
PRIVACY & CIVIL LIBERTIES OVERSIGHT BOARD

## 2007 REPORT TO CONGRESS



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# I. INTRODUCTION

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which created the Privacy and Civil Liberties Oversight Board (Board), requires that "[n]ot less frequently than annually, the Board shall prepare a report to Congress, unclassified to the greatest extent possible . . . on the Board's major activities during the preceding period."[1] This report discusses the Board's activities from its first meeting on March 14, 2006, at which the Members were sworn in and an Executive Director was appointed, through March 1, 2007. This report contains no classified information.

Unlike other boards and commissions charged with addressing an issue, making recommendations, issuing a report and then disbanding, this Board embodies a permanent commitment to "ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations and executive branch policies related to efforts to protect the Nation against terrorism."[2] As the Federal government works to prevent acts of terror against the Nation, its citizens, and its interests, it must do so in compliance with the law, protective of the rights and liberties guaranteed by the Constitution, and consistent with the values we share as Americans. The Board's statutory mandate and fundamental purpose is to further those objectives.

During its first year, the Board met approximately twice a month. The Board dedicated itself to organization, staffing, and substantive background briefings on significant Executive Branch anti-terrorism programs affecting privacy rights and civil liberties and meeting with interested members of the privacy and civil liberties community. These included meetings with the Director of National Intelligence, and the heads of the National Security Agency, the National Counterterrorism Center, the Federal Bureau of Investigation, and the Terrorist Screening Center as well as the National Security Advisor, the Homeland Security Advisor, the Secretary of Homeland Security, the Attorney General, the White House Chief of Staff, the White House Counsel, and the Information Sharing Environment Program Manager. The Board has been fully briefed at the highest level of classification on the NSA's surveillance programs, the Treasury Department's Terrorist Finance Tracking Program, and the National Counterterrorism Center's National Implementation Plan on the War on Terror. While the Board was unable in its first year to spend as much time on evaluating and providing oversight of programs most affecting privacy rights and civil liberties as it would have liked, as this Report describes in Section VI (The Year Ahead), the Board now has the appropriate foundation to provide the advice and oversight required by IRTPA.

[1] Pub. L. 108-458, §1061(c)(4) (Dec. 17, 2004).

[2] *Id.* § 1061(c)(1)(C).

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In order to stand up its operation during the first year, the Board allocated its resources among three core areas, discussed below, to build a foundation on which to offer substantive advice and oversight. Activities in these areas have helped the Board establish its viability, subject matter expertise, and credibility. The Board unanimously identified substantive accomplishments in these three areas at the outset as necessary prerequisites for long term success and included them in its first annual agenda, adopted in June, 2006. This first report to Congress outlines the Board's activities in these areas:

***Organization, Administration and Process***. The Board understood that, due to its part-time Membership, it had to establish the means and infrastructure necessary to help it accomplish its statutory mission. Toward that end, it has hired a professional staff, reached agreement with the Director of National Intelligence on the scope and logistics of detailing additional staff from within the intelligence community, acquired the necessary security clearances, built out appropriate office space with secured facilities for classified information, and developed a web site for communication with the public. Due to its position within the White House Office, the Board receives additional administrative support from White House staff.

***Education and Outreach.*** The Board has engaged policy officials and experts within the Executive Branch, Congress, the public, and private, non-profit, and academic institutions. It has taken great care and exercised due diligence to become familiar with the departments and agencies responsible for protecting the Nation against terrorism by meeting with senior officials, examining their missions and legal authorities, learning of their specific programs, and reviewing their operational methodologies and privacy and civil liberties training, reporting, and auditing programs. For example, the Board has met personally, among others, with the Attorney General, the Secretary of the Department of Homeland Security, the Director of National Intelligence, the Directors of the National Counterterrorism Center and National Security Agency, the Information Sharing Environment Program Manager, the Undersecretary of the Treasury for Terrorism and Financial Intelligence, and the President's senior staff. Among other non-governmental experts and advocacy groups, it has met with representatives from the American Civil Liberties Union, the Electronic Privacy Information Center, the Center for Democracy and Technology, the Markle Foundation, and the American Conservative Union. It also held its first public forum at Georgetown University on December 5, 2006.

As a part of this education and outreach effort, the Board has made it a priority to work with a new and growing network of Executive Branch homeland security professionals specifically dedicated to consideration of privacy and civil liberties issues. The Board considers one of its fundamental responsibilities fostering a sense of community among these new professional privacy and civil liberties officers and members of the relevant professions that have existed within the Federal government for decades, including attorneys, inspectors general, and relevant program policy officials.

The Board intends to continue providing these offices with the necessary support to enable them better to accomplish their own responsibilities.

***Issue Prioritization***. The Board's statutory authority is broad. The Board has focused on those issues that could provide the most value for the American people, the President, and the Executive Branch. Policies and programs warranting the Board's attention will evolve over time. Identification of these priorities will necessarily change as new initiatives are considered, developed, and implemented. This report outlines the process and consideration undertaken by the Board in developing and reviewing those issues.

With these foundational accomplishments behind it, the Board stands at the beginning of its second year well equipped to further address the substantive issues of its statutory mandate.

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## II. HISTORY AND MISSION

Following the attacks of September 11, 2001, Congress and the President established the National Commission on Terrorist Attacks on the United States (9/11 Commission or Commission), a bipartisan panel charged with investigating the events of 9/11 and offering "recommendations designed to guard against future attacks."[3] As the Commission acknowledged, many of its recommendations "call[ed] for the government to increase its presence in our lives – for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies."[4] However, the Commission also noted that "[t]he choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home."[5] Consequently, the Commission also recommended the creation of "a board within the Executive Branch to oversee . . . the commitment the government makes to defend our civil liberties."[6] In order to implement the Commission's numerous recommendations, Congress passed, and President Bush signed, the Intelligence Reform and Terrorism Prevention Act of 2004.[7] Among other actions – including reshaping the intelligence community under one Director of National Intelligence[8] – IRTPA authorized the creation of the Privacy and Civil Liberties Oversight Board.

IRTPA requires the Board to "ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism."[9] In carrying out this mandate, the Board has two primary tasks. *First*, it must "*advise* the President and the head of any department or agency of the Executive Branch to ensure that privacy and civil liberties are appropriately considered in the development and implementation"[10] of "laws, regulations, and executive branch policies related to efforts to protect the Nation from terrorism."[11] *Second*, it must exercise *oversight* by

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[3] *National Commission on Terrorist Attacks on the United States*, *available at* http://www.9-11commission.gov/about/index.htm (last accessed Nov. 1, 2006).

[4] THE 9/11 COMMISSION REPORT, 393-94 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (last accessed Nov. 1, 2006).

[5] *Id.* at 395.

[6] *Id.*

[7] Pub. L. 108-458 (Dec. 17, 2004).

[8] *Id.* § 1001 *et seq.*

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[9] *Id.* § 1061(c)(3).

[10] *Id.* § 1061(c)(1)(C) (emphasis added).

[11] *Id.* § 1061(c)(1)(B).

"continually review[ing] regulations, executive branch policies, and procedures . . . and other actions by the executive branch related to efforts to protect the Nation from terrorism to ensure that privacy and civil liberties are protected."[12] The statute expressly requires the Board to advise[13] and oversee[14] the creation and implementation of the Information Sharing Environment (ISE).

In order to offer informed advice and oversight, the Board may access "from any department or agency of the executive branch, or any Federal officer or employee of any such department or agency[,] all relevant records, reports, audits, reviews, documents, papers, recommendations, or other relevant material, including classified information consistent with applicable law."[15] And to allow Board Members timely access to classified materials to carry out their mandate, the statute requires "appropriate departments and agencies of the executive branch [to] cooperate with the Board to expeditiously provide Board members and staff with appropriate security clearances."[16] The Board may also demand that persons other than departments, agencies, and elements of the Executive Branch provide "relevant information, documents, reports, answers, records, accounts, papers, and other documentary and testimonial evidence."[17] If a Federal agency, official, or other relevant persons choose not to produce information requested by the Board, the Board may pursue a remedy by notifying the Attorney General or the head of the relevant agency. The Attorney General may then "take such steps as appropriate to ensure compliance" with the Board's request, including issuing subpoenas.[18] Although the Board may have general access to "materials necessary to carry out its responsibilities,"[19] materials may be withheld if "the National Intelligence Director, in consultation with the Attorney General, determines that it is necessary . . . to protect the national security interests of the United States"[20] or if the Attorney General determines that it is necessary to withhold information "to protect sensitive law enforcement or counterterrorism information or ongoing operations."[21]

[12] *Id.* § 1061(c)(2)(A).

[13] *Id.* § 1061(d)(2).

[14] *Id.* 1061(c)(2)(B).

[15] *Id.* § 1061(d)(1)(A).

[16] *Id.* § 1061(h).

[17] *Id.* § 1061(d)(1)(D)(i).

[18] *Id.* § 1061(d)(2)(B).

[19] *Id.* § 1061(d)(1).

[20] *Id.* § 1061(d)(4)(A).

[21] *Id.* § 1061(d)(4)(B).

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As shown in the Board's location, assigned roles, and authority, IRTPA did not create an independent watchdog entity in the nature of an inspector general.[22] Rather, the statute created a Board that operates *within* the Executive Office of the President and ultimately reports to the President. The statute requires the Board to produce an annual report to Congress only "on [its] major activities"[23] – not on all of its internal deliberations and recommendations. The statute expressly places the Board within the Executive Office of the President (EOP), an office whose sole purpose is to support the Executive. Consistent with that placement and with the goal of offering candid advice,[24] the President has located the Board even more closely to him by placing it within the White House Office (WHO). Congress acknowledged this placement by earmarking certain WHO appropriated funds for Board use rather than appropriating funds to a specific EOP entity. As the statute explicitly acknowledges, all five Board Members (like other EOP and WHO employees) serve at the pleasure of the President.[25] By empowering the Board with broad access to records, IRTPA has created a Board that can offer a distinctly independent perspective to the President, along with oversight of executive agencies.

