportunity to speak separately by way of introduction, but if not, why don't I just begin with some questions.

Let me ask you as the Chairman, Mr. Medine, would the apparent revelation that perhaps only a proportion of this telephone data was actually collected change in any way the conclusions of your report?

Mr. MEDINE. I do not think we can address in public session the pros and cons of that conclusion, but we would be happy to meet with the Committee in private session. But even if the reports are true, it still means that hundreds of millions of telephone records are being collected, and so at least it is my view that it would not change the recommendations of the Board.

Senator BLUMENTHAL. Would it undercut the accuracy of representations made by the U.S. Government to the courts to justify this program?

Mr. MEDINE. Again, I do not want to comment on that because some of this matter still remains classified, and I think there is more to be said on that, but I do not think it can be said in public session.

Senator BLUMENTHAL. Well, let me put it a different way. Wouldn't you agree with me that the U.S. Government has misled the courts, whether purposefully or inadvertently, in justifying this program on the basis that all telephone records are collected?

Mr. MEDINE. Again, I am not prepared to confirm any of the reports that have been made, and so I do not want to draw any conclusions about representations that were made in any court proceedings.

Senator BLUMENTHAL. Let me then just move on to a separate line of questioning. Is it fair to say from your report that the present bulk metadata collection program is unjustifiable under existing law?

Mr. MEDINE. That is the conclusion of the majority of the Board, yes.

Senator BLUMENTHAL. It is illegal.

Mr. MEDINE. Yes. It is not consistent with the Section 215 authority.

Senator BLUMENTHAL. So in order to continue it, if the Congress chooses to do so, we would have to change the statute?

Mr. MEDINE. That is the majority's view, although, again, the majority would also counsel that even if you change the statute and resolve the statutory issues, we still believe there are serious constitutional issues and very serious policy issues related to balancing national security with privacy and civil liberties, and given that there are alternative legal authorities to be used, at least the majority's preference would be to abandon 215 for these purposes and use those other legal authorities.

Senator BLUMENTHAL. In other words, in effect, scrap 215 and rely on alternative authority?

Mr. MEDINE. Exactly, yes.

Senator BLUMENTHAL. Has the panel reached any conclusion in terms of timing as to whether our consideration or perhaps revision of 215 or other authorities should await resolution by the U.S. Supreme Court of some of these issues that may come before it in cases that are now in the lower courts?

Mr. MEDINE. The panel has not addressed that question specifically, but, again, given both the legal and policy concerns, I think the interest would be to move forward and try to resolve those issues sooner than later.

Senator BLUMENTHAL. Because we have no assurance, knowing the U.S. Supreme Court, whether it will, in fact, address those issues that are considered necessary and relevant for the Congress to act or not, that is up to the Court to do?

Mr. MEDINE. Right. We only have district court decisions now, and they have to work their way up through the system. But at least the majority of the Board believes that action should be taken on the program sooner than later.

Senator BLUMENTHAL. There is no telling whether the U.S. Supreme Court will resolve those critical issues and when it will do so.

Mr. MEDINE. Right, or how it will do so, as well, in terms of providing guidance.

Senator BLUMENTHAL. Let me ask you and Judge Wald, on the issue of the adversarial process, I understand that the conclusion of the panel was that the advocate—I have called it a "constitutional advocate"—should be enlisted only when the Court thought there was a novel or important issue. My view is that the constitutional advocate should make that decision and be involved wherever she thought an important or novel issue was raised by a warrant—not necessarily or usually before the warrant was issued—so as not to delay the process, but at least afterward, analogous to what happens in the ordinary criminal process where there is the opportunity to challenge the legality of a search or surveillance after the fact, and the evidence can be excluded.

Isn't it often the case, let me ask you, Judge Wald, that judges fail to see important or novel issues without counsel saying, in effect, this issue is critical, it is decisive, it is unresolved by other courts, or resolved badly? Don't judges benefit by hearing that argument to be made by counsel?

Judge WALD. Yes, Senator, they certainly do. Because I was forewarned that this might be a question, I did a very brief look at some of my own experience in 20 years on the DC Circuit, and I looked at only one year's opinions which I was involved in. There were 33 opinions in that particular year in the 1980s. And seven times out of the 33 opinions which I wrote that year—and I was only one of ten judges. I do not know what the record would be of the other nine judges—but seven of those opinions were sent back to the district court because the district court had not discussed what we considered to be an important legal matter. And I would say that that number might even be low because, as you well know, there is a doctrine in the regular courts that if you did not raise it down below, you cannot raise it on appeal.

But, yes, it was a not totally infrequent occasion, despite the obvious fact that all of our cases did have counsel on both sides, and even with that kind of protection, there still were missed items—I would say especially in the regulatory complex cases, which had a lot of different issues involving technology. I just could not help copying one sentence from one of these monstrous EPA cases in which the court of appeals said, "This is the first challenge to the new source performance standards since the passage of the 1977 amendments. Therefore, the court was surprised that neither party raised during the discussion below the appropriate standard of law. In that discussion, they did not even mention the fact of a new major legislative effort." So, I mean, even with the best kind of counsel, it can happen.

Senator BLUMENTHAL. Issue spotting is a challenging business.

Judge WALD. Yes.

Senator BLUMENTHAL. Even with counsel. And without it, reliance on a judge is often hazardous. I have never been a judge, but I have litigated for a number of years, and I have always been astonished at how cases that I have tried may raise issues on appeal

that I thought were insignificant below, and sometimes decided by a ruling without an opinion. But I think that the reason that I propose the constitutional advocate be involved in every decision that she or he thought was significant was to give the court the benefit of that kind of additional insight and guidance and perspective.

I am going to turn to my colleague Senator Grassley and then to Senator Franken for his questions.

Senator GRASSLEY. Thank you.

I am going to ask Ms. Brand a question, but Ms. Cook, if you want to follow up with anything, you are welcome to do that.

Ms. Brand, you and Ms. Cook disagreed with the Board's analysis and conclusion in a few key areas, including its conclusion that the bulk metadata program is not authorized under Section 215.

Question: Can you explain why you disagree with the Board's analysis and conclusion on this point and why you believe that the program is lawful?

Ms. BRAND. Sure. Thank you, Senator Grassley. You know, I think the statutory question is difficult. It is not a simple question. It is certainly one on which reasonable people can differ. But at the end of the day, I would agree with every single federal judge who has considered the statutory question, all of whom have upheld the program.

There is a lot to say about the Board's 40- to 50-page legal analysis on this subject, but just one thing that concerns me about their analysis is that it seems to disregard the difference between national security investigations and criminal investigations. One example of that is in the Board's analysis of whether the relevance standard in the statute is met. In that discussion, the Board says a grand jury subpoena, which, as you know, also has a relevance standard, has never been used to collect the volume of data that is collected under the 215 program. And that is just not the right question to ask because relevance is contextual. You have to ask, "Relevant to what?" And in the grand jury context, information has to be relevant to a criminal investigation, which is retrospective and comparatively narrow.

In the FISA context, under Section 215, information has to be relevant to an ongoing FISA investigation. That is a long-term, proactive, preventive intelligence investigation into an entire terrorist organization, and so it should not be surprising that a broader volume of data would be relevant to that than would be relevant to your typical criminal investigation.

Senator GRASSLEY. Okay. Ms. Brand, you and Ms. Cook also disagreed with the Board's conclusion that the program should be shut down as a policy matter. The Board found that the program's risk outweighed its benefits, but in your written statement, you appeared to challenge both sides of that equation. You wrote that the program's actually intrusion on privacy is small and that its benefits cannot be measured solely by how many terrorist plots it directly disrupted.

Question: Can you explain in more detail why you disagreed with the Board's policy decision and conclusion that the program should be terminated and why you believe that it is worth preserving?

Ms. BRAND. Sure. The question boils down to whether the privacy implications of the program outweigh the national security

benefits, and I think the Board's report both overstates the privacy implications and understates the benefits.

On the privacy side, it is useful to stop for a minute and think about what the program is. It is not collection of content of any communication. The government cannot listen to anyone's phone calls with this program. It is literally a series of phone numbers and the times they called other phone numbers with no names or any other personally identifying information attached to any of them. It is just a bunch of numbers.

The uses of it are also really limited. The government cannot look at the information in the data base unless they have a particular phone number that they have evidence is connected to terrorism. And then they can look in the data base to see which phone numbers talked to that phone number. Again, no names. So that exercise in connecting phone numbers to phone numbers is what this program is about.

In addition, you have the numerous levels of oversight of the program. The use of the program is incredibly strictly limited. And if you take all of that plus the additional restrictions that we recommended be imposed, I think the intrusion on privacy is very small.

On the value side, I said exactly what you said, which is that whether this program has thwarted a particular plot lately is not the only question. You have to look longer-term into whether the next time there is a large-scale terrorist threat against the United States, could this program prevent it, and I think the answer is clearly yes, there is the potential for that.

You also have to remember that preventing a terrorist attack is not the only measure of value. It is also valuable when the government can determine there is no terrorist threat. So if you had, for example, a situation where there was evidence of a terrorist plot abroad and the government was trying to figure out if there is also a domestic threat, if the government can determine there is no domestic threat, then they might not have to take an action like grounding all the airplanes in the United States. And that is also valuable, I think.

Senator GRASSLEY. Okay. Ms. Cook, the Board concluded unanimously that the bulk metadata program is constitutional, but neither you nor Ms. Brand joined the extended analysis of this question that is contained in the report. Did you find this a difficult or close constitutional question, number one? And, number two, could you explain why you did not join the analysis of the three other members of the Board?

Ms. COOK. Thank you for the opportunity to answer that question. As to the Fourth Amendment, the Board was unanimous that the program does not violate the Fourth amendment. *Smith* v. *Maryland* is the law of the land, and the Board was unanimous that the government is entitled to rely on that precedent.

I declined to join the Fourth Amendment section as it was primarily an extended discussion of a potential evolution in Fourth Amendment jurisprudence. I did not find persuasive the Fourth Amendment analysis, the prognostications particularly, as it depended very heavily on a sole concurrence in the *Jones* decision. I

do not think that is an indicator necessarily of where the Supreme Court is going.

As to the First Amendment, I could not join that analysis as the First Amendment analysis was of programs that simply do not exist. As Ms. Brand has explained, the program here is simply about numbers calling numbers. It is not associated with individuals' information. The majority, nonetheless, talks about the NSA painting complete pictures of every American's associational activities. As that is not the program we were analyzing, I could not join the First Amendment analysis.

Senator GRASSLEY. Mr. Medine, I will ask you my last question. The Board's report recommends the creation of an advocate to participate in the FISA Court process. The report recommends: one, that the advocate should come from a pool of attorneys outside the government; two, that the FISA Court should retain control over whether to call upon the advocate in a matter; and, three, the advocate should not participate in or review all applications filed by the government.

Two questions together. Could you walk through why the Board felt strongly about each of these issues? And, second, did the Board meet with any judicial representatives or did their views play a role in shaping the Board's recommendations?

Mr. MEDINE. Thank you, Senator Grassley, for the opportunity to respond.

Just answering your last point first, the Board held two public workshops, as I mentioned earlier, and we took testimony from two former FISA judges, Judge Robertson and Judge Carr. In addition, the Board met in private session with former FISA Judge Bates. And so, yes, we had discussions with former judges in helping form our views of those questions that you have raised.

The first question you raised is having the lawyers, the special advocates, be outside the government. We felt that it was important that they be independent and bring a fresh view to these issues, and the alternative of seating them in the executive branch, which is where the government is already making the request of the FISA Court, so we thought to be more independent it made sense for them to be not part of the executive branch. And, likewise, it does not make sense to have an advocate be part of the judicial branch, which is supposed to be a neutral arbiter of these issues.

