**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.

**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.

## 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?

**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.