Senator Chuck Grassley
Questions for the Record

Patricia M. Wald, Nominee to be a Member of the Privacy and Civil Liberties Oversight Board

(1) Scope of the Board's Authority and Responsibilities of its Members

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

I believe that generally privacy and established civil liberties can be accommodated with national security protections. There is sufficient flexibility in privacy doctrines to adjust to the realities of technological developments and still maintain the essential core of privacy and liberties. However, it will take much attention to detail to arrive at the desirable accommodation.

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

(1) Having served as a judge for 22 years I would, if confirmed, initially view policies impartially to assess whether privacy and civil liberties had been appropriately balanced; however as a Board member I would be free to offer my best advice on accommodating them if I did not think the balance had been reached, something judges do not do.

(2). As a member of the Board, if confirmed, I would not see myself as an advocate for any special group or interest. I would view my role as an even-handed and dispassionate protector of basic liberties and privacy, surveying proposed and existing governmental policies to assure their compliance with those basic liberties. Where I perceived problems, I would discuss them with the other Board members and the relevant agencies to seek a workable solution.

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

Yes, if confirmed, I believe my work on the Board should be impartial. While I do not perceive my role would be to "empathize" with any group, I would foresee listening as a Board to relevant input from advocacy groups on their views and information.

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

No.

(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and

"coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

It is my understanding that the functions of the Privacy Offices at DNI, DHS, DOJ and DOD are to insure that privacy and civil liberties are protected in the policies and procedures of their respective Departments, including reviewing complaints of alleged abuse and insuring that utilized technology does not erode privacy or civil liberties. I understand that at DHS the Offices of Privacy and Civil Liberties are separate, the latter performing FOIA oversight as well. At the DOJ I understand that the Office of Privacy and Civil Liberties provides legal advice on these issues to all Departmental components and specifically oversees compliance with the Privacy Act of 1974, the privacy parts of the E-Government Act of 2002 and the Federal Information Security Management Act and policy directives issued thereunder. It also provides privacy training and prepares privacy reports for the President and Congress. Finally, it is my understanding that the DOD Privacy and Civil Liberties Office oversees privacy and civil liberties protection for members of the Armed Forces and DOD civilian employees and others with whom the DOD interacts.

E. How will the Board's work differ from these offices?

If the Board Members are confirmed and the Board is reconstituted, the Board's principle responsibilities will entail oversight and review of all agencies in the government rather than one and insure coordination among the various privacy offices. It will be independent and not responsible to any agency head. Because the Board members will come from a variety of careers both outside and inside the Government, they will add new viewpoints to the consideration of privacy and civil liberties issues.

F. How will you ensure that you do not duplicate the efforts of these offices?

The Board's specific coordination responsibilities under its statute over agency privacy offices include receiving reports from these privacy offices, making recommendations to them and, as appropriate, coordinating their activities in related matters. One of the Board's main tasks will be to develop early trust relationships with these offices to avoid unnecessary duplication.

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

If an agency disagrees with the Board's input on a particular proposed policy, which falls under 42 U.S. C. 2000ee (d) of the statute, the Board must include a report on that disagreement to the President and Congress. If the President disagrees with the Board on a matter falling within (d)(1) it must report on the matter to Congress.

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

I do not foresee the Board's initiating legislative proposals or conducting active lobbying efforts with Congress. If it appeared that a change in proposed legislation were necessary to protect privacy or civil liberty concerns, I expect the Board would discuss its concerns with the appropriate agencies and officials in the Executive Branch, and would draw the issue to Congress' attention.

(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

Chapter 9 of the Report of the President's Commission on the Intelligence Capabilities of the United States)(2005) of which I was a member sets out a series of recommendations for information sharing to which I subscribe and some of which – though not all- have since been adopted. They include centralized risk management of all intelligence information, including that received by law enforcement agencies, establishment of uniform standards across the agencies for sharing information, which would encompass keeping down any artificial "walls." There do need to be guidelines on what use can be made of the information so transmitted beyond its intelligence value, who has access to it and how long it is retained so as not to circumvent long established rules for investigating law enforcement cases. The Board's enabling statute specifically calls for the Board to review proposed laws, regulations and policies for privacy and civil liberties concerns and certainly it would have to establish the requisite contacts with affected agencies to insure that it was apprised of their needs and given access to proposed policies and guidelines in order to build in the requisite protections from the earliest stage.

