

ANSWERS TO SENATOR KLOBUCHAR'S QUESTIONS FROM PATRICIA WALD

QUESTIONS FOR THE RECORD

From Senator Amy Klobuchar

"Nominations to the Privacy and Civil Liberties Oversight Board"

April 18, 2012

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?*

During my 20 years on the D.C. Circuit I had to rule on many cases in which national security concerns were arguably in tension with civil liberties or privacy interests. The contexts of the cases were different but in general however my procedure was to examine the factual allegations underlying the claim, as well as the defendant's legal and factual justification for their actions; after that to proceed to parse the relevant constitutional or statutory basis for both sides' positions. Of course in the judicial realm, there are governing presumptions, i.e. deference to the lower court or Congress and in some cases to the agency. Nonetheless as my decisions, which are listed in the questionnaire I submitted to the Committee illustrate, the Court often ruled in favor of the claimant or even if not so ruling, remanded for the lower court or agency to establish a more rational framework for making the decision.

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?*

I see differences in the dynamics and considerations in privacy issues between national security and commercial contexts along the following lines. The imperative to assure national security is a predominant one for the national government in the Constitution and in the public mind. Although in regulating under the national security mantle the government must comply with individual rights

including privacy the balancing test gives substantial weight to the government's documented need for the information it seeks.

In the commercial sphere where legislation may be based on the commerce power the constitutional test may be somewhat stricter; there is also the so-called third party doctrine to contend with in commercial cases, a doctrine which is being increasingly questioned (see Justice Sotomayor's concurrence in *US v Jones*). That doctrine says that when a private person enters into a contract with a private entity to allow surveillance or monitor conversations or communications (ie cellphones) the person gives up privacy rights to the use made of the information unless the contract covers it. Of course Congress can intervene to regulate third party contracts but in many cases has not done so. Additionally, private surveillance of buildings, cargos, malls and entertainment places is widespread without regulation as to what use is made of the information obtained. Although some courts have recognized "expectations of privacy" in some parts of public life, e.g. public phone booths, the privacy rights of individuals against private entities is hazy at best. Constitutionally protected rights such as the Fourth Amendment's guarantee against unreasonable searches and seizures do not apply to private entities, so privacy in this sphere may be a legislative responsibility. On the other hand in balancing need against right to privacy, the commercial entity's interest is likely less compelling than in national security cases.

I think one way to facilitate cooperation between private industry and government on national security and privacy issues is to make as transparent as possible the way information will be collected, used, stored, and accessed by both government and industry including transmittal from private industry to government. In that way people will not feel deceived and any objections can be debated in the political process.