

PRIVACY & CIVIL LIBERTIES

OVERSIGHT BOARD

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PUBLIC MEETING ON

EXECUTIVE ORDER 12333

- - -

May 13, 2015

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Transcript of the Privacy & Civil
Liberties Oversight Board's public meeting on
Executive Order 12333 held at the National
Constitution Center, F.M. Kirby Auditorium,
525 Arch Street, Philadelphia, Pennsylvania,
commencing at 10:30 a.m. on the above date,
before Loretta J. Clark, a Professional
Shorthand Reporter and a Commissioner of the
Commonwealth of Pennsylvania.

1 A P P E A R A N C E S:

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BOARD MEMBERS:

3

David Medine, Chairman

4

Rachel Brand

Elisebeth Collins

5

James Dempsey

Patricia Wald

6

7

8 PANELISTS:

9 Session 1:

10

Robert Chesney

Aziz Huq

11

Deborah Pearlstein

Stephen Slick

12

Session 2:

13

Orin Kerr

14

Katherine Strandburg

Stephen Vladeck

15

Session 3:

16

Michael Allen

17

Timothy Edgar

Mieke Eoyang

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Matthew Olsen

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2 P R O C E E D I N G S

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4 MR. ROSEN: Ladies and gentlemen,
5 welcome to the National Constitution Center.

6 I'm Jeffrey Rosen, the president of this
7 wonderful institution. We're so glad that you
8 were able to make it here in light of the
9 terrible train accident that occurred last
10 night and our thoughts and prayers are with the
11 victims and their families.

12 Let me say just a brief word
13 about the National Constitution Center and how
14 thrilled and honored we are to host this
15 meeting of the Privacy and Civil Liberties
16 Oversight Board. The National Constitution
17 Center is a very unique and wonderful
18 institution. We are a private nonprofit but we
19 have a Congressional charter to disseminate
20 information about the U.S. Constitution on a
21 nonpartisan basis and we are the only place in
22 these polarized times that can bring together
23 people of very different perspectives to
24 debate, celebrate and learn about the U.S.

1 Constitution. We do that as the Museum of We,
2 the People here in this beautiful building on
3 Independence Mall in Philadelphia where we have
4 rare copies of the Declaration of Independence,
5 the Constitution and one of the 12 original
6 copies of the Bill of Rights and I hope all of
7 you will go see it during the breaks of this
8 great panel.

9 But we're also America's Town
10 Hall and a Center for Civic Education and we
11 sponsor debates and pod casts and symposia
12 about Constitutional issues on every media
13 platform. I've just come from Boston, where we
14 had a wonderful debate co-hosted by the
15 Federalist Society and the American
16 Constitution Society about the Citizens United
17 decision. And during this meeting I'm going to
18 enlist some members of this great body to have
19 a pod cast discussion as well. So, this is the
20 place to come and hear the best arguments on
21 all sides of Constitutional issues so that you
22 can make up your own minds. That is why it is
23 so appropriate and fitting that we have the
24 honor of hosting this meeting of the Privacy

1 and Civil Liberties Board.

2 I want to read from PCLOB's great
3 charter as well. The Privacy and Civil
4 Liberties Board is an independent bipartisan
5 agency within the Executive Branch established
6 by the implementing recommendations of the 9/11
7 Commission Act and it has two primary
8 responsibilities -- to analyze and review
9 actions the Executive Branch takes to protect
10 the nation from terrorism, ensuring that the
11 need for such actions is balanced with the need
12 to protect privacy and civil liberties. And
13 second, to ensure that liberty concerns are
14 appropriately considered in the development and
15 implementation of laws, regulations and
16 policies related to efforts to protect the
17 nation against terrorism.

18 That is why it is so appropriate
19 that the Privacy and Civil Liberties Oversight
20 Board's consideration of constitutional issues
21 related to Executive Order 12333 is held here
22 at the National Constitution Center. You are
23 going to hear about separation of powers, First
24 Amendment issues and Fourth Amendment issues

1 and there could not be a more appropriate place
2 for this important discussion that you are
3 about to hear.

4 And with that, it's my great
5 honor to introduce my friend and the great
6 leader of the Privacy and Civil Liberties
7 Oversight Board, David Medine. David, welcome.

8 MR. MEDINE: Thank you, Jeff, and
9 thank you for hosting us at this perfect place
10 for holding this meeting. On behalf of the
11 Board, our thoughts go out to the victims of
12 the train accident yesterday and their families
13 and hope everyone recovers as quickly as
14 possible.

15 Good morning and welcome. This
16 is a public meeting of the Privacy and Civil
17 Liberties Oversight Board, in which we will be
18 addressing Executive Order 12333 and the
19 foreign intelligence activities that are
20 conducted under it. It is 10:35 a.m. on May
21 13, 2015 and we're meeting in the F.M. Kirby
22 Auditorium at the National Constitution Center
23 in Philadelphia, Pennsylvania. This meeting
24 was announced in the Federal Register on April

1 29, 2015 and as chairman, I will be the
2 presiding officer.

3 All five Board members are
4 present and there is a quorum. The Board
5 members are Rachel Brand, Elisebeth Collins,
6 James Dempsey and Patricia Wald. I now call
7 the meeting to order. All in favor of opening
8 the meeting please say aye.

9 VOICES: Aye.

10 MR. MEDINE: Upon receiving
11 unanimous consent, we will now proceed. We're
12 meeting today to examine the history,
13 Constitutional implications and practice of
14 intelligence that ae conducted under Executive
15 Order 12333 as part of the Privacy and Civil
16 Liberties Oversight Board's oversight function.
17 Executive Order 12333 has governed the
18 intelligence activities of the United States
19 since it was issued by President Reagan in
20 1981.

21 The purpose of today's event is
22 twofold: To inform the Board as we conduct our
23 oversight work and to inform the public about
24 our activities and about some of the questions

1 raised by Executive Order 12333 with respect to
2 privacy and civil liberties. Oversight of
3 counterterrorism activities conducted under
4 E.O. 12333 presents some new challenges.

5 First, our earlier reports on
6 Section 215 and 702 examined discreet
7 individual surveillance programs governed by
8 specific rules that were unique to those
9 programs. But E.O. 12333 does not provide the
10 authority for any one intelligence gathering
11 program. Instead the Executive Order is a high
12 level delegation of authority from the
13 President to 17 agencies and offices that make
14 up the United States intelligence community.
15 The Executive Order provides direction on which
16 intelligence community elements are supposed to
17 conduct which activities and it sets the ground
18 rules for activities that have a United States
19 person A fact, a category that includes
20 citizens and legal permanent residents.

21 In essence, Executive Order 12333
22 establishes the overarching framework under
23 which the entire intelligence community
24 operates and it provides broad rules under

1 which individual intelligence activities are
2 developed and conducted. For oversight bodies
3 like PCLOB, this raises the question of how to
4 learn about and understand the wide range of
5 counterterrorism activities under Executive
6 Order 2333 in order to focus oversight efforts
7 on those activities that may have the greatest
8 impact on privacy and civil liberties.

9 Second, individual activities
10 conducted under E.O. 12333 are authorized and
11 reviewed in a manner different from activities
12 undertaken pursuant to statutory authorization
13 such as the way the 702 program operates under
14 the Foreign Intelligence Surveillance Act.
15 Instead, these activities are developed within
16 the Executive Branch by intelligence agencies
17 that conduct them. This raises questions about
18 how these intelligence activities are initiated
19 and vetted. Who proposes these activities?
20 Who approves them? Who evaluates their effect
21 on privacy and civil liberties? Who monitors
22 how they're conducted?

23 Third, the Section 215 and 702
24 surveillance programs that the Board previously

1 examined are both conducted here at home in the
2 United States. By contrast, E.O. 12333 governs
3 intelligence activities conducted anywhere in
4 the world and many of those activities take
5 place outside the United States. When E.O.
6 12333 was issued over three decades ago, the
7 global communications landscape was quite
8 different than it is today. Widespread use of
9 the internet, e-mail, cell phones, smart
10 devices and social media had not yet developed
11 nor had the capacity that we have available
12 today for large scale digital processing
13 analysis of data.

14 This raises the question of how
15 technological revolutions that have occurred
16 over the past three decades have effected E.O.
17 12333 intelligence activities from a
18 Constitutional perspective and from a policy
19 perspective. In the global digital age,
20 information or communications acquired in a
21 foreign country may be more likely than ever to
22 involve those in the United States. Should the
23 rules governing overseas collection change to
24 reflect this new reality? And if so, how?

1 Finally, intelligence activities
2 that are conducted under the Foreign
3 Intelligence Surveillance Act are subject to
4 oversight by the court that approves those
5 activities, the FISA court. This means that a
6 second branch of government plays a role in
7 reviewing the Executive Branch's intelligence
8 activities. And FISA surveillance is
9 specifically authorized by Federal legislation,
10 it's subject to oversight from Congress as
11 well, thus bringing three branches of
12 government into the picture.

13 By contrast, courts play no role
14 in E.O. 12333 activities. They do not approve
15 those activities, review them or oversee them.
16 And while the Congress has oversight
17 responsibility with respect to E.O. 12333
18 activities, primarily in the form of oversight
19 from the House and Senate Intelligence
20 Committees, it's unclear how closely Congress
21 has traditionally reviewed these activities.
22 This raises questions about the oversight
23 measures that take place exclusively within the
24 Executive Branch and not Congress and the

1 courts and how they protect privacy and civil
2 liberties of U.S. persons. And a necessary
3 part of that inquiry is the question of how big
4 Congress' role is even allowed to be under the
5 Constitution under the Separation of Powers
6 Doctrine.

7 Another important question is
8 what constraints the First and Fourth
9 Amendments impose on the exercise of
10 presidential power in this area. Now to
11 examine these difficult questions, the Board
12 has brought together a wide range of
13 outstanding experts today to discuss three
14 topics. We will have panels on -- and of
15 course, it's fitting as Jeff said that we're
16 here at the Constitution Center to discuss
17 those topics.

18 The first panel will address
19 separation of powers raised by E.O. 12333 as
20 well as the history of the Executive Order.
21 After lunch our second panel will consider
22 First and Fourth Amendment implications of E.O.
23 12333 activities. And our final panel will
24 focus on E.O. 12333 in practice, including

1 oversight mechanisms.

2 Thank you. With that, I turn it
3 to Rachel Brand.

4 MS. BRAND: Thank you, Mr.
5 Chairman. I should turn on my mike. Thank you
6 and thank you to the Constitution Center for
7 hosting us here. It's good to be back on this
8 stage. I'm going to be very brief in my
9 opening remarks. I'd first like to thank our
10 witnesses for being here, especially
11 considering the very unfortunate circumstances
12 of last night and this morning. I'm glad you
13 could make it. I look forward to hearing your
14 presentations, and I look forward to the
15 opportunity to ask questions. And if I should
16 do something different with my mike, please let
17 me know. Is it working? Okay. Thank you.

18 When we announced last year that
19 we intended to review Executive Order 12333, we
20 didn't articulate any limits on that review.
21 We mistakenly, I think, gave some in the public
22 and the agencies the impression that we planned
23 to review every aspect of E.O. 12333 and its
24 implementation. This may have exacerbated a

1 common misimpression that E.O. 12333 is a
2 discrete intelligence program. But, of course,
3 as David said, it is not. It is a document
4 that first outlines a construct for all the
5 intelligence community's activities, assigning
6 particular roles to particular agencies, and
7 also imposes a number of privacy focused
8 limitations on those agencies' actions.

9 Reviewing every activity
10 conducted under 12333 would be impossible for
11 us to do as a practical matter and would go far
12 beyond our statutory mandate of
13 counterterrorism. Fortunately, we have since
14 clarified that we intend to limit our inquiry
15 into 12333 to selected individual programs that
16 fall within our statutory jurisdiction. So,
17 with all of that in mind and in light of the
18 many public misimpressions about 12333, I'd ask
19 the witnesses today to be precise in
20 identifying what you are talking about. If you
21 are talking about a particular aspect of 12333
22 or its implementation, please say so. And I
23 may ask you questions along those lines to help
24 me better understand your testimony. So thank

1 you again for being here.

2 MS. COLLINS: I'd like to first
3 welcome and thank our panelists, who I know are
4 all busy folks and the logistics were
5 particularly challenging today. Second, I want
6 to thank the staff of the PCLOB. We are small
7 but mighty. The dedication of the staff allows
8 us to put together really tremendous events
9 like this, so I thank them for that. And
10 finally, I want to thank the Constitution
11 Center and our hosts here today.

12 For an intelligence oversight
13 body such as ours, understanding the history,
14 parameters and contours of Executive Order
15 12333 is a necessity. As you can see from the
16 titles of the three panels we have planned for
17 today, Executive Order 12333 touches upon a
18 broad range of issues, including and especially
19 suited to our setting today, the balance and
20 separation of Constitutional powers. But the
21 practical questions about the operation of
22 government programs and the oversight
23 mechanisms that are designed to ensure that
24 these programs stay within bounds set by

1 controlling statutes, regulations and policies
2 are equally important.

3 Like other policy directives or
4 orders issued by past and current presidents,
5 E.O. 12333 is a product of the legal, political
6 and historical events that preceded its
7 existence. But as of today, the Executive
8 Order has been utilized by numerous presidents
9 to organize and divide responsibility amongst
10 the components of America's intelligence
11 infrastructure. This order also limits the
12 government's foreign intelligence activities
13 and restricts the intelligence community's use
14 and dissemination of U.S. person information.

15 To the extent that I am aware,
16 the United States is unique in having such an
17 intelligence policy framework that expressly
18 recognizes the privacy interests of its
19 citizens in matters of national security. I
20 hope that the discussion we have today and the
21 considerable knowledge and expertise of our
22 panelists will aid the Board as it begins to
23 review specific counterterrorism activities
24 governed by the Executive Order. I also hope

1 this event will help to correct and demystify
2 much of the popular discussion surrounding this
3 misunderstood and oftentimes mischaracterized
4 order.

5 MR. DEMPSEY: Good morning. I'd
6 like to thank Jeff Rosen for hosting us and the
7 National Constitution Center for generously
8 hosting us today, all the panelists for sharing
9 their expertise on these timely and important
10 questions and the PCLOB staff for planning our
11 agenda today. Actually, speaking of staff, I
12 managed to get on the stage here without a pen,
13 so if someone could give me a pen, I'd be
14 grateful. Thank you.

15 For me, the consideration of
16 Executive Order 12333 is dominated by the
17 technological realities that drive legal and
18 policy debates in so many spheres today. The
19 route that evolution of technology since the
20 advent of the internet has fundamentally
21 changed the way we communicate, keep records,
22 do business. These changes are forcing every
23 organization that deals with data, which is
24 virtually every organization, public and

1 private, to develop and update rules for
2 collecting and using data. The challenges of
3 the digital age are acute for U.S. intelligence
4 agencies, which handle huge volumes of data and
5 must of necessity do much of their work in
6 secret.

7 So, I'm particularly interested
8 in how we can move forward to design rules that
9 are suited to the current threat and technology
10 environment in which the intelligence agencies
11 operate are as transparent as possible and are
12 coherent and consistent, starting with the
13 Constitution at the top of the pyramid down
14 through Executive Orders and Attorney General
15 guidelines to the very detailed guidance that
16 must be given to collection targeters and
17 analysts.

18 The Board has already expressed
19 its concern that some of the Attorney General
20 guidelines in the middle of the protocol stack
21 are seriously outdated and some cases predating
22 the internet. I hope that today's meeting will
23 help to better inform both the Board and the
24 public about the origins of Executive Order

1 12333 in the context of debates about
2 separation of powers and oversight, about how
3 changes in technology and surveillance
4 capabilities are challenging, if not leaving
5 behind the traditional rules and
6 understandings, and finally, how we can design
7 21st century legal rules and oversight systems
8 that respond to the realities of 21st century
9 technology.

10 So again, thank you to all who
11 had a role in this. I look forward to all the
12 panels.

13 MS. WALD: I, too, look forward
14 to this forum as an opportunity for PCLOB to
15 learn from experts in law, technology and
16 intelligence policy as we embark on what may be
17 the most ambitious of our inquiries thus far.
18 Executive Order 12333 is not, I believe, well
19 understood outside of the intelligence
20 community. The operations it authorizes are
21 conducted in great part outside of the United
22 States, a great many of them are classified
23 and, except for Congressional oversight, not
24 subject to any regularized independent review

1 outside the Executive.

2 Our inquiry is designed to
3 clarify the scope of E.O. 12333, the
4 limitations that are contained in it and in the
5 regulations of the several departments which
6 conduct operations under its ambit and the ways
7 in which the Executive Order activities may
8 affect Americans. We begin modestly by looking
9 deeply at two projects conducted pursuant to
10 its authority. That approach, however, must
11 take appropriate account of the broader legal
12 and Constitutional framework in which all
13 intelligence operations must be conducted. And
14 it is in that realm that we are hopeful and
15 confident that our speakers today will inform
16 our future activities.

17 We are thankful to Jeff Rosen,
18 the National Constitution Center, the panelists
19 today and to our able staff for doing the
20 backstage logistical work that undergirds this
21 kind of important intellectual exchange.

22 I do have one other point to make
23 briefly. Our panelists today deal with the
24 Constitutional framework of separation of

1 powers as it may affect Executive Order 12333,
2 the First and Fourth Amendments and their
3 implications for such activities, especially as
4 new technologies for conducting surveillance
5 emerge with relentless certainty and, finally,
6 the real world considerations of the
7 intelligence community and Congress, in which
8 E.O. 12333 operates.

9 In my view, the focus of all
10 three panels is essential to our work. It has
11 sometimes been suggested that PCLOB should
12 stick to policy analysis and leave legal and
13 Constitutional issues to the courts and
14 Congress. My experience, both inside the
15 judicial branch and at PCLOB, convinces me that
16 that should not and can not be. Because we are
17 a government of laws and PCLOB specifically
18 operates under statutory mandate to assure that
19 laws are implemented in a way that
20 appropriately balances privacy and national
21 security and counterterrorism programs, we must
22 understand and examine the legal and
23 Constitutional framework within which the
24 intelligence community operates.

1 I cannot candidly think how we
2 could conscientiously pursue policy analysis
3 outside of that framework. So, our friends in
4 the legal academy, those who have worked in the
5 intelligence community and in Congress have
6 valuable and often different perspectives on
7 these issues and we're very grateful to them
8 for sharing those views with us and the public
9 today.

10 MS. COLLINS: Thank you, David.
11 So, again, welcome and the hour is nigh we
12 finish what we need to be doing and now we get
13 to actually listen to the experts. So, thank
14 you, guys for joining us today. This first
15 panel will examine the legal, historical and
16 policy considerations that led to the
17 development and implementation of Executive
18 Order 12333 as well as Constitutional
19 separation of powers issues implicated by its
20 implementation.

21 Each of our distinguished
22 panelists will have five to seven minutes of
23 opening remarks. Rebecca, I believe, if you
24 could, here we go -- will hold up a yellow card

1 to let the panelists know that two minutes
2 remain. And once the first panelist's time is
3 up, I will introduce the next speaker. When
4 all the speakers have given opening comments,
5 each Board member will have ten minutes to ask
6 questions and I understand we will be subject
7 also to the yellow flag rule. All right.

8 So, turning to our first
9 panelist, Robert Chesney is the Charles I.
10 Francis Professor in Law and the Associate Dean
11 for Academic Affairs at the University of Texas
12 Law School -- School of Law -- excuse me. In
13 addition, he is the Director of the Robert S.
14 Strauss Center for International Security and
15 Law, a university wide research unit bridging
16 across disciplines to improve understanding of
17 international security issues. So, if you
18 could kick us off.

19 MR. CHESNEY: Thank you.
20 Chairman Medine and members of the Board, I
21 appreciate the opportunity to appear before you
22 today. I will use my time to help frame our
23 discussion of 12333 foreign intelligence
24 collection and the Constitution separation of

1 powers. Mindful that your charge is specific
2 to counterterrorism, but at the high level of
3 generality I plan to talk about, I'm not going
4 to be very specifically focused on that
5 constraint in these remarks.

6 I want to start within the
7 central point and that is that foreign
8 intelligence collection raises two distinct
9 types of separation of powers questions and
10 it's critical that we be clear in
11 distinguishing those two and avoid confuting
12 them. One concerns the power of the President
13 considered in isolation. That is, does the
14 President have inherent Constitutional
15 authority to collect foreign intelligence
16 without need of a statutory grant of power to
17 do so? A distinct second question concerns the
18 power of Congress in relation to that of the
19 President. That is, would it be Constitutional
20 for Congress to legislate various kinds of
21 constraints on the collection of foreign
22 intelligence information?

23 I'll talk about these in that
24 order. First, does the President have inherent

1 Constitutional authority to collect foreign
2 intelligence information? I believe this is an
3 easy question that the answer is yes. It's
4 true that the text of Article Two does not
5 specifically address the point, but the case
6 for inherent collection authority is
7 nonetheless overwhelming. It flows from the
8 President's role as Commander in Chief, as the
9 sole organ of United States in foreign affairs,
10 as the Supreme Court put it in Curtis Wright,
11 and as the officer vested with the executive
12 power. Functionally, the President's
13 comparative institutional competence advantages
14 with respect to secrecy, dispatch and energy
15 all favored this conclusion, and most notably,
16 the course of actual practice over time
17 strongly favors this conclusion.

18 For nearly two centuries the
19 Executive Branch in various forms of foreign
20 intelligence collection with little, if any,
21 hint of statutory authorization beyond the
22 provision of generalized funding. Diplomats
23 performed the function, private representatives
24 of the President performed the function,

1 Army/Navy performed the function, eventually
2 including signals intelligence of an electronic
3 variety. Things changed only slightly with the
4 National Security Act of 1947 with its brief
5 references, affirmative references, to
6 collection. But absolutely no one thought at
7 the time that what the National Security Act
8 was accomplishing was a grant of a novel
9 heretofore unavailable form of authority for
10 the Executive Branch to use.

11 Simply put, the course of
12 practice throughout our history establishes
13 that the President has this authority as an
14 inherent matter. Of course, it also follows
15 that all things being equal, the President, in
16 using this authority, is at liberty to adopt
17 the rules he sees fit with respect to which
18 subordinate Executive Branch entities or
19 officials shall have which particular
20 sub-functions under the general collection
21 domain and, likewise, if the President wishes
22 to impose substantive constraints on those
23 entities and individuals. This is what 12333
24 and its predecessor Executive Orders do. It's

1 a manifestation of the President exercising
2 these Article Two functions.

