

**Senator Chuck Grassley  
Questions for the Record**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**Rachel L. Brand, Elisebeth Collins Cook, James Xavier Dempsey, Patricia M. Wald  
Nominees to be a Member of the Privacy and Civil Liberties Oversight Board**

**RESPONSES OF RACHEL L. BRAND**

**(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?

*It is hard to improve on the notion espoused by the 9/11 Commission that protection of privacy and civil liberties in the counter-terrorism context involves a*

*careful and continual balancing. There will be no civil liberties or privacy to protect if our country is crippled by terrorist attacks. At the same time, our democratic and open society cannot continue to function if security concerns are allowed to override constitutionally protected freedoms. How to preserve that balance is never a simple question and depends on the circumstances. In general, of course, the more intrusive the power the government seeks, the more scrutiny it should receive, both before and after the fact. This is reflected in existing statutes and constitutional jurisprudence and would guide me in providing advice and recommendations if I am confirmed to the Board.*

- 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?
- 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?
- 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?

*Responses to B. through D.:*

*The Board's organic statute gives the Board two primary purposes: to "review and analyze" agency actions after the fact; and to "ensure that liberty concerns are appropriately considered" during the policy development process. 42 U.S.C. 2000ee(c).*

*If confirmed, I intend to provide my independent advice and judgment, not advocate for the views of any person, group, or interest.*

## **(2) Views on Duplication Existing Government Privacy and Civil Liberties Efforts**

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)?

*Pursuant to 50 U.S.C. 403-3d(b), ODNI's Civil Liberties Protection Officer has the following duties:*

*“The Civil Liberties Protection Officer shall—*

- (1) ensure that the protection of civil liberties and privacy is appropriately incorporated in the policies and procedures developed for and implemented by the Office of the Director of National Intelligence and the elements of the intelligence community within the National Intelligence Program;*
- (2) oversee compliance by the Office and the Director of National Intelligence with requirements under the Constitution and all laws, regulations, Executive orders, and implementing guidelines relating to civil liberties and privacy;*
- (3) review and assess complaints and other information indicating possible abuses of civil liberties and privacy in the administration of the programs and operations of the Office and the Director of National Intelligence and, as appropriate, investigate any such complaint or information;*
- (4) ensure that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;*
- (5) ensure that personal information contained in a system of records subject to section 552a of title 5 (popularly referred to as the “Privacy Act”), is handled in full compliance with fair information practices as set out in that section;*
- (6) conduct privacy impact assessments when appropriate or as required by law; and*
- (7) perform such other duties as may be prescribed by the Director of National Intelligence or specified by law.”*

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

*DHS has two separate offices: one for privacy and one for civil rights and civil liberties. The chief privacy officer's responsibilities are set forth in section 222 of the Homeland Security Act of 2002 (6 U.S.C. 142(a)). They include:*

- “(1) assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;*
- (2) assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974;*
- (3) evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government;*
- (4) conducting a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected;*
- (5) coordinating with the Officer for Civil Rights and Civil Liberties to ensure that—*
  - (A) programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner;*
  - and*
  - (B) Congress receives appropriate reports on such programs, policies, and procedures; and*
- (6) preparing a report to Congress on an annual basis on activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters.”*

*DHS's Officer for Civil Rights and Civil Liberties was also established by the Homeland Security Act. See 6 U.S.C. 113(d)(3). Pursuant to 6 U.S.C. 345, the Officer's general responsibilities are as follows, in addition to an annual report to Congress:*

- “1. review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department;*
- 2. make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;*
- 3. assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;*
- 4. oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;*
- 5. coordinate with the Privacy Officer to ensure that—*
  - a. programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and*

- b. Congress receives appropriate reports regarding such programs, policies, and procedures; and,*
6. *investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.”*
- C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

*The Department’s Office of Privacy and Civil Liberties “provides legal advice and guidance to Departmental components; ensures the Department’s privacy compliance, including compliance with the Privacy Act of 1974, the privacy provisions of both the E-Government Act of 2002 and the Federal Information Security Management Act, as well as administration policy directives issued in furtherance of those Acts; develops and provides Departmental privacy training; assists the CPCLO in developing Departmental privacy policy; prepares privacy-related reporting to the President and Congress; and reviews the information handling practices of the Department to ensure that such practices are consistent with the protection of privacy and civil liberties.” See <http://www.justice.gov/opcl/>.*

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

*According to DOD’s website, the Defense Privacy and Civil Liberties Office’s functions include:*