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The Board acts in concert with a robust and developing privacy and civil liberties (PCL) infrastructure that is already operating throughout every major anti-terrorism agency, including the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Office of the Director of National Intelligence (ODNI).[26] In most cases, these PCL offices are headed by officials with direct access to their agency heads. They are primarily staffed by diligent career civil servants who focus on and provide an additional degree of continuity regarding the appropriate consideration of privacy and civil liberties. As discussed below, the Board intends to provide a coordinating role for these PCL offices and will also assist in addressing unique problems that require government-wide coordination or specific White House involvement.[27]

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[22] *See, e.g.*, the Federal Inspector General Act of 1978, 5 U.S.C. Appx § 1 *et seq.*

[23] IRTPA § 1061(c)(4).

[24] Although the statute subjects the Board to the Freedom of Information Act (FOIA), *see id.* § 1061(i)(2), the regular exemptions to FOIA disclosure still apply. *See* 5 U.S.C. § 552(b).

[25] IRTPA § 1061(e)(1)(E) ("The chairman, vice chairman, and other members of the Board shall each serve at the pleasure of the President.").

[26] In IRTPA, Congress expressed its sense "that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer." *Id.* § 1062.

[27] *Infra* Part V.B.2.

IRTPA also sets the qualifications of the Board's Members. The President must appoint as Members "trustworthy and distinguished citizens outside the Federal Government who are qualified on the basis of achievement, experience, and independence."[28] Both the Chairman and Vice Chairman of the Board also require Senate confirmation.[29] To these ends, President Bush appointed the following individuals as Members:

- ***Carol E. Dinkins, Chairman*** – Formerly served as Deputy Attorney General and Assistant Attorney General in charge of the Department of Justice's Environment and Natural Resources Division. She is a partner with Vinson & Elkins, L.L.P. in its Houston, TX office.

- ***Alan Charles Raul, Vice Chairman*** – Former General Counsel of both the U.S. Department of Agriculture and the Office of Management and Budget as well as Associate White House Counsel to President Reagan. He is a noted expert and author on privacy, data protection, and information security. He is a partner in Sidley Austin's Washington, DC office.

- ***Lanny J. Davis*** – Served as Special Counsel to President Bill Clinton and is a noted author and frequent television commentator. He is a partner in Orrick, Herrington and Sutcliffe's Washington, DC office.

- ***Theodore B. Olson*** – Served as U.S. Solicitor General from 2001-2004 and as Assistant Attorney General for the Office of Legal Counsel from 1981-1984. Mr. Olson is one of the Nation's premier appellate and Supreme Court advocates and is a partner in Gibson, Dunn and Crutcher's Washington, DC office.

- ***Francis X. Taylor*** – A retired Brigadier General with the U.S. Air Force and former Commander of the Air Force Office of Special Investigation. He also served as Assistant Secretary of State for Diplomatic Security and U.S. Ambassador at Large for Counterterrorism. He is presently the Chief Security Officer for the General Electric Company.

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On February 17, 2006, the Senate confirmed Chairman Dinkins and Vice Chairman Raul. All five Members were sworn into office and held their first meeting on March 14, 2006. In taking office, the Board effectively took the place of the President's Board on Safeguarding Americans' Civil Liberties (President's Board), which the President created by executive order in 2004.[30] The President's Board was chaired by the

[28] IRTPA § 1061(e)(1)(C).

[29] *Id.* § 1061(e)(1)(B).

[30] *See* EO 13353 (Aug. 27, 2004).

Deputy Attorney General and consisted of twenty-two representatives from the Departments of State, Defense, Justice, Treasury, Health and Human Services, and Homeland Security, the Intelligence Community, and the Office of Management and Budget.[31] Following the enactment of IRPTA and the creation of the Board, the President's Board disbanded itself and transferred its papers to Board staff.

In addition to IRTPA, the Board works within the legal framework that guides all efforts to protect the Nation against terrorism.[32] Consequently, the Board has gathered and familiarized itself with relevant seminal documents and authorities that impact its mission.[33]

[31] The President's Board met as a full group six times and organized itself into six subcommittees. The six subcommittees included Investigative Legal Authorities, Redress Systems, Data Collection and Sharing Standards, Engagement with Arab-American Communities, Public Outreach, and Policies and Procedures.

[32] *See, e.g.*, IRTPA § 1061(d)(1) (allowing the Board to obtain documents subject to the statute's restrictions and "to the extent permitted by law").

[33] This list includes, but is not necessarily limited to: U.S. CONSTITUTION; BILL OF RIGHTS; Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 *et seq.*; *Strengthening the Sharing of Terrorism Information to Protect Americans*, EO 13388, 70 Fed. Reg. 62023 (Oct. 27, 2005); *Strengthening the Sharing of Terrorism Information to Protect Americans*, EO 13356 (Aug. 27, 2004), 69 Fed. Reg. 53599 (Sept. 1, 2004); *Strengthened Management of the Intelligence Community*, EO 13355 (Aug. 27, 2004), 69 Fed. Reg. 53593 (Sept. 1, 2004); *National Counterterrorism Center*, EO 13354 (Aug. 27, 2004), 69 Fed. Reg. 53589 (Sept. 1, 2004); *Establishing the President's Board on Safeguarding Americans' Civil Liberties*, EO 13353 (Aug. 27, 2004), 69 Fed. Reg. 53585 (Sept. 1, 2004); *Conduct of Intelligence Activities*, EO 12333, 46 Fed. Reg. 59941 (1981); *Memoranda from the President to Congress and Executive Departments and Agencies: Guidelines and Requirements in Support of the Information Sharing Environment* (Dec. 16, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051216-10.html (last accessed Jan. 4, 2006); THE 9/11 COMMISSION REPORT; COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION: REPORT TO THE PRESIDENT OF THE UNITED STATES (March 31, 2005).

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## III. ORGANIZATION, ADMINISTRATION AND PROCESS

The Board has established and instituted the means and infrastructure to support it in accomplishing its statutory mission. As mentioned previously, the Board operates within the White House Office, a unit within the Executive Office of the President. Given this placement, the Board follows established White House Office policies in carrying out its administrative and budgetary responsibilities.

### A. Necessary Administrative Actions and Budget

In order to manage its everyday affairs, the Board has hired a full-time staff. As an initial matter, it hired an Executive Director – Mark A. Robbins, who previously served as General Counsel of the U.S. Office of Personnel Management. Shortly thereafter, it hired a Deputy Executive Director and Counsel, Seth M. Wood, and a Staff Assistant, John V. Coghlan. The Board's staff communicates on a daily basis with all Members and regularly reports its activities to the Board. Staff – in conjunction with the Office of Government Ethics[34] and ethics counsel within the White House Counsel's office – have identified and clarified the relevant legal, ethical, and financial rules and guidelines applicable to special government employees,[35] as defined by law. The Members have entered into ethics agreements which ensure that their activities on behalf of clients and employers do not conflict with their service on the Board.

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The Board has also begun the process of securing detailees from other agencies.[36] Then-Director of National Intelligence John Negroponte determined that a detail assignment to the Board for a period of one year will fulfill the "joint duty" requirement for professional advancement within the intelligence community and requested that each of the 16 intelligence agencies reporting to ODNI propose candidates for such a detail assignment.[37] The Board is not responsible for reimbursing host agencies for detailees under the provisions of IRTPA.

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[34] Members and staff have held two formal meetings with the Office of Government Ethics and have sought informal advice as needed.

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[35] Due to their part-time status, Board Members are classified as special government employees. 18 U.S.C. § 202(a) (defining a "special government employee" as one "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days"). In order to determine a Member's employment status, staff has established a process for reporting and recording the time Members spend on Board activity.

[36] IRTPA § 1061(g)(2).

[37] IRTPA also authorizes the Board to hire the services of consultants as necessary.

As a WHO unit, the Board did not have to hire separate staff dedicated to press and communications, legislative affairs, administration, or information technology but instead has utilized the services of the relevant components of the White House Office. The Board's administrative support staff has been integrated into the regular operations of the WHO and attends regularly-scheduled meetings with the White House Office of Management and Administration.

IRTPA requires the Board to adopt rules and procedures for physical, communications, computer, document, personnel, and other security in relation to the work of the Board. As a WHO unit, the Board adopted the existing rules and procedures of the EOP.

Staff has carried out other necessary duties to allow Board Members full access to the potentially classified and sensitive documents necessary to complete their statutory obligations. For example, working with the relevant Executive authorities, Members and staff have obtained Top Secret/SCI clearances. Staff and OA have also constructed appropriate office space[38] to house the Board's operations within the White House complex. This suite includes secure facilities for the review and storage of classified information, as well as secure telephone and fax lines. Office space build out included laying secure communications lines to connect the suite with existing secure lines located at the Winder Building that houses the Office of the United States Trade Representative.

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The Chairman, Vice Chairman, and Board staff were issued passes that allow them general access to the White House complex.

With the assistance of White House administrative staff and the EOP Office of Administration, the Board has developed a working budget for fiscal years 2006 and 2007. In its FY 2006 appropriations bill, Congress specified that "of the funds appropriated [to the White House Office,] $1,500,000 shall be for the Privacy and Civil Liberties Oversight Board."[39] The Board was in existence for only half of FY 2006.

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An estimate of specific line item costs incurred by the Board to date includes the following items:

- $340,000 for full-time staff salaries and benefits
- $60,000 for Member and staff security clearances and background investigations

[38] The Board's office and suite are located at 1724 F St. NW in Washington, DC.

[39] House Rep. No. 109-307 at 78 (Nov. 18, 2005), accompanying passage of Pub. L. 109-115 (Nov. 30, 2005).

- $13,000 for Member travel costs

- $103,000 for Member per-diem payments

As noted above, the Board was not responsible for providing the funds for the significant costs associated with the build out of its office space, including secure facilities for the review and storage of classified documents; the laying of secure communications line under F Street, between the Board's suite and the White House complex; office rent or utilities costs; office information technology costs and support; and costs associated with detailed employees from the Executive Branch, which will account for a significant portion of its staffing needs in the year to come.

