

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

“Nominations to the Privacy and Civil Liberties Oversight Board”

April 18, 2012

RESPONSES OF RACHEL L. BRAND

Questions for all witnesses

Question No. 1: Career Experience

You have all established very impressive careers with experience working in both public service and private legal practice.

- Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?
- How did you go about analyzing such conflicts?

While working in the U.S. Department of Justice’s Office of Legal Policy, I was involved in developing and considering a variety of counter-terrorism-related policy proposals. As with any public policy proposal, policies related to the government’s counter-terrorism efforts are developed with many considerations in mind, including the potential benefit of the proposal to the fight against terrorism, the effect of the proposal on government resources, and, importantly, its effects on individual rights. National security and civil liberties need not be thought of as being in “conflict.” There is virtually always a way to ensure that the government can obtain the information that it needs to prevent terrorist attacks and bring offenders to justice without unnecessarily intruding upon individual privacy and liberty.

Question No. 2: Privacy Concerns in the Commercial Arena

Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government’s regulation of commerce.

- Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?
- Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?

The Board’s organic statute tasks it with considering a fairly narrow set of privacy issues – those implicated by the government’s counter-terrorism activities. See 42 U.S.C. 2000ee. As such, if confirmed, commercial privacy issues would not be within the Board’s bailiwick. That said, there are some clear differences between privacy concerns arising from

governmental actions and privacy concerns in the purely commercial context. For example, the government's actions implicate constitutional concerns that a commercial party's actions do not. And even beyond constitutional boundaries, the government's coercive power should subject its actions to deeper scrutiny and more rigorous controls, in general, than actions by private parties.

It is often mutually beneficial for private parties and the government to collaborate; each can benefit from understanding the other's concerns. Of course, the Board's work is statutorily limited to reviewing the actions of government agencies engaged in counter-terrorism work. See id.