So we concluded that the best way to bring a fresh perspective to raise legal and constitutional concerns was to have a panel of outside private lawyers, chosen by the chief judge of the Court, with the appropriate clearance or able to get clearance, and work space, to address these important questions in appropriate cases, which, I guess, turns to the second question, which is in regard to giving the judge control over the cases. We felt that certainly in everyday, routine cases there was not a need for a special advocate. The judges have testified to us that they are very capable in handling those, much the way they handle search warrants, ex parte in regular proceedings. It is the novel programmatic approvals involving novel technical and legal issues where the judge's role is challenging. And so we wanted to give judges authority to invite

the special advocates in those cases where the judge deemed it appropriate.

We do want a reporting mechanism to make sure the judges exercise that authority appropriately, and so since the government is supposed to designate those significant cases in advance, we would like the Court to report on how many cases were designated in that fashion, and in such cases, how many was a special advocate appointed.

Likewise, there are also cases that do not, on their face, appear to present novel or technical issues, but the judge may know that they raise important questions, and we wanted the judge to be free, even in those cases, to invite in, to have discretion to expand the pool, and also discretion as to when it is appropriate to bring someone in.

And, again, I think I answered your last question, which is that not all applications, because probably a significant majority of the cases are routine and do not require the role of an advocate and it might actually slow the process down. But in significant problematic approvals like the 215 program and others, where the judge is almost acting like an administrative agency in approving a program, the judges themselves said they would value an outside opinion being brought in.

Senator GRASSLEY. Thank you, Mr. Chairman. Thank you, panel.

Senator BLUMENTHAL. Thank you, Senator Grassley.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, and I would like to thank the Oversight Board for its work.

All my questions are basically on transparency. On page 190 of your report, you stated that, "Transparency is one of the foundations of democratic governance." And I could not agree more. However, it has been eight months since the Snowden leaks, and the government still has not given the American people even a rough estimate of how many people have had their information collected under Section 215 or how many numbers have been collected. And under current law, the government does not have to.

I have a bipartisan bill that would fix this, the *Surveillance Transparency Act*. It would mean that the government would have to say how many numbers, how many people's numbers, have been collected and how many have been queried, how many people have been queried.

Recommendation 9 of your report echoes my bill. It says the government should give the American people a more detailed report about Section 215.

What specific information should be included in these public reports, do you think? And do you think this reporting should be required by law? Anyone can take this. Mr. Dempsey? Mr. Medine? Ms. Brand?

Mr. DEMPSEY. Senator, I think the recent agreement by the Justice Department to allow companies to disclose more information did not actually address the bulk collection question.

Senator FRANKEN. Right.

Mr. DEMPSEY. And assuming I understand your question correctly, the problem is that once anybody publishes a number saying a million of our customers are affected, then that basically says

there is a bulk collection program directed against this entity. And I believe that is sensitive information.

I think a better way to address the bulk——

Senator FRANKEN. Wait a minute. When you say "the entity," you mean the company?

Mr. DEMPSEY. Yes.

Senator FRANKEN. Okay. But that is sensitive information in the sense that—first of all, the companies would like to be able to say that. They would like to be more transparent. They have endorsed my bill. They support my bill.

Mr. DEMPSEY. Honestly, I think there may be a split between what the telephone companies want to do and what the Internet companies would want to do. I am not sure about that, but I do see a legitimate security concern about naming or identifying or singling out——

Senator FRANKEN. But you do not have to single out. The government can say how many—all it can say—it does not—it just says how many numbers are caught up in the bulk collection. So it is not singling out a phone company. It is not singling out——

Mr. DEMPSEY. Well, but I think the better way to get at the question on the bulk side is to have a statute that either clearly authorizes bulk collection or does not authorize bulk collection. The fundamental conclusion of the Board majority was that the statute as you read it does not read like a bulk collection statute. And if we are going to authorize bulk collection, then we should have a statute, in my view, designed for that purpose and explicitly setting out the parameters of what a bulk collection program would look like.

To me, that kind of legislative transparency is honestly more important than operational transparency. And here we are only talking about bulk collection, which, again, to my mind presents a unique question about what the government says about when it is doing it and——

Senator FRANKEN. Okay. Let me go to Mr. Medine. Thank you.

I am asking what the government reporting should be, and assuming that we keep the bulk collection—which I am not necessarily assuming, but if we do, to me it makes sense that the government says how many numbers have been collected and how many have been queried? What is your opinion on that, your thoughts?

Mr. MEDINE. Our report certainly calls for greater transparency by the government in how many requests it makes under each of its surveillance programs that are authorized by Congress. When you get down into the details of how many people's information is gathered, that is not always an easy thing to determine. Even in the phone records program, multiple—I could have multiple phone numbers. So calculating how many——

Senator FRANKEN. Well, you could say how many numbers have been caught up, right?

Mr. MEDINE. Right. There certainly could be greater transparency.

Senator FRANKEN. That is easy to do.

Mr. MEDINE. Yes. I think the tradeoff—and it is program by program—is in some cases there are national security concerns that

if we reveal that we are collecting a certain number of—amount of information under a particular program, we may have tipped off to potential terrorists how to not communicate under that program anymore because now the government is collecting it.

So I think there is a balance to be struck, and the government has just negotiated an agreement——

Senator FRANKEN. Can't you put a rough estimate on how many—I mean, if you say, you know, this many numbers we are collecting data on in our bulk collection, and Americans—see, my feeling is this: that Americans basically distrust executive power, and if they are not given enough information to make a decision for themselves about the legitimacy of things, then they will assume that the power is being abused. And to me it would make—I do not think you would be giving anything away if you said this many millions of numbers are having their—or tens of millions are having their numbers, data collected about them, and this many thousands are being queried. Do you really think that would——

Mr. MEDINE. I think in some circumstances it could, and I think the recent——

Senator FRANKEN. Give me a circumstance.

Mr. MEDINE. Well, if you have a collection of some program on the Internet and we review——

Senator FRANKEN. I am talking about the——

Mr. MEDINE [continuing]. Phone records——

Senator FRANKEN. Yes. I am talking about the bulk data. That is what I am talking about.

Mr. MEDINE. If we reveal how many phone records we are collecting, it might indicate which records we are not collecting, for instance, and so that might tip off people about safer methods of communication.

Senator FRANKEN. If you said we are collecting information on 80 million numbers, does that tell you anything about what we are not collecting?

Mr. MEDINE. It might.

Senator FRANKEN. Really?

Mr. MEDINE. It depends on the number of companies offering those services and the number of customers they have. But we think that there is—transparency is clearly important. That was a major part of our report. FISA Court decisions should be made public. The government should reveal its surveillance efforts. And the laws that Congress passed should clearly reveal the authorities under which those programs operate. But we do think that there are some potential national security concerns, and the agreement the Justice Department reached with the companies, say, for instance, to not allow reporting for two years after a new program is instituted might provide some guidance on how to balance those important—both important—concerns of transparency and national security.

Senator FRANKEN. Okay. Well, I hope we have a second round. Thank you. I am sorry I am over my time.

Senator BLUMENTHAL. Thank you, Senator Franken. We will have a second round, assuming that we can do it before the votes occur at 11:30.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Welcome to all of you. It is good to see you all again.

Anybody can answer this question. I want to thank you all for your service on the Board and contributing to this report. I would like to start with an issue that has received less attention than the NSA surveillance program, and that is the Foreign Intelligence Surveillance Court, or the FISC. Now, the Board unanimously recommended that the Court take full advantage of existing authorities to obtain technical assistance and legal input from outside parties, such as properly cleared outside lawyers. The Court can do that now, in my opinion, without any new legislative authority.

Does the Court take advantage of that assistance? Any of you.

Mr. MEDINE. I think the Court certainly has access to the government's technology experts in gathering information. Beyond that, I cannot really say what the Court has done.

Senator HATCH. Anybody else care to comment? Yes, Judge Wald.

Judge WALD. Among the former and current judges of the FISA Court that we did talk to, we had one judge tell us that he did not think it was clear to all the judges how or to what extent they could take advantage of outside help. There have been, I believe, few instances—there was one amicus in the review court of the FISC Court, and there has been a more recent situation in which they have allowed an outside group that has petitioned to file a written presentation. But it was not clear, and we know of—I know of no examples where they did take advantage of outside technical——

Senator HATCH. Okay. Now, the Board unanimously recommended some reforms to make the work of the FISA Court more transparent. I am skeptical, however, about the recommendation that the scope of surveillance authority should be made public. The Board was divided on that issue, as I recall, and I am concerned that publicly outlining surveillance collection methods may compromise the investigative techniques employed by intelligence and law enforcement communities and ultimately pose a risk to national security.

Yesterday the Director of National Intelligence issued, pursuant to Presidential Policy Directive 28, the list of permissible uses of intelligence collected in bulk. Now, it seems to me that making public the purposes for which the government uses intelligence rather than the methods it uses to collect that intelligence strikes a better balance, and I would like your comment, perhaps from someone on both sides of the issue, if you could.

Ms. BRAND. I can start by explaining why I did not sign on to the 12th recommendation, which is, I think, what you are referring to.

Senator HATCH. Right.

Ms. BRAND. I agree with the majority in principle that, where programs or the outlines of programs or the purposes of programs can be revealed, they should be; but there is an important caveat to that, which is it has to be done consistent with the national security. I do not think that a program's legality depends on whether it has been disclosed to the public. And I was concerned that that is what the Board's recommendation implied.

I think that in our democracy, where we rely on committees like this one and on the intelligence committees to do oversight, there are necessarily going to be some things that occur in private, and that is permissible.

Ms. COOK. I also would say I think it is difficult to draw conclusions about what can safely be disclosed publicly from the Section 215 disclosures given that they followed the wholesale leak of the program. So I think we need to address this prospectively and taking into serious account what the potential damage could be from disclosure of previously classified programs.

Senator HATCH. Okay. Well, I am happy to welcome you all here again. Judge Wald, you and I were together a long time ago.

Judge WALD. Yes. I think we go back 30 years, if I——

Senator HATCH. I think we do, and I am just happy to have all of you here and I——

Judge WALD. I was just going to add——

Senator HATCH. Go ahead.

Judge WALD. On the transparency, our recommendation, the majority's recommendation, I think was fully cognizant of the fact that we in no way wanted the methods, operational details, or even the existence of a particular operation to be automatically disclosed. We did have testimony, actually, from a former Ranking Minority—Ranking Minority/Majority as it changed—Member of the House Intelligence Committee that the so-called framework and purpose of many of the programs could be disclosed by carefully drawing these lines, and let me just give an example.

Now, we are just about to begin, or have begun, our report on Section 702 of the FISA Act, which deals with the collection of communications, one side of which may be in the U.S. and one side of which is foreign. And that amendment, which allows this program was openly debated before this body and before other bodies. Now, we have just begun the investigation. I am not about to try to preview any of our conclusions. But I will say this: The fact that how the program would operate in terms of the courts approving a target or minimization and what kinds of categories of material could be put in the targeting, many of these things are right in the statute or in the legislative history in the reports that accompany it.

Now, my belief is that—again, we have only begun our investigation, but that the government itself has said that the 702 program has been very, very valuable to it and has said, certain representatives of the government, much more valuable actually than——

Senator HATCH. My time is running out.

Judge WALD. Yes. That is my point.

Senator HATCH. Let me just mention this. Ms. Brand and Ms. Cook, it has been suggested that you believe the metadata program might be illegal. Now, is that a fair characterization of your position? Each of you can speak to the matter.

Ms. BRAND. No.

Ms. COOK. No.

Senator HATCH. Why not?

Ms. BRAND. I was explaining earlier to Senator Grassley some of my reasons for thinking that the statute's language can support the program. I think what people are reading too much into is my statement that reasonable lawyers can differ on this. It is not the

clearest-cut of questions, but at the end of the day, I think that the program is legal. That is my opinion.