3 But this isn't really the
4 interesting question. The interesting question
5 isn't whether the President, all things being
6 equal and in the absence of legislation, has
7 these sorts of authorities. The interesting
8 question is the second one I mentioned at the
9 outset. What constraints, if any, are
10 Constitutional for Congress to impose on the
11 exercise of this function? Another way to
12 frame that is whether the President's Article
13 Two authorities are to any extent preclusive of
14 statutory regulation. This is a much trickier,
15 more fraught question, more nuanced question
16 and I don't believe it allows for a
17 one-size-fits-all answer in one direction or
18 the other.

19 I think that the most useful
20 thing I can do at this point is to identify
21 some of the variables that help distinguish
22 different types of existing or potential
23 constraints in this area. For example, one
24 variable concerns the nature of the potential

1 constraint. Is Congress attempting to manage
2 or control the internal Executive Branch
3 decision making process related to collection?
4 For example, with a requirement that certain
5 officials or entities have a voice in decisions
6 to collect in certain ways. Is it instead an
7 attempt to compel the sharing of information
8 with Congress? Or is it instead a substantive
9 prohibition of some kind, perhaps barring
10 collection on certain topics or in certain
11 places or for certain reasons?

12 Another potentially relevant
13 variable concerns the nature of the Article One
14 authority that Congress might be employing. Is
15 Congress exercising the spending power where
16 its capacity to regulate indirectly is arguably
17 at its maximum? Or is it instead a stand alone
18 regulatory measure that might be said to depend
19 on, say, the necessary and proper cause in some
20 fashion or perhaps the power of Congress to
21 make rules for the Armed Forces?

22 And critically, we might also
23 consider whether the legislation that either
24 exists that we might consider or might

1 hypothetically exist pertains to a
2 Constitutionally protected right, particularly
3 the First and Fourth Amendments. Now, there's
4 no doubt we can expand on this list,
5 highlighting potentially relevant variables,
6 but I think this is enough to illustrate my
7 point that the nature of potential legislative
8 constraints can vary widely and that, in turn,
9 can greatly complicate the Constitutional
10 separation of powers analysis, particularly
11 insofar as in this realm the course of practice
12 over time may loom very large. We have the
13 example of some forms of legislative regulation
14 already. We have procedural regulations and
15 information sharing regulations.

16 In the covert action sphere we
17 have the Hughes Ryan Amendments and, of course,
18 we have FISA for collection of a certain kind
19 with Fourth Amendment equally strongly
20 implicated, both from the 1970's. And in those
21 cases, whatever arguments might have been made
22 in the 1970's -- and certainly some arguments
23 were made challenging the constitutionality --
24 the course of the practice of the Executive

1 Branch acquiescing in these measures over time
2 weighs heavily in the balance today and that,
3 in turn, helps to bolster the case for similar
4 measures in the future.

5 Where the same variables are not
6 present, it's not nearly as clear. Now, I
7 won't go so far as to suggest that we can draw
8 a clear line here. I think any amount of time
9 spent thinking about separation of powers in
10 the foreign affairs and national defense realm
11 teaches you quickly that although we often talk
12 in terms of bright lines, it's very hard to
13 actually draw them. And so, I would instead
14 simply suggest that consideration of these
15 sorts of factors can be a useful guide in
16 making claims -- not so much about what is
17 clearly constitutional or clearly
18 unconstitutional, but rather that which is
19 going to be relatively troubling and
20 problematic and that which will be relatively
21 acceptable and likely to prove constitutional
22 on close inspection.

23 And my time having expired, I'll
24 end there and I look forward to your questions.

1 MS. COLLINS: Perfectly timed. A
2 great way to start us off. Thank you. Deborah
3 Pearlstein is an Assistant Professor of Law at
4 the Benjamin N. Cardozo School of Law. Her
5 research focuses on national security law and
6 the separation of powers. Previously,
7 Professor Pearlstein served as the founding
8 Director of the law and security program at
9 Human Rights First.

10 MS. PEARLSTEIN: Thank you.
11 Thank you very much to the Board and Chairman
12 Medine for the opportunity to testify on 12333
13 today. As you know, 12333 establishes
14 procedures for, among other things, the bulk
15 collection of human and technical foreign
16 intelligence information outside U.S. borders.
17 While 12333 prohibits directly targeting U.S.
18 persons for collection, it expressly
19 contemplates, as the administration has
20 acknowledged, that an unidentifiably large
21 quantity of Americans' electronic
22 communications may be incidentally captured
23 through the process of bulk data collection.
24 Because other witnesses will

1 address the constitutionality of this
2 collection and the adequacy of associated
3 minimization procedures under the First and
4 Fourth Amendments, it was here on the
5 separation of powers significance of this
6 particular practice. The President has
7 maintained the power to engage in bulk data
8 collection like this flows neither from 12333
9 nor from any necessary Congressional authority,
10 but, as Bobby tells us, from the President's
11 constitutional authority to conduct U.S.
12 foreign relations and to fulfill his
13 constitutional responsibilities as Commander in
14 Chief and Chief Executive.

15 What does the Constitution's
16 commitment to the separation of powers tell us
17 about the wisdom of the 12333 scheme? I'd like
18 to make four brief points. First, in the
19 service of his duty to act in defense of the
20 nation, the President no doubt has some
21 inherent Article Two authority to engage in
22 electronic surveillance to obtain information,
23 particularly about those who plot unlawful acts
24 against the government, as the Supreme Court

1 has recognized. But as the Court has also
2 repeatedly reminded us, no governmental power
3 is unlimited. The conclusion that the
4 President's power in this context, as all
5 others, must be limited flows from the
6 enumerated structure of the Constitution
7 itself, from the existence of external limits
8 on executive power in the Bill of Rights and
9 elsewhere and from the reality that Congress is
10 also given a substantial role in national
11 security affairs. Congress has the power not
12 only, for example, to define and punish
13 offenses against nations and make rules
14 governing the regulation of our Armed Forces,
15 and also, of course, the spending power, but to
16 regulate commerce with foreign nations and
17 among the several states.

18 Telecommunications and the
19 internet are today channels of commerce in just
20 the same way waterways were in the 19th century
21 and there is no serious dispute that Congress
22 can make rules regarding their use by
23 commercial and domestic governmental actors.
24 Indeed, as I believe this administration

1 agrees, when Congress legislates in the field
2 of surveillance, that legislation controls
3 executive operations, at least so long as it
4 doesn't fundamentally impair inherent or what
5 Bobby calls preclusive executive authority --
6 that is, this preclusive core of power that not
7 even Congress can regulate to engage in foreign
8 intelligence surveillance.

9 So, what is the scope of that
10 inherent preclusive Congressional authorization
11 or prohibition to the existence of a systematic
12 unbroken executive practice long pursued to the
13 knowledge of Congress and never before
14 questioned that might be treated as a gloss on
15 the executive power. This is the Supreme
16 Court's words. But while presidents have long
17 engaged in foreign intelligence collection in
18 retail in this individual targeted way, never
19 in human history has there been the kind of
20 computing power required to engage in the kind
21 of wholesale collection and subsequent
22 searching the executive undertakes today.

23 Worse, as multiple actors have
24 suggested, executive practice under 12333 was

1 and remains little understood even to members
2 of Congress. When some of its contours were
3 revealed, legislative questioning seems to have
4 begun in earnest. More, Congress has in a
5 closely related context in FISA, of course,
6 regulated to constrain executive authority and
7 foreign intelligence surveillance for nearly 40
8 years, primarily by the executive unchallenged
9 years. History in this sense offers little
10 basis for recognizing the breadth of preclusive
11 power asserted here.

12 Third point: The functional
13 interests that the allocation of power between
14 the branches was designed to advance -- first
15 and foremost, protecting individual liberty,
16 but also promoting political accountability and
17 facilitating effective government remain
18 indisputably salient today as a matter of
19 policy and constitutional law. But substantial
20 questions exist as to the success of 12333 by
21 any of these metrics. The activities regulated
22 by 12333 generally avoid the structure of multi
23 branch participation the Constitution presumes
24 is best suited to protecting individual rights.

1 For example, here executive agencies make the
2 rules, the Attorney General approves them,
3 agencies then implement them with no
4 legislative authorization or other politically
5 transparent rule making process in the first
6 instance and no judicial review or other
7 rigorous independent check after the fact.

8 It's not that liberty and
9 accountability interests can never be protected
10 in an intrabranch scheme. Many administrative
11 agencies protect rights and ensure their
12 operations are politically accountable through
13 substitute mechanisms. Notice and comment rule
14 making is one of many examples. But 12333
15 offers little in the way of alternative
16 processes to correct for the absence of multi
17 branch participation. Indeed, executive rule
18 making processes relating to any military or
19 foreign affairs function remain broadly
20 exempted from the Administrative Procedure Act
21 requirements governing rule making otherwise.
22 Collecting massive amounts of data is one of
23 the most potentially intrusive things a
24 government can do. It is also in this context

1 the least subject to independent checks.

2 Finally, what of the need for
3 effectiveness in government, equally one of
4 Hamilton's interests in structuring each branch
5 of government to feature different
6 institutional competencies. While Hamilton's
7 notion retained substantial influence, the
8 unitary executive is the most competent branch
9 in security matters, given its characteristic
10 advantages of secrecy and dispatch, here it's
11 useful to recall the lessons organization
12 theorists have taught us since Hamilton's time.
13 Namely, that unitary secretive structures have
14 significant and predictable disadvantages as
15 well.

16 Political scientists,
17 sociologists and others have studied elements
18 of structural design to identify how
19 organizations best manage, for example, chronic
20 or acute kinds of risks. They found insular
21 institutional cultures, career incentives in
22 professional norms, all these can be advantages
23 but can also contribute to disincentives, to
24 adaptation and self-correction, features

1 essential for the maintenance of effective
2 intelligence collection in the face of rapidly
3 changing technology.

4 That there had been no
5 comprehensive revision to 12333 guidelines to
6 protect information concerning U.S. persons for
7 nearly 30 years is in this respect an
8 unsurprising sign of a predictable
9 organizational pathology. The greater outside
10 participation could help remedy going forward.
11 Engaging in applying these lessons of
12 institutional competence and design can allow
13 us to do intelligence collection better.

14 MS. COLLINS: Thank you. We turn
15 now to Aziz Huq, who is the Professor of Law
16 and the Herbert and Marjorie Freed Teaching
17 Scholar at the University of Chicago Law
18 School. His research focuses on constitutional
19 law, criminal procedure and Federal Courts.
20 Previously Professor Huq was the Director of
21 the Liberty and National Security Project of
22 the Brennan Center for Justice.

23 MR. HUQ: Chairman Medine, Board
24 members, thank you very many for the

1 opportunity to address you this morning. My
2 testimony today will address two questions at
3 the request of your staff. First, what is the
4 origin of Executive Order 12333 and, second,
5 what inference we draw from that origin about
6 the relationship between the separation of
7 powers privacy rights. In brief, I shall
8 answer first that 12333 illustrates how the
9 separation of powers can fail under those
10 political circumstances that are perhaps most
11 propitious to its success. And second, I shall
12 argue that advocates of robust Privacy
13 Protection should use a diversified range of
14 institutional safeguards rather than leaning
15 upon our entirely non self executing separation
16 of powers.

17 History first. In 1976 the
18 Senate Select Committee to Study Governmental
19 Operations with Respect to Intelligence
20 Activities or the Church Committee published a
21 comprehensive record of decades long illegality
22 involving several security agencies. The
23 committee, acting with a bipartisan concord
24 that is rare today, pointed to the absence of

1 comprehensive organic statutes for the NSA, the
2 CIA and the FBI. It urged that this gap be
3 filled. With one exception, the 1978 FISA
4 statute, the committee's statutory
5 recommendations failed. A central reason was
6 the Ford administration's timely promulgation
7 of executive orders. These divided and sunk
8 the legislative coalition for reform. One was
9 Attorney General Levy's FBI guidelines, another
10 was the February 18, 1976 Executive Order
11 11905, the precursor to 12333. Like many
12 executive orders, both 11905 and 12333 rested
13 upon diaphanous and gauzy imputations of
14 statutory authority. Rather than instantiating
15 Congress's will, 11905 and 12333 are best
16 understood as executive instruments to thwart
17 legislative will.

18 Why does the resulting statutory
19 gap matter? It matters here because the 1978
20 FISA was never intended to be field covering.
21 To the contrary, its regulatory reach is mapped
22 by the definition of electronic surveillance in
23 50U.S.C.1801(f), which largely encompasses
24 domestic wire communications. The Wiretap

1 Act's parallel boundary provision in
2 18U.S.C.2511 evinces similar limits. FISA's
3 intended complements, however, were never
4 enacted. And it is within that gap that those
5 surveillance programs that have been identified
6 in the media as operating pursuant to 12333
7 unfold.

8 Members of the Church Committee
9 worried that non statutory constraints would
10 prove evanescent. So it was. President Reagan
11 campaigned for office on the promise to
12 deregulate the CIA and he adhered faithfully to
13 his word. On December 4, 1981 he issued
14 Executive Order 12333. This abrogated a
15 Carter-era revision of 11905. The December
16 1981 revision did many things. It expanded the
17 CIA's authority to engage in both foreign and
18 domestic surveillance. It enlarged the scope
19 for covert actions. And particularly relevant
20 here, it eased and enabled the dissemination of
21 incidentally obtained information concerning
22 U.S. persons.

23 Now, this trajectory of
24 regulation matters because the late 1970's were

1 perhaps one of the most fruitful opportunities
2 over the last several decades for Congressional
3 regulation of the National Security Agencies.
4 Legislators then, unlike now, did not want for
5 information. The White House's luster stood at
6 a post Watergate idea. One party also
7 commanded significant majorities in both
8 houses. Yet comprehensive regulation
9 floundered in large measure, as I said, because
10 the executive employed executive orders to
11 divide and dilute Congressional opposition.

12 Subsequent trends have only
13 deepened Congressional emasculation. Growing
14 party polarization has raised the enactment
15 cost of any legislation. The increasing
16 technological sophistication of surveillance
17 has widened the knowledge gap between the
18 branches. And when specific statutory language
19 can be mustered, such as in the operative
20 provisions of the Stored Communications Act,
21 the text rapidly yields to obsolescence.

22 We know what happens when
23 Congress cannot agree or when it faces
24 technical uncertainties. Canonical work by

1 political scientists such as O'Halloran and
2 Epstein finds that it delegates. Delegation,
3 which is the legislative panacea in other parts
4 of the regulatory state, however, may well just
5 be another way of stating the problem in the
6 national security context.

7 So, what did we learn? First, my
8 co-panelists have debated the legal question of
9 the distribution of authority between Article
10 One and Article Two. I would add caution.
11 This legal question must be understood in light
12 of if they observe dynamics between the
13 branches. What Congress can do as a matter of
14 law in short is quite different from what it is
15 likely to do in fact.

16 Second, the history of
17 interbranch dynamics suggests that the Congress
18 will not reliably provide comprehensive
19 regulation in this domain or that it will be
20 able to update such regulation in the face of
21 technological change. Congressional
22 involvement may be necessary under some
23 circumstances, but it alone cannot be
24 sufficient.

1 Third, and finally, if
2 constraints upon aggregate collection and
3 analysis are desirable, they must be
4 established in a more creative fashion. We can
5 draw some insight from a tragedy that was
6 roughly contemporaneous with the promulgation
7 of Executive Order 12333. We might say with
8 some glibness that one doesn't rest the success
9 of an entire mission to space on a single
10 O-ring. Preventing catastrophic outcomes,
11 we've learned from the Challenger and like
12 disasters, means having multiple often
13 redundant safeguards in place. In the privacy
14 context, it requires a plurality of
15 institutional platforms to prevent the misuse
16 of aggregated telecommunications data.

17 This Board is an important start.
18 We could talk more about other robust internal
19 checks, such as inspector generals, other kinds
20 of privacy officers as well as external checks
21 like support for and sanction of self help in
22 the privacy domain as well as enlarge private
23 rights of action. And we should further
24 recognize the fruitful interaction between the

1 branches. Hence, when the Second Circuit Court
2 of Appeals last week drew upon this Board's
3 report to rule on Section 215 collection, it
4 provided a small but useful example of how
5 multiplicity of institutional platforms can
6 interact to generate meaningful constraint that
7 no one branch alone can provide.

8 Thank you for the opportunity to
9 speak to you today

10 MS. COLLINS: Excellent. Three
11 for three on time. So, for our last panelist
12 challenge, Stephen Slick is the Director of the
13 Intelligence Studies Project at the University
14 of Texas at Austin. Before moving to Austin,
15 Professor Slick acted as Station Chief and DNI
16 representative in the Middle East. He has also
17 served as a special assistant to the President
18 and Senior Director for Intelligence Programs
19 and Reform on the staff of the National
20 Security Council.

21 MR. SLICK: Thank you, Beth. I
22 appreciate the opportunity to be here today. I
23 appreciate the invitation from the Board. I
24 left Philadelphia 29 years ago, a law practice

1 up the street, to join CIA's clandestine
2 service and I have never regretted that
3 decision, but I always welcome the chance to
4 come back to Philadelphia. So, with the
5 chairman's permission, I'll move very quickly
6 through a prepared statement and then welcome
7 your questions.

8 This statement will address the
9 circumstances surrounding the 2008 amendments
10 to Executive Order 12333, the treatment of
11 privacy and civil liberties issues that arose
12 during that process as well as the limited
13 separation of powers issues that we discussed
14 while making those amendments several years ago
15 now. There's a more detailed account of the
16 interagency process that led to the amendments
17 in 2008. It's captured in a Studies in
18 Intelligence article from June 2014. I left
19 several copies back on the desk and I'm sure
20 there will be a scuffle breakout after we
21 finish here over who gets the three copies I
22 carried with me. But anyway, you're welcome to
23 those. And then I'll conclude with a short
24 comment on the practical application of the

1 Executive Order from the perspective of a CIA
2 field operations officer. And for the record,
3 because of my long association with CIA, these
4 remarks were approved by CIA's Publication
5 Review Board.

6 Although Executive Order 12333
7 was a near constant reference point during my
8 career in the clandestine service, I was most
9 intensely focused with the order while serving
10 on the staff of the National Security Council
11 in 2008 when the order was significantly
12 amended by President Bush. My colleague, the
13 NSC's legal advisor, Mike Scudder, and I were
14 responsible for interagency coordination of
15 draft amendments to the order before the
16 President approved them.

17 President Bush chose to update
18 the order late in his administration, in part
19 based on the consensus recommendation of his
20 Director of National Intelligence, Mike
21 McConnell, the President's Intelligence
22 Advisory Board and his senior staff advisors.
23 After the Intelligence Reform and Terrorism
24 Prevention Act was passed in 2004, creating the

1 position of the DNI, establishing the National
2 Counterterrorism Center and mandating greater
3 information sharing between intelligence
4 agencies, the original Executive Order on
5 intelligence signed by President Reagan in 1981
6 was clearly obsolete. With the benefit of two
7 years' experience operating under the IRTPA,
8 DNI McConnell proposed a series of amendments
9 to the order that would clarify ambiguous
10 provisions in the law, accelerate the process
11 of integrating the intelligence community and
12 also reinforce the DNI's role as the leader of
13 that community. For example, Admiral McConnell
14 sought a stronger hand in selecting and
15 removing senior intelligence officials. He
16 sought the authority to determine what data
17 constituted national intelligence and therefore
18 needed to be shared with him as well as with
19 other agencies. And also the ability to
20 implement more efficiently certain policies at
21 intelligence agencies housed within other
22 cabinet departments.

23 This latter objective grew from
24 mounting frustration with agencies that would

1 repeatedly invoke Section 1018 of the IRTPA, a
2 provision in the law that was intended to
3 prevent the DNI from interfering in
4 departmental chains of command. The President
5 and his senior staff and members of the NSC
6 Principles Committee were extensively engaged
7 during the first half of 2008 resolving a
8 series of thorny issues that arose while
9 updating the order. The final text of the
10 order was approved in late July after passage
11 of the FISA Amendment Act and before Board
12 Member Collins and her colleagues at the
13 Department of Justice completed the Attorney
14 General guidelines for domestic FBI operations
15 that are described in the Executive Order.

16 With respect to the privacy and
17 civil liberties protections in the 1981
18 Order -- or excuse me -- the 2008 Order,
19 President Bush provided unequivocal guidance.
20 He directed that the process of updating the
21 Executive Order was to be privacy neutral. If
22 an opportunity arose to strengthen the privacy
23 and civil liberties protections of the new
24 order, we were to do so, but in no instance

1 were safeguards in the original order to be
2 weakened. In practice, this meant that
3 relatively few changes were made to Section Two
4 of the order.

5 One example of how civil
6 liberties matters were addressed involved the
7 DNI's authority to determine when information
8 was of interest to more than one IC agency and
9 therefore subject to the procedures for access
10 sharing and retention that would be approved by
11 the Attorney General. The amended order made
12 clear that whenever such information pertained
13 to American citizens or law enforcement
14 investigations, the relevant procedures
15 promulgated by the DNI had to be reviewed and
16 approved in advance by the Attorney General.

17 Turning to the panel's assigned
18 topic, separation of powers, I would note only
19 that there was full agreement that amending
20 Executive Order 12333 was the preferred means
21 to achieve the goals of the DNI and the
22 administration in 2007 and 2008. Between 2004
23 and 2007 there have been periodic discussions
24 about whether to pursue formal amendments to

1 the IRTPA, but this option was never seriously
2 entertained. There had been little appetite
3 for reopening highly charged intelligence
4 reform questions that were exhaustibly debated
5 in the summer of 2004 within the administration
6 and later that year by the Congress.

7 Indeed, the NSC principals agreed
8 at one of the first meetings called to consider
9 these amendments that one objective for the
10 process would be to avoid taking any actions
11 that were likely to provoke a legislative
12 response. The overall goal was to establish a
13 durable model for effective intelligence
14 activity but within the framework of the IRTPA.
15 We were aware that the intelligence orders
16 issued decades earlier by Presidents Ford and
17 Carter had been prepared with extensive
18 consultation with the Congress. In 2008,
19 however, the decision was taken to provide
20 Congress with notice and explanation of planned
21 amendments to the Executive Order. Requests
22 from the Intelligence Oversight Committees for
23 a draft of the order were declined. That
24 decision was later criticized by the leaders of

1 these committees. Because of the many
2 contentious issues addressed in the revised
3 order and delicate compromises that were
4 reached among Executive Branch principals, it's
5 unlikely, in my view, that the process of
6 updating Executive Order 12333 could possibly
7 have been completed before the end of the
8 administration if substantive consultations
9 with Congressional leaders had been attempted.

10 Despite the criticism at the
11 time, I'm not aware of any instance where the
12 Congress has subsequently acted to reverse or
13 modify any of the changes made in 2008. And
14 notwithstanding the considerable attention paid
15 to oversight of intelligence activities in
16 recent years, the current administration has
17 also not further amended Executive Order 12333.

