Senator Chuck Grassley
Questions for the Record: Responses of Elisebeth C. Cook

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

(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?

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?

I believe that privacy and civil liberties are often best protected by providing clear, coherent, and rational guidelines, and ensuring that those authorized to act are informed of and trained to those guidelines. The statute authorizing this Board, 42 U.S.C. § 2000ee ("PCLOB statute"), assigns roles to Members of the Board: to provide advice and counsel, and to conduct oversight. If confirmed, I would not view myself as an advocate for any group or interest, and would approach questions with an open mind. There are many individuals I consider to be role models, and each shares one core quality that I seek to emulate: an unwillingness to form opinions or make decisions absent full information about both the threats faced and the potential impact on privacy and civil liberties.

(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)?

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?

The responsibilities and authorities of privacy and civil liberties offices vary by statute and otherwise, including by virtue of the missions of the various departments. 50 U.S.C. § 403-3d(b) (ODNI); 6 U.S.C. § 142(a), 6 U.S.C. § 113(d)(3), 6 U.S.C. § 345 (DHS); http://www.justice.gov/opcl/ (DOJ); http://dpclo.defense.gov/privacy/About_The_Office/about_the_office.html (DOD). For example, DHS, by statute, splits various functions between a privacy office on the one hand, and a civil liberties office on the other. In contrast, DOJ's privacy and civil liberties office was not created by statute. But the general role of these offices and officers is the same: to provide a mechanism for consideration of the impact of their department's actions on privacy and civil liberties. The Board, by contrast, is a creature entirely of statute, designed to work with all "departments, agencies, and elements of the executive branch relating to efforts to protect the Nation from terrorism." 42 U.S.C. § 2000ee(d)(1). The Board shall be provided, by statute, "reports and other information from privacy officers and civil liberties officers," 42 U.S.C. § 2000ee(d)(3)(A), and will work best when it builds on the work of those officers rather than duplicating or impeding it. Similarly, many if not all of the relevant agencies have Inspectors General who do important work in this area that should not be duplicated or impeded. The Board must assign its priorities and design its procedures in such a way as to promote collaboration and prevent 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?

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

The PCLOB statute provides two primary mechanisms for the Board and its Members to inform Congress: reports to specified Committees of Congress submitted not less than semiannually, 42 U.S.C. § 2000ee(e), and testimony before Congress upon request. 42 U.S.C. § 2000ee(d)(4). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f)(1). The PCLOB statute speaks in terms of "providing advice on proposals" and "review[ing] proposed legislation," and directs that "in providing advice on proposals to retain or enhance a particular governmental power, consider whether the department, agency, or element of the executive branch has established-(i) that the need for the power is balanced with the need to protect privacy and civil liberties; (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and (iii) that there are adequate guidelines and oversight to properly confine its use." 42 U.S.C. § 2000ee(d)(1)(D).

(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?

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.

During our confirmation hearing, I agreed that "the wall is properly down, should remain down, that, as you say, it had become perverted. In my view, it served neither clearly national security nor did it really provide adequate or any protection, really, for civil liberties." I further agreed that "we need to keep it down and find the ways other than that wall to protect the interests at stake here." I believe strongly that information sharing is a critical action "taken to protect the Nation from terrorism," and that "stove-piping" can have fatal consequences. Traditional law enforcement can form an integral part of any information sharing environment, as exemplified by the fusion centers and task forces now operating across the country. We can and should share information effectively, while protecting privacy and civil liberties.

(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.

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?

While at the Department of Justice, I viewed the authorities granted by the USA PATRIOT Act to have been effective and necessary to investigators and agents. In 2006, Congress reauthorized the sixteen expiring provisions of the USA PATRIOT Act, all but three of them permanently. At the same time, Congress added significant safeguards and oversight as to the use of the tools, ensuring that these important tools were used in a responsible manner. More recently, the current Administration also supported reauthorization of the expiring provisions. Similarly, while I was at the Department of Justice, I worked on the efforts to modernize FISA through the FISA Amendments Act (and various predecessor versions), and believed such modernization was necessary. However, I have not been in the government for several years, and no longer have access to classified information, so would be unable to opine with the same degree of certainty today.

If confirmed, as directed by the PCLOB statute, "in providing advice on proposals to retain or enhance a particular governmental power, [I would] consider whether the department, agency, or element of the executive branch has established-(i) that the need for the power is balanced with the need to protect privacy and civil liberties; (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and (iii) that there are adequate guidelines and oversight to properly confine its use." 42 U.S.C. § 2000ee(d)(1)(D).