Senator HATCH. Okay.

Ms. COOK. Similarly, I believe that the program is authorized. Ms. Brand had noted a concern with the majority's approach to relevance. I think there are a number of concerns that I have with the majority's legal analysis. For example, the Board has concluded that Section 215 prohibits providers from producing documents to the NSA instead of the FBI. It sounds like a technical issue, but the Board has concluded on that basis that the Section 215 program is unlawful.

But if you read Section 215 where it talks about production of tangible things, there is no requirement whatsoever that it be made to the FBI. The majority has instead cobbled together this prohibition and rested its legal analysis on this prohibition that does not appear on the face of the statute.

Senator HATCH. Thank you.

Mr. Chairman, if I could just ask one other question, because I am going to have to leave.

Let me just shift to the NSA telephone metadata program, which has received most of the attention in these hearings and in the media.

Now, Ms. Brand, it is my understanding that the Board is unanimous that the metadata program is constitutional, but divided on whether it is authorized by statute. Is that a fair characterization?

Ms. BRAND. That is correct.

Senator HATCH. Okay. In addition to the Board's substantive conclusion about whether the *PATRIOT Act* authorizes the metadata program, I wonder whether the Board should have delved into that issue at all. And, Ms. Brand, please summarize why you think the Board should not have ventured into that area.

Ms. BRAND. Thank you, Senator Hatch. I would be happy to.

I think a Board like ours, which performs primarily an advisory function and is not a court, does not have to address every legal argument that is available and has to pick and choose and consider the ramifications of what issues it decides to address.

I think, frankly, on the legal question here, the statutory question, it is not clear to me what this Board adds. It is not as though we are addressing this as a matter of first impression. This program has been operating for years. It has been the subject of numerous judicial opinions. The legality of it will ultimately be resolved in cases that are currently pending in the courts.

But, more importantly, I think where the Board concluded also that there is a policy reason for shutting down the program, it just struck me as gratuitous and unnecessary to also say the program is illegal, because that has a very demoralizing and negative effect on the intelligence community. You want your intelligence agencies to aggressively protect the national security within the bounds of the law. You do not want them to be timid and be scared of the rug being pulled out from under them by being second-guessed, you know, years later when they did everything right by going to the court and operating under what they believed to be a legal program.

So I just thought it was a mistake to address the illegality.

Senator HATCH. Well, thank you. Mr. Chairman, I am sorry.

Mr. DEMPSEY. Senator, may I speak to that point just briefly?

Senator HATCH. With the Chairman's permission, yes.

Senator BLUMENTHAL. Go ahead. Sure.

Mr. DEMPSEY. Senator, you know, when I first heard about this program and the fact that it was authorized by the Court, I felt, okay, it must be lawful. We will look at it. Maybe we will find some additional tweaks that we can make to it and that will be it. If it has been authorized by the Court, that is the end of the story.

But the more we looked at it, the more I came to the conclusion—and a majority of the Board came to the conclusion—that the program just does not fit within the statute, that it was shoehorned into this statute. And I think nobody, with all respect to both the executive branch officials and the judicial officials, nobody looked at the statute as carefully as we did. I think if we had come forward and opined on some balancing test or some other aspect and had not looked at the statute carefully, people would have criticized us, "Well, you did not read the statute." I came to this conclusion slowly. I came to it a little bit to my own surprise. But as you read the statute, the words just do not add up to this program.

And on the constitutional point, I want to be clear. The Board's majority report says under application of existing case law, *Smith* v. *Maryland* and the other third-party record cases, if those were to be applied to this program, then you would conclude zero constitutional privacy interest in the data— therefore, not unconstitutional.

The problem is there is no case ever addressing a program of this scope until the two most recent district court cases. There is no Supreme Court case that ever applied the *Smith* v. *Maryland* doctrine, the transactional records doctrine, to such an extensive program. The bottom line is nobody knows what the Supreme Court would say when confronted with such an extensive and ongoing program of this kind. That is the bottom line constitutionally, I believe.

Senator HATCH. Well, thank you.

If I could just ask Miss—Ms. Cook, welcome back to the Committee. We have missed you. Do you agree with Ms. Brand that the Board should have stayed away from the issue of legality and stuck to the policy questions regarding the NSA metadata program?

Ms. COOK. I think the decision to spend such an amount of time and——

Senator HATCH. Could I point out that, as you know, more than a dozen federal judges, both on the Foreign Intelligence Surveillance Court and on the U.S. district court, have concluded that the *PATRIOT Act* does provide authority for the metadata program? Now, the President's Review Group, who appeared before this Committee, came to that conclusion. And the Attorney General, who also was here just last month, strongly holds that position. The Board was split, though, 3–2 on this, and I just wanted to know: Why was the majority wrong on this issue, in your view?

Ms. COOK. Well, I think there are two questions there. First, whether we should have engaged in such an extensive legal analysis. As you have noted, this program is subject to extensive judicial oversight and is currently subject to ongoing litigation in three

district courts. We are a Board of extraordinarily limited resources, particularly at the time we were considering this. The decision to do both a statutory analysis and also a Fourth Amendment analysis that really was prospective only, had costs. We have not meaningfully begun our review of the Section 702 program, nor have we begun to address any of the other priorities we had identified since the inception of our Board.

As to the question of whether the legal analysis was incorrect, we have discussed the relevance issue. We have discussed the majority's view that the records could not be produced directly to the NSA, both of which I disagree with. And I would also disagree with the majority's analysis on the ECPA issue.

As you are aware from 2001, one of the primary purposes of the amendments in 2001 to Section 215 was to eliminate any notion that Section 215 could be used for some types of records but not for other types of records. The legislative language—uses the term "any tangible things." The majority, nonetheless, imports from a completely different title of the code a modifier of the term "any." I could not join that type of analysis.

And I would also say thus far it is a pleasure to be back to the Committee today.

Senator HATCH. Well, thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Hatch.

Judge WALD. Senator Hatch, could I indulge upon a 30-year relationship to address very briefly——

Senator HATCH. Sure.

Judge WALD [continuing]. A few of the points here.

Senator HATCH. I have watched you all that time, by the way.

Judge WALD. It has been a mutual watch.

Senator HATCH. Yes, I know.

[Laughter.]

Judge WALD. Anyway, I would simply like to point out that our governing statute says, "The Board shall continually review actions by the executive branch related to efforts to protect the Nation from terrorism to determine whether such actions are consistent with governing laws." I think part of our mandate has been to look at the consistency of the statute with the laws.

I would also point out that we had requests from a number of Senators and a number of Members of the House to look at 215 and 702, and in each of the letters, it was mentioned that we should look at the statutory basis.

The other point which I think is certainly worth thinking about is Rachel Brand's concern, I think a very legitimately motivated concern, that if you say that the NSA people—whom we were all impressed with their good faith and their diligence. If we say that they were operating under a statute which did not give them the authority to do what they are, this could be somewhat morale destructive.

I only wish to point out, again, drawing upon my 20 court years, the average percentage of times in which an appellate court said that the lower court or the agency, and primarily the agencies in our cases, that the agencies had operated outside the mandate of the statute were numerous. And I think it was never suggested that we were saying these were bad people or that they had done

something that was wrong. It was rather that legal interpretations are difficult in complex legislation, and the fact that another body may disagree with the agencies' take is something which I think these dedicated public servants are used to, and I would be very surprised if it really decreased their sense of loyalty and dedication.

Thank you for indulging me.

Senator BLUMENTHAL. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Let me just ask a timing question first. When did the exercise that led to the report that we have in front of us begin?

Mr. MEDINE. It began in June of last year.

Senator WHITEHOUSE. After the disclosures?

Mr. MEDINE. Yes, after the disclosures, a number of Members of Congress and the President asked us to conduct a study of the 215 program, and we embarked on it almost immediately.

Senator WHITEHOUSE. You were aware of the 215 program at the time?

Mr. MEDINE. Prior to the unauthorized disclosures? I only joined the Board in late May, and I was not——

Senator WHITEHOUSE. Was the Board aware of the 215 program beforehand? Did you have——

Judge WALD. As I recall, Senator Whitehead——

Senator WHITEHOUSE. Whitehouse.

Judge WALD. Yes.

Senator WHITEHOUSE. It is okay.

Judge WALD. We learned of the program shortly before that. I cannot give you an exact date, but I would put it at a month or several weeks before.

Senator WHITEHOUSE. Why do you suppose that is, since you have the authority to continually review all of these programs? Why was it that you were not aware of this until just shortly before that?

Ms. BRAND. Our agency consisted—before Mr. Medine was confirmed, our agency consisted of four part-time members who could work on PCLOB work about one day a week with no staff, and so we were struggling merely to get stood up and start to meet with the agencies about a variety of programs. And so we were beginning to learn about programs, but we were nowhere near, I think, the volume of intake that we will be at in the future. I think that was part of it.

Senator WHITEHOUSE. So as far as you are concerned, nothing was withheld from you. It was just that you did not have the aperture to grind through all the different programs.

Mr. DEMPSEY. Senator, we had a briefing scheduled on 215 before the Snowden leaks, and the person was hit by a bus the weekend before he was due to brief us, and we had to cancel the briefing. He was not hit by a bus. He was in a car accident.

Ms. COOK. We have seen no indication that there was an effort to withhold information about this program either prior to the disclosures or subsequent to the disclosure.

Judge WALD. I think we learned——

Senator WHITEHOUSE. So the gap is actually on your end in terms of having the capacity to look into the breadth of various programs.

Judge WALD. I think I would just add that this was a fairly tumultuous year in which the four of us with no staff went racing around trying to learn as much as we could about a variety, a wide variety of programs by many different agencies, not just NSA, the one question or the one thing I learned most was that you have to know how to ask the right questions. If you ask the right questions, the information is forthcoming. We had no instance where they said, "We will not tell you" or "We absolutely refuse." But you do have to know how to ask a second round of questions, and we were just getting, I think, to that point of sophistication when the——

Senator WHITEHOUSE. And you had gone into operation as a body when?

Judge WALD. I am sorry. What?

Senator WHITEHOUSE. As a body, you had gone into operation on what date?

Judge WALD. Sometime in August we were confirmed, in the prior August.

Mr. DEMPSEY. August 2012.

Judge WALD. Yes, and then shortly thereafter, we were sworn in. So I would say——

Ms. COOK. But there is an idiosyncracy to our statute that I would point out, which is that only the four part-time members were confirmed in August 2012. Only the Chairman has the statutory authorization to hire staff or an executive director, and Mr. Medine was not confirmed until May 2013. So we did not actually have the statutory capacity to hire staff or an executive director, to say nothing of our attempts to find office space, Internet, everything that needs to be done for a fledgling agency.

Senator WHITEHOUSE. So that takes me to the question of an independent advocate who could appear in the Foreign Intelligence Surveillance Court representing a public interest. I think there is pretty broad agreement that that is a good idea. When you get into the details of how that individual gets managed and supervised, I get more anxious. I think if the person is an appointee of the chief judge of the Court or the Chief Justice of the United States, they risk becoming the pet lawyer of that individual. I think if the Court can call on them or not at its discretion, there is the risk that they get completely marginalized when they may have something useful to say. If they are not supervised by somebody, there is the risk that you have just created a sinecure for some individual or small group of individuals, and that as long as they appeal to the political galleries that are watching their behavior adequately, they stay on even long after they have become ineffective and not noteworthy to the Court any longer because they are ineffective.

There are all these dangers of how you keep that focus and how you keep that task properly done. Make the case for why you all should be the oversight in the context of those dangers.

Ms. BRAND. We have not suggested that we should be the oversight for the special advocate. I know some have suggested that we be the body to appoint the members, a pool of special advocates or appoint a special advocate. We intentionally did not recommend

that, in part because we have an oversight function of the agencies involved in——

Senator WHITEHOUSE. Okay. I am sorry. I misunderstood. I thought that was your suggestion.