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The Board is able to meet its statutory responsibilities under the present budget arrangement and funds available.

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B. Substantive Actions to Fulfill Statutory Mandate

In carrying out its substantive statutory mandates, the Board has formally met twenty-three times in its first year. All but five of these meetings occurred in person and all but two had unanimous attendance. All meetings took place in or around Washington, DC – within the White House complex, at various departments and agencies, and one meeting at Georgetown University. To place the activity of the Board's part-time membership in perspective, the Board has formally met an average of about once every two weeks. Members always remain in near-constant communication with each other and the staff through e-mail and telephone. In the first few months of operation, the Board adopted a number of formative procedures and policies, including issue prioritization, everyday operations, public communications, and analytical methodologies.

As an initial matter, the Board adopted its first annual agenda. The agenda functioned as a business plan by allocating responsibility for tasks among staff and setting expectations regarding how the Board would function. It also served as a substantive agenda by laying out an initial list of issues on which the Board agreed to focus its energies. The Board adopted a communications plan that laid out a strategy for engaging the public through direct means (such as a website and publications in the *Federal Register*) and through media outlets (both traditional and emerging). As part of its direct communication strategy, the Board approved the creation of a web site – www.privacyboard.gov – to discuss the Board's history, mission, and activities and provide the public access to Board Member biographies, Board statements, and other related documents. The web site also serves as a means by which the public may contact

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the Board.

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The Board also developed a series of preliminary processes, procedures, and methods by which it could fulfill its advice and oversight responsibilities to the President and Executive Branch agency heads. Of greatest importance, it agreed upon a methodology for analyzing and evaluating proposed programs. It established both a regular means for Board staff to report their activities to the Members and a means of discussing issues and offering possible actions for the Board to take. It also adopted a set of White House Security Guidelines. These processes and templates are discussed in greater detail in Section V.A.

## IV. OUTREACH AND EDUCATION

The Board moved immediately to establish lines of communication within and outside of the Federal government, to educate itself on relevant issues of interest and concern relating to efforts to protect the Nation against terrorism, and to educate others on its mission and oversight and advisory roles.

### A. The White House and Executive Office of the President

In order to obtain the most complete, real-time access to information regarding proposed and operational anti-terror programs, the Board must establish trust and credibility between itself and the relevant members of the Executive Branch. To that end, the Board has developed a sound, regular, and productive working relationship with the President's most senior advisors tasked with anti-terrorism responsibilities. This relationship has put the Board in a position to integrate itself into the policymaking process and obtain the necessary support from the Administration to offer meaningful advice.

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The Board has met personally with the following principal senior White House officials:

- Chief of Staff Joshua B. Bolten and then-Chief of Staff Andrew Card
- National Security Advisor Stephen J. Hadley
- Homeland Security and Counterterrorism Advisor Frances F. Townsend
- Counsel to the President Fred Fielding and then-Counsel Harriet Miers
- Staff Secretary Raul F. Yanes (and also while he served as General Counsel of the Office of Management and Budget).
- A.B. Culvahouse, Chairman of the Intelligence Oversight Board and member of the President's Foreign Intelligence Advisory Board.

Comment [WHS]: WH Staff opposes use of personal names.

These meetings have allowed the Board to forge strong working relationships with agencies within the Executive Office of the President, including the National Security Council, Homeland Security Council, Office of Management and Budget, Office of the Counsel to the President, and the President's Foreign Intelligence Advisory Board and Intelligence Oversight Board, among others. Additionally, the Board's professional staff meets weekly with an EOP working group which consists of commissioned officer

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representatives from the Office of the White House Chief of Staff, the National Security Council, the Homeland Security Council, the Office of the Counsel to the President, the Office of Legislative Affairs, the Office of Communications, and the Office of Management and Budget.

B. Executive Branch

The Board has also met with senior administration officials throughout the Executive Branch who have responsibilities for developing and implementing war-on-terrorism policies and strategies. These officials include:

- Attorney General Alberto Gonzales
    - Deputy Attorney General Paul McNulty
    - Assistant Attorney General for Legal Policy Rachel Brand
    - Assistant Attorney General for National Security Kenneth L. Wainstein.
    - Acting-Assistant Attorney General for Legal Counsel Stephen G. Bradbury
- The Secretary for Homeland Security Michael Chertoff
- Department of the Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey
    - Assistant Secretary for Intelligence and Analysis Janice B. Gardner
- Then-Director of National Intelligence John Negroponte
    - Then-Principal Deputy DNI (now CIA Director) General Michael Hayden
    - Information Sharing Environment (ISE) Program Manager Ambassador Thomas McNamara
    - ODNI General Counsel Benjamin A. Powell
- FBI Director Robert Mueller

- Director of the National Security Agency Lt. General Keith Alexander
    - Then-National Security Agency Inspector General Joel Brenner
    - Director of Signals Intelligence Directorate James Cusick
    - General Counsel Vito Potenza
- Director of the National Counterterrorism Center Vice Admiral John Scott Redd, USN (Ret.)
    - Deputy Director for Strategic Operational Planning, Vice Admiral Bert Calland
- Then-Director of the Terrorist Screening Center Donna Bucella.

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The Board and its staff have made repeated visits to a number of government facilities to observe how those agencies operate, develop anti-terror policies, and train their employees to protect privacy and civil liberties. On-site visits also tend to promote a high-quality dialogue between Board Members and advisors. Consequently, the Board has personally visited the Department of Justice, the Department of Homeland Security, the National Security Agency, the National Counterterrorism Center, the Terrorist Screening Center, the Federal Bureau of Investigation, and the Department of Defense Counterintelligence Field Activity Office.

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Perhaps most importantly, the Board has established strong working relationships with the developing privacy and civil liberties offices within the government's anti-terror agencies. These offices and officers advance privacy and civil liberties at the ground level and generally have the greatest practical impact on the development and implementation of policies within their respective agencies. The privacy and civil liberties offices with which the Board works most closely include those at the Department of Justice, the Department of Homeland Security, and the Office of the Director of National Intelligence. These officials have likewise developed lines of communication and authority within their organizations' structure.

These relationships allow the Board to encourage the sharing of information and best practices among those offices. The relationships have also allowed the Board to coordinate and offer assistance when the privacy or civil liberties officers encounter problems. The Board has helped and will continue to help coordinate and foster the development of a privacy and civil liberties infrastructure throughout the Executive Branch. This portion of the Report includes a brief summary of the PCL offices' major

activities over the last year and is in addition to the Board's own independent activities described in Part V, *infra*.

- Department of Justice: Like the Board, over the past year the DOJ Privacy and Civil Liberties Office has also begun its early work in earnest. The Violence Against Women and Department of Justice Reauthorization Act of 2005[41] required the Attorney General to appoint a senior official to assume primary responsibility for privacy policy. The Attorney General appointed Jane C. Horvath as the Department's first Chief Privacy and Civil Liberties Officer on February 21, 2006. Placed within the Office of the Deputy Attorney General, the DOJ Privacy Office considers issues relating to the Privacy Act, privacy and civil liberties, and e-government compliance. Among other activities, this office joined DHS in the delegation that represented the United States in negotiations with the European Union regarding the transfer of Passenger Name Record (PNR) information from Europe to the Bureau of Customs and Border Protection. In participating in these negotiations, this delegation helped ensure that all parties adequately considered privacy and civil liberties interests. In conjunction with the ODNI Civil Liberties and Privacy Office, the DOJ Privacy Office also helped draft privacy guidelines governing the ISE. The office has also worked with the Board and other privacy and civil liberties offices to assist in drafting a Memorandum of Understanding that will establish standardized procedures to address complaints regarding air travel watch lists.

- The Office of the Director of National Intelligence: Like the Board, the ODNI Civil Liberties and Privacy Office (CLPO) came into existence with the passage of IRTPA. The statute requires CLPO to ensure that civil liberties and privacy protections are appropriately incorporated into the policies of the ODNI and the intelligence community, oversee compliance by the ODNI with legal requirements relating to civil liberties and privacy, review complaints about potential abuses of privacy and civil liberties in ODNI programs and activities, and ensure that technologies sustain and do not erode privacy. The Director of National Intelligence appointed Alexander W. Joel to lead the CLPO, and Mr. Joel hired a deputy to address privacy issues and another deputy to consider civil liberties concerns. In addition to completing a number of necessary stand-up requirements, the ODNI has, through the work of the CLPO, established internal ODNI policy for Protection of Privacy and Civil Liberties. In addition, the CLPO has identified a senior official at each intelligence agency to serve as the focal point of privacy and civil liberties issues at that agency. Perhaps most importantly, the CLPO co-drafted the privacy protection guidelines that govern the Information Sharing Environment, and is co-chairing the process for ensuring that agencies have sufficient guidance and support to implement the guidelines

[41] Pub. L. 109-162 (Jan. 5, 2006).

**Comment [MAR6]:** Transition sentence added at suggestion of Counsel to address OIRA comments 7 and 8, below.

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**Comment [OIRA7]:** General comment: the report should first and foremost describe the activities and results of the Board and then second how the Board's support encouraged other activities led at other agencies. Suggest deleting as this does not report results of PCLOB as much as it does DOJ's CPO. Alternatively, the connection between how the PCLOB supported DOJ's CPO can be stronger.

**Comment [MAR8]:** Text modified to acknowledge efforts of others in these areas per WH staff concerns.

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effectively and consistently. Moreover, the CLPO has conducted numerous reviews of intelligence community programs and activities, helped shape significant policies and guidelines, and established procedures for community personnel to provide the CLPO with information about possible privacy and civil liberties abuses.