(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?

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 appropriate circumstances for applying the law of war on the one hand, and standard law enforcement models on the other. Similarly, some actions are appropriately assessed as national security or intelligence related. These distinctions are recognized in the law today, such as through Congress' 2001 Authorization for the Use of Military Force ("AUMF"), the availability of Title III surveillance and other criminal-focused tools, and FISA. In some circumstances, it may be lawful and preferable to utilize the traditional law enforcement model and pursue, for example, a terror financing prosecution. In others, it may be lawful and preferable to use national security authorities. In all circumstances, I believe we can and should comply with the Constitution and all applicable laws, including those designed to protect privacy and civil liberties.

I have not closely studied the law related to military commissions, although it is my understanding that they have historically been available and utilized. I could well imagine times when it is impracticable or unnecessary to provide Miranda *warnings to terrorist suspects, such as during the heat of battle. Most military operations abroad traditionally have been undertaken as an exercise of the President's Commander-in-Chief authority, with Congressional authorization such as the AUMF. In this context, the judiciary itself typically declines to review those actions.*

(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?

The use of race, ethnicity, or other protected classes in national security or criminal investigations implicates serious constitutional, policy, and operational concerns. In addition to constitutional and legal restrictions imposed upon the use of protected classes in these circumstances, at the end of the day, investigators and agencies must work both in and with communities to be most effective.

As a general matter, yes, focusing the limited resources of an investigative agency where they are most likely to make an impact is a preferred method for combating terrorism. Nor is it generally viewed as necessary to completely ignore race, religion, or ethnicity as a factor in investigations: for example, certain groups (such as white supremacists) have membership criteria that explicitly encompass race and/or ethnicity. Similarly, to the extent that investigators have a suspect description that includes race or ethnicity, I am not aware of any requirement (constitutional or otherwise) that investigators completely ignore that piece of information. As to individuals entering from high-risk countries, our immigration system consistently (and lawfully) distinguishes amongst individuals by country of origin, such as through the Visa Waiver Program.

(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?

The question as to whether the President has the power to target, and kill, an American citizen based upon due process that does not include judicial process encompasses a very broad range of potential situations, including military actions. It is therefore difficult to say that the

President does not possess that authority in certain circumstances. However, when and under what circumstances that power or authority might be exercised, or what process exclusive of judicial process might be required or advisable, is not a question that I have studied.

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?

By statute, the Board has the authority to advise the President, but does not have the authority to "declare" an action constitutional or unconstitutional. The PCLOB statute provides that as part of its semi-annual report to Congress, the Board must identify "each 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). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f).

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

I agree with Attorney General Holder that due process does not necessarily include judicial process when it comes to national security. Moreover, Congress has made clear that judicial process is not always required; for example, specified agencies may issue National Security Letters without prior judicial process. Similarly, there may be a range of actions taken with respect to non-U.S. persons, or actions on a battlefield, that may not require judicial process. The precise line as to when due process requires judicial process, and what that judicial process might entail, is a fact-intensive fact-specific inquiry.

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 confirmed, I will work with my colleagues to set priorities for our attention in addition to those set by statute. To the extent that we consider the issue you identified above, I would hope to understand the legal reasoning and factual context for any policy developed, and the implementation of that policy. There are strong reasons for publication and dissemination of such legal memoranda; however, any such decision must also take into account the significant

and appropriate justifications against publication and dissemination, including potential operational impacts, deliberative process concerns, and classification.

(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?

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

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

I do not currently hold a security clearance, although I did hold various security clearances during my time at the Department of Justice. It is my understanding that depending on the level of classification, a SCIF is not always necessary to review or hold classified information. However, I would anticipate that the Board would be called upon to review information classified at a level requiring a SCIF, in which case one likely alternative to requesting funds to build a new SCIF would be to share one of the numerous SCIFs in the area. How much classified information we would review could depend on the priorities set by the Board, if and when we are confirmed.

It is unlawful to disclose classified information, and I would not do so.

(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 it 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?

The Supreme Court and other courts have, from time to time, opined on this question (or variants thereof), and should this issue come before the Board, I would familiarize myself with that jurisprudence as a starting point to analyze any proposal to alter the current definition of U.S. Person. That said, designation as a U.S. person has fairly significant legal implications, such as triggering minimization requirements under FISA, which can have practical consequences related to the sharing of information.

(10) <u>Scope of Authority to File Amicus Briefs</u>

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 PCLOB statute does not explicitly grant litigating authority to the Board, and I would not anticipate that the Board would file an amicus brief in a case.