18 Later today the Board will hear
19 from distinguished panelists, several of whom
20 are close friends of mine, about the practical
21 application of Executive Order 12333. I would
22 add to that only the following: Based on my
23 several decades of service with the CIA,
24 including multiple assignments overseas, it's

1 difficult to overstate the seriousness with
2 which field collectors of intelligence treat
3 the provisions of the Executive Order. As a
4 young operations officer serving overseas under
5 cover, my colleagues and I received annual
6 in-person refresher briefings from CIA's Office
7 of General Counsel about the provisions of the
8 Executive Order. Years later while I was
9 leading a large field station, I encountered
10 Executive Order 12333 issues almost every day.
11 For example, field managers are required to
12 assign lanes in the road between different U.S.
13 collection agencies that may be present in a
14 foreign country. They have to apply
15 minimization procedures to U.S. person
16 information that's collected and they have to
17 determine when it's necessary to disclose an
18 intelligence affiliation to American citizens.

19 The Board should be assured that
20 intelligence officers and managers serving
21 overseas are trained to identify issues like
22 these when they arise and seek guidance from
23 more senior managers and their attorneys in
24 Washington.

1 Thank you. Sorry for getting the
2 red card.

3 MS. COLLINS: I think that means
4 that you can't participate in the rest of this
5 panel and possibly the next panel, if I
6 remember soccer correctly.

7 MR. MEDINE: Thank you all for
8 your very helpful comments. Two of the -- I
9 guess I'm talking about separation of powers,
10 we're talking about some strong powers of the
11 president under Article Two and I'd like to
12 focus on the Congress' spending power, which
13 two of the panelists have addressed. I think
14 we tend to think of legislative restrictions
15 imposed on the President in terms of exercising
16 foreign intelligence powers, but I'd like you
17 to discuss spending power because that seems
18 almost an exclusive grant of authority to
19 Congress whereas, as was mentioned earlier, the
20 President's power to conduct intelligence is
21 inferred from some of the President's
22 constitutional authorities.

23 So, what happens in the event of
24 a conflict where the Congress in an

1 appropriations bill writes in a provision that
2 says the President cannot conduct any foreign
3 intelligence gathering in Country X? Is that
4 constitutional? And doesn't Congress have
5 exclusive spending authority to control the
6 President's use of the budget or does the
7 President say under Article Two I have
8 exclusive authority and I'm going to spend
9 money that I wasn't appropriated to engage in
10 those activities? Any thoughts on how those
11 two powers, separation of powers -- not the
12 legislative, but the spending -- interrelate?
13 And I guess we can start here.

14 MR. CHESNEY: Well, that's a
15 great example to raise and it calls to mind the
16 analogy here to the Commander in Chief
17 authority of the President in Article Two where
18 in our classrooms -- I suspect Deborah has the
19 same experience -- we routinely are talking
20 with students various hypotheticals about where
21 the Commander in Chief authority might run up
22 against various legislative powers and, of
23 course, the history of Vietnam and the role
24 that Congress played in compelling the military

1 withdrawal from Vietnam. Ultimately it was the
2 spending power that did the trick, as we all
3 know. Does that mean that there's no limits to
4 the conditions that could be imposed by
5 leveraging the power of the purse? At some
6 point there has to be. So, in class when this
7 comes up under the Commander in Chief clause
8 heading, I'll pose a hypothetical about the use
9 of the spending power to require that the
10 military chain of command be disrupted in some
11 obviously unconstitutional manner such as
12 making the Speaker of the House the Commander
13 in Chief because the spending power is being
14 used in that way.

15 And this usually leads to what I
16 think is the right answer, which is that bridge
17 is too far. So, the question is how close to
18 the constitutional bone can you cut in
19 leveraging the spending power? And there is a
20 substantial gray area in which reasonable
21 lawyers are going to disagree about which
22 bridge is too far. I think the Commander in
23 Chief example I just gave you is sort of the
24 paradigm for what would be too far. But we

1 have the example of the funding constraints for
2 Southeast Asia and Vietnam in the early 1970's
3 to suggest some historical practice in which
4 the Executive Branch acquiesced, allowing a cut
5 pretty close to that bone. Perhaps the same
6 set of considerations apply by analogy here in
7 the foreign intelligence collection realm,
8 which I see is actually quite analogous.

9 MS. PEARLSTEIN: So, I agree it's
10 a great question. I think I'd say two things
11 or make two points in response. The first is
12 to keep in mind the conclusion that was
13 detailed really wonderfully in the article by
14 Marty Leiderman and David Barron several years
15 ago about the scope -- entirely focused on the
16 scope of the President's preclusive
17 constitutional authority. And the conclusion
18 of that rather lengthy historical study was
19 that there's got to be some but not much. And
20 the reason they concluded that was the case --
21 that is, not much that Congress couldn't
22 constrain about what the President did was
23 primarily historical -- that is, in the past
24 200-plus years, Congress has regulated,

1 including in the military context, but not only
2 in that context, almost everything that the
3 President has done. And today we have the
4 really historically unprecedented example over
5 the last several years of Congress regulating
6 essentially who can and can't be released from
7 a particular prison facility held in a
8 particular wartime, which is one might have
9 imagined was at that preclusive core and is
10 nonetheless happening. So, I guess the first
11 point I'd make is there's something there, but,
12 you know, it's a narrow piece.

13 The second point I'd make on
14 constraints surrounding Congress' spending
15 clause power, which I otherwise agree, are --
16 you know, Congress has an enormous amount of
17 power to say we're going to give you this money
18 but only on the following conditions. And that
19 is that Congress operates under a set of, as
20 we've discussed, weighty and enormously
21 effective political checks, which is to say
22 that even when in Vietnam or otherwise a
23 majority of Congress might have otherwise said
24 we want the President to stop doing this, it

1 has felt constrained from exercising its
2 spending clause power for political reasons.
3 Now that may be and, in fact, often is exactly
4 the way we want the system to operate. Among
5 other things it means or it puts a check on
6 Congress' exercise of its spending clause
7 powers, it's unlikely to do something that's
8 really extreme or really beyond the pail in
9 pulling in the powers of the executive because
10 it has, you know, all over it the desire and
11 the political incentives to expand executive
12 power generally.

13 MR. CHESNEY: Mr. Chairman, can I
14 add a quick follow-up thought?

15 MR. MEDINE: Sure.

16 MR. CHESNEY: It occurs to me to
17 emphasize that, of course, not all collection
18 names are of equal stature in this regard. And
19 so, going back to my opening theme of being
20 mindful of these distinctions, if we imagine
21 the distinction between collection undertaken
22 to inform trade policy versus collection
23 undertaken in the context of an armed conflict
24 in which national self defense authority of the

1 President has been implicated, I think that's a
2 salient distinction and I'm thinking of the
3 prize cases in which the Supreme Court in the
4 American Civil War specified that when it comes
5 to national self defense, the President in that
6 capacity when acting unilaterally, it's not
7 just the President having the authority to do
8 so, but as the court put it, it's the duty of
9 the President to act in that circumstance.

10 And this suggests that to the
11 extent there is a preclusive core into which
12 even the spending power can't intrude, that
13 core is going to be more strongly implicated in
14 the national self defense scenario.

15 MR. MEDINE: So, I guess talking
16 about the war powers that the President has, we
17 also heard earlier both from my colleagues and
18 from the panelists that as part of 12333
19 authorities, more and more U.S. person
20 information is being incidentally collected. I
21 guess the question I'd like to pose is what is
22 Congress' authority to legislate protections
23 for U.S. persons in the context of 12333
24 collections? Could Congress impose a probable

1 cause requirement, a warrant requirement, other
2 restrictions that would limit or protect
3 further incidental collections of U.S. persons
4 in light of the fact that a lot of the
5 activities we currently engage in are in war
6 theaters or against terrorist activities? Does
7 Congress have the necessary and proper
8 authority to vindicate Americans'
9 constitutional rights by imposing restrictions
10 on the President's exercise of Article Two
11 powers together and engage in national security
12 matters?

13 MS. PEARLSTEIN: So, does
14 Congress have the power to enact legislation
15 protecting its civil liberties? Yes. And in a
16 way I view this as a species of the discussion
17 we've been having. As long as Congress has an
18 affirmative authority that's applicable under
19 the spending clause, which is centrally
20 relevant here, under the commerce clause, which
21 I think we shouldn't overlook the importance
22 of, particularly in the context of regulations
23 about the government's access to and use of
24 channels of communications. I think there's no

1 barrier to that and, you know, with reference
2 to my earlier remarks about attending to the
3 nature of a preclusive core, one might
4 logically reason it can't be within the scope
5 of the President's preclusive power to do
6 something that might otherwise violate the
7 First or Fourth Amendments' right of the
8 Constitution. These external limits exist on
9 the President's power regardless. So, it seems
10 a reasonable constitutional expectation that
11 assuming Congress already has the affirmative
12 authority to do it, that's certainly a realm
13 within which it can act.

14 MR. CHESNEY: I'll just add that
15 as I mentioned in my opening remarks, I think
16 that the authority of Congress and the
17 corresponding analysis of what the preclusive
18 zone may be, Congress is in a very strong
19 position when there are clear connections or
20 clear nexus with First and Fourth Amendment
21 equities. As a strictly technical matter, it
22 gets a little bit tricky explaining precisely
23 what the affirmative legislative authority is
24 if you're not talking about leveraging of the

1 spending power. I understand the Foreign
2 Commerce Clause argument. I'm not as drawn to
3 it as I think my colleague is. And if we were
4 talking about regulation of state government
5 activity, you could simply point to the
6 enforcement powers under Section Five of the
7 Fourteenth Amendment and you could get
8 enforcement legislation for any number of
9 rights through that way.

10 We don't have identical language
11 for the Fifth Amendment in regulation of the
12 Federal government's activities and so, it
13 might require a bit of fancy footwork. I think
14 that the spending power is a critical piece to
15 get around that.

16 MR. MEDINE: Can I have maybe a
17 minute -- just a quick question and maybe a
18 really quick answer, which is Congress not that
19 long ago -- I guess in Section 309 of the
20 Intelligence Authorization Act -- limited 12333
21 record retention to five years subject to a
22 number of exceptions. You can say yes or no --
23 constitutional or not?

24 MS. PEARLSTEIN: Oh, I don't

1 know. I'd have to ask other questions. I'm
2 sorry.

3 MR. MEDINE: Okay. I'll defer to
4 my colleague since my time has expired.

5 MS. COLLINS: Although I think
6 it's a great question, so if I have some time I
7 might go back to that. I actually wanted to
8 follow-up Professor Huq, if I could, with you
9 on this notion of the separation of powers
10 being non self executing. And the reason I ask
11 your basis for that is it strikes me and
12 another source of authority for a congressional
13 power is, of course, their ability to make
14 criminal statutes and criminal penalties. And
15 so, to the extent that there is a statutory
16 prohibition or restriction, there are
17 individual agents within the Executive Branch
18 who face potential criminal prosecution for
19 violating those types of legislative
20 enactments. So I just want to press a little
21 bit on what you meant by non self executing.

22 MR. HUQ: What I'm thinking of
23 here is the mechanism that according to Madison
24 would motivate the branches to act in their

1 self and trust in a way that produced the kind
2 of equilibrium that the frame is anticipated.
3 In the Federalist papers, Madison pointed to an
4 identity between the interests of the officials
5 who inhabited the different branches and the
6 interests of the institution itself. There's a
7 large literature in political science that
8 legal scholars have recently rediscovered to
9 the effect that individuals within the branches
10 do not always or necessarily act in the
11 interest of the branches. The point probably
12 has the most force with respect to Congress,
13 where incentives that are party framed are
14 often more powerful than interests that are
15 institutional in their grounding.

16 The consequence of the insight
17 that the interest of the person is not always
18 aligned with the interest of the institution is
19 that the mechanism whereby the framers
20 perceived the balance or the mechanism that the
21 framers perceived as producing healthy
22 equilibrium between the branches is one that is
23 unevenly operative between the branches. So,
24 in using the phrase non self executing that's

1 what I meant.

2 You are entirely correct to say
3 that Congress has authority to enact criminal
4 statutes. At the same time there is Supreme
5 Court case law -- most importantly, the
6 Armstrong case -- that recognizes the
7 discretion on the part of the Executive Branch
8 to determine when and how prosecutions proceed
9 under statutes that Congress has enacted. And
10 at least at the extreme, there are constraints
11 that one might tie back to the Bill of
12 Attainment Clause on Congress' authority to
13 require a direct the use of criminal penalties,
14 at least in the absence of the use of the
15 impeachment procedures.

16 MS. COLLINS: Thank you. I don't
17 know if it's Director Slick, Professor Slick,
18 Steve, however --

19 MR. SLICK: Steve is fine.

20 MS. COLLINS: Excellent. This is
21 a little bit of a combination of some of the
22 panels we'll have later and what you talked a
23 little bit about. With the 2008 changes to
24 E.O. 12333, was some of the intention there

1 also to deal with technological changes? If
2 not, why not and should there be a subsequent
3 change to E.O. 12333?

4 MR. SLICK: Well, I'll answer the
5 second half of your question first. When I
6 mentioned at the end of my remarks that the
7 current administration had not amended the 2008
8 version of the Executive Order, I welcomed
9 that. It was an extremely complex undertaking.
10 The range and scope of issues that were
11 addressed in the four or five months we spent
12 at a very high level working on this were truly
13 daunting and there are second and third order
14 consequences to change issue making in
15 something that's been as durable and as
16 pervasive as that. So, I would not undertake
17 further amendments to that Executive Order
18 lightly at all.

19 And to answer your question about
20 technical change, I think we believed at the
21 time in the spring of 2008 that those issues
22 were largely being addressed through the FISA
23 Amendments Act that was then under debate in
24 Congress and Admiral McConnell spent a good bit

1 of time lobbying on the Hill, explaining to
2 members how new technologies had changed the
3 capacity of our intelligence community to
4 collect and analyze information and they
5 frankly did the best they could in that piece
6 of legislation to reflect technologies that
7 didn't exist in 1978. We did not have a
8 broader discussion around the revisions to the
9 Executive Order about new technologies and how
10 they should be represented in that text.

11 MS. COLLINS: Well, since we do
12 have the experts here and we have a recent
13 piece of legislation signed into law, I'm going
14 to ask David's question. I think it's a great
15 one and I've got plenty of time on the clock
16 for folks to answer, so legislatively imposed,
17 although with some exceptions, restriction of
18 five years on retention or materials collected
19 pursuant to 12333? Professor Chesney?

20 MR. CHESNEY: If I'm not
21 mistaken -- I haven't looked at this recently,
22 but I believe there are some caveats to it; is
23 that right?

24 MS. COLLINS: There are some

1 exceptions.

2 MR. CHESNEY: Yeah. I think that
3 those are critical in enabling me to say yes.

4 MS. COLLINS: What were the types
5 of factors that need to be reflected in that
6 type of legislation in order to maintain its
7 constitutionality?

8 MR. CHESNEY: Right. So I think
9 you need to be mindful of the prospect that --
10 to go back to my example of, you know, a
11 national defense relevant scenario or there's
12 something that gets close to the bone of the
13 President's duties relating to the national
14 defense. Insofar as we can hypothesize
15 arguments about the need to retain information
16 for a longer term than the statute might
17 otherwise allow, there's not an exception and
18 you could have as-applied examples where it
19 would be problematic to have such legislation.
20 I think that by anticipating those types of
21 categories, as I think this legislation does, I
22 think you avoid those constitutional
23 difficulties and that may be a good guide to
24 how to -- if there's to be further legislation

1 in this area in containing those sorts of
2 waivers and caveats, I think is critical.

3 MS. COLLINS: So, if the
4 exceptions are capable of swallowing the rule,
5 then it might be constitutional?

6 MR. CHESNEY: One can put it that
7 way to make it sound a certain way, but I
8 wouldn't put it that way myself. I think that
9 they enable the rule to function in the vast
10 majority of cases and with sensible carefully
11 tailored exceptions, it can ensure its
12 constitutionality.

13 MS. COLLINS: David?

14 MR. MEDINE: I'm not familiar
15 with the changes.

16 MS. COLLINS: All right.
17 Professor Huq?

18 MR. HUQ: I'm also not familiar
19 with the exceptions that Professor Chesney
20 described.

21 MS. COLLINS: You guys have not
22 spent enough time inside the Beltway recently.
23 This was the hottest topic for a while.

24 MR. HUQ: That explains so much.

1 You make us glad to not live in the Beltway. I
2 think that the hard question is one of the
3 question of who decides -- that is, the
4 question of who has the discretion or who has
5 the authority to make the determination on some
6 kind of a categorical basis of when and how a
7 matter of retention is critical to the national
8 defense. The law and the case law, I think,
9 does not provide us with even a framework for
10 approaching that question or thinking about it.
11 In part because much of the law and the Vietnam
12 era examples, the price cases are all instances
13 that are quite dissimilar from the retention
14 context.

15 And to be frank, the closest that
16 I can think of with respect to Presidential
17 retention issues and Congress executive
18 interactions is the second Nixon case, which
19 concerns the Presidential Records Act and
20 that's an instance in which notwithstanding
21 what might have perhaps in the hands of another
22 President been a more compelling set of claims
23 received a fairly cold welcome on the part of
24 the Supreme Court. So, if one is engaged in

1 the exercise of trying to fit this legislation
2 within the different categories that the case
3 law seems to give us for species of
4 Congressional regulation, I think the closest
5 fit is Nixon and I think that that lists in
6 favor of broader rather than narrower
7 discretion on the part of Congress to make
8 judgments about what is as, as they say,
9 necessary and proper.

10 MS. COLLINS: And with no offense
11 intended to my fellow Board member, Judge Wald,
12 what is your view of the institutional
13 competence of the courts to be revisiting or
14 looking at determinations by the Executive
15 Branch or perhaps Congress, but more likely the
16 Executive Branch as to what does implicate
17 national security?

18 MR. HUQ: The question of
19 institutional competence, first, is always a
20 relative one. One doesn't just ask what the
21 error rate with respect to courts is going to
22 be, but what is the error rate of courts in
23 relation to the error rate of some other
24 institution -- for example, the Executive. One

1 also cares about whether the proportion that of
2 false negatives and false positives is going to
3 be different with respect to courts and with
4 respect to Executive. So, if one believed, for
5 example, that the Executive erred on, let's
6 say, in terms of retention and disclosure in
7 retaining too much and disclosing too little,
8 and one thought that the court's word err on
9 the side of retaining too little and disclosing
10 too much, it may well be that one thinks that
11 an error prone court is actually a desirable
12 offsetting institutional check upon an error
13 prone Executive.

14 MS. COLLINS: I think I actually
15 should probably stop you here as I'm getting
16 the red flag as well.

17 MR. DEMPSEY: Thanks again to the
18 witnesses. Beth Collins has asked almost all
19 of my questions, so thank you. So, all I'll
20 try to do is a little bit of follow-up. One
21 for Professor Slick: On this question of
22 technology and the 2008 changes that followed
23 the 2005, of course, revelations in the New
24 York Times about warrantless surveillance,

1 domestic surveillance, which then translated
2 into the FISA Amendments Act to Protect
3 America, FISA Amendments Act debate which was
4 ongoing simultaneous with the internal
5 discussions about amending 12333. Was there at
6 the time -- the legislative debate mainly
7 focused on activities occurring inside the
8 United States and it was only a tiny bit of
9 FISA Amendments Acts that addressed
10 surveillance outside the United States. But
11 the disclosure and sort of some -- was there an
12 effort to go through 12333 and say, well,
13 whatever we're doing outside United States,
14 there is some clause here or some
15 framework everything we do fits inside the
16 framework well enough so it's okay that
17 Congress resolved the issues posed and raised
18 in the Protect America Act and everything else
19 is basically already covered by the general
20 terms of 12333. In other words, was there an
21 effort to sort of say, okay, let's look at what
22 we're doing overseas and make sure that there
23 is at least a clause or a phrase or a provision
24 that it fits under?

1 MR. SLICK: I would first caveat
2 my reply by saying I didn't have full
3 visibility into every discussion that took
4 place surrounding the 2008 amendments to the
5 order. As I mentioned earlier, I was not aware
6 of the kind of deliberate thought process that
7 you described. That doesn't mean it didn't
8 happen in the NSC lawyers group or it didn't
9 happen in the Justice Department forum and
10 legality review, but I'm not familiar with the
11 kind of discussion and the kind of deliberative
12 process that you describe. We were doing a lot
13 of other things in connection with these
14 amendments, trying to ensure we had a stable
15 long term footing for the functioning of U.S.
16 intelligence going forward.

17 Our hope was that this order
18 would be durable, last several decades. The
19 DNI was interested in enhancing his authorities
20 in certain ways. This was not particularly
21 popular with a number of department heads and
22 so there was a lot of heavy lifting, but it had
23 to do with the roles and responsibilities, the
24 daily functioning of the intelligence community

1 rather than the issue you describe.

2 MR. DEMPSEY: Right, right.

3 Okay. That's fair enough. But am I right in
4 thinking about 12333 that somehow everything
5 that's happening does fit within it? In other
6 words, when you were in the CIA and when you
7 had responsibilities for overseeing the
8 activities and operations and personnel, you
9 would always find comfort that, okay, that fits
10 here or that is prohibited here and you would
11 look at -- you said that 12333 issues arose
12 frequently and if the issue came up of can we
13 do this, why are we doing this, would you go to
14 12333 and say, well, that Section 1.8(b) or
15 that Section 2.6(c) at least we've got that
16 provision that lets us go forward. Is that the
17 way the people look at it?

18 MR. SLICK: That's not the way
19 that the field headquarters' relationship
20 operates. We rely on our field managers, even
21 our very senior and experienced field managers
22 to issue spot. They review hundreds and
23 hundreds of incoming and outgoing telegrams in
24 a day. They're dealing with large numbers of

1 operations officers who are busy trying to
2 build relationships and gather information.
3 The role of the field manager is to issue spot
4 on 12333 issues and refer them to headquarters.

5 And to answer the first part of
6 your question, no, I never encountered a field
7 operational decision that led me to doubt
8 whether there was authority under 12333 or
9 under a statute to go forward. And in any
10 case, there's a chain of command and those
11 sorts of issues are referred to Washington for
12 more senior officers as well as for the general
13 counsels to get involved.