- The Department of Homeland Security: The DHS Privacy Office is headed by Hugo Teufel and is the first statutorily created privacy office[22] within the federal government dedicated to the oversight of privacy protections. As such, Hugo Teufel, as Chief Privacy Officer and Chief FOIA Officer, serves as the primary advisor on privacy matters and, by designation, departmental disclosure matters to the Secretary of DHS. In addition to privacy policy advice, the DHS Privacy Office works (1) to ensure that the use of technologies sustain, and do not erode, privacy protections; (2) to ensure that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices; (3) to evaluate legislative and regulatory proposals involving personal information within federal government; (4) to conduct privacy impact assessments of proposed rules of DHS; (5) to coordinate with the Officer for Civil Rights and Civil Liberties; and (6) to prepare an annual report to Congress on activities of the Department that affect privacy. The Privacy Office is structured into two functional components: privacy and freedom of information. The freedom of information component addresses issues to include FOIA and Privacy Act requests and appeals and FOIA policy and regulations. The privacy component addresses the above statutory and policy-based responsibilities, in a collaborative environment, to include Compliance; International Privacy Policy; Legislative and Regulatory Affairs; and Technology. Much of the Privacy Office work focused on developing a compliance framework for the Privacy Act and E-Government Act. This effort standardized and harmonized privacy compliance concerning Privacy Impact Assessment (PIA) and System of Records Notice (SORN) reporting requirements. Both documents require agencies to complete an analytical template that describes the intended benefits of a particular program or change, the possible privacy concerns or risks generated by such a program or change, and how the agency mitigates privacy risks. Operationally, the Privacy Office provided privacy advice regarding the Secure Flight program, reviewed the implementation of the arrangement to transfer PNR information from air carriers in the European Union to the Bureau of Customs and Border Protection, participated with DOJ and DHS Privacy and Civil Liberties officers in drafting the ISE Privacy Guidelines, and advised DHS on privacy issues concerning data governance and data security.

[22] Pub. L. 107-296, § 222 (Nov. 25, 2002) (codified at 6 U.S.C. § 142).

**Comment [OIRA9]:** Not clear how the PCLOB function supported this section, this appears to be better placed in an appropriate report from the DNI.

**Deleted:** In addition to completing a number of necessary stand-up requirements, CLPO has issued ODNI's Instruction for Protection of Privacy and Civil Liberties and has identified the basic contacts throughout the intelligence community necessary to ensure the protection of privacy and civil liberties. Perhaps most importantly, the CLPO co-drafted the privacy protection guidelines that govern the Information Sharing Environment. It has conducted reviews of potentially

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The DHS Office for Civil Rights and Civil Liberties (CRCL) has a relatively broad responsibility to ensure that DHS programs and activities comply with constitutional, statutory, regulatory, policy, and other requirements related to civil rights and civil liberties. It also must investigate complaints that allege possible abuses of civil rights or civil liberties. The CRCL is led by Daniel W. Sutherland, the Officer for Civil Rights and Civil Liberties. Of specific relevance to the Board, the CRCL has focused a great deal of its efforts on resolving complaints arising from the use of aviation watch lists. Along these same lines, the CRCL has worked with the Board and other privacy officers to develop a standardized procedure – to be embodied in a Memorandum of Understanding – to resolve watch list complaints.

The Departments of State, Treasury, and Defense have also designated officials to act as privacy points of contact for the Board. The Board anticipates and looks forward to building similar working relationships with other privacy and civil liberties offices throughout the Executive Branch.

C. Congress

Board Members and the White House Office of Legislative Affairs have reached out to Senators and Representatives to brief them on the Board's mission, priorities, and activities, as appropriate. The Chairman and Vice Chairman have responded to all Congressional requests for testimony. The Board has also authorized its Executive Director to ensure that appropriate lines of communication and information exist between it and Congress. These Congressional interactions include the following:

- On November 8, 2005, Carol Dinkins and Alan Raul testified at their confirmation hearing before the Senate Judiciary Committee. Prior to their confirmation hearing, they conducted courtesy visits with Senators Richard J. Durbin, Edward M. Kennedy, Arlen Specter, Jeff Sessions, and John Cornyn.

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- On May 4, 2006, the Executive Director met with a bipartisan group of staff from the House Permanent Select Committee on Intelligence.

- On June 6, 2006, Chairman Dinkins and Vice Chairman Raul testified before the House Government Reform Subcommittee on National Security, Emerging Threats, and International Relations.

- On August 10, 2006, the Executive Director met with majority staff from the Senate Committee on Homeland Security and Governmental Affairs.

- On November 3, 2006, the Executive Director met with minority staff from the Senate Judiciary and Senate Homeland Security and Governmental Affairs Committees.

- The Executive Director worked with Senate Judiciary Committee staff regarding certain administrative matters relating to confirmation materials.

- On November 27, 2006, Carol Dinkins, Alan Raul and Lanny Davis briefed bipartisan staff from the Senate Judiciary, Intelligence and Homeland Security Committees.

- On December 13, 2006, the Executive Director met with staff of Representatives Shays, Maloney, and Thompson.

- On December 19, 2006, Member Lanny Davis and the Executive Director met with staff to Senators Lieberman and Durbin.

- On February 8, 2007 the Executive Director met with minority staff of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

- The Board has either corresponded with individual Members of Congress or been the subject of correspondence between Members and the Executive Office of the President on a number of occasions since enactment of the Intelligence Reform and Terrorism Prevention Act of 2004.[43]

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The Board and its activities have been referenced in two Congressional reports: (1) House Permanent Select Committee on Intelligence Oversight Subcommittee's report: *Initial Assessment on the Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004* (July, 2006); and (2) Government Accountability Office report: *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public* (September 2006).

D. Media

The Board works in coordination with the White House Communications and Press offices. On September 10, 2006, Members Lanny Davis and Ted Olson appeared on a Discovery Channel special hosted by Ted Koppel entitled *The Price of Security*. Members of the media were invited to attend the Board's December 5, 2006 public meeting, and Board Members gave numerous interviews following that event. Additionally, media representatives are encouraged to monitor the Board's web page (www.privacyboard.gov) for activities and statements. The Board has been the subject of

[43] The Board and its activities have been referenced in two Congressional reports: (1) House Permanent Select Committee on Intelligence Oversight Subcommittee's report: *Initial Assessment on the Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004* (July, 2006); and (2) Government Accountability Office report: *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public* (September 2006).

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numerous articles nation-wide in the press and on-line. Members believe they have responded to all requests for interviews or comments.

E. Private Sector, Non-profit, Academic, and Advocacy Groups and Experts

The Board has set as a high priority engaging in a productive and ongoing dialogue with privacy, non-profit, and academic organizations within the privacy and civil liberties community. These conversations have helped identify issues important to the community, exchange ideas regarding how to craft anti-terrorism policies and procedures, and establish trust between the Board and the community. For example, the Board has strived to communicate regularly with the co-chairs of the 9/11 Commission, Governor Thomas Kean and Congressman Lee Hamilton.[44] Chairman Dinkins and Vice Chairman Raul met collectively with Governor Kean and Congressman Hamilton and apprised them of the Board's major activities. They have also held individual telephone conferences with Governor Kean and Congressman Hamilton. Following the December telephone conference, Congressman Hamilton requested the Board's executive director to contact him every 60 days with additional updates on the Board's efforts. In addition, the Board's executive director has met with then-State Department Counselor and former Commission executive director Philip D. Zelikow and Commission General Counsel Daniel Marcus. The Board is dedicated to meeting the letter and spirit of the 9/11 Commission's recommendations, consistent with its statutory authority, and looks forward to continued contact with the Commission's co-chairs.

Additionally, the Chairman and Vice Chairman met with representatives from the American Civil Liberties Union and the Center for Democracy and Technology within the first two months of the Board's operation. The Board also has held meetings with: the American Conservative Union; the Center for Strategic and International Studies; the Electronic Privacy Information Center and the Privacy Coalition; the Markle Foundation; Cato Institute; the Heritage Foundation; the Liberty Coalition; and the National Institute of Standards and Technology. Board representatives have appeared at the Progress and Freedom Foundation's Annual Aspen Summit, the U.S. Army Judge Advocate General's School Advanced Intelligence Law Conference, and the Intelink and the Information Sharing Conference and Technology Exposition.

The Board has also appeared before or participated in advisory committees and workshops conducted by DHS (the Data Privacy and Integrity Advisory Committee); ODNI (Privacy Protection Technologies Workshops hosted by ODNI and the Disruptive Technologies Office); DOJ (Intergovernmental Privacy Issues Forum and Global Justice Information Sharing Initiative, Global Advisory Committee); American University (Masters of Public Administration Seminar on Separation of Powers); and National

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[44] As noted previously, the Commission's recommendations led to the Board's creation.

Academies of Science (Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and other National Goals).

On December 5, 2006, Georgetown University's Institute for International Law and Politics hosted the Board's seventeenth meeting, a public forum discussion between the Board, privacy and civil liberties advocacy groups, academicians, and the public. The Board was joined by Alexander W. Joel, Civil Liberties Protection Officer at the Office of the Director of National Intelligence; Jane C. Horvath, Chief Privacy and Civil Liberties Officer at the Department of Justice; and Daniel Sutherland, Officer for Civil Rights and Civil Liberties at the Department of Homeland Security. Panelists included Caroline Fredrickson, Director of the Washington Legislative Office of the American Civil Liberties Union; David Keene, Chairman of the American Conservative Union and Co-chair of the Constitution Project's Liberty and Security Initiative; Marc Rotenberg, Executive Director of the Electronic Privacy Information Center; Michael Ostrolenk, Co-founder and National Director of the Liberty Coalition; Brian Walsh, Senior Legal Research Fellow at the Heritage Foundation; James Dempsey, a member of the Markle Foundation Task Force on National Security in the Information Age; Fred Cate, Distinguished Professor and Director for the Center for Applied Cybersecurity Research at Indiana University; Peter Swire, the C. William O'Neill Professor of Law at Ohio State University and former Chief Counselor for Privacy in the U.S. Office of Management and Budget under President Clinton; Neal K. Katyal, Professor of Law at Georgetown University; and Anthony Clark Arend, Professor of Government and Foreign Service and Director of the Institute for International Law and Politics at Georgetown University.

F. International Forums

As appropriate, the Board intends to participate in international discussions on issues of relevance and interest. For example, Vice Chairman Alan Raul represented the Board as a member of the U.S. delegation to the 28th International Data Protection and Privacy Commissioners' Conference in London on November 2 and 3, 2006. This is an annual gathering of the various European Union and other International Data Protection officers. The U.S. has observer status to this conference. The delegation is led by the Department of Homeland Security and also includes representatives from the Department of Justice and Federal Trade Commission.