C. What is your view of the relationship between law enforcement and intelligence gathering?

Inevitably collection of information primarily for either intelligence or law enforcement purposes will on occasion unearth information that is relevant to both. If law enforcement surfaces intelligence information, that information should go to the appropriate centralized entity for analyzing. However there must be guidelines that take into account law enforcement's legitimate interests in prosecution as well as rights of potential targets of criminal enforcement. Conversely if intelligence gathering surfaces information relevant to domestic crimes some version of the "plain sight" rule should be heeded; in short, care must be taken to insure one side or the other must not be tasked to collect a certain kind of information that will benefit the other or to drive its own investigation beyond the point of its own mission in order to facilitate the other's.

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

I believe information sharing with the proper safeguards for privacy and civil liberties protection must replace the old "need to know" philosophy that undergirded information sharing inside and between intelligence agencies in the past and led to the tragic inability to "connect the dots" culminating in 9/11. As the 2005 Intelligence Commission Report pointed out, new advances in technology (i.e. audit, authentication and access controls) can aid in preserving accountability at every stage of dissemination. The Report quoted the Markle Foundation's conclusion that "without trust, no one will share"; one of the Board's most important tasks early on will be to build that trust with existing agencies that they are engaged with in a mutual effort to accommodate each other's respective mandates. The Board Statue highlights specifically the Board's duty to "continually review" the information sharing practices of the Executive Branch to ensure its adherence to the ISE guidelines issued under 6 U.S.C. 485.

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

The goal of the ISE is to prevent "stove-piping.". Uniform standards for access and dissemination in the intelligence community and across agency lines, overseen by a central unit in DNI and in the Executive Branch, should advance that goal.

(4) <u>Opinions on Patriot Act & FISA Provisions</u>

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain

foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

If confirmed, and required to advise on the reauthorization of the Patriot Act I n its current form I would base my evaluation on the criteria set out in the Board statute: balancing the need for the governmental powers involved versus protection of privacy and civil liberties, as well as the existence of adequate supervision, oversight and guidelines for the use of those powers. I would consider especially any new information that may become available as to the use of national security letters which has been the subject of continued controversy on issues such as the standards for their use, adherence in practice to the guidelines issued for their use, lack of judicial review and the requirement that the recipient of such a letter keep silent about receiving it.

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

Again, if confirmed to be a Member of PCLOB, and asked to advise on the reauthorization of FISA I would use the criteria in the Board Statute. FISA is an essential part of our intelligence and counterintelligence program and most parts of the law have proven workable and balanced. The latest revisions in 2008, however, followed an intense national debate over whether they would permit too broad a swath for incidental wiretapping of U.S. persons. If confirmed, I would wish to obtain information on how the new powers granted by the recent amendments have been used and to what effect as well as any alleged violations of privacy or civil liberties entailed in their use.

E. Please describe when or how you have dealt with the FISA law?

My only direct contact with FISA was in 1978 when it was being considered at the DOJ where I was the Assistant Attorney General for Legislative Affairs and my contacts with Congress at that time in support of its passage. FISA came up only peripherally in cases before the D.C. Circuit while I was a judge. I participated in a FISA panel discussion a few years ago, a transcript of which was submitted in my answers to the main Senate questionnaire. As I recall, the bulk of my remarks were addressed to the issue of DOJ and Congress' intent on the exclusivity of FISA as the source of Executive power in the field.

(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:

A. Do you believe that we are engaged in a war on terrorism?

Whether or not it is called a "war," attacks upon the United States around the world by non-State organizations justify military force responses in many situations.

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

I do not think every action by the Executive Branch need be governed by strict law enforcement models. The U.S. is entitled to protect its security by taking affirmative steps including military action apart from arrest and trial when it has reason to believe a terrorist attack against its territory or personnel is imminent.

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

In cases other than those discussed above, I think a law enforcement model is generally preferable because it allows the subject to demonstrate that a mistake, particularly as to identity or involvement in a terrorist operation, has been made according to time-honored rules of the adversary process (albeit with certain limits to accommodate national security concerns) and because the decision maker will be impartial. Thus the process will be perceived as more neutral both domestically and

abroad. U.S Courts before and after 9/11 have proven their ability to handle these cases efficiently, transparency, and without attendant violence.