Ms. BRAND. No.

Mr. MEDINE. We have recommended that the Court choose from private attorneys to act as a special advocate in appropriate cases, and then that there be reporting as to when the Court exercises its jurisdiction to bring those parties in.

Senator WHITEHOUSE. How do you avoid the pet lawyer or the sinecure effects in that circumstance?

Mr. MEDINE. We thought long and hard about where to put the special advocate. We thought first about the executive branch. We were concerned that it is the executive branch that is approaching the FISA Court for authority, and so it did not make sense to have the executive branch arguing against itself. We then thought about the judiciary, and, again, the judiciary is supposed to be an independent arbiter, and it did not make sense to have them be the house of the special advocate. And so we thought having a private outside attorney who would have the independence to come in and make those arguments, and hopefully with some transparency about who is chosen as an advocate so the public can know who is involved, and also transparency about when they are chosen to participate, we thought struck the right balance between independence and accountability.

Senator WHITEHOUSE. It is a worrisome question to me, and I confess I do not have an answer to it in mind myself. But when you dive into something that is so inherently private and classified as this kind of activity, the ordinary controls—a lot of the ordinary controls—vanish, and that leaves some sort of small "P" political dynamics that can begin to take over, and I think every one of us has probably, at some point in our lives, had the experience of seeing somebody move into a position akin to this and dine out on it for the rest of their lives without producing much value.

Mr. MEDINE. Well, again, that is where we hope that the rotation of the judges will play a role in that. We have also tried to empower the special advocate to have more appeals—take cases on appeal, so there is greater oversight of the process. But there is certainly a challenge there, but, again, we tried to strike what we thought was the best balance between the competing concerns.

And, also, I guess it is worth keeping in mind, at least from what we have learned, that the cases in which a special advocate is appropriate do not happen all that often, and if you institutionalize the person, then they are out there trying to figure out what to do with their job as opposed to bringing in outside attorneys just on a case-by-case basis we thought made more sense.

Mr. DEMPSEY. Senator, I think what we tried to do is to create an incremental improvement in the current structure, a relatively lightweight system, and to surround it with some of the reporting that is already inherent in the FISA oversight process. That is, already the Government is required to report to this Committee and the intelligence committees on significant opinions issued by the Court. We would supplement that by saying, "Was the special ad-

vocate invoked in that case?" We recommend that that reporting come to us as well.

And we did think that the judges genuinely wanted this capability. In our discussions with the former judges of the Court that we talked to, it seemed that they genuinely wanted the ability to call upon a special advocate in certain cases. So I think our recommendations add up to that—some internal checks and balances on the system. The government is currently required to notify the Court when there is a significant issue posed in a case. That is one triggering point. The judges themselves, we did conclude, are genuinely alert to those cases. They might not see all of them, but alert to them. Then there is the reporting to this Committee after the decisions are made and the question, was there the advocate, so you begin—you do not institutionalize it. I think that you could have a good enough workable system that would significantly add to the credibility of the process, without an institutionalized weighty structure.

Senator WHITEHOUSE. I have gone well over my time, and I have two distinguished colleagues here whom I am trespassing upon. I would be delighted to have another round to continue this discussion. I yield back now.

Senator BLUMENTHAL. If we have time, we will have another round. Thank you, Senator Whitehouse.

You know, I first of all want to come back to a point that Mr. Medine made that we should be immensely grateful to our intelligence community for the courageous and able contribution that they make to protecting our national security. And I said it yesterday when the Armed Services Committee heard testimony from Director Clapper. We frequently emphasize the failings because we do not always see the successes. And we should be mindful of the courage and dedication that they demonstrate day in and day out, some of them in harm's way.

You know, I may be the only person on this Committee who feels this way, but I believe that the disclosure that only 30 percent of these records are actually collected and that the proportion has plummeted since 2006 is a real game changer. It calls into question the entire rationale for the metadata collection program. And as a matter of process, it really raises the question of credibility for the U.S. Government in the representation that it has made to the FISA Court, its failure to correct a representation that evidently it made in 2006 that 100 percent of these records were going to be collected, representations made to the district courts that are currently considering this issue.

To quote the Deputy Attorney General in testimony that he gave in July to Congress, Deputy Attorney General James Cole said, in justification for this program, "If you are looking for the needle in the haystack, you have to have the entire haystack to look through."

I am just a country lawyer from Connecticut, but if I went to a judge—and as a prosecutor, I did—and I said, "We need a search warrant to look at the whole house because we believe there may be incriminating evidence in this house, and we need to search through every room, and that is why we are asking for the warrant to search the whole house." And then the police, under my author-

ity, went to the house and only looked at maybe a few rooms and decided either they did not have time or the rooms were dark or some were locked, I would feel an obligation to go back to the judge and say, "Your Honor, we need to at least tell you about the search," and I could think of a number of analogous situations comparable to it. And the question of whether the whole house needs to be searched is in question.

In this instance, the rationale for this program is that all of the data has to be collected so that connections can be made, algorithms can be applied, analysis can disclose whether or not there are communications that may raise national security concerns.

So I guess my question to the panel, and particularly to the dissenters, Ms. Brand and Ms. Cook, doesn't this disclosure that only 30 percent of these records were actually collected because of the explosion in cell phone use, a legitimate reason, perhaps, that the government was unable to collect all of them, raise questions not only about the efficacy of the program but also about its legal foundation?

Ms. BRAND. I think for the reasons that the Chairman explained, it is touchy for us to talk about this because I am not clear exactly on what is classified and what is true, and so we cannot get into that here. But on a prospective basis, if there were an institutional reason why the government would only be able to collect 30 percent of the records and that is it forever, that would diminish the value of the program from what it would be if they collected 100 percent of the record. I agree with that.

You know, another thing that I want to point out is that something I said in my separate statement, and I think others on the Board agree, is that for any program like this, the government should be continually assessing the value of the program and whether it has diminished—or it could increase—but whether it has diminished over time in light of changed circumstances, changed behavior of suspects, changed behavior of the public, additional legal tools that might be available, or other changes in the law, everything, and continually assess whether they should continue a program. I think they do that already on an informal basis, but I think a more formalized process in which the Privacy Board would be involved would be a good thing.

Mr. MEDINE. And, Senator, we certainly all agree that there should be an ongoing assessment of efficacy of these programs. But if I could just return to your first point for a moment with regard to the dedication of the workers in the intelligence community, again, just to restate that, we have found them extraordinarily dedicated. And I just want to make clear that our recommendations about the legality of the program have nothing to do with the good faith in which they have operated and the administration has operated and the courts have operated with regard to this program. Our effort is to take a look—our mandate is to talk about—look at privacy and civil liberties and what protections are available. Section 215 does have protections, and we think on a prospective basis, even to the extent the program continues for a short period, those protections ought to be in place. And so our effort is to look forward, not to impugn at all the good faith of anyone who has relied on either constitutional issues or statutory issues.

Senator BLUMENTHAL. Because we are running out of time, I am going to cut short my questions, but just make the observation that I believe that the constitutional advocate, far from being a lightweight institution, has to be a real heavyweight to protect the Constitution. And I would err on the side of giving that person or office the resources, the authority, the personnel, and ultimately the credibility that will enhance the trust and confidence of the American people in the constitutionality of this process and its legality.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

I am just a little confused from my first set of questions, so I just—because it seems a little at odds with the report, and any of you can weigh in on this, please. On page 205—well, let me first go on—Recommendation 9 says " . . . the government publicly disclose more detailed statistics to provide a more complete picture of government surveillance operations."

And then on page 205, you say, " . . . if a statute such as Section 215 continues to be used as the basis both for individualized collection and bulk collection, the mere number of Section 215 orders could be misleading."

So when I asked about transparency before and putting out the number of—and right now this *Washington Post* article is speaking to the issue of how many numbers or how many phone calls are being collected—and that is collected—it just seems to me—and since the number of orders is, as you say, misleading, I do not understand your answer. I do not understand why revealing the number of numbers that are caught up in this collection is not more transparency and does not give Americans a better idea of the dimension of this so that Americans can decide for themselves what this program is and whether it is legitimate or whether it is proper.

Mr. DEMPSEY. Senator, you have been a leader on this issue, and I do not in any way want to lose sight of what I think is substantial agreement between us and probably between all the members of the Board and you on the importance of transparency and the value of numbers as a component of transparency. I was simply responding to what I think is an important, but in some ways narrow, question, which is how do we handle numerical reporting on bulk collection programs as opposed to numerical reporting on targeted programs, which I think everybody agrees, and some progress has been made and more could be made on the numerical reporting, how many orders, how many accounts affected on the targeted side. So that is not what I think you and I are talking about now. We are talking about the bulk side——

Senator FRANKEN. Right.

Mr. DEMPSEY [continuing]. Where obviously one order or three orders or five orders could be meaningless if millions and millions of people are affected. On the other hand, we were thinking here, what about the next program and the next program and the next program? And how do we deal with—again, if 215 stays as it is—how do we deal with bulk reporting on the next program and the next program and the next program?

Senator FRANKEN. What about the program that exists? This is——

Mr. DEMPSEY. This is a program that exists——

Senator FRANKEN. Americans know about this program, and we still have not really given them—I mean, the *Washington Post* will put it in an article. Why can't the government tell us the number of telephone numbers that are having their data collected? And then how many are being queried? That would give people some idea of the scope of this program and what it is doing. And I think Americans deserve to have that information in order to decide for themselves—and I think it would be very helpful.

And, listen, I agree with both the Chairman and Mr. Medine on our intelligence people. I believe that they are doing the best job they can. But we have oversight, and part of the oversight to me is what you talk about, how important transparency is. And I am very confused about what you write in your report and what your answer was to my first question in my first set of questions.

Mr. DEMPSEY. Do not let me hog it here, because others can have views. I will simply say I agree on the numbers of the queries, that the reporting there has been disclosed and could be disclosed.

Senator FRANKEN. It has been?

Mr. DEMPSEY. I am 99 percent sure that the government has declassified, at least for one year——

Judge WALD. So-called RAS——

Mr. DEMPSEY [continuing]. The number of queries made against the data base.

Judge WALD. There are 300—yes, actually if I could, Senator Franken, one, speaking for myself, I agree that Americans, their first and primary question is going to be, you know, How big is this? How many Americans are likely affected by this program?

To the extent that this information can be disclosed without hurting national security, the burden would be on the government to show why it would be a national security problem, but to approximate as close as you can get to that number without there being any security problems. But as Jim suggested, the so-called RASs are used to query this entire data bank, and obviously there is some confusion from the newspaper accounts as to how big that bank is. But they have disclosed that they query it with the so-called RASs, a reasonable, articulable suspicion, in the area of 300 times a year. What we do not know from that is how many numbers they access on a first hop or a second hop or even a third hop. You have to be very careful in defining what number you want because, as we learned, the way the system operates is this. When you get the first hop as to which numbers the suspicious number has been in contact with, what happens is the analysts look at all the numbers that pop up, and they may look at several of them and say, "That is of no interest to us. We know automatically that that is some kind of number that has no interest to us, so we will only look at one out of the 12 or one out of the 10." Or they may look at them all, or they may look at some and discard them. And then you go to the second hop from all of those numbers, and you get, you know, a wider and wider swath.

But I do think your general notion that Americans are most interested in some notion of the scope of people who have been affected is one that the government and the Congress and all other people should work toward approximating, unless the government can show that there is some national security danger there.

Mr. MEDINE. I also wanted to add that one of the policy reasons why we recommended ending this program is that concern by Americans that they are being surveiled, and whether it is 30 percent or 100 percent, knowing that the government is collecting your phone calls to your lawyer, to your political organization, to a journalist has a chilling effect, and that is why we think it is preferable to not have the government maintain this bulk data but use other authorities and have the information held elsewhere.

