PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court

Separate Statement by Board Member Elisebeth Collins Cook

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I appreciate the thorough work of my colleagues, as well as the staff, and agree with almost all of the recommendations of the Report. I think it bodes well for the future effectiveness of the Board that we are virtually unanimous as to the policy-based recommendations reflected in the Report, and I urge that serious consideration be given to each of recommendations two through eleven. I agree that to date the Executive Branch has failed to demonstrate that the program, as currently designed, justifies its potential risks to privacy, and for that reason I join the recommendations to immediately modify its operation. I also agree with the Board that modifications to the operations of the Foreign Intelligence Surveillance Court ("FISC") and an increased emphasis on transparency are warranted—to the extent such changes are implemented in a way that would not harm our national security efforts.

I must part ways with the Report, however, as to several points. First, although I believe the Section 215 program should be modified, I do not believe it lacks statutory authorization or must be shut down. Second, I do not agree with the Board's constitutional analysis of the program, as it is concerned primarily with potential evolution in the law, and the potential risks from programs that do not exist. Third, I write separately to emphasize that our transparency and FISC recommendations must be implemented in a way that is fully cognizant of their potential impact on national security. Finally, I disagree with the Board's analysis of the efficacy of the program.

Fundamentally, I believe that the Board has erred in its approach to this program, which has been (a) authorized by no fewer than fifteen Article III judges, (b) subject to extensive Executive branch oversight, and (c) appropriately briefed to Congress. The Board has been unanimous that as a policy matter the Program can and should be modified prospectively, including by limiting the analysis the National Security Agency ("NSA") could do with the records and the amount of time NSA could keep the records. The Board has nonetheless engaged in a lengthy and time-consuming retrospective legal analysis of the Program prior to issuing those recommendations. I am concerned that this type of backward-looking analysis, undertaken years after the fact, will impact the willingness and ability of our Intelligence Community to take the proactive, preventative measures that today's threats require. And there is no doubt that should the Intelligence Community fail to take those proactive, preventative measures, it will be blamed in the event of an attack.[1]

[1] By the same token, having undertaken this legal analysis, I do not understand the Board's apparent recommendation that the program it considers unauthorized continue for some interim period of time.

First, based on my own review of the statutory authorization, I conclude that the Section 215 program fits within a permissible reading of the Foreign Intelligence Surveillance Act business records provision.[2] I am not persuaded that the reading of the statute advanced by the government and accepted by the Foreign Intelligence Surveillance Court[3] and Judge Pauley of the United States District Court for the Southern District of New York[4] is the only reading of Section 215, but I am persuaded that it is a reasonable and permissible one. Perhaps as important, I think the program itself represented a good faith effort to subject a potentially controversial program to both judicial and legislative oversight and should be commended. Moreover, the program has been conducted pursuant to extensive safeguards and oversight. When mistakes were discovered (and mistakes will occur at any organization the size of the National Security Agency), they were self-reported to the court and briefed to appropriate congressional committees; corrective measures were implemented, and the program reauthorized by the FISC.[5]

Second, the Board has engaged in an extensive discussion of emerging concepts of Fourth Amendment jurisprudence, none of which I join. Our conclusion that the program does not violate the Fourth Amendment is unanimous, as it should be: *Smith v. Maryland* is the law of the land.[6] The government is entitled to rely on that decision, and the judges of the FISC (and our federal district and circuit courts) are required to do so, unless and until it is reversed. Analysis of whether, when, or how the Supreme Court may revisit that decision and its application is inherently speculative and unnecessary to the Board's report.

Nor do I join the Board's First Amendment analysis (which also informs the balancing/policy section). The First Amendment implications the Board finds compelling arise not from the Section 215 program but from perceived risks from a potential program that does not exist. Although the Board focuses on the "complete" pictures the NSA could paint of each and every American in concluding that it has a significant chilling effect, that is not an accurate description of the Section 215 program. The information the NSA receives *does not include the identity of the subscribers*. As the Board's Report

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2 *See* Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified as amended at 50 U.S.C. § 1861).

3 *See, e.g.*, Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 06-05 (FISA Ct. May 24, 2006); Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 13-109 (FISA Ct. Aug. 29, 2013).

4 *See* Memorandum & Order, *ACLU v. Clapper*, No. 13-3994 (S.D.N.Y. Dec. 27, 2013).

5 *See, e.g.*, Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 09-13 (FISA Ct. Sept. 3, 2009).

6 *Smith v. Maryland*, 442 U.S. 735 (1979).

acknowledges, a number is paired with its subscriber information (in other words, information that would allow the NSA or other agency to identify the person associated with the number) only after a determination is made that there is a reasonable, articulable suspicion that a number queried through the database is associated with one of the terrorist organizations identified in the FISC's orders. For a telephone number reasonably believed to be used by a U.S. person, the reasonable articulable suspicion standard cannot be met solely on the basis of activities protected by the First Amendment. Any investigative steps related to that number can be taken only after a determination that the number associated with its subscriber information has potential counterterrorism value. There is no disagreement that this process is applied to only an extraordinarily small percentage of the numbers in the database, yet the Board Report's balancing/policy and First Amendment analyses proceed as if each and every number of every American is systematically paired with its subscriber information and analyzed in great detail.

