

Comments to the  
Privacy and Civil Liberties Oversight Board by the  
Center for National Security Studies  
On Activities under Executive Order 12333

June 16, 2015

Pursuant to notice dated March 23, 2015 in the Federal Register.

Agency/Docket Numbers:

Notice-PCLOB-2015-01

Docket No. 2015-0001

Sequence No. 1

Document Number:

2015-06537

The Center for National Security Studies is a think tank and civil liberties organization that for almost 40 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights and that respect for our constitutional system of government will accomplish that.

The Board has asked for comments concerning its proposed Examination of E.O. 12,333 Activities. In April, 2015, the Board approved and published a plan for its suggested work.

Proposed public report re legal framework.

The Board’s plan states that it “plans to issue a public report that explains E.O. 12,333 at a high level, focusing on how the legal framework established by the Executive order and its implementing procedures governs the collection, use, retention, and dissemination of information concerning U.S. persons.”

The Center respectfully suggests that the Board issue a public report outlining at a pretty detailed level what legal authorities and restrictions govern the collection, use, etc of information concerning U.S. persons. In particular, the Center urges the Board to address the following legal questions.

- Are the statutory authorities, such as FISA, ECPA and Title III, which govern electronic surveillance and collection of electronic information inside the United States, comprehensive? Is there any such collection in the United States which is not covered by those statutory authorities but comes within E.O. 12,333? In other words, is there a gap in statutory coverage? In answering this question, the Center urges the Board to take a broad view of what the American public would consider to be forms of electronic surveillance, e.g. surveillance of electronic financial transactions or surveillance of geo-location information. A public explanation is needed that goes beyond simply reiterating the definitions of coverage contained in the statutes and explains what surveillance activities do not come within statutory coverage.

In answering this question, the Center notes that the Board has identified “collection that occurs within the United States or from U.S. companies” as one of the activities under the E.O. that it may choose to focus on. Whether it does focus on such actual activities, the Center respectfully suggests that the Board outline which such activities are NOT covered by statute, but only by Executive Order and regulation.

- Are the counter-terrorism activities of the FBI inside the U.S, which are not covered by the surveillance statutes, but which do come within E.O. 12,333, all governed by the public Attorney General’s Guidelines governing FBI investigations?

- Is the public version of E.O. 12,333 complete, i.e. are there any classified amendments?
- What other Executive Orders, if any, also govern the “collection, use, retention, and dissemination of information concerning U.S. persons” which is covered by E.O. 12,333? For example, is E.O. 13388 “Further Strengthening the Sharing of Terrorism Information to Protect Americans” one such Order? If so, it would be extremely useful for the Board to explain how the various Executive Orders relate to each other, e.g., whether specific provisions of E.O. 12,333 have been affected by later Executive Orders?

The Center notes that while it understands the need for information regarding intelligence operations to be secret, it is hard to envision how a description and explanation of the legal authorities concerning the collection and use of U.S. person information could be properly classified.

#### Proposed in-depth examination of activities.

Regarding the choice of activities on which the Board will “conduct focused in-depth examinations”, the Center urges the Board to choose activities which are of significant public interest and are likely to be the subject of public debate. More specifically, the Center urges the Board to examine activities under E.O. 12,333 which have been alleged to involve collection of significant amounts of U.S. person information. In doing so, the Center urges the Board to focus on what can be made public concerning the scope of such activities, i.e., the scope of collection of US person information, before focusing on compliance with any technical rules or procedures which must remain secret. Such public disclosure is necessary for the Board to carry out its mandate; if there is massive collection of US person information under the E.O, civil liberties, including the right to democratic decision-making, can be protected only through a public debate about the need for, risks of, and limits on such collection.

The Center also urges the Board to explain as a legal matter how the “targeting of U.S. persons” could be governed by E.O. 12,333, rather than by FISA. Since 2008, FISA has governed electronic surveillance targeting U.S. persons even when they are overseas. It is the Center’s understanding that if a U.S person overseas is targeted for other kinds of surveillance, e.g. in person surveillance, that activity would be governed by E.O. 12,333. If, however, the Board means to refer to lethal force operations overseas targeted at U.S. persons, those operations are carried out pursuant to the laws of armed conflict. The Center urges the Board to postpone any examination of such activities until the Board has engaged in public discussion and debate about those controlling authorities in order to establish a baseline framework and determine whether to examine such activities.