Senator FRANKEN. I know—but no matter where it is held, that is problematic. But I know the vote has been called, and we have got to go.

Senator BLUMENTHAL. Senator Whitehouse, did you have other questions that you would like to——

Senator WHITEHOUSE. Perhaps as an observation, but you can respond, and if our time runs out, if you want to respond for the record, that is fine.

This is probably the most overseen program in the history of the American intelligence community. Setting aside the intelligence community, it is probably one of the most overseen government programs ever anywhere. It was managed by NSA, but it was overseen by the Department of Justice and the ODNI. With NSA you had relatively independent bodies like the Inspector General, the Office of the Director of Compliance, the General Counsel's Office which had important roles in it. It was reported quarterly to the President's Intelligence Oversight Board. You had a full-time court with multiple judges overseeing it. I think they used to say that there were more than 30 different congressional committees that had oversight authority over it, but certainly the intelligence committees, this Committee, equivalent committees in the House all had oversight over it. It is hard to imagine how you could apply more oversight and have it make an incremental difference if you add one more office to the wide array of offices that are already engaged in oversight.

So to the extent that there was an oversight problem, it raises, to me, the question more about the quality of the oversight and the organization of the oversight rather than the quantity of it, because we certainly threw more oversight at this program than anything in history. And I just am interested in your reactions to that thought. I do not think one more patch is going to help when there is such a huge quilt of oversight patchwork there already.

Mr. MEDINE. I think there are a number of things. One is—and I do not want to overstate our capabilities, but our Board is now an independent agency with high-level clearances, with authority to see all the information regarding these programs and report our independent views without any review prior by the White House or anyone else to the Congress, the President, and the public, as we have done with regard to this program. We will not be able to be everywhere, by any means. We are very small and we will probably stay relatively small. But in those areas where we look, we can——

Senator WHITEHOUSE. The Inspectors General are in the same position.

Mr. MEDINE. Right. But our focus is on national security, a balance of privacy and civil liberties. They have obviously a much

broader focus. So I think—I hope we can contribute in some way going forward. And as we have recommended——

Senator WHITEHOUSE. Let me not put you in the position of trying to defend that you should have some role going forward. My point is when you have got this vast array of oversight already, the most overseen program in history, adding one more thing I do not think is a convincing argument on its own. I think that we have got to take a look at the structure of this patchwork and array of oversight and see if, in fact, there were oversight problems, what do they go back to? I do not mind adding you to the equation. That is not my point. My point is there is already so much oversight that I cannot believe that adding you is going to make a huge marginal difference. It will make a good difference, and I do not object to your further participation in this. But I really think that to the extent that oversight is condemned in all of this, the solution is not adding more small elements of oversight to an already vastly overseen, multiply overseen—frankly, hard to imagine how you could add more oversight to it other than yourselves. I mean, every branch of government is covered, every House of Congress is covered, the executive branch has multiple redundant coverage.

Mr. MEDINE. Senator, if I could, I think you are exact—you are 100 percent right. I actually think that is why the value of our Board and what needs to be done is, I think what we did was we pulled back and said, wait a second, where is the legal foundation for this? Upon what structure has all of that oversight been created? And we concluded, the majority, that the foundation itself was inadequate. And then, I do believe, we took, remarkably, the most in-depth look at effectiveness and looked, I believe, more closely and probingly at effectiveness and again concluded that the program came up short. But those two questions—what is the legal foundation and what is the effectiveness, despite all of that structure, I believe they never really got, in 10 years of this program, adequate attention.

Senator BLUMENTHAL. And I want to take the prerogative of the Chair to observe, in response to Senator Whitehouse's point, that none of the oversight was adversarial in nature, which is why I propose the constitutional advocate. Courts always do better when they hear both sides. The process is well served when there is contention, as there was within this Board. And I might just point out that the dissent by Ms. Brand says, in commenting on whether the Board should consider the legal question, as you very thoughtfully observed, and I am quoting, "This legal question will be resolved by the courts, not by this Board, which does not have the benefit of traditional adversarial legal briefing and is not particularly well suited to conducting de novo review of long-standing statutory interpretations."

At least part of that observation can be said of the FISA Court and of the legal review and perhaps factual review that has been conducted in this program. The oversight may have been numerically abundant, but as you observed, Senator Whitehouse, potentially lacking in quality.

So I am going to have to go to the vote. Senator Whitehouse moves more quickly, so he may——

Senator WHITEHOUSE. No, we will go ahead, and I will let the Chairman conclude the hearing. I would just note in reply that the great adverse relationship that the Founding Fathers built into the Constitution was the adverse relationship between the legislative and the executive branches, which they characterized as one of jealousy and rivalry that was to be harnessed for the good of the public. So I would hate to think that just because there was not a lawyer in the courtroom with a general public interest purpose, that there was not adversarialness in all of this. There should have been, and the structure of our government creates that adversarialness. And if that has not been adverse enough, then that is our fault. But it is not the fault of the lack of an additional lawyer in the courtroom at the FISA Court.

Senator BLUMENTHAL. I do not think lawyers are necessary for adversarial contention, but I think your point is well taken. And I am going to close the hearing, leave the record open for one week, and, again, thank the panel for being here, for your very thoughtful and insightful and very helpful testimony, and again thank our entire intelligence community that day in and day out works to grapple with these very difficult and challenging questions.

Thank you, and the hearing is closed.

[Whereupon, at 11:48 a.m., the Committee was adjourned.]

APPENDIX

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court"

Wednesday, February 12, 2014
Dirksen Senate Office Building, Room 226
10:00 a.m.

The Honorable David Medine

The Honorable Patricia M. Wald

The Honorable Rachel L. Brand

The Honorable James X. Dempsey

The Honorable Elisebeth Collins Cook

PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on the Report of the Privacy and Civil Liberties Oversight Board
on Reforms to the Section 215 Telephone Records Program
and the Foreign Intelligence Surveillance Court
February 12, 2014

Today, the Judiciary Committee welcomes all five members of the Privacy and Civil Liberties Oversight Board (PCLOB) for our fifth hearing this Congress on government surveillance activities. The PCLOB's recent report adds to the growing chorus calling for an end to the government's dragnet collection of Americans' phone records under Section 215 of the USA PATRIOT Act.

This is not the first time that the Committee has heard this message. On January 14, 2014, the Committee heard testimony from the President's Review Group on Intelligence and Communications Technologies, which found that the Section 215 program has not been essential to our national security and that the government should not store Americans' phone records in bulk.

I could not agree more. As I have said repeatedly, the administration has not demonstrated that the Section 215 phone records collection program is uniquely valuable enough to justify the massive intrusion on Americans' privacy. The PCLOB's report likewise determined that the program has not been effective, saying: "We have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack." This finding stands in stark contrast to initial claims by senior NSA officials that the Section 215 program helped thwart dozens of terrorist plots.

The primary defense of the NSA's bulk collection program now appears to be that the program is more of an insurance policy than anything else. But even that defense of the program has been called into question. According to news reports, under this program the NSA collects somewhere in the range of 20 to 30 percent of domestic phone records. These estimates are consistent with the President's Review Group report, which cautioned against placing too much value in this program as a tool to rule out a domestic connection to a terrorist plot – the so-called insurance policy. The Review Group report tells us that is precisely because – although the program is unprecedented in scope – it still covers only a portion of the total phone metadata held by service providers.

The intelligence community has defended its unprecedented, massive, and indiscriminate bulk collection by arguing that it needs the entire "haystack" in order for it to have an effective counterterrorism tool – and yet the American public now hears that the intelligence community really only has 20 to 30 percent of that haystack. That calls even further into question the effectiveness of this program.

The PCLOB report also provides a detailed constitutional and statutory analysis of this program, and concludes that the program "lacks a viable legal foundation under Section 215" and "implicates constitutional concerns under the First and Fourth Amendments." The PCLOB report further reveals that although the Foreign Intelligence Surveillance Court first authorized this program in 2006, it did not issue an opinion setting forth a full legal and constitutional analysis of the program until last year. These conclusions are particularly important to the work of this Committee as we consider the legal theory on which this program rests. I remain deeply concerned that under the administration's interpretation of Section 215, the government could acquire virtually any database it thinks might one day contain useful information. This could have serious privacy and business implications in the future, particularly as new communications and data technologies are developed.

The PCLOB report underscores the need to rein in the government's overbroad interpretation of Section 215 and to provide for greater transparency. Although the administration is in the process of undertaking some preliminary and positive changes to the bulk phone records collection program, these reforms are not enough. Congress should heed the advice of the PCLOB, and shut this program down. Congress should enact the USA FREEDOM Act.

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Background Information on David Medine, Rachel L. Brand, Elisebeth Collins Cook, James X. Dempsey, and Judge Patricia M. Wald

David Medine, Chairman, Privacy and Civil Liberties Oversight Board

David Medine started full-time as Chairman of the Privacy and Civil Liberties Oversight Board on May 27, 2013. Previously, Mr. Medine was an Attorney Fellow for the Security and Exchange Commission and a Special Counsel at the Consumer Financial Protection Bureau. From 2002 to 2012, he was a partner in the law firm WilmerHale where his practice focused on privacy and data security, having previously served as a Senior Advisor to the White House National Economic Council from 2000 to 2001. From 1992 to 2000, Mr. Medine was the Associate Director for Financial Practices at the Federal Trade Commission (FTC) where, in addition to enforcing financial privacy laws, he took the lead on Internet privacy, chaired a federal advisory committee on privacy issues, and was part of the team that negotiated a privacy safe harbor agreement with the European Union. Before joining the FTC, Mr. Medine taught at the Indiana University (Bloomington) School of Law and the George Washington University School of Law. Mr. Medine earned his B.A. from Hampshire College and his J.D. from the University of Chicago Law School.

Rachel L. Brand, Member, Privacy and Civil Liberties Oversight Board

Rachel Brand has served as a Member of the Privacy and Civil Liberties Oversight Board since 2012. In addition to her service on the PCLOB, Ms. Brand is vice president and chief counsel for regulatory litigation at the National Chamber Litigation Center (NCLC), the litigation arm of the U.S. Chamber of Commerce. Before joining the Chamber, Brand practiced law with the international law firm WilmerHale, where she focused on strategic public policy counseling, crisis management, and congressional investigations. She also has extensive government experience, having served as the Assistant Attorney General for Legal Policy at the U.S. Department of Justice after being confirmed by the Senate and appointed by President Bush in 2005. Earlier in her career, Brand served in the Office of Counsel to the President at the White House, where she advised White House staff on a wide range of legal and constitutional issues and played a key role in high-profile legal issues arising from federal agencies and departments. During the 2002 Term of the United States Supreme Court, Brand served as a law clerk to Associate Justice Anthony M. Kennedy. She also clerked for Justice Charles Fried of the Supreme Judicial Court of Massachusetts. Brand graduated from Harvard Law School, where she served as deputy editor-in-chief of the Harvard Journal of Law and Public Policy, and earned a B.A. from the University of Minnesota-Morris.

Elisebeth Collins Cook, Member, Privacy and Civil Liberties Oversight Board

Elisebeth Cook has served as a Member of the Privacy and Civil Liberties Oversight Board since 2012. She is also a counsel at Wilmer Hale. Previously, Ms. Cook served as the Republican Chief Counsel, Supreme Court Nominations, for the Committee on the Judiciary in the United States Senate. She also served as Assistant Attorney General for Legal Policy, United States Department of Justice. At the Department, she spearheaded initiatives and provided advice relating to national security, judicial nominations, DOJ regulations, civil

justice, civil rights, violent crime and other issues. Ms. Cook was a clerk to the Honorable Laurence H. Silberman of the United States Court of Appeals for the District of Columbia, and to the Honorable Lee H. Rosenthal of the United States District Court for the Southern District of Texas. She holds a B.A. from the University of Chicago and a J.D. from Harvard Law School.