(11) <u>Cybersecurity Legislation</u>

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?

The wall arose from a provision of FISA governing the dissemination of information acquired through FISA, and resulted in dangerously inadequate dissemination and sharing of intelligence. As recognized by the Foreign Intelligence Surveillance Court of Review, Congress removed the statutory basis for the wall, and much work has been done to change the legacy culture of the wall. I would not support recreating the wall. That said, not all information is shared or disseminated identically today, even in the information sharing environment. For

example, there are restrictions on the sharing of information acquired through a grand jury. Information acquired through FISA and relating to U.S. persons is subject to minimization requirements that can impact the collection, retention, and dissemination of that information. There may similarly be logical and appropriate guidelines for the dissemination and retention of information acquired through any new cybersecurity authority, although under no circumstances should the wall be recreated.

(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?

I think it is always legitimate to ask questions about whether government should have access to information and what the government does with that information once the government has it. However, a truly informed opinion as to what information the government should have, how long it should keep it, how it might be used or shared, or what other restrictions might be appropriate, is dependent on a full understanding of the threats we face today. I would seek to develop such a full understanding before offering an opinion as to the questions above.

(12) <u>United States v. Jones</u>

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 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?

As I understand the opinions of United States v. Jones, *132 S. Ct. 945 (2012), the Justices looked to various strands of Fourth Amendment jurisprudence to assess the constitutional implications of GPS monitoring. I understand Justice Sotomayor's statements as to "familial, political, professional, religious and sexual associations," as well as the reference to "longer term GPS monitoring" to be an application of a traditional "reasonable societal expectation of privacy" test. Whether a technique that would not otherwise raise constitutional concerns may implicate those concerns solely by virtue of prolonged or sustained use is an open question.*

(13) <u>Agency Authority</u>

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, <u>after</u> the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

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 PCLOB statute uses the phrase "the President and the departments, agencies and elements of the executive branch," which by its terms encompasses the President, and can be read to encompass the actions of the Executive Office of the President and the Office of the Vice President ("elements of the executive branch"). 42 U.S.C. § 2000ee(d)(1)(C). Similarly, to the extent that the Vice President is acting in his or her capacity as Vice President rather than in his or her capacity as President of the Senate, those actions could also fall within the statutory language. To the extent that the Board disagrees with actions taken by the President, Vice President, or either of their offices, the PCLOB statute provides that as part of its semi-annual report to Congress, the Board must identify "each 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). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f)(1). The term "independent agency within the Executive Branch" is not one that I have studied, but the scope of any agency (be it PCLOB or the SEC) created by statute is defined by its authorizing 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?

The PCLOB statute provides that the "Board is authorized to (A) have access from any department, agency, or element of the executive branch, or any Federal officer or employee of any such department, agency, or element," information "necessary to carry out its responsibilities." 42 U.S.C. § 2000ee(g)(1). In the event a "department, agency, or element" of the executive branch is, "in the judgment of the Board, unreasonably refused or not provided, the Board shall report the circumstances to the head of the department, agency, or element concerned without delay." 42 U.S.C. § 2000ee(g)(4). The statutory authority to "submit a written request to the Attorney General that the Attorney General require, by subpoena," information, is limited to "persons (other than departments, agencies, and elements of the executive branch) to produce…." 42 U.S.C. § 2000ee(g)(1)(D). I would therefore not anticipate that the Board would request a subpoena directed at the Office of the President.

(14) <u>Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues</u>

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: Responses of Elisebeth C. Cook

From Senator Amy Klobuchar

"Nominations to the Privacy and Civil Liberties Oversight Board"

April 18, 2012

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?

During my time at the Department of Justice (2005-09), I had many experiences balancing civil liberties with national security and other priorities. For example, I was involved in the effort that resulted in the Attorney General Guidelines for Domestic FBI Operations, which reflect a balance of civil liberties protections with national security and criminal investigative needs. These guidelines provided an opportunity to provide clear and consistent guidelines across national security and criminal investigations, while at the same time increasing oversight of domestic operations through a combination of approval, notice, and audit requirements.

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?

As an initial matter, the legal framework for private companies to obtain and retain information is different from that applying to government acquisition, retention, and dissemination of information. Moreover, imperatives for which government collects and uses information, such as national security and criminal investigations, may be largely absent for private actors. In the end, industry, including telecommunications firms, and the government can each benefit from clear and consistent frameworks for protecting privacy.