## V. ISSUE IDENTIFICATION, PRIORITIZATION, AND DISCUSSION

As previously explained, IRTPA vests the Board with the broad mandate to provide advice and oversight concerning "regulations, executive branch policies, and procedures (including the implementation of such regulations, policies, and procedures), related laws pertaining to efforts to protect the Nation from terrorism, and other actions by the executive branch related to efforts to protect the Nation from terrorism."[45] Consistent with these statutory responsibilities, the Board considered how it could set its scope, agenda, and methodology in order to advise the President in as effective a manner as possible and in a manner that will bring the greatest value to the American people. To these ends, the Board began to identify and evaluate proposed and existing programs and policies that fall within its statutory mandate. Obviously, the list of policies and programs warranting the Board's attention will evolve over time. Additionally, as new policies are considered, developed, and implemented, the Board's identification of priorities will necessarily change as well.

As a general matter, the Board encounters and engages issues using one of three approaches:

- **Vertical Review**: At the direction of the President, through the request of an Executive Branch department or agency head, or as a result of self-initiation, the Board engages in an in-depth review and analysis of a particular policy or program.

- **Horizontal Review**: The Board examines an issue as part of existing policy development and implementation processes within the Executive Office of the President and the Executive Branch. The Office of Management and Budget (OMB) has integrated the Board into the Legislative Referral Memorandum (LRM) process. Through this process, the Board reviews Administration-wide policies, regulations, and programs that involve its statutory mission.

- **Initial Spot Review**: The Board informally gathers basic information on a policy, program, or issue that Board Members believe could implicate privacy and civil liberties concerns. This approach allows the Board to determine whether a more formal review is necessary.

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[45] IRTPA § 1061(c)(2)(A).

A. Scope and Process

In construing the mandate contained in IRTPA, the Board has initially determined that it will focus its efforts on issues concerning U.S. Persons[46] or occurring on American soil. As a result, it will not evaluate specific issues associated with the uniformed services' efforts against terrorism or activities directed against non-U.S. persons abroad. IRTPA instructs the Board to ensure the consideration and protection of "privacy and civil liberties" but neither defines this phrase nor guides the Board in determining whose privacy and civil liberties should warrant the Board's attention. In order to maximize the Board's effectiveness and to prevent the diffusion of its limited resources across too many programs, the Board has elected to concentrate on the United States and U.S. Persons.[47]

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In making this decision, the Board considered the structure and purpose of IRTPA, its legislative history, common canons of statutory construction, and how to carry out its statutory mandate most effectively. As an initial matter, the Congressional findings in IRTPA concerning the Board suggest that "privacy and civil liberties" should have a domestic focus by "call[ing] for an enhanced system of checks and balances to protect the precious liberties that are vital to *our* way of life."[48] IRTPA – particularly the title that contains the Board[49] – has a domestic focus,[50] does not generally address military or diplomatic actions abroad, and does not reference interrogation, non-U.S. detention, or rendition practices. Moreover, the term "civil liberties" refers to the rights guaranteed by the Constitution and, according to some definitions, rights protected under Federal civil rights statutes. These rights have been held to apply, in general, to individuals located inside the United States and to U.S. Persons abroad.

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[46] A "U.S. person" is defined, *inter alia*, as a United States citizen and a lawful permanent resident alien. *See, e.g.*, 50 U.S.C. § 1801(i); Executive Order 12333 § 3.4(i).

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[47] The Board reserves the right to revisit this determination as circumstances or events may warrant.

[48] IRTPA § 1061(a)(2) (emphasis added). Indeed, the findings preceding the formal creation of the Board link the operation of the Board to the "potential shift of power and authority to the Federal Government . . . [i]n conducting the war on terrorism." *Id.* § 1061(a)(1).

[49] Title I – the portion of the Reform Act where Congress placed the Board – largely confines itself to organizational and structural matters.

[50] For example, the statute attempts to improve national security through a variety of actions, including restructuring the Federal intelligence-gathering apparatus, *id.* §§ 1011-1023, strengthening security measures for cargo, *id.* §§ 4051-54, transportation, *id.* §§ 4011-29, and border enforcement, *id.* §§ 5101-5204, and reforming certain immigration laws. *Id.* §§ 5401-5506.

Legislative history – in the form of the 9/11 Commission Report and in Senate debate accompanying passage of IRTPA – also contains a domestic focus. In its preface to recommending the creation of the Board, the Commission Report highlighted the impact of its recommendations on U.S. Persons' rights: "Many of our recommendations call for the government to increase its presence *in our lives* – for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies."[51] The Commission connected this potential harm to domestic liberties to the Board's charge: "At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend *our* civil liberties."[52] Similarly, during debate on the IRTPA conference report, numerous Senators emphasized Congress' desire to "protect the lives of *Americans*, and [to] protect *their* liberties. That is what the Board is setting out to do."[53]

Certain canons of statutory construction, including the presumption against extraterritoriality,[54] also suggest that IRTPA's provisions authorizing the Board should not reach beyond the Nation's borders. Additionally, the Board is reluctant to oversee traditional Commander-in-Chief authorities – including combat operations – without a specific and express legislative mandate.

**Comment [DOJ10]:** Although we agree with the application of this principle to the operations of the PCLOB, it is not clear that it is equally applicable to all other provisions of the IRTPA. Therefore, we recommend modifying the sentence as such, which avoids the more sweeping assertion that none of IRTPA's provisions should have any extraterritorial effect.

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[51] 9/11 COMMISSION REPORT at 393-94 (emphasis added).

[52] *Id.* at 395 (emphasis added).

[53] *Debate on the Conference Report of the Intelligence Reform and Terrorism Prevention Act of 2004*, 150 Cong Rec 11939, 11949 (Dec. 8, 2004) (statement of Senator Durbin) (emphases added); *see also id.* at 11939 ("The creation of this Board is intended to ensure that at the same time we enhance our Nation's intelligence and homeland defense capabilities, we also remain vigilant in protecting *the civil liberties of Americans*.") (statement of Senator Dodd) (emphasis added); *id.* at 11978 ("The bill provides *protections for the rights of Americans* by creating a Privacy and Civil Liberties Oversight Board . . . .") (statement of Senator Mikulski) (emphasis added); *id.* ("While Americans are more willing to give up some of their privacy after 9/11, necessary intrusions must be carefully balanced against the *rights of U.S. citizens* and I believe the Board will help maintain the balance.") (statement of Senator Reed) (emphasis added).

[54] *See, e.g.*, *Small v. United States*, 544 U.S. 385, 388-89 (2005) (noting that courts begin with "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application"); *Arc Ecology v. United States Dep't of the Air Force*, 411 F.3d 1092, 1097 (9th Cir. 2005) ("Courts must assume that Congress legislates with knowledge of the presumption that a statute is primarily concerned with domestic conditions.") (internal quotation marks omitted).

Moreover, construing the scope of the Board's mandate substantially implicates questions regarding how best to allocate time and resources. The Board has decided to use these resources in a manner to serve the greatest number of United States citizens and U.S. Persons. Congress stands in a stronger position to oversee American anti-terrorism activities conducted abroad than the Board or its Members.

In addition to determining the general reach of its mandate, the Board established a standardized means to evaluate how well privacy and civil liberties have been considered in the development and implementation of anti-terrorism policies and programs. To that end, the Board has developed an "issues and process analysis methodology" that will bring full and consistent consideration of all issues that come before it.[55] This methodology allows the Board to consider separate substantive questions and the extent to which privacy and civil liberty officers within the relevant agency have meaningfully participated in the development and implementation of the policy or program. The methodology takes into account five large issues, as well as a number of subsidiary questions, including:

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- The scope of the program
- The program's legal basis
- How the program supports efforts to protect the Nation against terrorism from the perspective of managing risk to privacy or to survival
- The extent to which officials within the relevant department or agency analyzed the privacy and civil liberties interests implicated by the policy, program or issue, including factors such as
    - **Privacy:** *How does the program affect individuals' ability to control how personal information about them is collected, used, maintained, or shared?*
    - **Fairness:** *Does the program treat individuals fairly at every step?*

[55] The Board wishes to acknowledge and thank Jim Harper, Director of Information Policy Studies at the Cato Institute, and the Department of Homeland Security Data Privacy and Integrity Advisory Committee, on which Mr. Harper sits, for their guidance and earlier work product, upon which much of this is based. *See, e.g., Framework for Privacy Analysis of Programs, Technologies, and Applications*, Department of Homeland Security Data Privacy and Integrity Advisory Committee, Report No. 2006-01 (March 7, 2006), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_03-2006_framework.pdf (last accessed Jan. 29, 2007).

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- **Civil Liberties:** *Does the program limit individual civil liberties in some dimension? What specific Constitutional [illegible] interests are affected?*

- **Respect for the Individual:** *Does the program adequately preserve, to the extent possible, human dignity, autonomy, freedom of thought, expression and association?*

- **Data Security:** *How is personal information secured against threats to privacy and integrity?*

- Processes employed by the government to review privacy and civil liberties interests. This factor considers the existence and format of review procedures, how the government ensures that employees follow these procedures, the training required of employees, and how the government updates its policies.

With respect to internal deliberations, the Board has formalized procedures to allocate work and assignments among Board Members. These procedures have allocated assignments to, among others: Vice Chairman Raul to coordinate the Board's efforts concerning watch list redress procedures; Vice Chairman Raul and Member Davis to examine the NSA's surveillance activities; Member Frank Taylor to examine the Department of Defense Counterintelligence Field Activity (CIFA) TALON program; and Member Davis to examine elements of the reauthorized USA PATRIOT Act.

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The Board has also developed a standardized format for reporting internal deliberations and investigations and offering recommendations to the full Board. This report format includes background information, the legal authority underlying a given program or policy, the existing privacy and civil liberties infrastructure, benefits of the program or policy, privacy concerns, sources consulted, an evaluation of the consideration of privacy and civil liberties interests in the development or implementation of the program or policy, and recommendations to the Board. These pre-decisional reports are considered by the full membership of the Board at its regular meetings.