14 MR. DEMPSEY: Different question
15 entirely: Again, going to the question of the
16 role the judiciary, maybe for all of the
17 witnesses maybe starting with Professor
18 Chesney, it seems to me that we do ask judges
19 to make lots of fine-grained decisions,
20 including technology decisions. You think
21 about the Aereo case, the Supreme Court recent
22 Fourth Amendment cases that involve technology,
23 the Riley cell phone search case and other
24 momentous issues, some of them quite

1 technologically sophisticated and other
2 judgment calls, like the form of oversight the
3 judiciary provides to law enforcement involving
4 examination of very, you know, split second
5 decisions obviously. In thinking about sort of
6 all three branches and not only Congress, but
7 the judiciary, could there be, should there be
8 more of a role, particularly now in the era of
9 programmatic surveillance, the FISA court has
10 been given programmatic responsibility under
11 the 702 statute -- what really constitutionally
12 would limit, other than State Secrets Doctrine,
13 which is not just a small thing, I appreciate,
14 but what are your -- I mean, at some level I'm
15 asking isn't it time that we begin to define a
16 role for the judiciary in at least collection,
17 national security collection activities,
18 including those perhaps outside the United
19 States?

20 MR. CHESNEY: So, it seems to me
21 that first and foremost challenge for an
22 expanded role for the judiciary is the case in
23 controversy requirement, Article Three,
24 standing and elements like that. And we're

1 seeing this now in the currently pending --

2 MR. DEMPSEY: I think that would
3 drag down all of Title Three and FISA entirely.

4 MR. CHESNEY: Obviously, with
5 respect to Title Three and for FISA Title One
6 we've considered that question and decided to
7 allow the court to have that role. I'm simply
8 saying that if we're talking about less --
9 about still more complicated roles for the
10 court in the nature of general oversight of
11 programmatic surveillance, there are some
12 questions surrounding the 702 rule and we're
13 seeing the bite of these types of questions
14 with proposals to add an adversarial component
15 to FISK. And I think those to a substantial
16 extent can be overcome, but that's the biggest
17 check right there from a strictly legal
18 perspective.

19 Then there's the policy
20 perspective of, depending on -- and we've been
21 generic here about what that role might be, so
22 we might not even be thinking of the same
23 thing. But depending on what the expanded
24 judicial role might be, it may get beyond the

1 bounds of judicial competence, which is indeed
2 broad and wide and expected to be able to move
3 across many domains of expertise. You know,
4 thinking about antitrust, for example, is an
5 area where judges have to make all sorts of
6 high stakes, complicated decisions. It's like
7 they can do all sorts of things, but whether
8 it's the right move to -- in our legal culture
9 there is a tendency to want to look to the
10 judges to save us and sometimes for very good
11 reason, but maybe not always in every case is
12 that the appropriate solution.

13 MR. DEMPSEY: Professor
14 Pearlstein?

15 MS. PEARLSTEIN: So, I guess I'd
16 make just a few points. One is it depends a
17 lot exactly what it is we're asking the courts
18 to do; right? So, obviously there are formal
19 constraints that the Constitution imposes the
20 case and controversy requirement. But there
21 are some things the courts are enormously good
22 at and experienced in -- interpretation, for
23 example. So, if what we're asking is not for
24 the court to recapitulate a first order

1 decision that the Executive Branch makes -- is
2 this a good idea, is this not a good idea, do
3 we need this information, do we not, but simply
4 do you have the power to do what you're doing;
5 right? That's an entirely different kind of
6 inquiry than the inquiry we depend on the
7 Executive as an expert agency, whatever, to
8 make and that's the kind of inquiry that the
9 courts are good at and very experienced with
10 and so forth.

11 And you wouldn't want the court
12 to simply recapitulate the first order decision
13 that the Executive makes. And the reason for
14 that flows from organization theory as well --
15 that is to say, it creates the so-called
16 problem of redundancy problem. If you have a
17 first decision maker saying, oh, I'm
18 responsible or -- but I know somebody's going
19 to check my work later, they're less likely to
20 make a careful first order evaluation because
21 they know somebody down the road's going to
22 check their work, like my kid doing his
23 homework; right? You want the courts to have a
24 value added impact and it's entirely possible

1 to structure their world in a way that they do.

2 MR. DEMPSEY: Okay. Thank you.

3 MS. WALD: I have one sort of

4 basic question which is going to take a minute

5 to articulate and I just invite the answers,

6 comments of all of the panelists. And that is

7 I start out with the notion, which we all

8 accept, we have a checks and balances

9 Constitution which incorporates some notion --

10 the Federalist papers are full of it -- of how

11 the Executive balances Congress, how Congress

12 balances Executive, how the court comes in in

13 cases of controversies. I'm wondering what you

14 think -- I think Ms. Pearlstein said -- and I

15 copied the quote -- "12333 offers little in the

16 way of alternative processes that might correct

17 for the absence of multi branch participation

18 in ensuring an interest in liberty,

19 accountability and effectiveness are otherwise

20 served". Now, a couple of suggestions and they

21 come, I think, from you and from other people

22 in academia, who have suggested that in some

23 situations -- and I think 12333 is one -- where

24 there is no judicial and at least in practice

1 so far a fairly limited Congressional
2 oversight. One suggestion from Professor
3 Metzger up at Columbia is that Article Two's
4 mandate to the Executive to, quote, "take care
5 that the laws be faithfully executed" requires
6 recognition of what she calls a duty to
7 supervise defined as setting up a system and
8 structure of internal supervision adequate to
9 reserve the overall hierarchical control and
10 accountability of governmental power.

11 Now, other people have
12 suggested -- and I think Ms. Pearlstein alluded
13 to some of them -- that perhaps there are ways
14 to build into the Executive itself controls
15 that feel a little bit like independence. I
16 mean, whether they're ALJ's or people who are
17 outside the Executive that review certain parts
18 of the Executive's decisions, but some form of
19 independence. And the third part that we've
20 encountered and you mentioned in the FISA court
21 is that even when you set up a court as a
22 control, a form of multi branch accountability
23 of it, we found -- and I think a large part of
24 audience agreed with us -- that it really

1 doesn't work so well unless you have some
2 adversariness in it.

3 So, I'm really looking for your
4 suggestions about how to build on that kind of
5 control. I think I'm being realistic to
6 suggest we're not going to end up with FISA
7 looking at every E.O. 12333 decision. We don't
8 want that to happen. And maybe we can reform
9 Congress, but having been, as Mr. Slick knows,
10 in one of these former presidential commissions
11 which made every possible kind of suggestion
12 for reform of how you could make Congress be
13 much more attentive to its duties. So has
14 every subsequent one, including the 9/11
15 Commission, made the same suggestions. Some
16 may come into being indeed, but one has to be,
17 you know, a bit skeptical about it.

18 How do we try to in an E.O. 12333
19 situation duplicate the basic notions why you
20 have checks and balances in the government? I
21 think Professor Shlanger has talked about
22 offices of goodness in which she included us
23 very nicely as one inside the Executive. But
24 how do you try to replicate in as important a

1 function as E.O. 12333 operations entities to
2 perform the kind of independence accountability
3 that we have overall in the Constitution and in
4 many of the other parts of the government?

5 It's a big question and go at it.

6 MS. PEARLSTEIN: So, I'll start
7 and obviously welcome the others. I think
8 there are a variety of ways of going at this,
9 so let me try to categorize different ways.
10 One is to go after this in a kind of enhancing
11 expert, enhancing the role of expertise in
12 this; right? So, if you think of the courts as
13 one way of adopting a check and what they don't
14 bring is expertise, but they bring different
15 skills to the table. Another way is to try to
16 sort of further depoliticize and/or systematize
17 what's done and how the decisions are made.

18 So, what do I mean by that?

19 One is -- and I think PCLOB, in
20 its current iteration is a wonderful, right,
21 example of this as well --

22 MS. WALD: Necessary but maybe
23 not sufficient.

24 MS. PEARLSTEIN: Yes, yes. So,

1 in the human rights context we talk about now
2 this universal periodic review system; right?
3 Everybody, every nation submits to it. You
4 know, how are we doing in the human rights by
5 various human rights metrics. And it's
6 periodic so that you don't have any -- you
7 don't require a particular political event to
8 trigger it, you don't require any independent
9 action. It just automatically takes effect
10 essentially by terms of statute in essence.
11 This prevents things like counterproductive
12 agency competition or feeling like, oh, we're
13 the NSA, we're about to have our acts scored,
14 right, it's required kind of across the
15 intelligence community, it's systematized so
16 that there is a regular expectation that not
17 every 30 years, but every year, every two years
18 or whatever this sort of review of how we're
19 doing as technology changes, the privacy
20 protections will be addressed.

21 In terms of expertise, there are
22 also things like recordkeeping and sort of
23 systematized metrics. Is this program
24 effective at all; right? So, the NSA's Section

1 215 program, the Board's conclusion was -- not
2 this Board's conclusion, but the Commission's
3 conclusion was, look, it really didn't actually
4 essentially contribute to any particular
5 discovery in the counterterrorism context.
6 That kind of discovery is important and a
7 regular in the nature of Congressional research
8 service body that's responsible for assessing
9 sort of effectiveness, just raw effectiveness,
10 I think is useful.

11 But there are also ways of
12 constructing, I would say and then I'll stop --
13 professional incentives that remove appointment
14 and removal authority over particular Executive
15 Branch officials from any body that has -- any
16 agency that has control over these intelligence
17 operations. And just the independence of the
18 actor, institutional and otherwise, I think --

19 MS. WALD: But how do you get --
20 I'm sorry to interrupt you, but very
21 interesting -- how do you get independence
22 within the institution? And are their
23 mechanisms?

24 MS. PEARLSTEIN: So, here's an

1 interesting -- so, one way, for example, is
2 developing an institution with separate
3 professional commitments. And I'll give an
4 example. The JAG Corps inside the Pentagon,
5 right -- these are people who are uniformed
6 military who absolutely report within the same
7 chain of command to some extent, right? They
8 have a somewhat different reporting authority
9 than others do, but they're absolutely within
10 the military and certainly within the Executive
11 Branch. JAG lawyers played enormously
12 important role in pushing back against efforts
13 to, for example, carry out enhanced
14 interrogation techniques to design military
15 commissions in a way that was otherwise
16 offensive. Why was it that the JAGS were able
17 to operate at all effectively in this context;
18 right? To some extent it's because they had
19 separate professional ethics obligations in
20 their role as lawyers, right, that other
21 members of the branch didn't necessarily have.
22 So, that's one example I'd give.

23 MS. WALD: Anybody else?

24 MR. HUQ: So, in thinking about

1 separation of powers, I find it useful to look
2 back at the inspiration that Madison had, which
3 was the writings of Montesquieu. And
4 Montesquieu thought that you got restraint upon
5 power -- not by necessarily chopping up
6 government into executive, legislative and
7 judicial, which is something that was
8 unimaginable in pre revolutionary France. You
9 got it by having many intermediate
10 institutions, many what you might think of as
11 platforms for dissent, difference and division
12 within an outside government.

13 And it, I think, would be -- I
14 think it is productive to use the terms that
15 Montesquieu used to think about the ways in
16 which we already have a plethora of
17 institutions to serve the role that Judge Wald
18 described. Perhaps not enough, depending upon
19 your normative preferences of privacy, but
20 arranged nonetheless. So, a couple of
21 examples: Within the Executive Branch we have
22 institutions like NIST, the National Institute
23 of Science and Technology, that has played a
24 very important role in promoting the private

1 use of technologies that enable people to use
2 communications, media with privacy. Indeed,
3 even the NSA has played that role by helping to
4 promote certain encryption standards in periods
5 of time. So, there's a diversity within the
6 Executive branch above and beyond the offices
7 of goodness that Professor Shlanger has talked
8 about.

9 Moreover, courts, I think, play
10 an important role. Perhaps not in terms of
11 awarding remedies, but as Professor Pearlstein
12 suggested, as what you might think of as
13 catalysts for clarification. Again, the Second
14 Circuit ruling from last week is an example.

15 And then the third and I think
16 the hardest quality that one might think about
17 is in what way does one create institutional
18 cultures where the participants in the
19 institution have an eye not just to the goal of
20 the primary mission of the agency, but have an
21 eye to other normative commitments.

22 MS. WALD: Okay. I notice the
23 time is up. However, can I have one minute off
24 of panel two? I'll take them off of panel two

1 just so the other two panelists can

2 MS. BRAND: You can have one of
3 my minutes.

4 MS. WALD: Oh, thank you, Rachel.

5 MR. SLICK: Thank you. I'll try
6 to be brief. I just would like to add a very
7 practical consideration in response to your
8 question. And I would encourage you -- nobody
9 here -- to be quick to assume that there isn't
10 extensive and exhaustive oversight and review
11 already within the Executive Branch. Frankly,
12 it's anything I have encountered. In a foreign
13 environment we are leading the world in terms
14 of scrutinizing and applying skepticism to our
15 intelligence programs.

16 In that regard, having spent some
17 time at a pretty busy intersection of this
18 oversight and review at the National Security
19 Council, we have chains of command. And at the
20 chain of command is very often a person who's
21 appointed by the President and confirmed by the
22 Senate. We have the National Security Counsel,
23 an intelligence programs director that I led
24 where every covert action program is reviewed

1 on an annual basis and findings and
2 recommendations presented to the President.
3 The same thing for other sensitive intelligence
4 collection programs. There is the President's
5 Intelligence Advisory Board, which in recent
6 years has always been bipartisan -- members of
7 both parties there that provide discreet advice
8 to the President. There's the Intelligence
9 Oversight Board, a subordinate element of the
10 PIAB that reviews the legality of actions.
11 There are general counsels, there are
12 inspectors general. Each of them have a
13 relationship with Congress and they operate, as
14 Professor Pearlstein was saying, very much like
15 the JAG Corps. They're highly skeptical.
16 They're officers of the court. A lot of hard
17 questions are asked at every stage of a new or
18 ongoing intelligence operation.

19 MS. WALD: You think that message
20 really gets out to the public or even to the
21 academia?

22 MR. SLICK: I think we should be
23 more clear about it because a number of
24 colleagues and I spent 80 hours a week for four

1 or five years doing exactly this -- asking hard
2 questions to protect the administration and the
3 President's interest and nobody should presume
4 that a sensitive intelligence operation that
5 places at risk the U.S. diplomatic interest or
6 the interest of U.S. persons, U.S. citizens is
7 lightly undertaken.

8 There are multiple reviews. I
9 haven't even talked about the Office of
10 Management and Budget, the White House Counsel,
11 Department of Justice. There are extensive and
12 overlapping layers of review and if everybody's
13 doing their job, they weed out bad ideas and
14 ineffective operations,

15 MS. WALD: Okay. All right. I
16 just wanted to make sure. Mr. Chesney, in 60
17 seconds or less --

18 MR. CHESNEY: I can do it quicker
19 than that. I concur with what my colleague,
20 Steve, just said. I do think it's important to
21 take care to specify the problem that we're
22 talking about trying to address through
23 institutional design. Are we talking about
24 internal control failures where people are not

1 obeying the extant rules or even there's abuse
2 taking place? Are we talking instead about the
3 quality of the legal interpretations that are
4 being adopted? Are we talking about the
5 quality of the policy judgment? If it's the
6 policy judgment, I'm not sure that you need to
7 hear from law professors about that or at least
8 you don't need to hear from me.

9 If it's the internal controls, I
10 don't think the record suggests we have the
11 sorts of abuses or failure to follow the rules
12 that call for serious engagement, although
13 that's something you always want to watch for.

14 I think that the issue deep is
15 uncertainly about the legal interpretations and
16 whether we understand sufficiently in the
17 public domain at a high level of altitude what
18 the authorities being claimed are. And of
19 course, the dilemma there, as you know, is how
20 do you cure that transparency problem without
21 revealing sources and methods? And I think we
22 have yet to figure out quite how to walk that
23 tightrope.

24 MS. BRAND: Professor Chesney, I

1 wanted to ask you a question to begin with, and
2 if someone else asked you this while I stepped
3 out, humor me. You gave four or five
4 considerations that you thought were relevant
5 to whether Congress could constitutionally
6 legislate limits, but you didn't take a
7 position on which way any of them cut and
8 didn't give any examples of where something
9 might fall on one side of the lines. So I
10 wonder if you could give an example of where
11 legislative action might go too far or might
12 not be permissible under one of your criteria.
13 I was particularly interested in one that you
14 mentioned -- substantive prohibitions. Can the
15 government collect something at all? What
16 would not be a permissible limitation?

17 MR. CHESNEY: I think it would be
18 unconstitutional for Congress to forbid the
19 Executive Branch from collecting information
20 pertaining to nuclear proliferation or to
21 forbid collection involving Iran or any sort of
22 flat prohibition like that. I think that would
23 be akin to --

24 MS. BRAND: Why is that?

1 MR. CHESNEY: I think that would
2 cut not just to the bone, but would break
3 through the bone of the core preclusive
4 authority of the President. To the extent that
5 he has any, it surely contains some amount of
6 discretion in the deep duty to collect
7 intelligence vital to the national defense.

8 MS. BRAND: You're familiar with
9 the NIPF, the National Intelligence Priorities
10 Framework?

11 MR. CHESNEY: Yes.

12 MS. BRAND: Do you think with
13 something like that, which is sort of what
14 you're talking about -- it's the topics on
15 which the President and his administration want
16 intelligence. Do you think that there is any
17 role for the other branches of government
18 before the fact? I mean, there might be
19 oversight after the fact in some way, but is
20 there any role before the fact or not?

21 MR. CHESNEY: By saying before
22 the fact, do you mean --

23 MS. BRAND: Can Congress say,
24 look, I think you should add this to the list

1 or I think you should take this off the list,
2 that sort of thing?

3 MR. CHESNEY: Interesting.

4 Right. Because, you know, my hypotheticals are
5 sort of cartoonish and the more interesting
6 questions get down into the granular level.
7 Could Congress, for example, require elevation
8 to a higher tier of a particular topic? This
9 will sound like a dodge and I suppose it is,
10 but here it comes. You get very quickly into
11 the gray area of what -- reasonable people are
12 going to disagree about whether this goes too
13 far. The more granular, more modest the
14 intrusion, the easier it is to say, gosh, that
15 touches on the President's, you know, core
16 responsibilities and duties, but it's such a
17 modest intrusion that it's hard to say it's
18 clearly unconstitutional. You certainly can't
19 say it's clearly unconstitutional. What you
20 can say is that it gets into a fraught area and
21 then we throw up our hands and don't give a
22 clear answer, or at least I do.

23 MS. BRAND: Okay. Mr. Slick, did
24 you have --

1 MR. SLICK: Yeah. I would just
2 add to that I have no professional view to
3 rival my colleagues on whether legislation in
4 this regard in terms of intelligence priorities
5 would be constitutional or not, but I would
6 encourage you and defer to a later panel when
7 you have Michael Allen up here to ask him and I
8 think Michael will tell you that the Congress
9 already participates in the priority setting
10 process. For many years now the intelligence
11 community has recognized Congress as a
12 perfectly legitimate consumer of intelligence.
13 They, too, need information that's often secret
14 information to play their constitutional role
15 and therefore the NIPF or their subordinate
16 priority setting mechanisms are briefed
17 extensively of Congress. And if an influential
18 member of Congress had a specific topical
19 interest in intelligence, conveyed that to the
20 intelligence community, that requirement would
21 be satisfied.

22 MS. BRAND: Okay. Thank you.
23 Are there any other examples, Professor
24 Chesney, of something that might be

1 impermissible based on one of your criteria?

2 MR. CHESNEY: With the criteria,
3 what I was really trying to do is gesture
4 towards the relative stronger ground Congress
5 is on when, in particular, it's working in an
6 area that looks a lot like something Congress
7 has done in the past, the Executive Branch has
8 acquiesced in. For example, the requirement
9 that Congress be, or at least the committees,
10 the intel committees, be notified at some level
11 of generality about certain types of activities
12 or situations where there are Fourth and maybe
13 First Amendment equities strongly implicated.

14 But I want to avoid any claim
15 that there's a template or a cookie cutter
16 approach where we can say, well, here are the
17 type of fact patterns that are in and here are
18 those that will be out. I just don't think it
19 really works that way -- in part because as
20 Steve just suggested, the practical reality is
21 that there are a host of considerations having
22 nothing to do with the separation of powers
23 that actually inform much of the day-to-day
24 give and take between the intelligence

1 agencies, the Executive Branch more generally
2 and Congress.

3 MS. BRAND: Something occurred to
4 me during the previous discussion -- I didn't
5 think we'd be going here, but since you've
6 opened the door -- when the subject of FISA's
7 constitutionality came up a couple times, I
8 think, in response to Jim's questioning and in
9 your initial statement, you suggested that it's
10 constitutional because it's become practice and
11 the Executive Branch sort of acquiesced to it.
12 Is that what you meant or do you think that it
13 would be constitutional in the first instance?
14 As you know, there was some controversy about
15 that at the time FISA was enacted.

16 MR. CHESNEY: I think it was --
17 my own opinion is it's constitutional in the
18 first instance because it was so directly tied
19 in with Fourth Amendment equities in particular
20 and the whole design of it is to try to capture
21 these electronic surveillance situations where
22 those equities are implicated while leaving
23 untouched those that are involving non U.S.
24 persons located abroad, the collections abroad

1 and those equities aren't there.

2 My point in emphasizing the
3 practical precedent, as I would call it, is
4 that it undermines the -- as you know, there
5 were many and to this day some who still think
6 it's unconstitutional. I think that position
7 has been eroded over time by Executive Branch
8 acquiescence very severely. But I wasn't
9 persuaded by that position originally.

10 MS. BRAND: Okay. Mr. Slick, you
11 raised the PIAB and I wondered if you could
12 elaborate on the extent to which that's a --
13 how they exercise their oversight and what they
14 do. That's not an agency we've had a lot of
15 interaction with yet, although we've had a
16 little bit. Can you elaborate on that?

17 MR. SLICK: I would offer by
18 design the point of the PIAB and now the
19 President's Intelligence Advisory Board was
20 originally and when it's functioned
21 effectively, it's been extremely discreet and
22 operating outside public view within the
23 confidence of the President. I would only say
24 that the leadership and the members of the

1 Board during the five years that I served at
2 the White House were extremely diligent,
3 extremely bipartisan, extremely effective in
4 their oversight and extremely influential in
5 terms of the President seeking and taking
6 seriously their views. And I can assure you
7 from the intelligence community standpoint, if
8 you're the director of a large agency and
9 you're invited to come speak to the PIAB about
10 any topic, you will be there and you will be
11 prepared because they have this reputation for
12 seriousness and influence.

13 And I think it's a very little
14 known but highly important and effective check
15 and balance on the function of the intelligence
16 community, in particular because presidents in
17 recent years have appointed people affiliated
18 with both parties to the Board and treated them
19 seriously. So, I can't help you better
20 understand the functioning of the Board because
21 I frankly think it operates best when it's not
22 scrutinized particularly diligently from the
23 outside. And if a president uses it and takes
24 advantage of it, it can be a highly effective

1 tool in keeping his programs effective and
2 lawful.