*“Developing policy, providing program oversight, and serving as the DoD focal point for Defense Privacy matters.*

*Providing day-to-day policy guidance and assistance to the DoD Components in their implementation and execution of their Privacy Programs.*

*Reviewing new and existing DoD policies which impact on the personal privacy of the individual.*

*Reviewing, coordinating, and submitting for publication in the Federal Register Privacy Act system of records notices and Privacy Act rulemaking by the DoD Components.*

*Developing and coordinating Privacy Act computer matching programs within the DoD Components and between the DoD Components and other Federal and State agencies.*

*Providing administrative and operational support to the Defense Privacy Board, the Defense Data Integrity Board, and the Defense Privacy Board Legal Committee.”*

*See [http://dpclo.defense.gov/privacy/About The Office/about the office.html](http://dpclo.defense.gov/privacy/About%20The%20Office/about%20the%20office.html).*

- E. How will the Board's work differ from these offices?
- F. How will you ensure that you do not duplicate the efforts of these offices?

*Responses to E. and F.:*

*To some extent, the relationship between the agency privacy offices and the Board is prescribed by the Board's organic statute. See 42 U.S.C. 2000ee-(d)(3).*

*The Board should not duplicate the work of the existing agency privacy and civil liberties offices. Functioning simply as a redundant level of oversight would not be feasible, given the Board's limited budget and largely part-time membership, and would not be a good use of taxpayer funds.*

*There are a variety of possible approaches the Board could take to fulfill its statutory mandates within the constraints of its size and budget. If confirmed, I will consult with my colleagues on the Board to find the best approach.*

*One approach might be to consider the Board's work to fall into two main categories. First, the Board must carry out certain tasks that the statute specifically requires it to perform. For example, it must submit reports to Congress at least twice a year. See 42 U.S.C. 2000ee(e). Second, to fulfill the Board's more general oversight and advice functions (see 42 U.S.C. 2000ee(d)(1),(2)) the Board might focus on a small number of the most important privacy and civil liberties issues raised by the government's efforts to combat terrorism. On the policy side, the Board might focus only on emerging issues. In the oversight context, the Board might focus on significant or systemic civil liberties violations that come to light, rather than attempting to serve as another Inspector General.*

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?

*The Board, pursuant to its organic statute, may provide advice and recommendations to the President, but the President is not bound to accept them. However, the Board's organic statute does require the Board to periodically submit to Congress reports listing any "proposal reviewed by the Board...that-(i) the Board advised against implementation; and (ii) notwithstanding such advice, actions were taken to implement..." 42 U.S.C. 2000ee(e)(2)(D).*

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

*I do not have any specific plans to recommend legislation if I am confirmed. If confirmed, I will consult with my colleagues on the Board about whether this is appropriate or necessary.*

**(3) Preventing the Rebuilding of the “Wall” Between National Security and Law Enforcement.**

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?”

*I believe this question quotes from another nominee’s responses at our confirmation hearing.*

*In general, however, the fact that the Board’s organic statute lists as one of the Board’s two main purposes to “ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism” suggests that Congress intended the Board to be involved in the policy development process before policies are finalized. How that is done will depend upon the circumstances. Whether it can be accomplished will depend largely on whether the agencies view the Board as a*

*trusted partner that desires to help them fulfill their counter-terrorism missions while also protecting privacy and civil liberties. If confirmed, my goal will be to forge such relationships with the relevant agencies.*

- B. How will you ensure that none of your work contributes to the creation of a new “wall” between law enforcement and intelligence?
- C. What is your view of the relationship between law enforcement and intelligence gathering?
- 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?
- 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.

*Responses to B. through E.:*

*Information sharing is critical to preventing terrorist attacks. The 9/11 Commission described some of the deficiencies in agencies’ information sharing prior to the attacks of September 11, 2001. It took a massive effort throughout the executive branch to address cultural and technological barriers to information sharing, and many changes to the governing legal framework, to get where we are today. The counter-terrorism agencies must continue their efforts to promote information sharing and prevent stovepiping.*

*If confirmed, I will be mindful of the barriers to information sharing that, at least in part, prevented the counter-terrorism agencies from detecting and preventing the terrorist attacks of September 11, 2001. The Board must ensure that its advice and recommendations promote privacy and civil liberties without pushing agencies back to pre-9/11 stovepiping.*

#### **(4) Opinions on Patriot Act & FISA Provisions**

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.