Comment [OIRA11]: Is this report posted to the website (or can it be)?

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B. Specific Issues, Policies, Procedures, and Regulations

Employing this standardized methodology and operating within its statutory mandate, the Board has evaluated numerous proposed and currently existing terrorism-prevention policies, regulations, statutes, and other Executive actions. Some issues came to the Board's attention through its numerous meetings with privacy advocacy organizations, Executive officials, and Congressional leaders. The Board engaged other issues because media reports brought them to its attention, and other matters arose simply because the Board has begun to integrate itself into the regular Executive decision-making and policy

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implementation processes. In all of its efforts, the Board has had the opportunity to ask whatever questions it desired and has received answers to those questions. The following list of matters on which the Board has offered advice and oversight is intended not to be exhaustive but rather to offer a representative sample of issues that the Board has considered during its relatively brief existence. The Board is careful below not to reference facts, issues, or materials of a classified nature.

1. Oversight of Existing Federal Anti-terrorism Policies and Programs

The Board has begun its efforts to review some of the Federal government's most sensitive and far-reaching surveillance programs. As discussed below in greater detail, these programs include National Security Agency surveillance programs (such as the former Terrorist Surveillance Program (TSP) and the current program governed by the Foreign Intelligence Surveillance Court) and the Terrorist Finance Tracking Program (TFTP). The Board also conducted a review of the National Implementation Plan (NIP).

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At its first meeting on March 14, 2006, the Board determined that it would have an on-going interest in monitoring the government's various surveillance programs. In order to bring any kind of value to their analysis, however, the Members decided that they first had to understand fully the scope of the government's efforts to protect the Nation against terrorism. Consequently, the Board undertook an extensive effort of educational due diligence. The Board believes that receiving premature briefings on any specific program without understanding the full context in which that program operates would not serve to help it fulfill its statutory mission.

The Board has taken great care and exercised due diligence to become familiar with the departments and agencies responsible for protecting the Nation against terrorism. The Board has examined the agencies' and departments' mission and legal authorities, as well as their operational methodologies and privacy and civil liberties training, reporting, and auditing programs.[56]

Following the Board's educational efforts, and with the support of the Attorney General, the Director of National Intelligence, and the President's Chief of Staff, the Board formally requested a briefing on the TSP and TFTP in September 2006. The President's approval followed promptly, and the briefings were immediately scheduled.

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[56] For example, the Board's Vice Chairman and Executive Director attended a session of the standard National Security Agency employee privacy training given to all new employees and once every other year to all current employees. This training is based, among other authorities, on the requirements of USSID-18, which regulates the collection and use of information on U.S. Persons within the signals intelligence community.

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- *Terrorist Surveillance Program and January 10, 2007 Orders of the Foreign Intelligence Surveillance Court*

The Board devoted substantial time and focus in its first year of operation to reviewing anti-terrorist surveillance conducted by the National Security Agency (NSA) and the Terrorist Surveillance Program (TSP) described by the President on December 17, 2005.[57] The TSP involved surveillance of communications where one party to the communication is outside the United States and the government has probable cause to believe that at least one party to the communication is a member or agent of al Qaeda, or an affiliated terrorist organization.

The Board's review of the NSA's surveillance activities was conducted in the course of various briefings by senior NSA personnel, including the Director, and through briefings, questioning, and other interaction with analysts and program operators. Board members repeatedly visited NSA and observed the physical operations where the relevant surveillance is conducted. In particular, the Board reviewed material supporting the government's determination that there was probable cause to believe that at least one of the parties to a surveilled communication was a member or agent of al Qaeda, or an associated terrorist organization.

The Board also received briefings and had opportunities to question NSA lawyers from the Office of General Counsel, Inspector General officials, and other knowledgeable personnel. The Board discussed TSP with the Attorney General Alberto Gonzales, the Acting Assistant Attorney General for the Office of Legal Counsel Steve Bradbury, and the current and former Counsel to the President, among other knowledgeable officials in the Executive Branch.

The Board was briefed on the multiple levels of review, approval and oversight for conducting this surveillance. At the NSA, operators must carefully justify tasking requests, and multiple levels of review and approval are required to initiate collection. Ongoing audits and legal reviews are conducted by the NSA's

[57] As noted below, the Board reviewed the operations of both the TSP (which has now ceased) and the surveillance program governed by the Foreign Intelligence Surveillance Court (FISC).

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Office of Inspector General, General Counsel and Signals Intelligence Directorate Office of Oversight and Compliance. No surveillance may be conducted without leaving a reviewable audit trail that can be and routinely is subject to extensive continuing examination by Inspector General and Compliance staff.

In addition, the members of the Board reviewed U.S. Signals Intelligence Directive 18 (USSID 18), which reflects the classified guidelines established by the NSA and approved by the Attorney General pursuant to Executive Order 12333 to ensure that information about U.S. Persons is protected from improper or excessive collection, dissemination and distribution.[58] The NSA requires all of its personnel holding security clearances authorizing access to certain information to participate in extensive USSID 18 training upon the initiation of access and every two years during which they continue to have access. The Vice Chairman and Executive Director participated in the full USSID 18 training received by NSA personnel in order to examine the extent and quality of the training, and to assess awareness of the need to protect the privacy and civil liberties interests of U.S. Persons among NSA personnel with access to sensitive information.

On January 17, 2007, the Attorney General notified Senators Leahy and Specter that a Judge of the Foreign Intelligence Surveillance Court (FISC) had issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (FISC Orders). As a result of the FISC Orders, any electronic surveillance that was conducted under the TSP is now conducted subject to the approval of the FISC. After the FISC Orders were issued, the Board was extensively briefed by both the Department of Justice and NSA regarding this development. Members of the Board also have studied the classified FISC Orders themselves and closely reviewed the classified material submitted to the FISC in connection with the Orders, including the applications, legal memoranda, and supporting declarations.

[58] *See, e.g.*, EO 12333 § 2.4 ("Agencies within the Intelligence Community shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad.").

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While the details of the FISC Orders remain classified, we can report in an unclassified format that as a result of the Orders the relevant surveillance is now subject both to extensive ongoing Department of Justice review and to the approval of the FISA Court. The Department of Justice's responsibilities for implementing the Orders are carried out by the new National Security Division in the Department of Justice headed by Assistant Attorney General Kenneth Wainstein, who has briefed the Board.

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Based upon its review, the Board has concluded that the Executive Branch's conduct of these surveillance activities appropriately considers and reasonably protects the privacy and civil liberties of U.S. Persons. As a result of the new FISA Court Orders, the highly regimented Executive Branch process of justification, review, approval, and auditing has been further augmented by court supervision. This provides reasonable assurance that national security and privacy and civil liberties interests are appropriately balanced. The Board found no evidence or reasonable basis to believe that the privacy and civil liberties of U.S. Persons are improperly threatened or impinged under the surveillance conducted by the Executive Branch, either under the TSP or subsequently under the new FISC Orders. In the opinion of the Board, it appears that the officials and personnel who were involved in conducting the TSP, and who now are responsible for implementing surveillance under the FISC Orders, are significantly aware and respectful of U.S. Constitutional and legal rights and protections for U.S. Persons, and that they are actively committed to protecting privacy and civil liberties of U.S. Persons in conducting such surveillance.

Comment [DOD12]: DOD recommends deleting these words. Otherwise, as written, it implies that we DO threaten or impinge on the privacy and civil liberties of US persons who are linked to specified terrorist entities. This would not be an accurate statement.

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The Board notes that it was not involved in and has taken no position on the original design or legal authorization of the TSP. The Board believes that it is appropriate for it to provide continuing advice and oversight with respect to NSA's surveillance activities.

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- *National Implementation Plan*

On November 28, 2006, at the National Counterterrorism Center (NCTC), the Board was briefed on the National Implementation Plan (NIP). This plan was approved by the President in June, 2006, and is intended to coordinate and integrate all instruments of national power in a unified effort to protect the Nation against

terrorism. Toward that end, it assigns hundreds of specific tasks to various Federal departments and agencies. Participating departments and agencies are now adopting and implementing their own supporting plans, and an annual strategic review of the entire NIP is in progress. The Board is working with NCTC to ensure that it has access to NIP tasks and activities that could raise privacy or civil liberties concerns.

- *Terrorist Finance Tracking Program*

Also on November 28, at the Treasury Department, the Board was briefed on the Terrorist Finance Tracking Program (TFTP) by Stuart Levey, Under Secretary for Terrorism and Financial Intelligence, and Janice Bradley Gardner, Assistant Secretary for Intelligence and Analysis. Under this program, intelligence analysts review records acquired through administrative subpoenas from the Society for Worldwide Interbank Financial Telecommunication to locate financial connections to known or suspected terrorists. This program also predates the Board's existence.

In each briefing, Board members were free to engage in a probing inquiry and ask unfettered questions, all of which were answered. Following each briefing, the Board met to consider further areas of inquiry, additional issues associated with these specific programs to address, and underlying documents to review. Chairman Carol Dinkins has requested Vice Chairman Alan Raul and Member Lanny Davis to coordinate continuing activities with NSA and Member Frank Taylor to coordinate continuing activities with regard to the National Implementation Plan. These initial briefings were the beginning of the Board's review of these specific programs, not the totality of its involvement.