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

Military Commissions do have a place in counterterrorism efforts; they are clearly appropriate where the subject has been captured at or near the battlefield. At the same time, there should be sufficient transparency and protection of rights in the process to meet minimum due process standards. Miranda warnings are not necessary in all circumstances surrounding the capture of terrorist suspects, particularly if they are seized on the scene of terrorist episodes. I do think that captured subjects from military operations abroad should have habeas corpus rights after they have been removed from the theatre of war, though I recognize and would abide by Supreme Court rulings which so far have only recognized that right in the case of Guantanamo detainees.

(6) Views on Race and Ethnicity Relating to Terrorism Cases

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

Yes, I do believe in impact related priorities for an investigative agency if pursued in a non-discriminatory way.

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

I do not believe that race, ethnicity or religion need be ignored in individual cases where credible evidence points to their relevance but without such indicia those factors by themselves should not provide the initial justification for targeting or conducting special surveillance of groups or individuals on those bases.

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

Foreign nationals do not have all the same constitutional or statutory rights as U.S. persons to nondiscriminatory treatment. If there is credible evidence that individuals or even members of a special group may pose a national security risk, U.S. officials should be able

to take special precautions to insure that those individuals or group members do not have an opportunity to commit violent acts on our soil. Labeling all persons coming from a particular country high security risks per se, however, so as to justify their exclusion or heightened surveillance, is likely to be counterproductive, as some post-9/11 nationality-based investigative efforts in the U.S. have showed.

(7) <u>Targeted Killing of Anwar Al Awlaki</u>

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

I believe the President has the power as Commander in Chief to authorize the targeting and killing of an American citizen abroad on the basis of reliable information careful deliberation and review to insure that the subject is engaged in a terrorist operation against the United States by a group identified as Al Qaeda or an ally and it is clearly impracticable to arrest or capture him. These appear to be the criteria in use as described by John Brennan, the President's chief counterterrorism adviser.

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

The statute empowers the Board to "advise" the President to insure that privacy and civil liberties are appropriately considered in implementation of his policies. "Declaring" constitutional violations is more appropriately the function of courts.

C. Do you support Attorney General Holder's public statement that due process does not necessarily include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

In my view, due process does not necessarily require judicial process in all matters involving national security. Battlefield screening such as Geneva Convention Article V screening hearings held by the military to eliminate those not involved in the conflict or those that are POWs as opposed to those who cannot qualify as such have been used in most wars before the current Afghanistan conflict. Those field hearings utilize military personnel only but require adequate if minimal due process guarantees. The Supreme Court has held in the *Boumediene* case that Guantanamo detainees require judicial habeas type hearings, as the non-judicial CSRT hearings held by the military at the base did not provide adequate due process guarantees. Without knowing any details about the evidentiary foundations for current drone type operations, it is impossible for me to give an opinion as to whether they meet any due process test

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

If the Board determined that targeted killings were a priority area for its consideration, then such a request should be seriously considered. I cannot envision circumstances under which we would be asked to opine on Congress' right to a copy. I am inclined to support the public being informed to the degree consistent with national security on the legal reasoning supporting the policy.

(8) Classified Information

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other

security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

I had security clearances both in my judicial work (1979-1999) and in my work on the President's Intelligence Commission (2004-5) I assume both have lapsed and I have had no occasion to view classified information since 2005.

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

It would seem almost impossible to handle classified information without access to a SCIF whether built or on loan. If confirmed, the Board and Chair will have to give immediate attention to the problem.

C. As a Board, how much time do you expect to spend reviewing classified information?

If confirmed, I expect a considerable amount of time will be spent with classified information depending on the priorities selected by the Board.

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

I along with many others, including former SOD Rumsfeld, have felt that too much material is unnecessarily classified. However, the Board has no authority to make classified information public, although it might make recommendations to the appropriate authorities including the President or Congress that the information be declassified.

(9) Scope of Constitutional Protections

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

The current FISA definition appears a fair and workable one; it is the same one applicable to all intelligence agencies under Executive Order 12333.

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

I am not familiar with the arguments for a broader definition.

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

A broader definition of U.S. persons would obviously place somewhat greater restrictions on intelligence surveillance, but before deciding whether it was warranted I would need to know more specific information about the alleged need for it by way of current risks to law-abiding citizens or residents of the U.S. as well as the seriousness of the impediments it would bring to information collection.

(10) Scope of Authority to File Amicus Briefs

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

I do not believe that the Board has authority to file amicus briefs. There is no apparent grant of "litigating authority" in the Board's statute. If a court were to ask or invite the Board to file an amicus, we would have to consult the Attorney General who might be able to file it on our behalf.