*Responses to A. and B.:*

*The USA PATRIOT Act was a very large piece of legislation touching on a broad array of subject matters. Of the hundreds of sections in the Act, only 16 were originally scheduled to sunset. Of those, all but three were made permanent, with some amendments, in the first reauthorization legislation. The three remaining provisions have been reauthorized by Congress, with additional amendments, several times since then. As I have not had access to classified information since leaving government service, I cannot speak to how the Act's effectiveness has or has not changed in the last few years. However, based upon my experience in the executive branch, I believe that many of the amendments effected by the USA PATRIOT Act have been instrumental in preventing further terrorist attacks on U.S. soil. In addition, many of the amendments to the Act enacted in the reauthorizing bills included additional protections for privacy and civil liberties. If I am confirmed, and if amendments to the Act come before the Board for consideration, I will review them with the benefit of full and timely information, including classified information, and will approach them with an open mind.*

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

*Responses to C. through E.:*

*While working in the Justice Department's Office of Legal Policy, I was involved in various policy questions concerning FISA. Based on that experience, I believe the investigative tools authorized under FISA are critical to ensuring our national security. It is important to remember that the statute includes several levels of pre- and post-operational oversight – including prior judicial approval of surveillance in most circumstances – and other protections for privacy and civil liberties. That said, I am not familiar with every provision of FISA and am unfamiliar with the details of the FISA Amendments Act, which was not enacted during my government service. If I am confirmed, and if amendments to FISA come before the Board for consideration, I will*

*review them with the benefit of full and timely information, including classified information, and will approach them with an open mind.*

**(5) Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism**

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

*There are certain aspects of the government's efforts to counter terrorism that constitute "war" as most people understand that term. Congress authorized the use of military force, and American troops continue to serve abroad under that authorization.*

*There are certain counter-terrorism functions of the executive branch that require application of a law of war framework and others that should be governed by standard law enforcement rules and procedures. Which should apply depends upon which government action is at issue. For example, actions on the battlefield are subject to different rules than those applied when a U.S. Attorney's office brings a prosecution under the material support statutes.*

*Military commissions have had a place in the war on terrorism, as they have been used in the last two Administrations and earlier in our nation's history. I have not had occasion to study legal questions concerning military commissions and am not in a position to opine on them here.*

**(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?
- 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?
- 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?

*All law enforcement agencies constantly engage in triage, placing their limited resources where they can have the most impact. However, those agencies must do so while also observing constitutional and other protections for civil liberties. Basing investigative actions solely on race or ethnicity raises serious constitutional problems, may not be effective as a practical matter, and may in fact be detrimental to law enforcement efforts by, among other things, chilling open communication between communities and law enforcement.*

*With respect to the question of foreign nationals coming into the United States, the government may consider national origin in the immigration and border contexts to a greater extent than it may in many other situations.*

**(7) Targeted Killing of Anwar Al Awlaki**

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?

*The government’s authority to target U.S. citizens abroad is an important and complex question that I have never had occasion to address. That being said, given the wide range of battlefield and other scenarios in which this question might arise, it is hard for me to imagine that it is never lawful for the government to kill an American citizen abroad.*

*With respect to the particular case of Mr. al Awlaki, I do not believe it would be possible to make a legal judgment without knowledge of the particular facts and circumstances of that case, many of which likely are classified.*

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 power to “declare” the President’s acts constitutional or unconstitutional is reserved for the courts. See, e.g., Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). I do not understand this to be the Board’s role.*

- 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?

*As I stated in my confirmation hearing, and as Supreme Court caselaw makes clear, what "process" is "due" as a constitutional matter is heavily dependent upon the circumstances. Under current law, judicial involvement in the use of national security authorities varies. For example, national security letters do not require prior judicial approval (though they can be challenged by the recipient in court), in contrast to FISA's general requirement of prior judicial approval of surveillance.*

- 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?

*Because I do not know whether this question is one that the Board will consider, I cannot predict whether the Board will seek to review the government's legal reasoning. It will not fall to the Board to decide whether other agencies should provide Congress with any written legal reasoning that may have been provided. It may be helpful for Congress to review that reasoning in order to carry out its oversight functions. At the same time, the executive branch may have privilege or security concerns. The legislative and executive branches continually engage in dialogue to ensure that the interests and needs of each are accommodated.*

#### **(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?

*No. I have had national security clearances during various periods of prior federal service.*

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

*Not all classified documents must be held in a SCIF. However, the Board's work will almost certainly require use of a SCIF. Where the Board finds SCIF space is an*

*administrative question for the Chairman, but I would expect the Board to use space in another agency's SCIF if possible.*

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

*I cannot quantify the percentage my time that will be spent reviewing classified information if I am confirmed. However, it is clear that much of the Board's work will require the review of classified information.*

- 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?