In addition to these three anti-terror programs – NIP, TFTP, and NSA surveillance activities – the Board examined a variety of other programs and policies:

- *Department of Defense CIFA TALON Program*

At the direction of the Board, Member Francis X. Taylor reviewed the Department of Defense Counterintelligence Field Activities (CIFA) Threat and Local Observation Notices (TALON) program. Within the last year, certain media reports alleged that the CIFA, through the TALON program, had monitored and collected information on U.S. Persons arising out of domestic activities that did not appear to present a threat to national security. During a May meeting of the Board, Chairman Carol E. Dinkins asked

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Member Taylor to gather background information on the alleged inappropriate activities, determine whether DOD had responded to such reports and the results of that response, and make recommendations as to whether additional review by the full Board was required. In carrying out the Chairman's charge, Member Taylor and Board staff met frequently with those who implemented and continued to oversee CIFA. Senior policy officials fully answered the Board's questions and provided any materials that were requested. At the conclusion of its investigation, the Board determined that a lack of clear guidance from the Deputy Secretary at the time the program was established and the absence of a designated TALON program manager resulted in an ambiguous program implementation and the improper and unauthorized collection and retention of information on U.S. Persons. The Board also reviewed and endorsed the steps that DOD took prior to the Board's investigation to correct these concerns. For example, the Deputy Secretary had ordered an immediate review of the program and issued additional guidance to clarify the TALON program's scope and to emphasize that the program would be conducted in full compliance with DOD policies and procedures regarding the collection of information on U.S. Persons. CIFA also has purged the TALON system of any inappropriately collected and retained information.

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- *Department of State E-Passport Program*

The Board reviewed efforts by the Department of State to distribute a passport containing an embedded data chip that holds personal information on the passport holder. The Board concluded that the *current* design of the passport does not pose substantial privacy concerns because (1) the information contained on the chip is identical to that contained in the actual passport; (2) such information is useless without an actual physical passport; (3) the passport utilizes substantial security protocols (anti-skimming technology, a unique PIN, and a varying identifier that prevents continuous tracking of the chip) to prevent someone from accessing that information remotely and from following an individual; and (4) the chip is engineered in a way that would require the State Department to recall and reissue passports before it could add more information on the chip (thereby preventing the government from easily amending the current contents of the passport). The Board stated that it would revisit this issue in the event the State Department desired to alter the program by including more information on the chip (such as new biometric

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measures like an iris or fingerprint scan that are in addition to the existing digital photograph that enables the biometric comparison using facial recognition technology), altering its border inspection procedures (e.g., to allow a chip to act as a proxy for a physical passport), or changing the schematics of the chip.

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- *Passenger Name Recognition (PNR)*

The Board was briefed on U.S. negotiations with the E.U. over the collection and dissemination of passenger name records for flights between the two jurisdictions. The briefing provided the Board with substantive discussions of the negotiations, as well as how privacy and civil liberties officers within DOJ (Jane Horvath, Chief Privacy and Civil Liberties Officer) and DHS (John Kropf, Director of International Privacy Programs) were involved in those negotiations. The Board is satisfied with the significant role these privacy and civil liberties officers played in these negotiations.

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- *Department of Homeland Security US-VISIT Program*

The Board is currently examining the privacy and civil liberties protections contained in the US-VISIT program. US-VISIT facilitates a process that collects and retains biometric and biographic information regarding aliens who enter and leave the country and who apply for immigration benefits. Although the program largely concerns non-U.S. person aliens, a proposed rulemaking would extend its reach to include all aliens, including Legal Permanent Residents (who qualify as U.S. Persons). The greatest civil liberties questions center on how information collected as part of US-VISIT will be shared within the government and with outside entities.

- *USA PATRIOT Act Review*

The 2006 reauthorization of the USA PATRIOT Act included over 30 new civil liberties protections. Member Lanny Davis visited the Department of Justice on November 17, 2006 to be briefed on these new protections by staff with the new National Security Division. Member Davis has been tasked by the Board to continue working with the Department of Justice to monitor implementation and operation of these protections.

2. Examples Where the Board Has Offered Advice Regarding the Development of a Policy, Program, Regulation, or Statute

- *Watch List Redress*

At the request of the Board, Vice Chairman Alan Raul has undertaken the coordination of efforts among the various relevant Federal departments and agencies to establish a formalized, unified, and simplified redress procedure for individuals with adverse experiences with the government's watch list or during screening processes. Both government officials and non-governmental advocacy experts repeatedly raised this issue as an area where the Board could bring focus, organization and prioritization.

The Terrorist Screening Center (TSC) is charged with maintaining the U.S. government's consolidated terrorist watch list, which contains the identifying information of all known or appropriately suspected terrorists. Thirteen months after the Center began operations, it established a formal watch list redress process. The process allowed agencies that used the consolidated terrorist watch list data during a terrorism screening process (screening agencies) to refer individuals' complaints to the TSC when it appeared those complaints were watch list related. The goal of the redress process is to provide timely and fair review of individuals' complaints, and to identify and correct any data errors, including errors in the terrorist watch list itself.

TSC's redress process consists of a procedure to receive, track, and research watch list-related complaints, and to correct the watch list or other data that caused an individual unwarranted hardship or difficulty during a screening process. Throughout 2005, TSC worked closely with screening agencies to establish a standardized process for referral of and response to public redress complaints. TSC also worked with federal law enforcement agencies and the intelligence community, each of which may nominate individuals to the watch list, to review the redress complaint of any individual on the terrorist watch list, evaluate whether that person was properly listed and that the associated information was correct, and make any corrections that were appropriate, including removal from the watch list when warranted.

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In the fall of 2005, TSC undertook to document formally the participating agencies' mutual understanding of their obligations and responsibilities arising out of the watch list redress process. Competing priorities within participating agencies, however, slowed progress. On June 20, 2006, Vice Chairman Raul convened a meeting of all relevant agencies and called for a renewed effort to prioritize this project. In attendance were representatives from TSC, the Departments of State, Defense, Treasury, Justice, and Homeland Security, the Office of the Director of National Intelligence, the FBI, the CIA and the National Counterterrorism Center.

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The resulting draft Memorandum of Understanding (MOU) is a constructive and positive step intended to secure a commitment from these agencies that participate in the watch list process actively to engage in and support the redress process. The MOU resulted from a six-month period of negotiations between the agencies mentioned previously. Vice Chairman Raul convened a final working group meeting on November 30, 2006; in January 2007, a final draft of the MOU was approved and submitted for the signature of the heads of these agencies.

The MOU sets forth the existing multi-agency redress process in significant detail, from receipt of an individual's complaint to the response sent by the screening agency. Among other things, the MOU establishes obligations for all parties to secure personal information, update and correct their own record systems, and share information to ensure redress complaints are resolved appropriately. Each participating agency must also commit to providing appropriate staff and other resources to make sure the redress process functions in a timely and efficient manner. Finally, each agency must designate a senior official that is responsible for ensuring the agency's full participation in the redress process and overall compliance with the MOU.

Once the MOU has been executed and implemented, the Board intends to continue efforts to bring all possible transparency and public understanding to this process.

- *Department of Defense Report of the Technology and Privacy Advisory Committee*

In September, 2006, the Department of Defense forwarded to the Board the recommendations of the March 2004 Report of the Technology and Privacy Advisory Committee (TAPAC) to the Secretary of Defense.[59] Five of the twelve recommendations required action on a government-wide basis beyond the authority of the Department of Defense. The Board is currently evaluating that Report to determine the extent to which the government has already implemented those recommendations and what additional steps the government should take to complete those recommendations.

- *Administration Clearance Processes*

As mentioned above, the Board has been fully integrated into the various Administration and Executive Branch program and policy clearance processes, including the OMB Legislative Referral Memorandum (LRM) process. As such, it regularly receives and is invited to comment on policy initiatives, programs, regulations, proposed legislation, and public remarks by agency officials that may have privacy or civil liberties implications.

3. Information Sharing

IRTPA called for the creation of the Information Sharing Environment (ISE). The ISE is an approach that facilitates the sharing of information relating to terrorism by putting in place the processes, protocols, and technology that enable the sharing of this information among Federal, State, local, tribal and private sector entities, and foreign partners. The ISE brings together, aligns and builds upon existing information sharing policies, business processes and technologies (systems), and promotes a culture of information sharing through increased collaboration. IRTPA also established the Program Manager for the Information Sharing Environment with government-wide authority to plan, oversee, and manage the ISE. The Program Manager assists the President and government agencies in the development and operation of the ISE and monitors and assesses its progress.

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[59] *Safeguarding Privacy in the Fight against Terrorism* (March 2004), *available at* http://www.cdt.org/security/usapatriot/20040300tapac.pdf (last accessed Dec. 29, 2006).

To guide efforts to establish the ISE and implement the requirements of IRTPA, on December 16, 2005, President Bush issued a Memorandum to the Heads of Executive Departments and Agencies. This Memorandum delineated two requirements and five guidelines which prioritize efforts that the President believes are most critical to the development of the ISE and assigns Cabinet officials responsibility for resolving some of the more complicated issues associated with information sharing. The five guidelines are: (1) Set Standards for How Information is Acquired, Accessed, Shared, and Used within the ISE; (2) Create Common Framework for Sharing Information Between and Among Federal Agencies and State, Local and Tribal Governments, Law Enforcements Agencies and the Private Sector; (3) Standardize Procedures for Sensitive But Unclassified Information; (4) Facilitate Information Sharing with Foreign Partners; and (5) Protect the Information Privacy Rights and Other Legal Rights of Americans.

IRTPA required that these guidelines be drafted and implemented in consultation with the Board. And with regard to all five sets of guidelines, the Board's Executive Director is a member of the White House Information Sharing Policy Coordination Committee which sits above all the working groups and directly below the Deputies and Principals Committees.

The President assigned various agencies the lead in developing the five sets of guidelines. The Department of Justice and the Office of the Director of National Intelligence were jointly assigned the lead in developing Guideline 5, now referred to as the ISE Privacy Guidelines. Within those agencies, the lead was assigned to Jane Horvath, DOJ's Chief Privacy and Civil Liberties Officer, and Alex Joel, ODNI's Civil Liberties Protection Officer. This ISE Privacy Guidelines drafting group spent April through November, 2006, soliciting comments and working with the Program Manager and White House staff, including Homeland Security Council staff and Board staff.

On May 16, 2006, the Board held its fourth meeting and, among other things, was briefed on the ISE by Director of National Intelligence John Negroponte and Program Manager for the Information Sharing Environment Ambassador Thomas McNamara. On June 26, at the Board's eighth meeting, the working group leaders Alex Joel and Jane Horvath briefed the Board specifically on the ISE Privacy Guidelines.