3 MS. BRAND: Can you give us a
4 sense of the types of matters that come before
5 it, whether it's programmatic or --

6 MR. SLICK: Everything.

7 MS. BRAND: Okay. I understand
8 that IOB would look at more --

9 MR. SLICK: The IOB would look at
10 reports of potential violations of law that are
11 required under the Executive Board to be sent
12 there for review. But there are few, if any,
13 limits on the scope of the PIAB. If they ask
14 for information or ask to speak to somebody,
15 they'll get access to that. It can be
16 regarding a specific incident, something that
17 went well or something that went poorly that
18 they wish to look back on and learn lessons
19 from or it can be broad and programmatic or it
20 can be, frankly, how effective is this leader
21 of the intelligence community of a given
22 agency. And that advice is conveyed in a
23 highly confidential way to the President.

24 MS. BRAND: One last question for

1 Professor Huq: In your remarks I couldn't tell
2 whether you were averse to the notion of extra
3 statutory collection, if that makes sense --
4 collection that's conducted under some inherent
5 presidential authority -- or not. I mean, your
6 critique of 12333 seemed fairly far ranging.
7 I'm wondering if there's some specific aspect
8 of the Executive Order that you would improve
9 or, if you could start from scratch, if there
10 was some specific provision that you think
11 should be included in it. So, go from
12 generalities down to specifics.

13 MR. HUQ: I apologize if I
14 conveyed a substantive view. I was trying to
15 make descriptive points about the behavior of
16 Congress and the Executive Branch rather than
17 make a claim about what the law is or ought to
18 be. With respect to extra statutory authority,
19 my suspicion is as a practical matter. Most
20 collection will occur in the number of statutes
21 that have been enacted from the 1947 National
22 Security Act onwards. And the treatment of
23 penumbral activities executed under an
24 Executive order raises what one might best call

1 complex legal questions which when they arise
2 in the courts have been treated in a highly
3 erratic way. So, the DC Circuit, for example,
4 has confronted questions of this kind in a
5 number of cases under the national security
6 domain recently in cases like Wright, Chamber
7 of Commerce v. Wright, Raskin v. Halder. And
8 it's taken very, very different approaches to
9 this sort of inference of penumbral Executive
10 Branch authority.

11 From that I would conclude that
12 it's very hard to predict and it's very hard to
13 even know what the right framework for legal
14 analysis is of such penumbral activities.

15 MS. BRAND: Thank you. My time
16 is up.

17 MR. MEDINE: Okay. Thanks very
18 much to the panelists for a very enlightening
19 and interesting discussion. We're now going to
20 break for lunch on your own.

21 - - -

22 (Whereupon, a luncheon recess
23 was held at this time.)

24 - - -

1 MR. MEDINE: Good afternoon. We
2 are resuming our discussion of Executive Order
3 12333 and we're going to begin our second
4 panel, which is on First and Fourth Amendment
5 implications of E.O. 12333 activities, the
6 impact of new technologies. And Pat Wald will
7 start that off.

8 MS. WALD: Thank you. Well,
9 welcome back to our participants and to any new
10 people that are joining us. Technological
11 advances have changed the ways in which we
12 communicate and obtain information. The rise
13 of the internet, e-mail, cell phones and social
14 media have transformed the modes of
15 communication, not only used by the terrorist
16 organizations but the public while also
17 reshaping opportunities for the government to
18 surveil. So, this second panel will address
19 the First and Fourth Amendment implications of
20 this new technological landscape as it pertains
21 to foreign intelligence activities.

22 Now, once again, each of our
23 three distinguished panelists will have eight
24 minutes of remarks since we lost one of our

1 panelists. So, you get his time. Our aide in
2 the front row will hold up a yellow card to let
3 the panelist know that a minute remains. And
4 once the first panelist's time is up, I'll
5 introduce the next speaker. When all the
6 speakers have given opening comments, each
7 Board member will have ten minutes to ask
8 questions and we'll begin with Professor Kerr.

9 Orin Kerr is the Fred Stevenson
10 Research Professor of Law at George Washington
11 University School of Law where his research and
12 writing focuses on criminal procedure and
13 computer crime law. Before joining the faculty
14 in 2001, Professor Kerr was a trial attorney in
15 the Computer Crime and Intellectual Property
16 Section of the U.S. Department of Justice.
17 He's also been a Special Assistant United
18 States Attorney in the Eastern District of
19 Virginia and he clerked on the Supreme Court
20 for Justice Kennedy. Okay, Professor Kerr.

21 MR. KERR: Thank you. It's a
22 pleasure to be here. I want to talk about the
23 Fourth Amendment limits on evidence collection
24 around the world and I want to start with an

1 overview of how the law applies based on what
2 we know and then I want to talk about some of
3 the ways that the law may apply based on things
4 we don't know but would need to answer to
5 really get a sense of how the Fourth Amendment
6 applies to evidence collection all around the
7 world.

8 So, the first thing I think we
9 know based on current law -- and I'm just going
10 to focus for now on existing doctrine -- if
11 you're a lower court judge applying the Fourth
12 Amendment looking at the Supreme Court's cases
13 and lower court cases, what does the state of
14 the law seem to be now. The first and most
15 important thing you would see is that most
16 people around the world don't have any Fourth
17 Amendment rights. And that is because of a
18 Supreme Court decision from 1990 called United
19 States versus Verdugo-Urquidez in which the
20 Supreme Court in a majority opinion by Chief
21 Justice Rehnquist says that the Fourth
22 Amendment only gives -- only grants any rights
23 at all to those who have a significant
24 voluntary connection to the United States and

1 does not give rights to people outside the
2 United States who have no significant voluntary
3 connections to the U.S. In the
4 Verdugo-Urquidez case, the case involved a
5 search of a man in Mexico who was a Mexican
6 citizen who had been brought to the United
7 States on trial and his house had been searched
8 in Mexico and the Supreme Court says he has no
9 Fourth Amendment rights to speak of. The
10 thought being that the Fourth Amendment gives
11 rights to the people and that implies some sort
12 of political community and that people outside
13 the U.S. who aren't U.S. citizens or a
14 permanent resident alien traveling abroad would
15 have no Fourth Amendment rights.

16 So that's the first step and that
17 immediately says that there's a lot of
18 surveillance around the world which won't
19 implicate the Fourth Amendment at all to the
20 extent that the people monitored are not those
21 with voluntary substantial connections to the
22 United States. That doesn't mean that if
23 you're a U.S. citizen and you go abroad, you
24 have no Fourth Amendment rights. The lower

1 courts have addressed some of the standard for
2 how the Fourth Amendment does apply when a U.S.
3 citizen or any kind of U.S. person travels
4 around the world.

5 And most courts have said -- this
6 is really an issue of Circuit Court
7 decisions -- that the law imposes a standard of
8 reasonableness rather than the warrant
9 requirement. So, the Second Circuit and the
10 Seventh Circuit have expressly held that there
11 is no warrant requirement abroad and that
12 instead the Fourth Amendment requires
13 reasonableness -- the big question being what
14 does reasonableness mean in that setting? And
15 courts are not exactly clear on how to figure
16 out what is a reasonable search, a reasonable
17 warrantless search, although the courts so far
18 have applied kind of a balancing idea of
19 looking at the significance of the search,
20 looking at the government's cause and sort of
21 looking at the totality of the circumstances.

22 So, that's a broad overview which
23 tells us that, first, the government can
24 conduct essentially unlimited monitoring for

1 Fourth Amendment purposes of foreigners, those
2 without a U.S. voluntary connection, and then
3 has to satisfy the reasonableness standard for
4 U.S. citizens, permanent resident aliens
5 abroad.

6 Things get much more complicated
7 when you try applying that rule for the reason
8 that in the context of internet communications,
9 you have people that could be in different
10 locations, monitoring that could occur in
11 different locations, you could have a U.S.
12 person communicating with a non U.S. person,
13 you could have the monitoring in the U.S., the
14 actual point of interception, the point of
15 collection occurring inside the U.S., occurring
16 outside the U.S., occurring in a particular
17 country, occurring in an overseas cable. And
18 the difficulty is that if the reasonableness
19 standard hinges on where the monitoring occurs,
20 you need to come up with some sort of idea as
21 to which reasonableness standard applies. Is
22 it where the person monitored is? Is it where
23 the interception occurs? Is it where the data
24 is analyzed subsequently? And right now we

1 just don't have answers to that question. It's
2 a really important set of questions.

3 I think normatively the best
4 answer is that the reasonableness standard
5 should follow the point of data collection
6 rather than data analysis or the location of
7 the person. And I think that's the most
8 consistent rule with other areas of Fourth
9 Amendment law and probably the easiest standard
10 to apply. But I should be clear that that's
11 just my normative sense of what probably the
12 best rule is. And the answer from current case
13 law is really we don't know. It's just an area
14 that the courts have not yet reached.

15 And I also want to stress the
16 relative degree of uncertainty, even on the
17 first question of who has Fourth Amendment
18 rights. I think the best reading of
19 Verdugo-Urquidez is that the majority opinion
20 from Chief Justice Rehnquist is the binding
21 opinion, it is controlling. At the same time,
22 that's a curious opinion in that Justice
23 Kennedy wrote a concurring opinion. He joined
24 the majority but then wrote a concurrence in

1 which he offers a very different rationale, a
2 rationale rooted in a prior decision called
3 Reid versus Covert and concurring opinions in
4 that case, which seemed to say that rather than
5 applying a sort of contractarian notion of the
6 people get Fourth Amendment rights, non people
7 don't. Instead that the scope of the Fourth
8 Amendment, as a practical matter, you look at
9 sort of legitimate government interests and
10 what kind of rules, Fourth Amendment rules,
11 would implicate or be inconsistent with those
12 interests. And it's much more of a pragmatic
13 standard in that case, leading Justice Kennedy
14 to say that, at the very least, the
15 exclusionary rule or the warrant requirement,
16 rather, would not apply.

17 And it's difficult then to say in
18 looking at Verdugo, do you look just at the
19 majority opinion, do you look at the concurring
20 opinions. And then to make it a little more
21 complicated, there's a line in the recent
22 decision, Boumediene versus Bush from 2008,
23 authored by Justice Kennedy in which he cites
24 his Verdugo-Urquidez concurrence in support of

1 the interpretation of the suspension clause
2 abroad.

3 And I think the difficulty is
4 that there's sort of two ways of thinking about
5 how the Fourth Amendment applies abroad. One
6 is to say that the Fourth Amendment is its own
7 part of the Constitution. And the rules for
8 the Fourth Amendment are specific to that
9 amendment and you shouldn't say this is how the
10 Fifth Amendment applies or this is how the
11 suspension clause applies, therefore it means
12 how the Fourth Amendment applies. In other
13 words, sort of an amendment specific approach.

14 The other is to say that there's
15 some sort of broad answer to how the
16 Constitution applied and the Fourth Amendment
17 is just one piece of that puzzle. And what
18 makes it complicated, I think, is that the
19 Verdugo majority opinion seems to take the
20 former approach. Justice Kennedy and his
21 concurring opinion and then in Boumediene seems
22 to hint at the latter approach. And you have
23 to figure out, well, which do you follow. Do
24 you sort of follow the likely swing vote in a

1 future case or do you follow the binding rule
2 as it exists now?

3 I think doctrinally the answer is
4 you follow the binding rule from
5 Verdugo-Urquidez, the five Justice majority
6 opinion. The rationale being that Justice
7 Kennedy had a choice in Verdugo -- either join
8 the majority opinion or not. If Kennedy joins
9 the majority opinion, he gives up the ability
10 to control under a Marks Analysis to have the
11 controlling opinion for lower courts. And he
12 made that decision and, therefore, the majority
13 opinion is binding.

14 It's entirely possible that that
15 won't be the case in the future, that the
16 future Supreme Court would look at these issues
17 differently. At the same time, we really have
18 no idea what the Supreme Court would do with
19 these issues in the future. We don't know who
20 would be on that court, for example. It may be
21 that Justice Kennedy would be the swing vote,
22 it may be that the issue doesn't get to the
23 Supreme Court for 25 years and Justice Kennedy
24 is retired at that point. We just don't know.

1 So, I think from a lower court
2 perspective and just for purposes of
3 understanding what is the law right now, the
4 Verdugo-Urquidez majority opinion and its
5 significant voluntary connections test is the
6 one to follow.

7 So, that's a basic overview and I
8 look forward to the questions.

9 MS. WALD: Thank you. Professor
10 Strandburg is the Alfred Engelberg Professor of
11 Law at NYU, New York University School of Law
12 where she teaches, among other things,
13 innovation policy and information privacy law.
14 She's also in her own right a research
15 physicist with qualifying degrees from Cornell
16 and Carnegie Mellon. So, I think you might
17 qualify as our technologist.

18 MS. STRANDBURG: I don't know
19 about that. But thank you very much and it's a
20 pleasure to be here. I'm going to speak about
21 the First Amendment, potential First Amendment
22 constraints on government collection under
23 Executive Order 12333. So, this is an area
24 where there really is very little directly on

1 point case law, so I'm going to try to go
2 through my analysis briefly and then we can
3 discuss it in the questions.

4 So, the first point I want to
5 make, which I think is pretty clear, is that
6 the First Amendment protects U.S. persons,
7 communications and associations with each other
8 and with foreigners, and that that's the case
9 even in the national security context. And I
10 think that's clear from the Supreme Court's
11 discussion. Whatever one thinks of the holding
12 in Holder versus Humanitarian Law Project,
13 where the court applied a strict scrutiny test
14 under the First Amendment.

15 The second point is that
16 surveillance of communication content
17 implicates First Amendment rights, again, even
18 in the national security context. And there
19 are many courts that have made statements to
20 that effect. One well known one is the one
21 from the Keith case where the court said though
22 the investigative duty of the Executive may be
23 stronger in such cases, so also is there
24 greater jeopardy to constitutionally protected

1 speech, and the price of lawful public dissent
2 must not be a dread of subjection to an
3 unchecked surveillance power.

4 So I think those two points are
5 fairly clear. I also have argued in some of my
6 writing that surveillance of communication
7 metadata, particularly when that metadata is
8 collected in bulk, implicates freedom of
9 association. And in situations where it is --
10 which it is if it's collected in bulk -- where
11 it's equivalent to government compelled
12 disclosure of protected associations. And this
13 is based on a variety of case law, but most
14 importantly on Supreme Court case law holding
15 that government demands for associational
16 information that are sweeping and
17 indiscriminate violate First Amendment because
18 of the chilling effects that such collection
19 can produce and because they are not
20 sufficiently tailored to the compelling
21 government interest.

22 Okay. So then the next point to
23 make is that, in fact, the courts have applied
24 strict or heightened, almost strict scrutiny to

1 data collection, which is bulk and
2 indiscriminate, as I just mentioned, and also
3 when collection is based on the content of the
4 speech. And I think that that would have to
5 apply to when collection is based on an
6 individual's association with a particular
7 other individual. And that's also suggested by
8 the Holder versus Humanitarian Law Project
9 case.

10 So, next I have argued
11 elsewhere -- and I think the best way to
12 understand what First Amendment scrutiny would
13 mean in this kind of context -- is that in
14 cases involving surveillance where there almost
15 always is a compelling government interest,
16 either in law enforcement or in national
17 security, the primary implication of First
18 Amendment scrutiny is that the surveillance
19 must meet requirements of specificity. And in
20 particular, there has to be a specific
21 compelling government interest, which has to
22 have a sufficiently close nexus to the
23 specific -- and the surveillance has to have a
24 sufficiently close nexus to that specific

1 interest. And there have to be no
2 substantially less burdensome means to achieve
3 that interest. And so, I've argued that at
4 greater length in some of my writing.

5 So, how does this apply to the
6 context of E.O. 12333? Well, I'm going to
7 focus on the collection of U.S. persons'
8 communications or communication metadata that
9 is collected abroad and where one is not
10 targeting a U.S. person. So, under that
11 circumstance, there are two kinds of situations
12 where you would collect U.S. persons'
13 communications. One is when they are
14 communicating with a target that is not a U.S.
15 person. And the second is when there is some
16 sort of bulk collection going on that is not
17 targeting a U.S. person.

18 So, first, I would argue that
19 First Amendment applicability, unlike perhaps
20 Fourth Amendment applicability, shouldn't
21 depend on the location of the collection point
22 because it is a protection of the speech rights
23 and association rights of the individuals, the
24 U.S. persons, that are involved.

1 Second, I would just emphasize
2 again that specificity and tailoring are the
3 key factors that come out of the First
4 Amendment's requirements. So, I would argue
5 that in general, activities that result in bulk
6 collection of a U.S. person are highly suspect
7 under the First Amendment and that is whether
8 or not the U.S. persons are targeted or the
9 collection of U.S. person information is only
10 incidental. If the result is bulk collection,
11 then I think there is a need to be worried
12 about specificity and tailoring.

13 And finally, that collection of
14 U.S. person data that is simply incidental to
15 collection that's targeting a non U.S. person
16 or either communication or associational
17 information, I think whether or not that would
18 pass muster under the First Amendment depends
19 on how well the targeting is done and how
20 substantial the incidental collection of U.S.
21 person information is. I don't believe,
22 though, that the mere presence of a foreign
23 intelligence purpose or a mere relevance to
24 national security is necessarily sufficient if

1 the result is significant collection of U.S.
2 person information.

3 Finally, because we're talking
4 about the First Amendment and not the Fourth
5 Amendment, though, we aren't necessarily just
6 looking at the collection of communications.
7 It's the overall government imposition on First
8 Amendment protected communication or
9 association that matters, the overall chilling
10 effect were all negative implications. So, I
11 think one has to look at the whole thing, the
12 entire thing of what the government is doing.
13 And in particular, I want to suggest that one
14 should be concerned about querying of any sort
15 of bulk or incidentally collected content or
16 associational information in order to pull up
17 with the purpose of pulling up U.S. person
18 information. I would argue that that kind of
19 querying also has to meet the specificity
20 requirements and that in order to do that,
21 would require some kind of standard, something
22 akin to a warrant standard. And similar kinds
23 of concerns, although not with quite the same
24 First Amendment gloss to them, have been raised

1 in the 702 Report of this Board and also the
2 President's Review Group.

3 So, I will -- is that the red one
4 coming out? Okay. I'll stop there.

5 MS. WALD: Okay. Thank you very
6 much. Our last speaker is Stephen Vladeck,
7 who's a professor of law at American University
8 Washington College of Law. His teaching and
9 research focus on Federal jurisdiction,
10 constitutional law and national security law.
11 He, like the other members of the panel, is
12 published widely in law reviews and popular
13 commentaries and he clerked for Judge -- on the
14 Eleventh Circuit for Judge Barkett and Judge
15 Berzon on the Ninth Circuit.

16 MR. VLADECK: Thank you, Judge
17 Wald. Thank you to all the members of the
18 Board for the invitation to participate in
19 today's meeting. You know, it's a common
20 assumption, as Professor Kerr's statement
21 suggests, that surveillance conducted pursuant
22 to Executive Order 12333 doesn't implicate the
23 Fourth Amendment for four different reasons.
24 And I think we heard two of them from my

1 friend, Professor Kerr. First, that insofar as
2 it's targeted at non U.S. persons, they are
3 categorically outside the Fourth Amendment
4 thanks to Verdugo. And second, insofar as it's
5 sweeping in communications by U.S. persons who
6 are outside the United States, that there are
7 at least two Circuit level decisions holding
8 that the warrant clause doesn't apply, they
9 just need to be reasonable.

10 I think there are two other
11 arguments that are often heard for why the
12 Fourth Amendment isn't a problem. The third is
13 that any collection of U.S. persons'
14 communications pursuant to 12333 is merely
15 incidental and so it doesn't implicate the
16 Fourth Amendment rights of those individuals
17 under the I think correctly but badly named
18 Incidental Overhearers Doctrine.

19 And then, fourth, in any event,
20 even if the Fourth Amendment did apply to 12333
21 surveillance, the foreign intelligence
22 surveillance exception to the warrant clause
23 would mean that such surveillance need only be
24 reasonable, even as applied to U.S. persons in

1 the United States to pass constitutional
2 muster.

3 And what I'd like to do in my
4 brief remarks today is offer a more circumspect
5 view of the Fourth Amendment status quo and
6 offer four specific reasons why in my view this
7 assumption may be challengeable and contestable
8 at least going forward. Orin already did some
9 of this work in talking about the relationship
10 between Verdugo and Boumediene. I'll just jump
11 right to what a panel of the Fifth Circuit
12 suggested last summer, which is that the
13 Boumediene court appears to repudiate the
14 formalistic reasoning of Verdugo-Urquidez as a
15 sufficient connections test. That panel
16 opinion has since been vacated so it's not
17 exactly precedent, but it does suggest that
18 there are at least some judges who are
19 beginning to think that the formality of
20 Verdugo-Urquidez needs to be reassessed after
21 and in light of Boumediene. And the mere fact
22 that that conversation is happening, to me is a
23 very important development.

24 Second, and in any event, it

1 seems increasingly awkward, as Orin suggested,
2 to try to shoehorn electronic surveillance in
3 the constitutional doctrines grounded in what a
4 really Westphalian conceptions of
5 territoriality and sovereignty. As my
6 colleague, Jennifer Daskal, explains in a
7 forthcoming law journal article entitled The
8 Unterritoriality of Data, the ease and speed
9 with which data travels across borders, the
10 seemingly arbitrary paths it takes and the
11 physical disconnect between where data is
12 stored and where it is accessed critically
13 tests these foundational premises of our
14 current Territoriality Doctrine.

15 In this regard, consider the
16 pending Second Circuit appeal in the case
17 involving whether the District Court can demand
18 production of e-mails stored by Microsoft on
19 servers located in Ireland. There at least the
20 government takes a strongly anti territoriality
21 position or at least one based on where the
22 data can be accessed -- not where the data is
23 stored. At bottom, Verdugo-Urquidez
24 increasingly appears to be an analog decision

1 that we're struggling to apply to digital
2 world, even if the Supreme Court hasn't said so
3 yet.

4 Third, even if 12333 surveillance
5 of non U.S. persons remains categorically
6 outside the Fourth Amendment, we know now that
7 the government has collected and will
8 inevitably collect communications of U.S.
9 persons under the same authorities. The
10 typical response is that such collection lies
11 outside the Fourth Amendment insofar as it is
12 incidental, much the same way as if a wire tap
13 obtained to produce evidence of one crime
14 incidentally revealed evidence of another. But
15 there is, in my view, a marked difference
16 between accidental incidental collection as in
17 the wire tap example and intentional incidental
18 collection where the government knows that the
19 surveillance method at issue will result in the
20 collection of non targeted communications to
21 which the Fourth Amendment would otherwise
22 apply and does it anyway.

23 As Judge Sand explained in his
24 2000 decision in the Bin Laden case, applying

1 the incidental collection doctrine to this
2 lateral class of cases is, quote, significantly
3 more problematic, unquote, from a Fourth
4 Amendment perspective. Again, no Circuit level
5 or Supreme Court precedent, but just reason to
6 wonder if these same doctrines are going to
7 apply as categorically.