James X. Dempsey, Member, Privacy and Civil Liberties Oversight Board

James Dempsey has served as a Member of the Privacy and Civil Liberties Oversight Board since 2012. He is also Vice President for Public Policy at the Center for Democracy & Technology (CDT), a non-profit public policy organization focused on privacy, national security, government surveillance, and other issues affecting the future of the Internet. Mr. Dempsey joined CDT in 1997, holding senior roles in the organization, including Executive Director (2003-2005) and head of CDT's West Coast office in San Francisco, CA. Prior to joining CDT, he served as Deputy Director of the non-profit Center for National Security Studies and Special Counsel to the National Security Archive. From 1985 to 1995, Mr. Dempsey was Assistant Counsel to the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights. From 1980 to 1984, he was an associate at Arnold & Porter, LLP. Mr. Dempsey clerked for Judge Robert Braucher of the Massachusetts Supreme Judicial Court. He has been a member of several bodies addressing privacy and national security issues, including the Markle Foundation Task Force on National Security in the Information Age, the Bill of Rights Defense Committee advisory board, the Industry Advisory Board for the National Counter-Terrorism Center, and the Transportation Security Administration's Secure Flight Working Group, among others. He holds a B.A. from Yale University and a J.D. from Harvard Law School.

Judge Patricia M. Wald, Member, Privacy and Civil Liberties Oversight Board

Patricia M. Wald has served as a Member of the Privacy and Civil Liberties Oversight Board since 2012. She served for twenty years on the U.S. Court of Appeals for the District of Columbia, from 1979 to 1999, including five years as Chief Judge. Since that time, she has served in various capacities including as a Judge on the International Criminal Tribunal for the former Yugoslavia and a Member on the President's Commission on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction. Prior to joining the U.S. Court of Appeals for the District Court of Columbia, Judge Wald was the Assistant Attorney General for Legislative Affairs at the Department of Justice. She also previously worked as an attorney at the Mental Health Law Project, the Center for Law and Social Policy, the Neighborhood Legal Services Program, the Office of Criminal Justice at the Department of Justice, and co-director of the Ford Foundation Drug Abuse Research Project. Judge Wald is a member of the American Law Institute and the American Philosophical Society, and serves on the Open Society Institute's Justice Initiative Board. Since July 2010, Judge Wald has been a member of the Council of the Administrative Conference of the United States. Judge Wald clerked for the Honorable Jerome Frank on the U.S. Court of Appeals for the Second Circuit, and received her B.A. from the Connecticut College for Women and her J.D. from Yale Law School.

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR DAVID MEDINE

Senator Grassley's Questions for the Record from

Senate Committee on the Judiciary

"The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court"

February 12, 2014

Questions for Chairman David Medine

1. Resources for Minority PCLOB Members

In a separate statement included in the PCLOB's Report, Ms. Cook wrote that "the decision of three Members of the Board to allocate the entirety of the permanent staff's time to the drafting of the Board Report, while simultaneously drafting and refining that Report until it went to the printer, has made a comparably voluminous response impossible."

Ms. Cook's statement makes it seem as though the Minority members of the Board weren't provided adequate resources to do their jobs. Please describe the process by which staffing and resources of the PCLOB were allocated during its review of the Section 215 program, and the results of that process (i.e., what staffing and resources were available to each member of the PCLOB). Going forward, what changes, if any, do you anticipate making to reallocate staffing and resources more equitably?

2. Hiring of the PCLOB's Executive Director

As of July 9, 2013, Sharon Bradford Franklin was senior counsel to the Constitution Project, a non-profit think tank. On that date, she appeared before the PCLOB and submitted a statement of that organization for the record. The statement reflected the Constitution Project's view that the program likely violates both the statute and the Constitution. Ms. Bradford Franklin also expressed the view that the "existing law does not authorize the bulk collection of telephone metadata." Just over a week later, on July 17, the PCLOB announced her hiring as Executive Director.

a. On what date did Ms. Bradford Franklin apply for the position of Executive Director? On what date was she offered the position? In the interests of transparency, if such an application or offer was outstanding at the time of her testimony before the PCLOB, did you consider disclosing this to the public? Why or why not?

b. Given Ms. Bradford Franklin's strong, pre-existing views concerning the legality of the Section 215 program, how can she be an effective, objective Executive Director for all members of the PCLOB, even those Members with whom she may disagree?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR RACHEL BRAND

Questions for Rachel Brand

3. Resources for Minority PCLOB Members

Please describe the staffing and resources available to you during the process of producing the Report, as compared to the other members of the PCLOB. Going forward, do you believe a reallocation of staffing and resources is necessary to ensure that each member of the PCLOB is treated equitably?

4. The PCLOB's Constitutional Analysis in the Report

The Board concluded unanimously that the bulk metadata program is constitutional. But you did not join the extended analysis of this question that is contained in the report. Did you find this a difficult or close constitutional question? Can you explain why you didn't join the analysis of the three other members of the Board?

5. Proposal for a FISC Advocate

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

b. The PCLOB also opines that the FISC already has the authority to create a pool of special advocates to provide it legal or technical guidance, without any need for congressional action. What is the legal basis for the FISC's authority to do so?

c. The PCLOB also recommends that the opportunities for appellate review of FISC decisions be expanded. One of the approaches suggested would permit the advocate to seek appellate review of FISC decisions. However, if the advocate that is created does not have its own independent standing, do you have any concerns that once the FISC issues a ruling in favor of the government, there would be no "case or controversy" remaining that could be addressed by an Article III appellate court? If so, how would the PCLOB's proposal resolve these concerns?

6. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR ELISEBETH COLLINS COOK

Questions for Elisebeth Collins Cook

7. Resources for Minority PCLOB Members

Please describe the staffing and resources available to you during the process of producing the Report, as compared to the other members of the PCLOB. Going forward, do you believe a reallocation of staffing and resources is necessary to ensure that each member of the PCLOB is treated equitably?

8. Lawfulness of the Section 215 Program

You disagreed with the Board's analysis and conclusion that the bulk metadata program isn't authorized under Section 215. Can you explain why you disagree with the Board's analysis and conclusion on this point, and why you believe that the program is lawful?

9. Disagreement with the PCLOB's Policy Recommendation to Terminate the Metadata Program

You also disagreed with the Board's conclusion that the program should be terminated as a policy matter because the program's risks outweighed its benefits. Can you explain in more detail why you disagree with the Board's policy analysis and conclusion that the program should be terminated, and why you believe it's worth preserving?

10. Proposal for a FISC Advocate

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

b. The PCLOB also opines that the FISC already has the authority to create a pool of special advocates to provide it legal or technical guidance, without any need for congressional action. What is the legal basis for the FISC's authority to do so?

c. The PCLOB also recommends that the opportunities for appellate review of FISC decisions be expanded. One of the approaches suggested would permit the advocate to seek appellate review of FISC decisions. However, if the advocate that is created does not have its own independent standing, do you have any concerns that once the FISC issues a ruling in favor of the government, there would be no "case or controversy" remaining that could be addressed by an Article III appellate court? If so, how would the PCLOB's proposal resolve these concerns?

11. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR CHAIRMAN DAVID MEDINE, JAMES DEMPSEY, AND JUDGE PATRICIA WALD

Questions for Chairman David Medine, James Dempsey and Judge Patricia Wald

12. Proposal for a FISC Advocate (part (a) is directed to Mr. Dempsey and Judge Wald only)

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

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13. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

14. The PCLOB's Conclusion that the Section 215 Metadata Program Is Unlawful

Do you believe that reasonable people can differ with your conclusion that the Section 215 metadata program is unlawful under the statute? If not, how do you account for the opposing views of the Justice Department in this and the prior Administration, the various federal judges who have considered the issue, and the views of your fellow Board members?

RESPONSES OF DAVID MEDINE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Senator Grassley's Questions for the Record from

Senate Committee on the Judiciary

"The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court"

February 12, 2014

Questions for Chairman David Medine

1. Resources for Minority PCLOB Members

In a separate statement included in the PCLOB's Report, Ms. Cook wrote that "the decision of three Members of the Board to allocate the entirety of the permanent staff's time to the drafting of the Board Report, while simultaneously drafting and refining that Report until it went to the printer, has made a comparably voluminous response impossible."

Ms. Cook's statement makes it seem as though the Minority members of the Board weren't provided adequate resources to do their jobs. Please describe the process by which staffing and resources of the PCLOB were allocated during its review of the Section 215 program, and the results of that process (i.e., what staffing and resources were available to each member of the PCLOB). Going forward, what changes, if any, do you anticipate making to reallocate staffing and resources more equitably?

Under the Privacy and Civil Liberties Oversight Board's authorizing statute, only the Chairman can hire permanent staff. Thus, when I joined PCLOB as its Chairman in May 2013, I was faced with an agency with no permanent employees and a staff comprised only of two detailees from other federal agencies. A short time later, thirteen United States Senators and the President asked the Board to conduct a study of the Section 215 and 702 programs. Thus, the agency was faced with the dual task of staffing up and conducting a study of two complex intelligence programs. The agency was also operating with a budget of under $1 million annually, constraining the ability to hire staff. A further staffing constraint was the need to hire individuals who already possessed Top Secret/SCI clearances, as the Board could not afford to wait many months for new hires to obtain the necessary clearances given the pressing need to study the two programs it was tasked to examine. In this context, the Board identified an attorney just completing a judicial clerkship who had obtained a TS/SCI clearance for his work on the court. During this time frame, the Board also hired an Executive Director, who had also previously acquired the needed clearance while working in the private sector, and who was able to spend much of her time on preparation of the Board's report. I personally made substantial efforts to identify and hire additional staff, as did other Members of the Board, and all of the Board members reviewed resumes and jointly conducted a number of interviews, seeking to recruit a staff that was balanced and experienced in privacy, civil liberties, and national security matters. Unfortunately, the Board was unable to hire any other full-time employees before the report was completed. The two detailees, serving as the Board's Chief Administrative Officer and Chief Legal Officer, were needed to ensure that the PCLOB continued to stand up and function as a new federal agency, including securing IT systems and addressing legal compliance issues such as FOIA and ethics requirements.

Given the considerable staffing limitations, the sole staff attorney was tasked primarily with supporting the drafting of the Board's report, a significant portion of which represented the unanimous views of the Board, including 10 of 12 recommendations. The Board's Executive Director was also tasked with drafting sections of the report for all Board member review and input, as well as arranging for briefings

and meetings with government officials and outside stakeholders conducted jointly by all Board Members. The background papers and drafts prepared by these two staff members were prepared for all Members of the Board. Huge challenges were presented in preparing what was ultimately a 235-page report, among them analyzing a significant quantity of legal materials including classified decisions of the Foreign Intelligence Surveillance Court (FISC), participating in agency and other briefings, reviewing additional written materials both by the government and outside sources, assisting in the planning and conduct of a public hearing in November 2013 and then analyzing the hearing results, preparing an analysis of instances in which the Section 215 program had been asserted to be effective, drafting the report itself (which includes an extensive description of the program and its history, an analysis of pertinent statutory and constitutional questions, a policy discussion weighing the national security benefits of the program against its implications for privacy and civil liberties, and recommendations regarding transparency and the operations of the FISC), and working with the Intelligence Community and the Board's Chief Legal Officer to ensure that an appropriate review of potentially classified information in the report was conducted and feedback on classification was properly addressed.

The Board does not have a Majority and Minority staff. Throughout the process of preparing the Board's report, all members of our very small staff worked for the Board as a whole. Going forward, the Board is now in the process of hiring additional staff. Once this has been accomplished, it is expected that all Board members will benefit from this added assistance in the drafting of Board reports and any separate statements that individual Board members choose to write.