In addition, the Board nowhere meaningfully grapples with two key questions. One, what is the *marginal* constitutional and policy impact of the Section 215 program, particularly in view of the Board's assertion that essentially everything the Section 215 program is designed to accomplish can be accomplished through other existing national security and law enforcement tools? Two, is there a difference as a policy and constitutional matter between an order or program that is designed by its very terms to force disclosure of each and every individual's protected activities (such as the disclosure requirement addressed in *NAACP v. Alabama*[7]), and a program such as the one under consideration today, in which information is *collected* about innumerable individuals, but human eyes are laid on less than .0001% of individuals' information? To the Board, there is no apparent constitutional or policy difference between mere collection of information and actually accessing and using that information. I do not agree.

Third, I agree with the Report's recommendations as to transparency (except recommendation twelve) and the operations of the FISC, both sets of which are designed to foster increased confidence in the government's national security efforts. I also understand that each of our recommendations is to be implemented with full consideration of the potential impact on our national security, and without hindering the operations of the FISC. As to transparency, we have always understood that not everything can be publicly discussed, *see, e.g.,* U.S. Const. Art. I § 5, cl. 3. ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy"), as we would like to avoid providing our adversaries with a roadmap to evade detection. The rational alternative, which occurred here, is to brief the relevant committees and members of Congress, seek judicial authorization, and subject a

[7] *NAACP v. Alabama*, 357 U.S. 449 (1958).

program to extensive executive branch oversight. In a representative democracy such as ours, it is simply not the case that a particular use or related understanding of a statutory authorization is illegitimate unless it has been explicitly debated in an open forum.

Finally, I have a different view from the Board as to the efficacy and utility of the Section 215 program. Although the Report purports to consider whether the program might be valuable for reasons other than preventing a specific terrorist attack, the tone and focus of the Report make clear that the Board does believe that to be the most important (and possibly the only) metric. I consider this conclusion to be unduly narrow. Among other things, in today's world of multiple threats, a tool that allows investigators to triage and focus on those who are more likely to be doing harm to or in the United States is both good policy and potentially privacy-protective. Similarly, a tool that allows investigators to more fully understand our adversaries in a relatively nimble way, allows investigators to verify and reinforce intelligence gathered from other programs or tools, and provides "peace of mind," has value.

I would, however, recommend that the NSA and other members of the Intelligence Community develop metrics for assessing the efficacy and value of intelligence programs, particularly in relation to other tools and programs. The natural tendency is to focus on the operation of a given program, without periodic reevaluations of its value or whether it could be implemented in more privacy-protective ways. Moreover, the natural tendency of the government, the media, and the public is to ask whether a particular program has allowed officials to thwart terrorist attacks or save identifiable lives. Periodic assessments would not only encourage the Intelligence Community to continue to explore more privacy-protective alternatives, but also allow the government to explain the relative value of programs in more comprehensive terms. I hope that our Board will have the opportunity to work with the Intelligence Community on such an effort.

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In many ways, the evaluation of this long-running program was the most difficult first test this Board could have faced. Unfortunately, rather than focusing on whether the program strikes the appropriate balance between the necessity for the program and its potential impacts on privacy and civil liberties, and moving immediately to recommend corrections to any imbalance, the Board has taken an extended period of time to analyze (a) statutory questions that are currently being litigated, and (b) somewhat academic questions of how the Fourth Amendment might be applied in the future and the First Amendment implications of programs that do not presently exist. I believe that with

respect to this longstanding program, the highest and best use of our very limited resources[8] is instead found in our unanimous recommendations.

The development of a modified approach to the very difficult questions raised by the government's non-particularized collection of data presents an ideal opportunity for the Board to fulfill its statutory advisory and oversight role. In this regard, I would note that some frequently mentioned alternatives pose numerous potential difficulties in their own right. For example, some have suggested that the NSA could essentially request that the telephone companies run the queries, rather than collecting and retaining records for querying. However, even assuming the companies currently keep the relevant records, there is no guarantee that those records will continue to be retained in the future. By the same token, if another terrorist attack happens, the pressure will be immense to impose data retention requirements on those companies, which would pose separate and perhaps greater privacy concerns. Finally, it is not at all clear how a third party entity to hold the data could be structured in a way that would (a) be an adequate substitute for the Section 215 program and (b) preserve the security of those records, while (c) ameliorating the perceived privacy concerns raised by that program.

There is much to consider in the near future, and I look forward to working with my colleagues on these important issues.

[8] Although many agencies claim to lack adequate resources, the situation of the PCLOB is particularly remarkable. The agency currently has a full-time Chairman, four part-time Members limited to 60 days of work per year, and two permanent staff members. The decision to engage in such an extended discussion of largely hypothetical legal issues was therefore not without practical consequences: the Board has delayed consideration of the 702 program, and has not addressed any of the other issues previously identified by the Board as meriting oversight. Moreover, 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.