*It is illegal to publicly disseminate classified information. The Board will not be in a position to publish classified information obtained from another agency unless it is first declassified by the relevant agency.*

#### **(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?
- 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 be restricted to the traditional statutory definition in FISA?
- C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

*Which constitutional protections are provided to which categories of persons within the borders of the United States is already the subject of a great deal of caselaw that will guide me if I am confirmed and if such questions become relevant to the Board's work.*

*I am not familiar with proposals to broaden FISA's statutory definition of U.S. Person. If I am confirmed, and if such an amendment is presented to the Board for review, I will consider the rationale provided for the change, whether it would truly improve protections for privacy and civil liberties, and how it would impact the effectiveness of the government's counter-terrorism efforts. Changes to definitional provisions of FISA such as this one could have far-reaching operational*

*consequences, some of which might not be immediately obvious, and therefore should receive careful scrutiny.*

**(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?
- 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?
- C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?
- D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

*The Board’s organic statute is silent on the question of amicus briefs. This does not necessarily mean the Board has authority to file amicus briefs, as there are other limitations on which agencies – other than the Department of Justice – may litigate. Whether or not the Board is authorized to file amicus briefs, I do not anticipate filing amicus briefs on behalf of the Board if I am confirmed.*

**(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?
- (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?

*Responses to (1) and (2):*

*I would not support recreating the “wall” discussed by the 9/11 Commission and dismantled by Section 218 of the USA PATRIOT Act.*

(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?
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?
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?
4. How long should any shared information be retained?

*Although I have not dealt with cybersecurity issues in any depth, it is obvious from public sources that cyber attacks are a serious national security threat.*

*In general, information sharing from the private sector to some part of the federal government would appear to be central to a comprehensive response to cyber threats.*

*Which information should be shared, with which agencies it should be shared, what privacy protections should be embedded into the framework, and whether there should be limits on the time that such information may be retained are complex questions, as the various cybersecurity bills pending before Congress reflect. Although I am not familiar with the details of the pending bills, there are undoubtedly many ways to draft cybersecurity legislation that would facilitate sharing with and within the government and ensure that it did not unduly burden individual privacy. Existing national security laws and frameworks provide several models for facilitating intake of information important to national security and sharing of that information within the government while minimizing any imposition on privacy and otherwise protecting civil liberties.*



**(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.
- B. Do you believe the 4<sup>th</sup> Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4<sup>th</sup> Amendment restrictions over time?

*The majority opinion in Jones essentially applied trespass principles to determine whether installation of a GPS device violated the Fourth Amendment. Justice Alito’s opinion concurring in the judgment criticized this approach and instead would have asked whether installation of the GPS device violated reasonable expectations of privacy. I understand the portion of Justice Sotomayor’s concurring opinion quoted in the question to be pointing out that attributes of GPS monitoring besides the length of the monitoring may have an effect on societal expectations of privacy.*

*I do not read the majority opinion in Jones to resolve the question of whether the Fourth Amendment embodies a temporal restriction. It will not fall to the Board to define the limits of the Fourth Amendment – any advice or recommendations I provide on constitutional questions, if confirmed, will reflect the then-current state of Supreme Court caselaw.*

**(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?

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?

*Responses to A. through C.:*

*If confirmed, my first point of reference will be the Board's organic statute. It states, at 42 U.S.C. 2000ee(c), that the "Board shall – (1) analyze and review actions the executive branch takes to protect the Nation against terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties." The executive branch includes the Executive Office of the President and the Vice President (except when the Vice President is acting as President of the Senate). As I noted in my response to question 2(G), the President is not required to accept any advice or recommendations of the Board. However, the Board's organic statute, at 42 U.S.C. 2000ee(e)(2)(D), requires the Board to report to Congress instances when the executive branch implements proposals over the objection of the Board.*

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?

*In the context of this Board, particularly in light of its history, I understand the term "independent agency within the Executive Branch" to simply mean that the Board is not part of any larger federal agency. The Board's authorities and functions are limited to those set forth in its organic statute.*

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?

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?

*Responses to E. and F.:*

*As I read the Board's organic statute, the Board may not request a subpoena for information from executive branch entities. See 42 U.S.C. 2000ee(g)(1)(D) (the Board may "submit a written request to the Attorney General of the United States that the Attorney General require, by subpoena, persons (other than departments, agencies, and elements of the executive branch) to produce any relevant information...") (emphasis added).*

**(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?

*Yes.*

## **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.*