8 Fourth and finally, if the Fourth
9 Amendment does apply to any of the surveillance
10 that the government conducts pursuant to 12333,
11 it's not at all clear to me that the foreign
12 intelligence surveillance exception to the
13 warrant clause would cover the whole range of
14 12333 activities. Although the court of review
15 in the Directives case has held that foreign
16 intelligence surveillance need only be a
17 significant purpose of government surveillance
18 activities for the exception to apply. Every
19 other Circuit level court to reach the question
20 has held that the Constitution requires that
21 foreign intelligence surveillance be the
22 primary purpose of the government surveillance
23 activities. Note the distinction between this
24 Fourth Amendment interpretation and the

1 statutory primary purpose doctrine that
2 Congress abolished in the U.S.A. Patriot Act.
3 And there are any number of
4 reasons -- I don't mean to belabor the point --
5 unless we're willing to accept that all foreign
6 surveillance is foreign intelligence
7 surveillance and there are lots of reasons why
8 we should resist that, then it stands to reason
9 that at least some 12333 activities would not
10 fall within this exception to the warrant
11 clause and would therefore raise serious
12 constitutional concerns.

13 Now let me close with a caveat.
14 The circumspection I've offered this afternoon
15 is grounded as much in questions that haven't
16 been answered as it is in existing rules and
17 doctrines. I agree entirely with Professor
18 Kerr that Verdugo-Urquidez is still the law
19 even though Justice Kennedy may not be sure
20 what law it is. And my goal has not been to
21 take a specific position on the merits of the
22 relationship between 12333 and the Fourth
23 Amendment, but rather just to suggest to you
24 that the relationship is far more nuanced and

1 potentially more troubling than we typically
2 assumed and that going forward, because of new
3 technologies, because of the increasing
4 interoperability of data and because of these
5 doctrinal questions I've raised today, these
6 questions might be more troubling than we've
7 typically assumed.

8 Thank you for your time and I
9 look forward to your questions.

10 MS. WALD: Okay. Thank you.

11 I'll start off on the questioning. Professor
12 Kerr, I believe you said that the
13 reasonableness should follow the law of the
14 place where the data is actually seized or
15 collected. And combining that with your and
16 others' observations on Verdugo, does that mean
17 in effect that foreign law has no input into
18 the question of reasonableness as to the place
19 where the data was seized? I mean, let me be a
20 little bit more specific on that. Apart from
21 whether it's the law of Germany -- let's use
22 Germany as the place where the data was
23 seized -- and taking into account the
24 President's directives on PPD 28, does that

1 suggest that there's any role for either
2 international law, some of the basic concepts
3 in international law which are supposed to and
4 perhaps are embodied in some treaties kind of
5 go across the whole universe or do we just
6 decide about the reasonableness following
7 American law precedent?

8 MR. KERR: So I think we don't
9 really know.

10 MS. WALD: Yes, I know, but I'd
11 love your ideas.

12 MR. KERR: In terms of what the
13 law should be, I think -- you know, it's hard
14 to say because there's so many different
15 situations where the issue can arise. So, one
16 context in which the cases have come up is
17 joint investigations. Say it's a criminal
18 case, U.S. authorities working with authorities
19 in Belgium monitoring a U.S. citizen who's in
20 Belgium and they want to search the apartment
21 in Belgium and they get a search warrant in
22 Belgium and the Ninth Circuit has said in that
23 context that the reasonableness standard is
24 based on foreign law -- that is, Belgian law.

1 And as long as the U.S. officials were acting
2 in good faith compliance with that law, that
3 seems reasonable. And I think that sort of has
4 a common sense quality of well, what else do
5 you expect them to do. I mean, they can't go
6 to a U.S. judge and get a search warrant in
7 Belgium and the piece of paper of a U.S.
8 warrant doesn't have any meaning in Belgium.

9 So, that's almost kind of a
10 common sense idea and interestingly goes back
11 to Justice Kennedy's opinion for the Ninth
12 Circuit in the 1980's in the Peterson case.
13 Other cases are going to be more unilateral
14 U.S. action and then you have to come up with a
15 sort of conceptual answer to what replaces the
16 warrant if there's no warrant requirement and
17 is that case by case reasonableness? Is that
18 categorical reasonableness? Is that a probable
19 cause requirement? I can think of lots of
20 different ways that the law could be construed.
21 For example, one idea would be there's no
22 warrant requirement, you don't have to get the
23 paper, but the government does have to satisfy
24 probable cause, for example. Or maybe they

1 have to satisfy reasonable suspicion, a lower
2 requirement. So, some threshold that doesn't
3 require judicial review ex-ante but does
4 require a kind of sense of cause to justify
5 that. That maybe makes sense in the unilateral
6 context where the U.S. is acting without
7 another country's officials involved.

8 It's not totally obvious that it
9 makes that much of a difference in practice
10 because you could see all of the reasonableness
11 standards to the extent you want to say, well,
12 we're going to factor in foreign law, we're
13 going to look to foreign law, which itself is
14 probably premised on similar kinds of
15 reasonableness considerations that the Fourth
16 Amendment reflects. It may be that all roads
17 kind of lead to the same place, but I think
18 doctrinally we just don't know.

19 MS. WALD: One follow-up on that
20 and then I'd like to hear the other panelists.
21 And that is that if you looked at some of the
22 current guidelines of E.O. 12333, one of them
23 says that -- one of the published guidelines
24 says that if a warrant would be required under

1 U.S. law for a certain kind of operation, then
2 the Attorney General should personally give his
3 okay to it. My question, I guess, would be
4 following up on yours, suppose it isn't
5 strictly a warrant case, but it is a case where
6 under U.S. law you have to have a
7 reasonableness inquiry, the kind you just
8 talked about -- maybe not a warrant, but mere
9 reasonableness. I guess does it make much --
10 is the dichotomy really that definite -- you
11 know, if it's a warrant here, we get the
12 Attorney General's advice, but if it's a
13 situation where the second part of the Fourth
14 Amendment, the reasonableness inquiry applies,
15 what should you do in that circumstance? Is
16 there protection in the hierarchy inside the
17 E.O. guideline for the two parts of the Fourth
18 Amendment or is it okay to just have one get
19 the highest level of supervision?

20 MR. KERR: I would guess that as
21 a practical matter, oftentimes having the
22 Attorney General approve a search based on a
23 probable cause standard is equivalent to or
24 maybe even higher than having a Federal judge

1 review the warrant application, given the
2 realities that some judges are going to
3 carefully scrutinize warrant applications, some
4 less so. So, probably the Attorney General's
5 going to take it seriously -- you never know
6 obviously, but that's at least likely in a
7 number of cases. So, it may not make that much
8 of a difference in terms of the actual amount
9 of privacy protection in terms of who does that
10 check.

11 And this is, I think, a broader
12 question in Fourth Amendment law -- you know,
13 how often do you need a warrant versus a
14 showing that is later proved in court? One
15 thing that makes it difficult in the national
16 security context is you usually don't end up in
17 court. So, some sort of paper -- some sort of
18 ex-ante judicial review or review by someone
19 plays the role that otherwise is much more
20 difficult to have without that.

21 MS. WALD: Thank you. Ms.
22 Strandburg, you gave us a pretty good account
23 of one of the questions I was going to ask you,
24 which was how you would propose to bring the

1 free speech rights of the subjects of E.O.
2 12333 abroad into this particular kind of
3 regime and you mentioned several of them --
4 specificity and several others. But I
5 wondered, some of the guidelines, at least the
6 ones we have access to as published guidelines,
7 do have minimization requirements. And, of
8 course, minimization is the technique which has
9 been accepted by the IC and by the FISA court
10 for a lot of the incidental U.S. persons'
11 information collected under a 702. You can
12 have your varying views and we've had them even
13 on this Board as to how adequate they are. But
14 I'm wondering what your opinion is on whether
15 it's useful to have minimization requirements
16 and, if so, how tight should they be or what
17 should they be?

18 MS. STRANDBURG: So, I do think
19 it's useful to have minimization requirements,
20 but I'm not sure that it's always sufficient,
21 so I -- but, you know, this is kind of an
22 unknown area, right, but because courts have
23 not asked this question yet under the First
24 Amendment context. But I don't think that --

1 my own view given -- and this is based mostly
2 on the First -- the freedom of association case
3 law, which I think comes kind of closest. I
4 don't think that saying, well, we'll take
5 really good care of it once we've got it is
6 enough specificity for bulk collection, for
7 just sort of, you know, dragnet bulk
8 collection. I think that the requirement of
9 tailoring to a specific purpose is greater than
10 that. And in some ways I take some of this
11 from -- one place that you can -- you might
12 think about this anyway -- is that we do have
13 the case law saying that from, say, Stanford
14 versus Texas or Zurcher versus Stanford Daily
15 saying that in the First Amendment context you
16 have to keep -- you have to apply the Fourth
17 Amendment warrant requirements with scrupulous
18 exactitude. And what that means in the actual
19 context of those cases is particularity. You
20 have a higher --

21 MS. WALD: I've got to cut you
22 off in order to have one quick question for Mr.
23 Vladeck before my time is up. And this
24 pertains to the Second Circuit case last week,

1 with which I'm sure everybody's familiar. The
2 published DOD regulations use the standard, I
3 see, definition of collection as beginning only
4 when, quote, it has been received in an
5 intelligible form for use by an employee in the
6 course of his official duties, unquote. The
7 recent Second Circuit opinion, as I read it,
8 seemed to lay down a contrary standard that
9 collection begins when the information is,
10 quote, seized by the government from its source
11 and it's searched, quote, when its computer is
12 scanned. I wonder if you just have some quick
13 comments on that particular --

14 MR. VLADECK: I think that's a
15 fair reading of the Second Circuit's opinion
16 and I also think it was, at least in some ways,
17 necessary for its analysis of why the
18 plaintiffs in that case had standing. Because
19 they could prove, based on the government's
20 representations, that their information had
21 been collected. They could not necessarily
22 prove what had happened subsequent to the
23 initial point of collection. And that's also
24 consistent with what Judge Leon at least

1 concluded in the District Court decision in the
2 Klayman case.

3 MS. WALD: Yes. But do you think
4 that's legalized --

5 MR. MEDINE: I'm sorry. The
6 time has expired. Mr. Dempsey?

7 MR. DEMPSEY: I guess one
8 question I would have is to ask Professor
9 Vladeck and Professor Kerr to comment on sort
10 of the relationship between the First Amendment
11 and the Fourth Amendment. So many cases, it
12 seems to me, take one branch or the other.
13 Most of the data privacy cases, of the past 30
14 years maybe, since the NAACP cases have gone on
15 the Fourth Amendment prong -- not the First
16 Amendment prong. But thoughts, Professor
17 Vladeck and Professor Kerr, on the relationship
18 between the First Amendment and the Fourth
19 Amendment, particularly when we're talking
20 about collection overseas but affecting U.S.
21 persons.

22 MR. VLADECK: Well, I mean, I
23 think there's obviously a relationship. I know
24 Professor Kerr's colleague, Daniel Solove, has

1 written a lot about the First Amendment as a --
2 basically as a rule of criminal procedure. I
3 guess my reaction is just sort of situated in
4 the doctrines that we're living with, which is
5 to say, that under current doctrine, I think
6 there's much more reason to be concerned about
7 the First Amendment implications of
8 surveillance activities overseas as opposed to
9 the Fourth because the Supreme Court has not
10 been nearly as categorical in its rejection of
11 First Amendment rights for non U.S. persons.
12 And I think a good example of this isn't a
13 Supreme Court case -- it's a Ninth Circuit case
14 from a couple years ago called Ibrahim versus
15 Homeland Security, where the Ninth Circuit held
16 that a Malaysian graduate student who was not
17 an LPR nevertheless had First Amendment
18 protection sufficient to challenge her
19 inclusion on the No-Fly List, even when she
20 wasn't in the country. You know, which is not
21 quite as far as, say, a non U.S. citizen with
22 no connection to the U.S. whatsoever, but it
23 strikes me as a much more functional approach
24 to this question than is usually seen under

1 Verdugo.

2 So, I think there is a
3 relationship. I think there's a natural
4 gravitation toward the First Amendment because
5 of the doctrinal complexities that Orin
6 referred to.

7 MR. KERR: I think based on
8 current law, the role of the First Amendment is
9 actually much more modest than maybe has been
10 suggested. And it's true that there are a lot
11 of court decisions where the judges say and
12 justices say First Amendment concerns are
13 implicated here, we need to be especially
14 sensitive to those concerns. But when the
15 rubber hits the road my sense is that the same
16 Fourth Amendment rules apply -- maybe with a
17 teeny tweak, but not with a substantial shift.
18 And maybe the best example of this is the
19 *Zurcher versus Stanford Daily* case, which
20 strikes me as being really at the heart of the
21 First Amendment. It was a search of a
22 newspaper for evidence of a crime that the
23 newspaper happened to have because the reporter
24 had taken photographs of a news event. And the

1 police wanted information about the crime, so
2 they break into the newspaper and find what
3 they're looking for. And the Supreme Court
4 says that's fine under the Fourth Amendment.
5 And if there's any case where you'd say as soon
6 as you have First Amendment concerns, the First
7 Amendment should have some different rule. I
8 would think Zurcher would really be the poster
9 child for that.

10 But you don't really see much of
11 that. As you suggested, the courts usually
12 just draw a distinction between the two. And
13 the way I think of it is once you're dealing
14 with kind of a good faith government
15 investigation, usually the First Amendment
16 concerns kind of go away in the case law.
17 There's some -- oh.

18 MR. DEMPSEY: Just one quick --
19 Professor Strandburg, if the government
20 agencies in those NAACP membership list
21 cases -- if they had thought there was a crime
22 and they had gotten a search warrant, could
23 they have gone in and seized, right? They
24 could have gone in and seized the list?

1 MS. STRANDBURG: Right. So,
2 actually, that's pretty close to exactly how I
3 was going to respond to what Orin just said,
4 which is that I think that there is a
5 substantial amount of overlap between the
6 Fourth Amendment and the First Amendment. And
7 generally in cases where a warrant is involved,
8 the courts have tended to find that the Fourth
9 Amendment requirement of the particularity
10 requirements of the warrant are sufficient to
11 meet the First Amendment requirement.

12 MR. DEMPSEY: They are
13 sufficient?

14 MS. STRANDBURG: Are sufficient
15 as long as they are -- as long as scrupulous
16 exactitude is used. But I think that when
17 you -- I mean, there's not a lot of case law on
18 this, but when you get outside of the warrant
19 context -- so, for example, in the context of
20 subpoenas, there are a number of cases
21 involving subpoenas for associational
22 information in which there's really basically
23 the court -- no one's saying that there's a
24 Fourth Amendment right there. And in fact, the

1 courts have held that the third party doctrine
2 doesn't apply and that there is a heightened
3 scrutiny required according to the First
4 Amendment. And courts have in those kinds of
5 cases -- and there are quite a few courts that
6 have done this -- have, you know, narrowed the
7 subpoena, required greater specificity. So, I
8 think that's the sort of best set of those
9 cases, but there are also a few other ones.
10 So, for example, there's disagreement among
11 courts about the question of whether or not if
12 you have a enough for a warrantless arrest and
13 it's pretextual or based on First Amendment --
14 based on speech, whether you have to have a
15 higher requirement than probable cause, for
16 example.

17 I also think that some of the
18 cases that the courts are really struggling
19 with right now under the Fourth Amendment --
20 the reason -- this is just my opinion that one
21 of the reasons they're struggling with them is
22 because there really are First Amendment
23 implications that they're not addressing
24 directly. So, I think Jones is a good example

1 of that. The smart phone case, Riley, is
2 another example of that. They're talking a lot
3 about these really First Amendment concerns in
4 saying that there's a Fourth Amendment interest
5 there.

6 MR. DEMPSEY: Professor Kerr, I
7 sort of cut you off there. I just wanted to
8 pursue this one point, but you were -- do you
9 want to finish the thought that you were
10 pursuing or had you?

11 MR. KERR: Sure. And maybe this
12 is a way of reconciling Professor Strandburg's
13 views and my own of where the cases are now.
14 My sort of overall summary, when I think of how
15 the First Amendment cases play out is that
16 there's sort of a good faith test. It's like
17 okay, investigators, were you really trying to
18 enforce the law or were you solely trying to
19 harass someone? And if you were really just
20 trying to harass a group engaged in speech,
21 then that raises First Amendment issues. But
22 as long as there's some sense of no, this was
23 actually some sort of law enforcement
24 investigation or legitimate investigation, then

1 the First Amendment concerns become more of
2 this kind of like okay, well, be careful if
3 there are First Amendment issues, but probably
4 no major doctrinal change.

5 And so, there's some role of the
6 First Amendment but it strikes me as this
7 relatively low threshold of almost a good faith
8 kind of inquiry. That's my best --

9 MR. VLADECK: But even that is
10 more than, under Verdugo, a non U.S. person
11 would have under the Fourth Amendment in the
12 context in which the First Amendment might
13 apply with any more breadth.

14 MR. KERR: Yeah. Assuming the
15 person has First Amendment rights but no Fourth
16 Amendment rights.

17 MR. VLADECK: Right. At all.

18 MR. KERR: Right.

19 MS. STRANDBURG: And I would also
20 say that this good faith investigation rule has
21 generally not been the rule that courts have
22 used in these association membership subpoena
23 kind of cases. It's for undercover
24 investigations mostly with a DC Circuit

1 exception.

2 MR. DEMPSEY: Hopefully a quick
3 question for Professor Kerr -- on your
4 equilibrium adjustment -- is that the right
5 phrase?

6 MR. KERR: Yes.

7 MR. DEMPSEY: Yeah, okay. So,
8 under the equilibrium adjustment theory, you
9 sort of look at, to some extent, the pre
10 technological analogue, if you can find one, so
11 no privacy right in the addressing information
12 on an envelope because it's on the outside,
13 therefore no Fourth Amendment right in the
14 addressing information on an internet
15 communication, let's say. So, that sort of
16 retains the equilibrium.

17 MR. KERR: Right.

18 MR. DEMPSEY: How does volume
19 play into equilibrium adjustment -- that is,
20 does an infinity of zeroes or a billion zeroes
21 equal zero and, therefore, if there was no
22 privacy interest in, you know, one calling
23 pair, should there be no privacy interest in
24 all the calling pairs for five years or -- ?

1 MR. KERR: I mean, I think volume
2 can change -- it certainly creates pressures on
3 the doctrine to come up with a different rule.
4 And probably the best example is Riley versus
5 California, the cell phone search case. So,
6 amount of stuff that's going to be on a cell
7 phone leads the court to say, wow, a cell phone
8 search is a totally different animal than a
9 search of a crumpled cigarette package in the
10 1970's and so we need a different rule for
11 that. So, I think volume can play a role. A
12 little bit of a different question -- if the
13 issue is can a lot of non searches become a
14 search at some point because then you run into
15 line drawing problems of well, okay, what is
16 that point and -- in Riley the court, I think,
17 was very careful to say, you know, we're going
18 to have a rule -- search incident to arrest is
19 allowed for physical evidence; digital
20 evidence, warrant requirement such as a
21 simple -- everything or warrant requirement.

22 And it's a much more complicated
23 issue when you start talking about okay, a lot
24 of evidence collection or a lot of volume maybe

1 changes the rule. I think probably if the
2 courts were to apply this approach, they --
3 maybe at some point they'd say the nature of
4 this evidentiary collection is so different
5 because of the technological era that this
6 evidence collection is always a search rather
7 than is never a search. Similar to something
8 like Riley, but it's always going to depend on
9 to what extent does the balance --

10 MR. DEMPSEY: Wait --

11 MR. VLADECK: But that's Alito's
12 opinion in Jones; right -- that a whole bunch
13 of -- Justice Alito's concurrent opinion in
14 Jones is that a whole bunch of -- you know, 27
15 days' worth of things that by themselves
16 wouldn't have been searches are a search.

17 MR. KERR: Although I take
18 Alito's opinion in Jones to be that people
19 don't think that their location is monitored
20 for a long time -- at least when they're big
21 narcotics traffickers, which, you know, it's a
22 half page in a ten-page opinion that cites
23 nothing. It sort of -- and I think it's sort
24 of hard to know what Alito was thinking. And

1 in this context, too, Justice Alito, from his
2 concurring opinion in the Riley case suggests
3 that wherever there's some sort of statutory
4 regulation or Congress has looked at this
5 issue, he would say probably the Fourth
6 Amendment doesn't apply at all. So that's
7 another issue and another approach that you
8 could take.

9 MR. MEDINE: Ms. Collins?

10 MS. COLLINS: So, Professor
11 Strandburg, I wanted to ask you a couple of
12 questions about where I think you've pivoted
13 from what the case law is to what you've argued
14 and specifically on the metadata question. And
15 I think you said the test is, you know, if it's
16 equivalent to a compelled disclosure and so,
17 this would be critically implicated by bulk
18 acquisition. So, I guess my question to you
19 is: If you have a situation where I take the
20 paradigmatic case to be an administrative
21 action directed at a lawful entity for their
22 membership lists. There's no purpose other
23 than to obtain the membership lists of an
24 entity engaged in lawful activity. But if you

1 take on the other side, a program that is
2 directed to identifying counterterrorism
3 groups, so this is, I would suggest, not
4 protected activity or certainly not with the
5 same level of activity. If you have a
6 likelihood of collection that is 50 percent, a
7 likelihood of eyes on it of 5 percent, a
8 likelihood of subsequent dissemination or use
9 of 1 percent, does that change your analysis in
10 any way?

11 MS. STRANDBURG: So, I think the
12 important point here is what is the effect on
13 people's exercise of their First Amendment
14 rights of whatever the government is doing
15 here; right -- the government program here.
16 So, I think that in a case where the government
17 is collecting in bulk everybody's
18 communications with no specificity, the effect
19 is likely to be highly chilling, right, because
20 the government has that information. And in
21 that information is exactly the kind of
22 information that the court in the Shelton
23 versus Tucker case where the law that was
24 involved said, you know, tell us all the

1 associations you belong to. It's essentially
2 the equivalent of that.

3 MS. COLLINS: Okay. Can I -- I
4 just want to make sure that my hypothetical is
5 clear. So, if you have a situation, does it
6 impact your analysis at all where we will
7 assume even 100 percent collection of a wide
8 range of individuals' communications or
9 metadata -- let's stick with metadata because I
10 think that's where you said that you're now
11 arguing rather than describing -- but the
12 likelihood that this information is ever
13 accessed or reviewed or used in any way --
14 let's make it .0001 percent likelihood -- is it
15 your position that that has the same or should
16 be considered by the courts to have the same
17 chilling effect as a request from the
18 government for the names of individuals who
19 belong to an association that is engaging in
20 protected activity?