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

Not applicable.

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

Not applicable.

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

Not applicable.

(11) Cybersecurity Legislation

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

I would not "rebuild" the former wall between sharing information collected in criminal investigations and national security investigations.

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

I do not think a wall should exist as it pertains to sharing information between the two types of investigations, but conditions should attach as to the accessibility to, and further dissemination of, such shared information where necessary in the interests of protecting privacy and civil liberties.

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

Yes I do support private networks sharing defined threat/vulnerability information with the government with appropriate privacy restrictions where the information is of a confidential nature and has been given to the private entity with an expectation of privacy. Consideration might be given to requiring FISA-like judicial warrants in the case of contents of such communications (with exceptions for exigent circumstances). There are also serious questions as to whether the sharing should be voluntary or mandatory on the part of the private entities, and if mandatory what kind of enforcement regime should be created.

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

Where content information is credible and relevant to a potential threat or vulnerability, it should be shared but conditions should attach as to the degree if any to which it can be further disseminated outside of the purpose for which it was transmitted. There are arguable Fourth Amendment problems when the government secures personal information from third parties without consent of the individuals and personally identifiable information PII is involved.

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

I believe in the case of PII and communications content (as opposed to "flow" information) minimization or redaction should take place to the greatest feasible degree consistent with the usefulness of the information. Greatest care should be used in allowing crossover use of such private-sourced information for criminal enforcement purposes as it would provide an alternate route to traditional restrictions placed on obtaining personal material in criminal investigations from third party providers to whom it has been given in confidentiality.

4. How long should any shared information be retained?

Retention limits of the material so provided should be clearly set and enforced. Obviously retention times would vary with the nature of the material but where the threat has been resolved the material, especially if it includes contents of communications or PII should in the absence of compelling reasons be promptly destroyed.

(12) United States v. Jones

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring),* Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these

attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

I understand Justice Sotomayor's concurrence to mean that extended GPS monitoring does impinge on the expectation of privacy. As Judge Douglas Ginsburg's *Jones* opinion in the D.C. Circuit explained; this kind of detailed surveillance of the subject's actions and movements over an extended time is both qualitatively and quantitatively different from the traditional police technique of a police car or undercover agent following a subject. It reveals a "way of life" rather than a "slice of life" that an ordinary person would not expect to be revealed, without probable cause to believe he had committed a crime.

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

The Fourth Amendment speaks in terms of an "unreasonable search "and the extended duration of an intensive search like a GPS can enter into the reasonableness decision. I would not think material initially seized lawfully would lose its status because the subsequent search lasted too long

(13) Agency Authority

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

The statute tells the Board to review the actions of both the President and Vice President and their Offices insofar as they implicate the subject matter of our jurisdiction.

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

The Board must report to the Congress on its "findings, conclusions and recommendations" resulting from its advice and oversight functions which would include any disagreement with the President or other Executive Branch official The statute also requires a similar report of those persons who disregard the Board's objections to the implementation of a proposal on privacy or civil liberties grounds.

D. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

The Board's authority and independence is in many ways similar to that of other independent agencies not in the Executive Branch such as the Securities and Exchange Commission. The Board however does not have its own enforcement authority such as the SEC or FTC has to initiate civil suits or enforce subpoenas. Article II of the Constitution reposes the Executive Power in the President; thus he would have power to assure that the Board conducted its activities in conformity with certain Executive Branch administrative requirements, unless the Board's statute indicated otherwise. The statute provides for the President's appointive power and presumably his removal power for cause would also be in line with that of other independent agencies pursuant to Myers v United States, though removal power is not explicit in the Board statute. As an independent agency the Board may take and report substantive positions that are not subject to control by the President. The Board statute imposes staffing and compensation requirements that are sometimes but not always in conformity with those governing Executive Department agencies.

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

The Board's recourse in the case of a DOJ official who will not grant requested access to information would be to report the refusal to the Attorney General. The statute says that the head of the agency "shall insure access" to the information. If

denied access by the A/G, the Board can report on the denial in its reports to Congress and the President.

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

The statute does not grant authority to request a subpoena from an Executive Branch component.

(14) Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-

democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

I would not utilize "foreign" sources to evaluate the legality of U.S. efforts to combat terrorism. Were the Board to review the propriety of new proposals not covered by existing law, it might prove useful to look at sources or practices outside the U.S., but that would not involve reliance on foreign or international law as such.