

Questions for the Record – Responses of James X. Dempsey

Questions from Senator Klobuchar

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?

A: For the past 27 years, my career has focused specifically on the need to balance civil liberties with national security and other priorities.

From 1985-1995, I was Assistant Counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights, working on issues involving national security, law enforcement, government surveillance, death penalty procedures, and government databases and information systems, among others. During that period, one example of balancing civil liberties with national security and law enforcement interests was my work as a Congressional staffer in connection with legislation that became the Communications Assistance for Law Enforcement Act of 1994. In the early 1990s, the FBI brought to the attention of Congress concerns that its ability to carry out electronic surveillance was being eroded by factors associated with the transition to digital technology in the nation's telephone networks, the growing importance of mobile telephone, and other technological developments. The FBI urged Congress to adopt legislation requiring telecommunications service providers to design their networks to ensure that the government could readily tap them. The issue presented a need to balance three interests: the government's interest in being able to expeditiously conduct electronic surveillance in criminal and national security investigations, the interests of industry in being able to continue to innovate and offer new features and services, and the values associated with privacy. Working on behalf of the Chairman of the Subcommittee on Civil and Constitutional Rights, I developed and managed a process of consultation with all affected stakeholders. In this effort, I coordinated with minority counsel for the Subcommittee and with staff for the Senate Judiciary Committee. We met multiple times with officials of the FBI, the telecommunications industry, academic experts in network operations and security, and privacy advocates. We convened a series of consultations bringing the parties together for dialogue, seeking to develop a better understanding of the technology, of law enforcement's needs, and of the implications for innovation and privacy. The resulting legislation, CALEA, passed the House on suspension in 1994.

Another example of my work balancing civil liberties and national security was my participation on the Markle Foundation's Task Force on National Security in the Information Age. After the attacks of 9/11, and after it became clear that the failure to share information contributed to the government's failure to identify and prevent the plot, the Markle Foundation convened a bi-partisan task force of former government officials, business leaders, technologists and civil

liberties advocates. I was privileged to serve first as participant in the task force's discussions, then as a member of the Task Force, and then as member of the Task Force steering group. The Task Force met over the course of 4 years, producing a series of reports that influenced and are reflected in the report of the 9/11 Commission, an executive order issued by President Bush, section 1016 of the ITRPA, the amendments to section 1016 in the 9/11 Commission Act, and ICD 501. In the course of that work, we met with officials of the NCTC, NSC, DHS, and FBI. We drew on the expertise of technology experts. The members of the Task Force engaged in extensive dialogue with each other, achieving the consensus reflected in the Task Force's reports and other work products.

Another example of seeking to balance civil liberties with national security was my work as a member of the TSA's Secure Flight Working Group, convened by the Transportation Security Administration in 2005. The small group of technology and privacy experts met with officials of the TSA responsible for passenger screening, reviewed documents relating to the development of Secure Flight, and engaged in extensive dialogue to develop a consensus report, which recommended a program very similar to that which was ultimately adopted by TSA.

Also in 2005, I was privileged to be a member of a bi-partisan group of former government officials who developed recommendations regarding the expiring provisions of the PATRIOT Act. The group included a retired 4 star general, a former deputy secretary of Homeland Security and a former White House chief of staff, as well as the current Attorney General and the current general counsel of the NCTC. The group met over a period of months and developed consensus recommendations for improving the expiring provisions of the Patriot Act.

More recently, in a related area, I worked on balancing privacy with the important energy management goals associated with the Smart Grid. In 2009, the California Public Utilities Commission commenced a set of proceedings designed to adopt rules to encourage deployment of the Smart Grid. I was intensively engaged in the proceedings. I met with other consumer advocates, with the utilities, and with companies developing Smart Grid technology. Working collaboratively with other privacy advocates, I helped lay out a comprehensive data privacy framework, which the PUC adopted. Based on that framework, I then helped draft a detailed privacy rule intended to provide both the clarity and the flexibility demanded of this still evolving field. Most importantly for purposes of your question, I worked with Pacific Gas & Electric to develop the proposed rule, which was presented to the PUC as a joint privacy-PG&E proposal. After extensive comment and some revisions, the PUC adopted a privacy and security rule based largely on the proposal I had helped craft.

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?

A: This is an important question, although, in my view, privacy concerns in the commercial arena are largely not within the jurisdiction of the PCLOB.

The dynamics of privacy are very different in commercial contexts as opposed to security contexts because the interests in the use of the data are very different. The rules that would be applicable in the commercial context are not the same as those that would be applicable in the commercial context. Nevertheless, the framework for identifying and addressing privacy questions is roughly the same, as the Department of Homeland Security explained in its 2008 Privacy Policy Guidance Memorandum.

I believe that industry, including telecommunications firms, and the government can work together to improve our approach to privacy issues. Already, advertising networks and browser developers are working together with consumer advocates and the government to implement Do Not Track (DNT) technology that makes it easier for users to control online tracking. One forum for cooperation where DNT is being developed is in the World Wide Web Consortium (W3C), where privacy advocates and companies are working together to develop the technical standard that will be used to implement DNT. Another example of industry-government-consumer cooperation is the Botnet Working Group, where industry, government and consumer advocates are working together to develop best practices for ISPs in responding to the botnet infection of their customers' computers, a problem that poses a serious risk to both privacy and security.