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**Comment [Treas14]:** The Dec. 16 Memo specified the Dept. Heads responsible for each guideline – the PM was to provide support to these Departments for the implementation/drafting of these guidelines (see page 2 of the Memo)

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IRTPA also called for the establishment of an Information Sharing Environment (ISE) and authorized the appointment of a Program Manager to oversee the implementation of the ISE. On December 16, 2005, prior to the Board's existence, the President issued a message to Congress and a Memorandum to the Heads of Executive Departments and Agencies establishing the format of the ISE and instructing the Program Manager to

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On November 16, 2006, Director John Negroponte sent to Congress the ISE Implementation Plan, which discusses how to bring about an information sharing environment. Although the parameters of the plan were adopted in December 2005, prior to the Board's existence, the Board's Executive Director did offer substantive advice regarding its content. On November 22, 2006, the President approved the Guidelines 1, 2, 4, and 5 report, including the recommendation that the ISE privacy guideline be issued. These were subsequently released to the public by the Program Manager.

The ISE Privacy Guidelines (Protect the Information Privacy Rights and Other Legal Rights of Americans) work in conjunction with the other information sharing guidelines, requiring each set to address its specific area of interest in a manner that protects the privacy rights and civil liberties of Americans. The guidelines must also implement provisions of Executive Order 13388, which requires agencies to "protect the freedom, information privacy, and other legal rights of Americans" while sharing terrorism information.

The ISE Privacy Guidelines regulations establish an information sharing framework that balances the dual imperatives of sharing information and protecting privacy by establishing uniform procedures to implement required protections in unique legal and mission environments. In addition, the framework establishes an ISE privacy governance structure for compliance. The framework attempts to strike a balance between consistency and customization, substance and procedure, oversight and flexibility. It also builds upon existing resources within Executive agencies and departments for implementation.

The ISE Privacy Guidelines are based on a set of core principles that requires agencies to: identify any privacy-protected information to be shared; enable other agencies to determine the nature of the information and whether it contains information about U.S. Persons; assess and document applicable legal and policy rules and restrictions; put in place accountability and audit mechanisms; implement data quality and, where appropriate, redress procedures; and identify an ISE Privacy Official to ensure compliance with the guidelines.

The ISE Privacy Guidelines regulations also require Federal departments and agencies to designate an ISE Privacy Official to oversee the full implementation of the privacy regulations. The ISE Privacy Official is the department or agency's senior privacy official (as designated by statute or executive order, or as otherwise identified in response to OMB Memorandum M-05-08 dated February 11, 2005). If a different official would be better situated to perform this role, he or she may be so designated by the head of the agency.

The ISE Privacy Guidelines also provide for an ISE Privacy Guidelines Committee, consisting of the ISE Privacy Officials of the departments and agencies comprising the Information Sharing Council (ISC), and chaired by a senior official designated by the Program

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Manager. Working closely with the Privacy and Civil Liberties Oversight Board as it exercises its oversight mission, the committee will seek to ensure consistency and standardization in implementation, as well as serve as a forum to share best practices and resolve inter-agency issues. The ISE Privacy Guidelines Committee will continually refine its guidance as the ISE develops and as specific sharing mechanisms are institutionalized. The Program Manager has designated Alex Joel and Jane Horvath to serve as co-chairs of this ISE Privacy Guidelines Committee, which will include the Board's Executive Director as a member.

The Board instructed its staff to meet with the Program Manager and provide options concerning its on-going oversight role and how that role can be most effectively and efficiently exercised.

## VI. THE YEAR AHEAD

After working to establish the foundation discussed throughout this report, the Board looks forward to continuing to fulfill its statutory responsibilities in the upcoming year. The Board intends to utilize the knowledge and trust built over the last year to engage, as time and resources allow, issues that will have the greatest impact on the greatest number of U.S. Persons. While it is impossible to foresee all issues that may arise in the coming year warranting the Board's attention, issues which the Board presently intends to pursue include:

- *Information Sharing Environment (ISE).* As discussed above, the Board is specifically charged with responsibility for reviewing the terrorism information sharing practices of executive branch departments and agencies to determine adherence to guidelines designed to appropriately protect privacy and civil liberties. Accordingly, the Board was integrated into the process chaired by the Program Manager for the development and implementation of appropriate information sharing guidelines for Federal departments and agencies. The Board will work with the Program Manager to institutionalize its implementation oversight role.

- *Government surveillance operations.* The Board will continue to exercise its oversight role over terrorist surveillance.

- *Terrorist watch list issues.* The Board played a role in coordinating efforts among the various Federal departments and agencies to establish a unified, simplified redress procedure for individuals with adverse experiences during screening processes. The execution of an interagency memorandum of understanding on redress procedures is only a first step in establishing a simple, transparent process. The Board will continue its efforts to promote this process.

- *USA PATRIOT Act and National Security Letters (NSLs).* The 2006 reauthorization included over thirty new civil liberties protections. The Board will work with the Department of Justice to monitor implementation of these protections.

- *Federal data analysis and management issues.* Board Members intend to enhance significantly their understanding of issues associated with data mining activities, data sharing practices, and governmental use of commercial databases. This level of understanding will assist the Board in its review of many Federal anti-terrorism programs. Toward this end, the Board will follow up on recommendations of the March, 2004 report of the Technology and Privacy Advisory Committee (TAPAC) to the Secretary of Defense, *Safeguarding Privacy in the Fight Against Terrorism.*

**Deleted:** <#>*Presidential Directive.* The Board wishes to obtain from the President a charge to the Executive Branch stating clearly the authority of the Board and the level of cooperation and access he expects the Board to have when working with relevant departments and agencies, as well as establish a systematic basis to meet with and report to the President regarding appropriate consideration and adequate protection of privacy and civil liberties in the Nation's anti-terrorism activities.¶

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- *U.S. Persons Guidelines.* These guidelines limit the government's ability to collect, retain, and distribute intelligence information regarding U.S. Persons. These guidelines are applicable to agencies in the intelligence community pursuant to Executive Orders 12333, and 13284. As was noted in the 2005 report to the President on Weapons of Mass Destruction, these rules are complicated, subject to varying interpretations, and substantially different from one agency to another. The Attorney General and the Director of National Intelligence have established a staff level working group to review these guidelines and propose appropriate reforms. The Board intends to participate in this process.

- *State and local fusion centers.* State and local law enforcement entities are establishing joint centers where they share information and data of value to their common missions. Federal agencies are developing partnerships with these centers. The Board will review these sharing practices to ensure that privacy rights and civil liberties concerns are taken into appropriate consideration.

- *National Implementation Plan.* The Board will continue to monitor those tasks and activities that might raise privacy or civil liberties concerns.

- *Department of Homeland Security Automated Targeting System (ATS).* ATS is a decision support tool used by Customs and Border Protection to assist in making a threshold assessment in advance of arrival into the U.S. based on information that DHS would otherwise collect at the point of entry. The Board intends to review this system.

Administratively, the Board will focus on further developing its staff resources by supplementing the permanent staff with detailees from the intelligence, law enforcement, and technology communities. Depending on developing priorities, the Board intends to bring in six detailees for terms of six months to one year.

In addition, recognizing the value and benefit of the public dimension to its responsibilities, the Board will conduct a continuing series of open public forums, perhaps around the country, that will allow interested American citizens to express their concerns with regard to privacy and civil liberties implications in the war against terrorism.

Finally, the Board understands that it may adjust its agenda based on evolving issues and concerns - whether those issues are brought before the Board through its internal role within the Executive Office of the President or through public comment.

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**Deleted:** The Board will participate in the annual strategic review of the National Counterterrorism Center's National Implementation Plan, which commences in June, 2007.

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**Comment [DHS17]:** ATS does not assign "risks scores" to individuals seeking to enter the country. ATS is a decision support tool used by CBP to assist in making a threshold assessment in advance of arrival into the U.S. based on information that DHS would otherwise collect at the point of entry.

This bullet implies that a "risk score" is assigned.

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## VII. CONCLUSION

Standing up any new institution takes vision, energy, and commitment. The Board believes it has made substantial solid progress over the past year in setting priorities and integrating itself into existing Executive Branch policy formulation and implementation procedures. The Board is pleased with the enthusiasm and level of support it is receiving, both substantively and administratively, from White House staff, the Executive Office of the President and other Federal departments and agencies essential to the protection of privacy and civil liberties.

Most importantly, as mentioned several times in this report, the Board has established a sound and productive working relationship with the growing universe of privacy and civil liberties professionals within the Executive Branch. Working together, these professionals and the Board are developing a system of mutual trust and support. This relationship is fundamental to the Board's ability to fulfill its role of providing constructive, objective advice to the President and relevant agency heads.

The American people expect the Federal government to protect them from terrorism, and to do so consistent with the Constitution and important American values. The Privacy and Civil Liberties Oversight Board is one of many checks and balances existing within the Federal government to help promote this. It is not a substitute for the President's responsibility to preserve, protect, and defend the Constitution of the United States or the oversight roles exercised by Congress. Instead, it is a significant new body within the Federal government in a position of trust and proximity to the President that can offer an objective assessment of policy initiatives.

The Board Members take their statutory mission and responsibilities seriously and look forward to working with the Executive Branch and Congress[60] in fulfilling them in the upcoming year.

**Comment [DOJ18]:** We do not understand what is meant by the assertion that the PCLOB is a "body within" or part of the Legislative branch. Therefore, we recommend that the words "and legislative" be deleted from the sentence quoted.

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[60] The 110th Congress is considering whether the Board's present construct, as established by IRTPA, warrants modification. Pending legislative initiatives would remove the Board from the Executive Office of the President, make it an independent agency within the Executive Branch, and provide it with subpoena power. Other proposed changes would keep the Board within the EOP but would require all Members to be nominated by the President and confirmed by the Senate to staggered six year terms, with the Chairman assuming a full-time appointment.

**Deleted:** DOJ COMMENT: We defer to OMB on whether the neutrality of this footnote, in context, is consistent with the Administration's strongly stated objections to the provisions described in the footnote.