2. Hiring of the PCLOB's Executive Director

As of July 9, 2013, Sharon Bradford Franklin was senior counsel to the Constitution Project, a non-profit think tank. On that date, she appeared before the PCLOB and submitted a statement of that organization for the record. The statement reflected the Constitution Project's view that the program likely violates both the statute and the Constitution. Ms. Bradford Franklin also expressed the view that the "existing law does not authorize the bulk collection of telephone metadata." Just over a week later, on July 17, the PCLOB announced her hiring as Executive Director.

a. On what date did Ms. Bradford Franklin apply for the position of Executive Director?

June 19, 2013.

b. On what date was she offered the position?

A conditional offer was made on July 15, 2013.

c. In the interests of transparency, if such an application or offer was outstanding at the time of her testimony before the PCLOB, did you consider disclosing this to the public?

No offer was outstanding at the time of Ms. Franklin's testimony.

d. Why or why not?

Not applicable.

e. Given Ms. Bradford Franklin's strong, pre-existing views concerning the legality of the Section 215 program, how can she be an effective, objective Executive Director for all members of the PCLOB, even those Members with whom she may disagree?

Ms. Franklin's testimony represented the views of her employer, The Constitution Project. When she joined PCLOB, her task was to support the Board's analysis and conclusions regarding the Section 215 program. The briefings she helped to organize, the document requests she coordinated, and the research she conducted were on behalf of all Members of the Board and were shared with all Members of the Board. As the Executive Director, she has been effective and objective in implementing the Board's conclusions and directions. Among other things, this is reflected in the fact that much of Ms. Franklin's work was on sections of the report that received the unanimous support of the Board.

RESPONSES OF RACHEL BRAND TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Questions for Rachel Brand

3. Resources for Minority PCLOB Members

Please describe the staffing and resources available to you during the process of producing the Report, as compared to the other members of the PCLOB. Going forward, do you believe a reallocation of staffing and resources is necessary to ensure that each member of the PCLOB is treated equitably?

While the section 215 report was being written, the Board had two full-time staff members, both of whom were working on the majority's draft, as well as two employees detailed from other agencies. The fact that we have such a tiny staff and the fact that the majority's report was not final until just before it was sent to the printer meant there were no staff resources available for the drafting of separate Board member statements. Needless to say, this lack of resources was especially challenging for part-time Board members with other professional commitments.

The Board is in the process of hiring a small number of additional staff. In my view, the staff of a multi-member, bipartisan board should represent a range of viewpoints and backgrounds. Based on my conversations with Chairman Medine, I believe he shares this view. I am hopeful that the staff he hires will reflect this. In addition, Chairman Medine has committed that minority members of the Board will have input into hiring decisions and will have access to staff resources once our hiring is complete. Unfortunately, due to the length of time required for hiring government staff and obtaining security clearances, this likely will not happen until after the Board's section 702 report is published.

4. The PCLOB's Constitutional Analysis in the Report

The Board concluded unanimously that the bulk metadata program is constitutional. But you did not join the extended analysis of this question that is contained in the report. Did you find this a difficult or close constitutional question? Can you explain why you didn't join the analysis of the three other members of the Board?

I concurred in the Board's conclusion that under Supreme Court precedent, the 215 program is permissible under the Fourth Amendment. I did not join the Board's description of academic criticisms of existing caselaw or its discussion of how Fourth Amendment jurisprudence might evolve in the future. In my opinion, the Board's correct conclusion that the program is constitutional under existing Fourth Amendment caselaw should have been the end of the constitutional analysis. The Board should not have engaged in the further constitutional tea leaf–reading for several reasons: 1) Government actors are entitled to rely on the law as it is when they take an action. 2) The trajectory of the law in this area is far from clear. *Compare ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. Dec. 27, 2013); *United States v. Moalin*, 2013 WL 6079518 (S.D. Cal. 2013); *In re Application of the FBI for an Order Requiring Production of Tangible Things*, 2013 WL 5307991 (FISA Ct. Aug. 29, 2013); *with Klayman v. Obama*, 2013 WL 6598728 (D.D.C. Dec. 16, 2013). 3) As I explained in my Separate Statement to the Board's report, this Board is not well-suited to predicting it in any event.

5. Proposal for a FISC Advocate

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC

process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

As I noted in my Separate Statement to the Board's report, I believe that the FISC already operates with a high degree of integrity. I believe each of the Senate-confirmed, life-tenured judges serving on that court takes his or her obligations seriously, just as when handling civil and criminal cases in the regular docket of his or her home district court. I do not believe a special advocate is necessary for the FISC to fulfill its statutory role or for it to function as a meaningful check on the government's use of foreign intelligence surveillance tools.

Nevertheless, I do believe that a mechanism for the court to receive third-party views in important cases will bolster public confidence in its integrity. In addition, based on conversations with judges who have served on the FISC, I believe that judges would welcome the opportunity to receive third-party briefing in certain circumstances.

Of course, as I also noted in my Separate Statement, legislation creating a special advocate must get the details right to avoid impairing a system that already works very well. Your question highlights some of the specific elements of the Board's recommendations that are among the most important features of a workable special advocate process: The special advocates should be pulled from a pool of lawyers outside the government to avoid creating an entirely new bureaucracy that would not reside comfortably in any branch of the government. The special advocate should not participate in routine, individual applications to the FISC, but only in novel or exceptionally important proceedings. And the FISC should retain control over the involvement of the special advocate, though Congress could provide standards to guide the court's decision whether to invite the special advocate's views on a particular application.

b. The PCLOB also opines that the FISC already has the authority to create a pool of special advocates to provide it legal or technical guidance, without any need for congressional action. What is the legal basis for the FISC's authority to do so?

The FISC and FISCR have, in a few cases, allowed non-governmental parties to provide views in proceedings before them. Although the extent of the FISC's current authority to call upon third-party technical experts is somewhat uncertain, the Board urged the court to utilize it to the extent permissible. It is not clear to me that the FISC could implement the Board's proposal to create a pool of special advocates without statutory authorization. The Board thus recommended that Congress enact legislation creating the special advocate process.

c. The PCLOB also recommends that the opportunities for appellate review of FISC decisions be expanded. One of the approaches suggested would permit the advocate to seek appellate review of FISC decisions. However, if the advocate that is created does not have its own independent standing, do you have any concerns that once the FISC issues a ruling in favor of the government, there would be no "case or controversy" remaining that could be addressed by an Article III appellate court? If so, how would the PCLOB's proposal resolve these concerns?

Any legislation creating a FISC special advocate will need to grapple with the difficult constitutional question you raise. One of the important features of any special advocate process, in my opinion, will be that the special advocate not be given procedural "rights" that would purport to require a court to hear an appeal that did not satisfy Article III's requirements. One possible way to facilitate further judicial review of an important statutory or constitutional question without violating Article III's requirements would be to allow the FISC, in its discretion, to certify an appeal to the FISCR. This could be modeled on the existing federal statute that allows federal courts to certify questions to a higher court under certain circumstances. The Board recommended that the special advocate be permitted to suggest to the FISC that it certify such an appeal. In my opinion, it is important that the court retain the ultimate decision whether to certify an appeal.

6. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

Creating a third party to hold the data would create more questions than it would answer. I explained in my Separate Statement to the Board's report that this option would make sense only if it both preserved the effectiveness of the program and ameliorated privacy concerns. I do not believe it would do either. In addition, it would raise a host of legal and policy questions, including the ones referenced in your question. Who would this third party be? To whom would it be accountable? Would it be a private party, or would it be governmental or quasi-governmental? If it were private, would its activities constitute state action, and would there be any constitutional limitations on its actions? If governmental, how would that ameliorate privacy concerns? Would the data held by this party be obtainable through subpoenas in civil or criminal proceedings? How would the data be secured? And so on. As I said in my Separate Statement, it would be wiser to leave the program with the government than to transfer it to a third party.

RESPONSES OF ELISEBETH COLLINS COOK TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Questions for Elisebeth Collins Cook

7. Resources for Minority PCLOB Members

Please describe the staffing and resources available to you during the process of producing the Report, as compared to the other members of the PCLOB. Going forward, do you believe a reallocation of staffing and resources is necessary to ensure that each member of the PCLOB is treated equitably?

As we have publicly discussed, PCLOB has very limited staff resources, although we are in the process of hiring additional staff. During the process of drafting the section 215 report, those limited full-time staff resources were dedicated to the majority report, which made it a significant challenge to draft a comprehensive separate statement that responded to each of the points in the Board's two-hundred-plus-page report as to which there was disagreement. Going forward, I expect that as we add staff resources, those resources will be made available to any minority views in an equitable fashion to facilitate a meaningful explanation of and dialogue between differing views.

8. Lawfulness of the Section 215 Program

You disagreed with the Board's analysis and conclusion that the bulk metadata program isn't authorized under Section 215. Can you explain why you disagree with the Board's analysis and conclusion on this point, and why you believe that the program is lawful?

I believe that the government's interpretation of Section 215, which has been accepted by every federal judge who has considered the question, is a reasonable one. Moreover, I found the majority's legal analysis to be both unpersuasive and incomplete in several respects. Fundamentally, the majority has identified numerous theoretical restrictions on the scope of the section 215 statutory authority, none of which appears in the statute itself.

For example, based on a strained analysis of phrases such as "made available to," "obtained" by, and "received by," the majority concludes that section 215 prohibits the *production* of documents to the NSA as opposed to the FBI. In reaching this conclusion, the majority never mentions, much less explains, the repeated use in section 215 of the term of art "production." Where that phrase appears in the statute, it is not tied to any requirement that production be made to the FBI, as opposed more generally to the government. The majority's legal analysis thus appears to be inconsistent with the plain language of the statute, and imports a statutory prohibition on production to the NSA out of nothing that the text would appear to support.

The majority also concludes that the section 215 program is inconsistent with the Electronic Communications Privacy Act based on its reading of the statutory phrase in section 215 "*any* tangible thing" (emphasis added) as "any tangible thing *except* phone records." It accomplishes this linguistic transformation by importing a statutory restriction out of context from a completely different title of the code. In addition to lacking a statutory basis, this approach is inconsistent with the legislative history of the FISA business records provision, which in 2001 (via section 215 of the USA PATRIOT Act) was amended to eliminate a categorical approach to the types of records that could be obtained.

Finally, the majority expresses discomfort with the government's view that the term "relevance" may have a broader meaning in the FISA context than in the context of civil discovery, an administrative subpoena, or a grand jury subpoena. However, the concept of relevance has always involved a contextual inquiry. Given that the national security investigations we see today are unprecedented in their scope, I am neither surprised nor uncomfortable to see that the scope of relevance in the FISA context is also unprecedented.

9. Disagreement with the PCLOB's Policy Recommendation to Terminate the Metadata Program

You also disagreed with the Board's conclusion that the program should be terminated as a policy matter because the program's risks outweighed its benefits. Can you explain in more detail why you disagree with the Board's policy analysis and conclusion that the program should be terminated, and why you believe it's worth preserving?

I believe that the section 215 program is fully authorized by statute and consistent with the Constitution; the question therefore becomes whether, as a policy matter, the program's risks outweigh its benefits. I believe the program is worth preserving unless and until an adequate substitute can be identified. Moreover, I did not agree with the majority's assessment of the value or potential risks of the program, or even with the methodology it used to make that assessment.