21 MS. STRANDBURG: No. However, I
22 think that I'm kind of -- even though I'm a law
23 professor, I'm going to fight the hypothetical
24 a little bit because I think that how do we

1 know what the likelihood is over the long run
2 of information being -- that is held by the
3 government used for some purpose, you know,
4 over a long period of time.

5 MS. COLLINS: So, the court
6 should take into consideration the possibility
7 that either the law would change or the
8 policies would change --

9 MS. STRANDBURG: Or that people
10 are -- there are bad actors. I mean, all of
11 these things, I think, have to be taken into
12 account. And then the second part of it, of
13 course, is the fit between the purpose of the
14 collection and the compelling government
15 interest. So, if one could show that doing
16 this was extremely effective and very necessary
17 to do in order to address this interest, that
18 wouldn't be the answer, but that would
19 certainly be an important consideration in the
20 balancing, I think, as it always is in the
21 First Amendment context.

22 MS. COLLINS: So, what do you
23 think are the most important aspects, assuming
24 that there wouldn't be tailoring on the front

1 end, so a lack of specificity on the front end?
2 Are there any circumstances -- and this follows
3 along with what Judge Wald is saying -- that
4 you could envision that a bulk collection
5 program would nonetheless meet First Amendment
6 heightened scrutiny? I think you're positing
7 strict scrutiny or some form of heightened
8 scrutiny.

9 MS. STRANDBURG: Right.

10 MS. COLLINS: So, is there any
11 circumstances under which you could contemplate
12 a program that is bulk, making it even more
13 difficult for foreign intelligence rather than
14 for counterterrorism purposes so you would have
15 lawful activity and not necessarily purely
16 unlawful activity?

17 MS. STRANDBURG: Realistic
18 situation, I think probably no. And that's
19 partly because of skepticism I have about the
20 efficacy of what you can do with all of this
21 data.

22 MS. COLLINS: Okay. So, it is --
23 there is no circumstance that you could
24 envision of a bulk collection that would meet

1 your form of First Amendment scrutiny? There's
2 no protections on the back end?

3 MS. STRANDBURG: I mean, it would
4 depend on -- I mean, no circumstance, no
5 realistic circumstance, I think.

6 MS. COLLINS: And I wanted to
7 actually grind the other professors on this
8 because it strikes me that there is room if
9 we're sort of creating the law going forward
10 for the courts to consider. Again, like a
11 reasonableness test and to disaggregate the
12 notion and the potential chilling effect of
13 collection as opposed to use or dissemination
14 or even eyes-on access because I think it's
15 clear from publicly available materials that
16 there is a huge gap between collection and the
17 probability that any individual will have eyes
18 on and just your thoughts as smart people as to
19 whether or not the court should look as a First
20 Amendment matter also at distinguishing between
21 collection and subsequent potential access or
22 use.

23 MR. KERR: Great. Make me go
24 first.

1 MS. COLLINS: If there were
2 another First Amendment person here, I would
3 ask the other First Amendment person.

4 MR. KERR: I'm reluctant to
5 express a view on the First Amendment as
6 somebody who toils in the Fourth Amendment
7 fields instead. But I think that a difficulty
8 I have conceptually with a lot of the different
9 chilling arguments is I think it's so hard to
10 say what the standard is for what chills
11 someone, especially given that most people have
12 such a terrible misunderstanding of what the
13 government is doing in both directions. So, it
14 may be that people think the government is
15 doing much, much more than they are. It may be
16 that the people think the government is doing
17 much, much less. And then you have, you know,
18 what's the role of the press in reporting
19 stories, what's the role of the government in
20 what they disclose, what's the role of
21 Congress? It's sort of hard, I think, to -- I
22 personally find in thinking through how that
23 plays out, it's tricky.

24 And the distinction between

1 collection and use disclosure, I think it may
2 be that courts in the Fourth Amendment context
3 start focusing more on the downstream issues.
4 So, the current status of Fourth Amendment law,
5 to go back to something I know something
6 about --

7 MS. COLLINS: Well done.

8 MR. KERR: Thank you. Is to
9 focus on the collection traditionally and it
10 may be that that will shift over time and there
11 will be more attention to use based on some
12 sort of reasonableness standard. You can
13 imagine different ways of kind of manipulating
14 the doctrine to focus on --

15 MS. COLLINS: Isn't that already
16 somewhat the doctrine, though? I mean, if you
17 take -- or at least that's a series of
18 arguments that's made that if you're looking at
19 reasonableness, you do have to look actually
20 at -- you know, in the absence of a warrant,
21 that you do look at what are the downstream
22 uses and what are the protections afforded to
23 the data?

24 MR. KERR: It can be in some

1 context, although you always have to get past
2 what is a search threshold and so that's -- you
3 know, in a wire tapping setting, yes. In the
4 searching a home setting, yes. But in a lot of
5 the metadata issues that we've been talking
6 about and they've been very much the focus in a
7 lot of news stories, you don't get there
8 because at least under current law it's not a
9 search. And so, I think it may be that the
10 courts try to come up with some way of saying
11 there's a search if you get a combination of
12 acquisition and use or some -- you can come up
13 with ways that the Supreme Court might try to
14 reconfigure this, you know, a decade, 20, 30
15 years from now. It's just lots of
16 possibilities.

17 MR. VLADECK: Can I offer a
18 response on the first --

19 MS. COLLINS: Please.

20 MR. VLADECK: So, I mean, first,
21 I think there is a structural problem in First
22 Amendment doctrine with regard to how you
23 measure and quantify chilling. And I don't
24 think that's in any way unique to the context

1 of chilling based on largely secret government
2 programs. I think that's actually even for
3 public programs. I think that's a doctrinal
4 problem the courts haven't solved, but they've
5 accommodated.

6 And second, building on that, I
7 mean, I'm struck by the Second Circuit's
8 decision in the Hedges case. This was a
9 lawsuit brought by plaintiffs who claimed that
10 the scope of the, what, 2012 National Defense
11 Authorization Act was so broad in the detention
12 authority it conferred that U.S. citizens could
13 reasonably believe that they would be detained
14 by the military for First Amendment protected
15 activities. And there's a very, I think,
16 thoughtful and, to my view, largely correct
17 First Amendment analysis by the Second Circuit
18 that explains at what point you cross the
19 threshold from, you know, a reasonable reading
20 of a largely secret government program to a
21 reading that requires, you know, making every
22 benefit of the doubt in favor of conspiracy
23 theories. Right? And so, I think, you know,
24 there is a way to actually operationalize this.

1 It's just, I think, based on what's public,
2 what the public could reasonably believe based
3 on what's public and I think that that's not
4 inconsistent with more general principles of
5 the First Amendment doctrine. I think that's
6 what Hedges did.

7 MS. COLLINS: And back to the
8 expert for a final word, please.

9 MS. STRANDBURG: Well, I was just
10 going to say I think it also depends on what
11 the alternatives are. So, if you have a
12 situation where there are alternatives that,
13 you know, maybe make it a little bit less
14 useful, don't fix everything, but are much less
15 intrusive, then I think that there the need for
16 tailoring really is what controls

17 MS. COLLINS: Oh. So, when you
18 said substantially less burdensome, you were
19 dealing with the level of the intrusion or
20 the --

21 MS. STRANDBURG: Yea.

22 MS. COLLINS: Okay. Thank you.

23 MR. MEDINE: Ms. Brand?

24 MS. BRAND: Thank you. I

1 actually wanted to follow-up on this. I'm glad
2 this came up in Beth's questions because I was
3 going to ask you about it, Professor
4 Strandburg. A minute ago you said something
5 about the level of chilling that made me think
6 that what you're referring to is some kind of
7 subjective understanding on the part of the
8 public about what is going on. Is that what
9 you mean? If the public feels chilled because
10 they have some massively incorrect
11 understanding of what's going on that it must
12 stop? Or what? I agreed a little bit with
13 what Orin said about the nature of
14 misunderstanding because if you look at some of
15 the currently discussed programs, you've got
16 people, including politicians, out there saying
17 things that are just flat wrong about what
18 these programs are and what they do. So, how
19 do we factor that into this chilling analysis?

20 MS. STRANDBURG: Yeah. So, I
21 agree with Steve that this is an area that's
22 sort of troubling for a First Amendment
23 doctrine in general and part of the reason for
24 that is that the standing doctrine is so tough

1 that you get very few cases where courts
2 actually get to the merits to discuss the
3 issue. But I think I would also say that it
4 can't be that whatever crazy thing people think
5 is what counts. So, there has to be some
6 aspect of sort of what reasonable people would
7 think, you know, what are sort of reasonable
8 concerns that citizens might have. But that's
9 just my, you know, sort of my take, I guess.

10 MR. VLADECK: Well, and if I may,
11 I mean, I think the Second Circuit goes out of
12 its way to say, you know, what is a reasonable
13 belief based not just upon the language of the
14 statute, but based upon public positions taken
15 by the government; right? And so, you know,
16 it's not actual knowledge; it's constructive
17 knowledge, but I think that's not a foreign
18 concept to courts in this context.

19 MS. BRAND: Okay. Go ahead.

20 MR. KERR: It strikes me that
21 even that standard is really hard to apply, and
22 in the Section 215 context is an interesting
23 example. So, looking at the statute, I would
24 have said before this known disclosures there's

1 no way that authorizes bulk collection. It's
2 an obviously wrong reading of the statute and
3 yet that is, in fact, what the government was
4 doing. And so going --

5 MR. VLADECK: But you wouldn't
6 have been chilled.

7 MR. KERR: Well, I mean, me
8 personally wouldn't have been chilled or --

9 MR. VLADECK: If you couldn't
10 reasonably have believed, based upon the plan
11 under the statute that the government was
12 collecting all the phone records, then how
13 would you have been chilled?

14 MR. KERR: And so you would say
15 Snowden is responsible for the chilling then?

16 MR. VLADECK: No. I would say as
17 the Second Circuit said in Hedges --

18 MR. KERR: He's not a bad actor,
19 so he personally didn't -- NSA contractor
20 perhaps --

21 MS. BRAND: All right. Let's cut
22 to the chase because I do have some other
23 questions. Did you want to finish your --

24 MR. KERR: No. It's just a hard

1 question.

2 MS. STRANDBURG: Okay. Well, but
3 I also think that chilling is maybe -- part of
4 the problem is the term of chilling effects. I
5 mean, chilling effects that are reasonable are
6 sort of based on reasonable assessments of what
7 could happen to you as a result of exercising
8 your First Amendment rights. And that has to
9 include things that can happen too if there are
10 bad actors in the government as well as things
11 that can happen to you if everybody follows the
12 rules. So, you know, one way to look at it is
13 that chilling effects are a way of talking
14 about what are the things that could happen as
15 a result of a particular program reasonably.

16 MS. BRAND: Okay. Orin, I want
17 to ask you to follow-up on Pat's question. I
18 was also intrigued by what you said about the
19 reasonableness inquiry should be assessed at
20 the point of collection. I was going to ask
21 you to give me a hypothetical and then you did
22 give one to Pat about the Belgian example.
23 Does that hold up across the world? If we just
24 assume arguendo that Belgian and E.U. law are

1 quite reasonable and protective of privacy,
2 what about -- I don't know -- Zimbabwe or Cuba
3 or Iran or Russia or China or any list of
4 places where perhaps privacy and civil
5 liberties are not so protected? Should we --
6 does U.S. law on reasonableness also
7 incorporate the reasonableness of those
8 locations?

9 MR. KERR: It's a great question.
10 It's the problem with the foreign law standard,
11 I think. It works nicely when you're dealing
12 with a western country that has basically U.S.
13 law and most of the western countries -- their
14 surveillance laws and sort of search and
15 seizure laws are actually quite similar to U.S.
16 law. So, you know, it might be a slight
17 difference in how a particular law is
18 interpreted, but they're actually pretty
19 similar. If you apply the foreign law
20 standard, what do you do when it's surveillance
21 of a pipe going underwater and there is no
22 country or what do you do if it's from a
23 satellite or what do you do if it's a war torn
24 nation that has no government?

1 There's sort of two answers to
2 that. One would be you could say, well, maybe
3 the foreign law standard works in some kinds of
4 contexts and doesn't -- it's just a general
5 reasonableness approach in other kinds of
6 contexts. That's maybe one. And arguably,
7 that's what the Second Circuit did in its case
8 that involved Kenya monitoring an Al-Qaeda
9 cell, a U.S. citizen in Kenya, where they did
10 not look to foreign law. They kind of noted
11 that a foreign warrant was, I think, obtained,
12 but it was just in passing. So, you're
13 absolutely right. The foreign law standard has
14 its own pretty substantial practice.

15 MS. BRAND: Then let me twist the
16 hypothetical a little bit more and ask if that
17 standard applies in all circumstances because
18 12333 is so broad, it affects so many different
19 contexts that it's kind of hard to wrap your
20 head around one general standard. It applies,
21 for example, to collection of intelligence on
22 the battlefield by a Department of Defense
23 element. So, if you are -- if some DOD
24 intelligence entity is collecting information,

1 say on the battlefield, about a U.S. citizen
2 who has become an ISIS fighter, what then?
3 It's a U.S. person, it's extraterritorial.
4 What's reasonable? How do you figure that out?

5 MR. KERR: So, I would say first
6 the foreign law standard would not apply for a
7 bunch of different reasons. It's not a joint
8 investigation, for example, and it seems that
9 the foreign law cases have really been limited
10 to U.S. and foreign governments working
11 together and --

12 MS. BRAND: Ok, so not foreign
13 law, then what?

14 MR. KERR: Not foreign law. And
15 then you run into what is reasonableness. And
16 so they're different answers. The courts have
17 suggested -- the Second Circuit suggested sort
18 of you weight the significance of terrorism in
19 that case. In this case with the significance
20 of the government's interest in effectively
21 fighting a war and then you weigh that against
22 the amount of the privacy invasion and,
23 presumably, the war interest wins out.

24 So, it may be that there's no

1 Fourth Amendment issues at all in the
2 battlefield context. It may be that it's
3 general reasonableness and that's case by case.
4 It may be that there's a reasonable suspicion
5 charge. We just don't know what the answer is
6 in that setting. It's not been litigated and
7 just has not come up.

8 MS. BRAND: Professor Vladeck,
9 did you have a thought on that?

10 MR. VLADECK: I mean, I think
11 Orin's -- I mean, so I share Orin's view, first
12 of all, that I think reasonableness is the
13 touchstone there and then the question becomes
14 what do we mean by reasonableness. I guess I'm
15 a little nervous about a balancing test -- not
16 in individuals cases, but in bulk cases. And
17 so, my concern lies much less with individual
18 U.S. persons who are subjected to
19 individualized searches in foreign countries
20 and more with how you apply a balancing test to
21 mass surveillance. Because it's not clear to
22 me how well the conventional reasonableness
23 doctrine under the Fourth Amendment can handle
24 what really is a very widespread, in some

1 cases, collection effort.

2 So, I'm much less worried about
3 the individualized battlefield or non
4 battlefield example where I think there
5 actually is useful case law like the Second
6 Circuit decision than with the quality of the
7 different question of when you're not actually
8 targeting an individual when you're doing it in
9 bulk.

10 MS. BRAND: Well, speaking of
11 bulk, I wanted to ask Professor Strandburg:
12 You talked about data in the bulk context. You
13 seemed like you were talking about all data
14 being alike, and I wanted to ask you if you
15 think in the First Amendment associational
16 context there is a hierarchy of data like we
17 have in the Fourth Amendment context. Because
18 of Fourth Amendment law or, if you're outside
19 the Fourth Amendment. By virtue of policy and
20 statutory law, U.S. law treats more intrusive
21 methods of collection differently, right? And
22 you have -- the government has to meet a higher
23 standard, it's harder to get, et cetera. Do
24 you think the same applies in the First

1 Amendment context? And just to take it down to
2 the lowest level of generality, if the
3 government decided to collect in bulk local
4 newspaper articles from local newspapers, which
5 would have stuff like who went to the Lions
6 Club meeting, so we would have associational
7 information, but it's clearly public
8 information, does that cause the same concerns
9 for you as things that are considered to be
10 more private?

11 MS. STRANDBURG: Yeah. So, I
12 think it has to depend on things like whether
13 the government is actually getting information
14 that isn't already out there.

15 MS. BRAND: So, you would say
16 public information is just outside of the
17 concern, of your concern?

18 MS. STRANDBURG: Not necessarily
19 because there is a point at which you can
20 collect enough little pieces of public
21 information and put them all together and get
22 quite a different picture than anyone would
23 have otherwise, like anyone would normally have
24 just from looking at the public information.

1 MR. VLADECK: And that's -- I
2 mean, isn't that the government's whole theory
3 of CUI, right of Control of Unclassified
4 Information? This is information that doesn't
5 need to be classified on its own, but that when
6 abrogated, can provide more of a picture than
7 the government wants to provide?

8 MS. Brand: Yeah, exactly.

9 MS. STRANDBURG: So, and it's
10 also what was underlying the case involving rap
11 sheets. There was a case that said there's a
12 privacy interest in rap sheets, even though all
13 of the information is out there.

14 So, I wouldn't go that far. I
15 wouldn't make like a categorical statement, but
16 I think clearly it does have to matter and it
17 has to matter whether the data implicates First
18 Amendment concerns at all; right? The data
19 could be something that doesn't tell you -- I'm
20 trying to think of a good example, but -- and
21 that actually comes back to the technology
22 question because as technology changes, what
23 you -- and this is one of the huge issues in
24 the privacy field in general is that there's

1 been a longstanding effort to try to define
2 what's private information. But as technology
3 changes, the kinds of things you can infer
4 using data mining and so on from information
5 changes quite radically. So, information that,
6 you know, would have been not private at all or
7 not tell you anything about association, you
8 know, 30 years ago might tell you a lot now.

9 MR. MEDINE: I want to pick up on
10 that technology point and go back to that
11 discussion that was going on before with Rachel
12 and Orin about the locus of the collection.
13 And we heard earlier about the unterritoriality
14 of data. I understand why in some ways it's
15 appealing to use the location of the collection
16 as a sort of touchstone from prior
17 jurisdictional application of law, but since
18 this panel is about new technology in part, it
19 seems to me if it's not antiquated that where
20 the matter of information is collected it will
21 be shortly. And should that really be the
22 touchstone for how we analyze Fourth Amendment
23 issues?

24 MR. KERR: Yeah. So, I think it

1 should be and I disagree with Professor
2 Daskal's approach for a couple of reasons. One
3 is that if you're going to say that
4 reasonableness should not be connected to data,
5 you need to come up with some answer as to what
6 the standard is or Fourth Amendment standard;
7 right? And so, my sense is that those who
8 would say that territoriality should not matter
9 would say, well, let's bring everything up to
10 the -- no one wants to bring it down; right?
11 No one wants to say, well, it's on the
12 internet, it has no location, therefore the
13 government can get it. Instead it is no, no,
14 no, no, we want to make everything the U.S.
15 standard and let's bring it up everywhere
16 around the world. And then I think, well,
17 okay, that is basically a way of just having a
18 universal warrant standard or something like
19 that and we should debate that on the merits,
20 but that strikes me as the implication. You
21 know, one rule for all of Earth is a pretty --
22 I think a remarkable answer. In part because
23 of the implication -- of the concerns in the
24 Verdugo-Urquidez opinion, which talked about

1 the warfare context or talked about national
2 security, national interests, the notion that
3 the U.S. is different, the political community
4 is different, we're enacting rules and police
5 investigating cases and having government
6 interest to protect us and to investigate cases
7 with the ultimate goal of deterring crime and
8 deterring wrongdoing and that that just is a
9 different issue in the domestic context and in
10 the foreign context.

11 It does raise, I think, a lot of
12 difficult conceptual issues of what the
13 standard should be and maybe you get sort of
14 one -- I tend to focus on the criminal context
15 and I think you get kind of one -- you get a
16 workable regime in the criminal context because
17 most of its going to be done through mutual
18 legal assistance anyway. Even if there's no
19 Fourth Amendment issues at all, it's ultimately
20 going to be done through these international
21 negotiations and then you've got a very
22 different set of implications in the national
23 security context when maybe it's with a
24 cooperation with a foreign government that's a

1 friend, maybe it's a unilateral action that
2 just sort of plays out very differently.

3 But I tend to think that despite
4 the global nature of data, those territorial
5 concerns are still very real and still very
6 important in that that territorial approach
7 still should be maintained.

8 MR. MEDINE: Professor Vladeck,
9 do you concur with that?

10 MR. VLADECK: So, to a point. I
11 agree that territoriality is relevant to the
12 question that you're asking. I guess I just
13 fear for reasons that Professor Daskal raises
14 in the article that we're putting too many eggs
15 in the territoriality basket. And part of that
16 has to do with volition. So, most of the
17 Supreme Court's territoriality doctrine is
18 premised on the notion that individuals were
19 making voluntary choices about where to be,
20 about where to locate things, about where to
21 store things. And with data, that can be true,
22 but it's often not necessarily true.

23 So, for example, if you're a U.S.
24 citizen living in the U.S., residing in the

1 U.S. but it just so happens that all of your
2 e-mails are stored on a server overseas and
3 that they can only be accessed from overseas
4 and you don't care if it's archived, you might
5 be surprised to learn that the government
6 doesn't need a warrant under the Second Circuit
7 and Ninth Circuit approach because the data is
8 overseas.

9 So, you know, I think that Orin
10 is certainly right that the answer cannot be a
11 Fourth Amendment to rule them all, but I think
12 that there is a lot of gray area between the
13 categorical off switch of Verdugo and the
14 categorical on switch of, you know, any access
15 to the U.S. anywhere gets you full Fourth
16 Amendment protections. And I'm not sure why we
17 should be so afraid of trusting courts as they
18 do in every other Fourth Amendment context to
19 strike the balance in that situation.

20 MR. MEDINE: Professor
21 Strandburg, I want to push you to the limits
22 with the First Amendment and see if you'll go
23 there, which is there is a -- from the prior
24 discussions suggests a lack of territoriality

1 to the First Amendment and maybe even some
2 questions of whether non U.S. persons may have
3 First Amendment rights. In the context of U.S.
4 surveillance programs overseas of non U.S.
5 persons, which could chill those non U.S.
6 persons' speech association rights and then, as
7 a result, deprive U.S. persons of the right to
8 receive information from those, do you see a
9 First Amendment constraint on the government's
10 activity in that context?

11 MS. STRANDBURG: So, you noticed
12 I carefully avoided that in my remarks --
13 partly because I think that, you know, for the
14 most part, it's hard to make the argument that
15 non U.S. persons have First Amendment rights, I
16 mean, except in the kinds of situations that
17 Steve mentioned earlier, you know. But when
18 they're just there, they haven't come here,
19 they have, you know, nothing to do with it, I
20 think that would be a big stretch and I think
21 it would also be extremely hard to implement
22 and probably also have what I think is the
23 undesirable effect of ending up with watering
24 down the First Amendment rights of U.S.