First, as set forth in my separate statement, I believe the section 215 program has value. It allows investigators to triage and focus on those who are more likely to be doing harm to or in the United States; to more fully understand our adversaries in a relatively nimble way; to verify and reinforce intelligence gathered from other programs or tools; and to provide "peace of mind." I also agree with my colleague Ms. Brand that a proper analysis of a counterterrorism tool must take a longer-term view than that reflected in the majority's analysis. At the end of the day, I believe that the majority engaged in an inherently artificial analysis. It attempts to determine (often many years after the fact) whether the section 215 program was the sole necessary tool in a particular investigation, an often impossible inquiry for investigators to answer after the fact. And where the section 215 program was shown to have been useful, the majority posits whether in some counterfactual universe a different tool could have been used instead, thereby discounting those circumstances in which the program did demonstrate its value. Second, as I noted in my separate statement, the majority's conclusions as to the potential risks of the section 215 program were based on a program that simply does not exist. As such, I weighed the potential risks of the program far differently than the majority. Because I believe the program as currently structured has value as a counterterrorism tool, and any potential risks to privacy can be mitigated by the interim steps we recommended, I believe it is worth preserving.

10. Proposal for a FISC Advocate

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

In assessing various proposals for changing the Foreign Intelligence Surveillance Court, I weighed several factors. First, I believe that the judges of the FISC take their responsibilities very seriously and have provided meaningful safeguards for our privacy and civil liberties. Second, the day-to-day operations of the FISC are critical to our national security efforts. Third, restructuring the FISC raises numerous constitutional questions. Fourth, any changes to the structure of the FISC risk imposing significant burdens on the operations of that court. But fifth, there was a lack of understanding of and confidence in the operations of the FISC. Weighing those factors, I thought the recommendations above struck the appropriate balance.

b. The PCLOB also opines that the FISC already has the authority to create a pool of special advocates to provide it legal or technical guidance, without any need for congressional action. What is the legal basis for the FISC's authority to do so?

Our report recommended that Congress pass legislation providing that the FISC appoint a pool of special advocates for certain limited purposes. In addition, we recommended that the FISC judges seek technical assistance where appropriate, which appears to be already contemplated in the FISC Rules of Procedure. These Rules currently authorize a FISC judge to "order a party to furnish any information that the Judge deems necessary" and provide that a FISC judge "may take testimony under oath and receive other evidence."

c. The PCLOB also recommends that the opportunities for appellate review of FISC decisions be expanded. One of the approaches suggested would permit the advocate to seek appellate review of FISC decisions. However, if the advocate that is created does not have its own independent standing, do you have any concerns that once the FISC issues a ruling in favor of the government, there would be no "case or controversy" remaining that could be addressed by an Article III appellate court? If so, how would the PCLOB's proposal resolve these concerns?

As we noted in our report, the issue of the Special Advocate does raise potential constitutional concerns, including implicating the case-or-controversy requirement reflected in Article III itself. Our proposal was an attempt to provide an additional potential avenue to appellate review, without creating the right to such an appeal. In making these recommendations, we looked to other judicial structures, such as bankruptcy proceedings and certification pursuant to 18 U.S.C. § 1292(b).

11. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

Although I did not join the report's recommendation that the government terminate the bulk collection program, or its comments as to potential alternatives to the current program, I did note in my separate statement my concern with proposals for a third party to hold the metadata. Moreover, I join my colleagues in posing the following questions as to any such proposal: (1) Is the entity subject to the same privacy and disclosure rules applicable to government agencies? (2) If not, what rules would it be subject to? (3) Under what circumstances could the government access the data held by the third party? (4) Who else could obtain the information held by the third party? (5) What security measures would the third party employ to prevent unauthorized access to the data it holds? (6) Would such security procedures be voluntary or mandated by law? (7) What steps would the third party take to make sure it accurately merged data received from telephone companies? (8) What rules would govern retention of data by the third party? (9) Who would be liable for the third party's conduct? and (10) Who would have compliance and oversight responsibility for the third party?

RESPONSES OF CHAIRMAN DAVID MEDINE, JAMES DEMPSEY, JUDGE PATRICIA WALD TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Questions for Chairman David Medine, James Dempsey and Judge Patricia Wald

12. Proposal for a FISC Advocate (part (a) is directed to Mr. Dempsey and Judge Wald only)

a. The PCLOB's Report recommends the creation of an advocate to participate in the FISC process. More specifically, the report recommends that (1) the advocate should come from a pool of attorneys outside government; (2) the FISA court retain control over whether to call upon the advocate in a given matter; and (3) the advocate should not participate in or review all applications filed by the government. Please describe why you concur in these recommendations.

We concurred in the Board's unanimous Recommendation 3 and accompanying text, which urges Congress to amend FISA to create a pool of "Special Advocates" – private attorneys capable of obtaining security clearances who possess expertise in national security law and privacy and civil liberties – upon whom the FISC judges could call at their discretion to present independent views. The role of the Special Advocate would be to raise legal issues addressing privacy, civil liberties, and civil rights concerns. We anticipate that the FISC judges would call upon Special Advocates in cases involving novel legal questions or applications involving broad surveillance programs, as well as in other cases where the judge concludes it would be helpful to have Special Advocate participation. PCLOB chose this option, rather than an institutionalized agency inside the court or government, based upon interviews and testimony of former FISC judges and the public letter of the current presiding judge to the effect that the vast majority of FISA warrant applications present no novel questions of law or technology, and thus would not benefit from the Special Advocate's participation. The Justice Department has publicly reported that there were a total of 1,856 applications to the FISC for electronic surveillance and/or physical searches during 2012, and former FISC Judge John Bates advised the PCLOB that approximately 95% of FISA applications involve individualized applications that do not raise novel or significant legal issues. For these reasons, we concluded that it was not necessary to have an advocate involved in every application. We also concluded that it was not necessary to create a permanent special advocate position.

We accepted the views of former FISC judges as well as other government witness that FISC judges would welcome and benefit from outside assistance in the much smaller number of cases (estimated at around 50 or fewer annually) involving complex technological or legal issues. As we noted in our discussion, FISC Rule 11 calls for government notification to the presiding FISC judge of such exceptional cases, but we suggested that the judges also should have the option of involving a Special Advocate in other cases at the judge's discretion. Our position was that we should leave this degree of discretion to the judges, but we recommended that the system include reporting requirements as to the number of cases in which the judges availed themselves of the Special Advocate resource where the government has designated the case as raising novel issues or has sought authority to conduct broad surveillance activities. This would facilitate an assessment of the program's operation.

b. The PCLOB also opines that the FISC already has the authority to create a pool of special advocates to provide it legal or technical guidance, without any need for congressional action. What is the legal basis for the FISC's authority to do so?

The FISC itself addressed the question of its authority to appoint attorneys to file briefs and present legal arguments in Judge Mary McLaughlin's Memorandum Opinion and Order of December 18, 2013. *See* Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 13-158 (FISA Ct. Dec. 18, 2013). As Judge McLaughlin explained, "federal district courts possess the inherent authority to appoint *amici curiae* and permit the filing of briefs by them," *id.* at 2, and some courts "have expanded the role of the *amicus curiae* from a purely impartial advisor to more of an adversarial or partisan participant." *Id.* at 3. Judge McLaughlin

made clear that such an attorney would not rise to the level of a party in litigation; nor would the Special Advocate proposed by the Board. As noted in the Board's report, however, it is the Board's unanimous recommendation that "it would be preferable to have a statutory basis" for a Special Advocate system, and therefore the Board's Recommendation 3 urges that Congress amend FISA to establish such a system.

As for technical advice, the FISC Rules of Procedure provide several sources of authority for FISC judges to obtain such guidance. FISC Rule 5(c) provides that a FISC judge "may order a party to furnish any information that the Judge deems necessary." Rule 17(c) states that "the government official providing the factual information in an application or certification" must attend the FISC hearing on the application along with the attorney representing the government, and Rule 17(d) provides that during hearings, FISC judges "may take testimony under oath and receive other evidence." In addition, the PCLOB met privately with Judge John Bates, who served on the FISC from 2006 to February 2013 and as its presiding Judge from 2009 to 2013. Judge Bates advised the Board that he believes the FISC already has such authority to obtain technical advice.

c. The PCLOB also recommends that the opportunities for appellate review of FISC decisions be expanded. One of the approaches suggested would permit the advocate to seek appellate review of FISC decisions. However, if the advocate that is created does not have its own independent standing, do you have any concerns that once the FISC issues a ruling in favor of the government, there would be no "case or controversy" remaining that could be addressed by an Article III appellate court? If so, how would the PCLOB's proposal resolve these concerns?

Our recommendation calls for the Special Advocate who participated in the original proceeding to be allowed to petition the Foreign Intelligence Surveillance Court of Review (FISCR) for review; it does not confer an absolute right to appeal. The FISA Court is a unique type of court created by Congress. Although designated as an Article III court, it lacks several vital aspects of other Article III courts, including proceedings open to the public and access to parties affected by the proceedings. Its surveillance orders differ from those issued by regular courts since ordinary wiretap orders can be ultimately challenged in any subsequent criminal proceeding and also when the required notice is provided to the target, even if there is no prosecution. The Board noted that one approach that would avoid any potential standing issues would be to create a procedure for the FISC to certify its decisions for review to the FISCR. A similar certification process already exists for certain other courts.

13. Proposal for a Third Party to Hold the Metadata

While the PCLOB's Report concludes that the government should terminate the bulk collection program, it also states that the Board "does not recommend creating a third party to hold the data; such an approach would pose difficult questions of liability, accountability, oversight, mission creep, and data security, among others." Please spell out in more detail the problems you see with this approach.

The Board is concerned that having a third party hold bulk telephone records currently held by the NSA would not address the privacy concerns noted in the Board's report but, instead, would create added concerns. The third-party proposal raises a slew of unanswered questions, including the following: (1) Would the entity be subject to privacy and disclosure rules applicable to government agencies? (2) If not, what rules would it be subject to? (3) Under what circumstances could the government access the data held by the third party (4) Who else could obtain the information held by the third party? (5) What security measures would the third party employ to prevent unauthorized access to the data it holds? (6) Would such security procedures be voluntary or mandated by law? (7) What steps would the third party

take to make sure it accurately merged data received from telephone companies? (8) What rules would govern retention of data by the third party? (9) Who would be liable for the third party's conduct? (10) Who would have compliance and oversight responsibility for the third party? These and other questions that would arise suggest that this solution does not address the concerns that have been raised about bulk collection and, in fact, may raise far more concerns.

14. The PCLOB's Conclusion that the Section 215 Metadata Program Is Unlawful

Do you believe that reasonable people can differ with your conclusion that the Section 215 metadata program is unlawful under the statute? If not, how do you account for the opposing views of the Justice Department in this and the prior Administration, the various federal judges who have considered the issue, and the views of your fellow Board members?

The analysis of Section 215 presented in the PCLOB report is the most complete review of whether the program is authorized and consistent with the statute. While numerous federal judges on the FISC have approved and reapproved the program, they did so without the benefit of opposing views, and it was not until 2013 – seven years after the court first approved the program – that a FISC judge, also without the benefit of opposing views, first wrote an opinion setting forth an explanation of how Section 215 authorizes the program. That opinion did not address a number of the significant points raised in our analysis.

We do not believe that the arguments advanced by government attorneys were frivolous or made in bad faith. We do, however, believe that these aggressive legal interpretations are incorrect. Although reasonable people might differ on one or perhaps several of the grounds upon which the PCLOB majority concluded that Section 215 provides no statutory authorization for the NSA's bulk telephony metadata collection program, our analysis identifies four separate grounds under which the program fails to comply with Section 215. In addition, we concluded that the program violates the Electronic Communications Privacy Act (ECPA). All of these separate analyses contributed to our rejection of the statutory basis for the program.

SUBMISSIONS FOR THE RECORD NOT PRINTED DUE TO VOLUMINOUS NATURE, PREVIOUSLY PRINTED BY AN AGENCY OF THE FEDERAL GOVERNMENT OR OTHER CRITERIA DETERMINED BY THE COMMITTEE, LIST

http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf

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