1 persons.

2 MR. MEDINE: Although again, is
3 it affecting U.S. persons' rights to receive
4 information if you're chilling the speakers'
5 ability to speak?

6 MS. STRANDBURG: Right, right.
7 So, you know, I think that seems kind of
8 farfetched to me -- your particular
9 hypothetical -- so I would say, no, probably
10 not. I don't know if one could come up with a
11 hypothetical where the reasonable chilling
12 effect on U.S. speakers would be significant
13 enough that it would really be the rights of
14 the U.S. persons that you would be concerned
15 about. But again there, I think it would be
16 the focus would be on the rights of the U.S.
17 persons. And off the top of my head, I don't
18 have such a hypothetical, but there could be
19 one.

20 MR. MEDINE: Professor Vladeck,
21 getting back to the Fourth Amendment, if the
22 United States is conducting surveillance
23 overseas, and again, we talked about this
24 earlier, where there's maybe incidental

1 collection of U.S. persons, what are the Fourth
2 Amendment constraints on that -- on the
3 collection activity or are the constraints more
4 related to use, dissemination, retention? And,
5 again, sort of maybe pushing things to the
6 limits, if U.S. wants to engage in collection
7 activity overseas without a foreign
8 intelligence reason of non U.S. persons, just
9 bulk collection to see what's going on without
10 any suspicion or targeting, but knowing that
11 that will inevitably collect U.S. person
12 information, are there constraints on the U.S.
13 government's surveillance activities under the
14 Fourth Amendment?

15 MR. VLADECK: Sure. So, I think
16 the part of what Judge Sand was struggling with
17 in the Bin Laden case was in a true internal
18 collection case, in theory the collector
19 doesn't know that they've accidentally
20 collected something until they've collected it.
21 And so, there is no way meaningfully to
22 anticipate the incidentalness of the
23 collection. And in that context, of course
24 were there to be any Fourth Amendment

1 implications, it would have to be on use and
2 dissemination -- not on collection because the
3 collection's already occurred.

4 What Judge Sand was worried
5 about -- I think rightly so -- was in the
6 context in which you know that you are going to
7 incidentally collect. Shouldn't there be some
8 constraints on the front end? The problem is
9 I'm -- perhaps Orin is familiar -- I am
10 unfamiliar with any cases since Bin Laden where
11 that's expressly come up. And so, I don't know
12 that there's case law on the subject. I have
13 to say my own sort of view is that that
14 distinction is one that makes sense to me
15 analytically -- that if the government is truly
16 stumbling upon information versus just not
17 targeting but knows that they're going to
18 collect anyway, that that maybe ought to have
19 Fourth Amendment consequences.

20 And so, with regard to your
21 second question about collection overseas, I
22 mean, I do think there are Fourth Amendment
23 consequences. Because of the Second and Ninth
24 Circuit decisions, perhaps there's no warrant

1 requirement if you are known to collect on U.S.
2 persons overseas, but maybe then the question
3 is is incidental collection reasonable? And
4 that answer might depend on technology. Is it
5 impossible to collect what you are clearly
6 legally entitled to collect without some
7 incidental collection? And if the answer is
8 yes, then perhaps maybe that's reasonable. So,
9 that's how I would cash that out without
10 knowing sort of the details of what exactly the
11 capabilities are.

12 MR. MEDINE: All right. And
13 Professor Kerr, one final question: Is there a
14 foreign intelligence exception to the Fourth
15 Amendment?

16 MR. KERR: Foreign intelligence
17 exception to the Fourth Amendment.

18 MR. MEDINE: Exception to the
19 warrant requirement.

20 MR. KERR: I mean, I would think
21 so. I think that's probably the most
22 consistent reading of the cases -- that the
23 warrant requirement would not apply in the
24 foreign intelligence context. You're talking

1 domestically that's what most Circuits have
2 held and that's certainly a plausible answer.
3 But doctrinally, we just have those Circuit
4 Court opinions from the '70s and that's all we
5 have at this point.

6 MR. VLADECK: Which all require a
7 primary purpose.

8 MS. WALD: We have been told that
9 we have a waiver from whoever the highest
10 authority is in this operation because we've
11 come in 15 -- well, 10 minutes ahead of our
12 schedule. As a result, each panel member gets
13 two minutes to have a discourse.

14 I have one question for Professor
15 Kerr: Having read your equilibrium adjustment
16 article and hoping I understood it, I thought
17 you said at one point that when technology
18 changes and new programs that weren't
19 contemplated by Congress, when it's a statute
20 that's involved, are not a good fit for the
21 statute that's relied upon to authorize them
22 the intelligence community should go back to
23 Congress and seek approval for the new program.
24 That seems to -- if that's the right

1 interpretation of your argument, it seems to be
2 in accord with Judge Lynch's opinion in the
3 Second Circuit case, but how would we apply
4 that concept, if I've got it right, to E.O.
5 12333 where there's no underlying statute?
6 Does it suggest a strong need for the
7 regulations to be periodically reviewed and
8 updated with perhaps more consistency than we
9 have had to date?

10 MR. KERR: Yes. So, this gets to
11 the question of really how the Foreign
12 Intelligence Surveillance Court should have
13 construed Section 215 and I think it's
14 appropriate for the Foreign Intelligence
15 Surveillance Court to apply what I call the
16 Rule of Lenity basically saying if the --
17 basically, some clarity is needed before a
18 court should interpret a law as authorizing
19 this broad collection program. And so, that is
20 consistent with Judge Lynch's opinion for the
21 Second Circuit. I certainly agree with the
22 underlying merit interpretation.

23 In a context where Congress has
24 decided not to regulate, as you indicate,

1 there's no statute to interpret for which there
2 should be a rule, you know, for which lenity
3 could apply. The easy answer to is that you
4 should have an Act of Congress -- that is
5 theoretically possible

6 MS. WALD: Well, how about the
7 regulations? We do have a whole bunch of AG
8 regulations on E.O. 12333 supplemented by every
9 departmental who's involved regulations. Is
10 there any sort of internal requirement that,
11 you know, they want to do a new technology
12 program, it doesn't exactly sort of fit what
13 they've been doing. Do they have any
14 responsibility to put that sort of out in
15 the -- not identify the program, but get
16 approval for the program?

17 MR. KERR: I don't know about
18 approval. It's not enough of a context that
19 I'm personally familiar with enough. But
20 certainly given that technology is constantly
21 changing and the implications of preexisting
22 rules and programs are changing, you'd want to
23 have continual oversight to see, you know, this
24 is how the program worked five years ago, let's

1 see how it works today because the answer could
2 be really different.

3 MR. MEDINE: Mr. Dempsey?

4 MR. DEMPSEY: So, a question for
5 Professor Kerr, which is: I think you've
6 written about -- I'm putting my own gloss on
7 it -- that in the computer search area or
8 possibly in the technological data search area,
9 the warrant alone is not enough for at least --
10 even with a warrant you get so much information
11 that a search still might not be reasonable if
12 the government collects more than would be
13 reasonable. Any indication that the courts are
14 moving in the direction of looking at that? I
15 remember there was this case involving what I
16 refer to as the other CDT, which was the drug
17 testing, the Barry Bonds steroid thing, and
18 then there was that Ninth Circuit opinion and
19 then it was withdrawn and it was replaced by
20 something much more general. But in the past
21 two or three years have the courts begun to
22 look at the downstream use of data and any
23 indication that merely having a warrant, which
24 would say give us everything and everything

1 might be far, far, far more than ever before,
2 including lots of things that are incidental,
3 any progress on that, any signs of where the
4 courts might be going?

5 MR. KERR: There have been a few
6 developments. First, two courts have suggested
7 that perhaps there should be a cutting back on
8 the plain view exception for digital evidence
9 without directly answering that. And that was
10 what I had written about in a 2005 article.
11 The Second Circuit and the Massachusetts
12 Supreme Judicial Court both said maybe we need
13 to rethink this and then remanded the case back
14 to the trial court, so we don't have answers
15 yet.

16 And then also, more recently, I
17 guess last year, the Second Circuit decided a
18 case called United States versus Ganas
19 involving the government had over-seized
20 evidence in a computer search, held onto that
21 evidence, a person's evidence that was stored
22 on a government storage device. Years later
23 the government had probable cause to search
24 that held file again and the Second Circuit

1 said you can't go back and search that, even
2 with new probable cause, effectively creating a
3 use restriction, which is that whenever the
4 government is collecting, over-collecting
5 because the nature of computer searches is that
6 they're so broad. That's sort of hermetically
7 sealed off, even from a subsequent search based
8 on probable cause. So, that is, I think, the
9 most remarkable development along these lines.
10 It's, again, this thinking of, you know, yes,
11 the government can get a search warrant, but
12 just having the search warrant doesn't mean
13 that they can do anything they want. There are
14 actually restrictions on when they can go back
15 or maybe plain view with the latter. We're not
16 sure of that yet.

17 MR. MEDINE: Ms. Collins?

18 MS. COLLINS: I wanted to go back
19 actually to something you all were exploring
20 when Rachel cut you off, unfortunately, which
21 is what is rule of misinformation in addressing
22 the chilling effect and how should courts
23 and -- Professor Strandburg, I would love your
24 thoughts on, you know, what should a court do

1 if there is a general belief in what the
2 government is doing and there is an impact on
3 the plaintiff's conduct but they're absolutely
4 wrong about what the government is doing? So,
5 they have been chilled?

6 MS. STRANDBURG: Yeah. I mean,
7 that's just a very tough one and I don't know
8 that I have -- I mean, especially if it's
9 something where a large number of people -- I
10 mean, if it's a few crazy people on the edges,
11 that's one thing; right? But if it's where a
12 large number of people -- I mean, the easy
13 answer is well, the government should tell you
14 things, tell you the information that you need
15 to know so that you know that this is not what
16 they're doing. I would think that in many
17 circumstances, that's probably possible, and
18 that would certainly be my first choice way to
19 address that problem.

20 MR. VLADECK: And that's exactly
21 what happened in Hedges. I mean, so in Hedges,
22 the District Judge issued a nationwide
23 injunction based upon the plaintiff's, in my
24 view, rather speculative assessment of the

1 government's intention authority. And the
2 Second Circuit basically, you know, made it
3 worth the government's while to clarify its
4 position in its briefing and then relied
5 heavily upon the government's position in its
6 briefing and the government's disclaimers of
7 some of the specific findings the District
8 Judge had made about the scope of the authority
9 in explaining why there was no real chilling
10 effect. So, I think it's not only possible; I
11 think we've seen it in a national security
12 case.

13 MS. COLLINS: And what is the
14 role of the potential government bad actor
15 because I actually sort of saw expressions
16 going different ways to the notion that a court
17 should consider or should assume that there may
18 be bad actors within the government who will
19 misuse information once the government has the
20 information? So, is it your position that the
21 court should presume that there will be bad
22 actors?

23 MS. STRANDBURG: I think the
24 court should take into account the possibility

1 that there may be bad actors -- not presume
2 that there will be, but take into account the
3 possibility that there may be. I think that
4 that has to be the right answer given
5 everything we know from history -- both our
6 history and the history of other countries with
7 respect to surveillance. So, yes, I think that
8 one has to assume that and I think that not in
9 this context, but in the context of the perhaps
10 it exists or perhaps it doesn't due process
11 right to information privacy, courts have taken
12 into account what are the things that the
13 government has done to make sure that there
14 won't be bad actors that are able to make use
15 data.

16 MR. VLADECK: I mean, I think the
17 question is just is it reasonable to believe
18 that, you know -- is it reasonable given the
19 program to believe that government officers
20 will overstep? And, you know, we actually have
21 legal doctrines that are based on the
22 assumption that at least in some circumstances
23 government officers will cross the line. You
24 know, qualified immunity wouldn't be that

1 exciting without that assumption.

2 So, I think the question is
3 simply: Is the belief reasonable on the part
4 of the listener that misconduct might occur?

5 MR. MEDINE: Ms. Brand?

6 MS. BRAND: I will retroactively
7 give Beth one minute of my time, and I will try
8 to take just one minute since you guys went
9 over on that one. Just going back, though, to
10 the question that Beth asked, it can't be, can
11 it, that chilling and the First Amendment
12 implications of a government action depend on
13 subjective public intent? I just don't see how
14 that can be. And it's interesting -- this
15 Hedges case -- you know, the government making
16 a factual statement in a judicial filing in
17 court -- that may educate the plaintiff in that
18 case. It probably doesn't educate the public,
19 depending on how much press it gets or
20 whatever, but then that becomes a very
21 subjective analysis right.

22 MR. VLADECK: It's worth
23 reminding ourselves that the Obama
24 administration's definition of who could be

1 detained under the AUMF was promulgated in a
2 brief filed in the DC District Court. So, I
3 think I would certainly agree with you in the
4 general typical case that court filings do not
5 make public statements. I think in this
6 sphere, though, they have.

7 MS. BRAND: Well, I think you're
8 conflating an issue about whether policy should
9 be made in a brief or whether a factual
10 statement in a filing in a court has some
11 effect on the public's subjective understanding
12 of what the government is doing, and therefore
13 whether the public is chilled. So, it has to
14 be either, I think, limited to the objective
15 understanding or at least the information made
16 objectively available to the individual
17 plaintiff, or it has to be some kind of
18 objective standard, which is, of course, what
19 we have in the Fourth Amendment context.

20 MR. VLADECK: I was never trying
21 to suggest they should be subjective.

22 MS. BRAND: No. I wasn't -- I
23 was directing that more to Professor
24 Strandburg. But what is your --

1 MS. STRANDBURG: Yeah. I'm not
2 suggesting subjective, either, but I am
3 suggesting what a reasonable member of the
4 public would think, which might not be
5 identical to what's actually going on. So, I
6 think that there is a potential difference
7 there.

8 MS. BRAND: How does a court
9 decide what a reasonable member of the public
10 thinks?

11 MS. STRANDBURG: How does the
12 court decide what a reasonable person does in
13 anywhere. I mean, this is -- you know, this is
14 something we do all the -- that courts do all
15 the time. Arguments on both sides evidence
16 and --

17 MS. BRAND: All right. My time
18 is up.

19 MR. MEDINE: Professor
20 Strandburg, it doesn't seem as though the First
21 Amendment has really imposed a significant
22 constraint on government surveillance
23 activities, say, in contrast to the Fourth
24 Amendment. Do you see that developing because

1 on the balance national security ends up
2 carrying a lot of weight, even under a strict
3 scrutiny standard? Do you see that changing at
4 all or are there arguments to be made to give
5 the First Amendment more of an impact in
6 regulation in this area?

7 MS. STRANDBURG: Well, I think it
8 is changing. Now, whether to the extent that
9 First Amendment considerations are beginning to
10 inform what courts are doing under the Fourth
11 Amendment more. Whether that is the way it
12 will go or whether courts instead will
13 recognize more specifically as, you know, they
14 have in certain areas like these subpoenas and
15 so on, that there is a more direct effect of
16 the First Amendment. You know, I don't know.
17 My personal view is that it would be better if
18 courts did that because it would bring up the
19 issues that courts are really worrying about in
20 some of these cases and allow them to be dealt
21 with directly.

22 MR. MEDINE: Thank you. Any
23 other comments? Okay. Thank you very much to
24 the panelists. We appreciate your thoughtful

1 responses. We're going to take a 15-minute
2 break and start sharply at 3:00 since lots of
3 people in the room and on the stage have travel
4 arrangements, so we're going to start promptly
5 at 3:00. Thank you very much.

6 - - -

7 (Whereupon, a short recess was
8 held at this time.)

9 - - -

10 MR. MEDINE: Attention. Hello.

11 The Chair is speaking. I need a gavel
12 obviously. We're going to begin the third and
13 final session of today's meeting on Executive
14 Order 12333 In Practice.

15 MS. BRAND: Thank you. I'm
16 Rachel Brand and I'm going to be moderating the
17 third and final panel of the day, which we've
18 entitled Executive Order 12333 In Practice,
19 which will examine how the Executive Order,
20 other law and policy, governs how the
21 intelligence community collects, retains and
22 disseminates information about U.S. persons.
23 It will also examine the mechanisms that the
24 Executive Branch and Congress have put in place

1 to oversee activities conducted pursuant to the
2 Executive Order.

3 So, just to -- mainly for the
4 benefit of the panelists, to tell you how this
5 is going to go logistically in case you didn't
6 see the previous panels, each of you will have
7 up to seven minutes to give your opening
8 remarks. There is a yellow card in the front
9 row. Rebecca has it at the moment. So, when
10 two minutes are remaining in your time, the
11 yellow card will go up. When the red card goes
12 up, your time is up. And then, so what I'm
13 going to do is I'm going to first introduce
14 Michael Allen, and after you're done speaking I
15 will introduce the next panelist, and so on. I
16 intend to be brutal on the timekeeping because
17 a number of us have to catch planes. So, if I
18 cut you off in mid sentence, no offense. It's
19 just a matter of timing.

20 So, our first speaker today is
21 Michael Allen. He is the managing director of
22 Beacon Global Strategies, L.L.C. From 2011 to
23 2013, Mr. Allen served as Majority Staff
24 Director of the House Permanent Select

1 Committee on Intelligence or HPSCI. Prior to
2 joining the HPSCI, he was Director of the
3 National Security Preparedness Group, which was
4 the Bipartisan Policy Center's successor to the
5 9/11 Commission. Mr. Allen additionally served
6 in a variety of roles in the White House,
7 including a variety of roles in the National
8 Security Council. Thank you for being here.

9 MR. ALLEN: Thank you so much for
10 the introduction, Rachel. Mr. Chairman, thank
11 you and the PCLOB for having me here today.
12 I'd like to focus my remarks on the state of
13 Congressional oversight of the intelligence
14 community. The activities of the IC are
15 absolutely critical to our national security.
16 Intelligence is the lifeblood of our decision
17 making process. It's very important, of
18 course, for our soldiers to be able to see over
19 the next fox hole. It's critical for
20 presidents to receive national intelligence on
21 everything from ISIS to the Iran nuclear
22 program. And, of course, its core most
23 important function is indication and warning.
24 And so, I applaud you all for taking on these

1 topics in the seriousness with which you treat
2 it.

3 While intelligence is critical to
4 national security, oversight of the IC is among
5 the most important functions in our democracy.
6 The President is asking the men and women of
7 the IC to put their lives on the line and do
8 very dangerous things for their country. But
9 to be able to perform these tasks, the IC needs
10 the support of the American people, whose
11 interests are represented by the members of
12 Congress, serving on the House and Senate
13 Select Committees on Intelligence. Because
14 some of the IC's activities are controversial,
15 the oversight committees are obligated to
16 scrutinize the activities of the IC to ensure
17 they're consistent with our values. This is
18 among the highest duties that the Congress has
19 in overseeing the Executive Branch.

20 There are many misconceptions
21 about Congressional oversight of intelligence.
22 Many of the academic papers and books, I think,
23 miss the boat altogether. This is in part,
24 naturally, of course, because the Intelligence

1 Committees necessarily operate in secret, as
2 the Constitution actually contemplated, but my
3 experience working with and for the
4 Intelligence Committees over the last decade
5 has convinced me that members of Congress
6 largely take their oversight responsibilities
7 very seriously.

8 I'd like to review what, in my
9 humble opinion, are several hallmarks of
10 effective Congressional oversight. The first
11 is the annual authorization bill. So much of
12 the academic literature out there does not
13 appreciate what exactly the Intelligence
14 Committees do. They perhaps look on Thomas and
15 find a very short unclassified intelligence
16 bill and say to themselves, well, there's
17 nothing here. In reality, the Intelligence
18 Committees draft a classified annex that
19 travels with and is attached to the actual
20 annual authorization bill. This is the engine
21 of Congressional oversight. It directs -- it
22 gives direction on specific programs, it fences
23 dollars until certain conditions are met, it
24 sets personnel level and it actually sets

1 ceiling on -- dollar ceilings on certain
2 programs and, of course, for certain agencies.
3 Congress for a time -- from 2004 to 2011 -- did
4 not or was not able to enact an annual
5 intelligence authorization bill and I think
6 Congressional oversight suffered as a result.
7 Luckily, we were able to restore that practice
8 in recent years and I think that is all for the
9 good.

10 The reason is, of course, is that
11 while it's very important what members of
12 Congress say -- and I do believe the Executive
13 Branch responds to members of Congress --
14 Congress needs to be able to give force so that
15 it can pass legislation to back up what they
16 say in law. I think the intelligence community
17 notices when they go up to the Hill, if the
18 committees are not getting along or can't do
19 their job or are dysfunctional and don't pass
20 an authorization bill every year, I think they
21 smell weakness and I think they might be able
22 to think, well, I have to endure a beating up
23 here in a hearing. But at the end of the day,
24 I know they can't do anything about it.

1 The second, I think, crucial
2 hallmark of what the Intelligence Committees do
3 for oversight, which, again, I think is
4 under-appreciated are the hearings that the
5 committees do. We're used to this as
6 Washington people. We see so many committees
7 every day, so many committees doing a variety
8 of different hearings every day. Secretary
9 Rumsfeld actually visited the HPSCI a few years
10 ago and he was, of course, occasionally
11 famously in an oppositional role to Congress,
12 but he reminded us on the HPSCI, or at least
13 the membership, the power that they have to
14 have a hearing, it sets an agenda for the
15 Executive Branch. In many cases it causes most
16 of the members, at least in the particular
17 subject matter area, to drop what they're doing
18 and to get ready for a hearing. It forces
19 bureaucratic stases to be addressed and very
20 often policies to advance.

21 So, in the House Intelligence
22 Committee we had at least two hearings a week
23 and many other one-off briefings and other
24 hearings, as the case may be, and I think that

1 benefitted enormously and I think oversight
2 benefitted enormously from that.

3 Another key aspect is leadership
4 and membership of the committee. Key to
5 effective oversight is, of course,
6 bipartisanship. Congress speaks louder when
7 they speak together. And again, of course, if
8 they're sending conflicting messages to the
9 intelligence community, I think oversight by
10 and large would be harmed.

11 Also, an active membership is
12 absolutely key to Congressional oversight.
13 Members have to invest the time and they have
14 to invest a lot of, frankly, time when they're
15 not in front of the camera or doing things with
16 their constituents to be able to come down to a
17 skiff and learn about the complex 17 agencies
18 of the intelligence community. But that's not
19 to say our oversight structure is perfect.
20 Well, I should say as an aside, it is the envy
21 of the world. Annually the equivalent -- the
22 British equivalent of the Intelligence
23 Committee comes and visits us and they marvel
24 at what the House and Senate Intelligence

1 Committees have in terms of access to
2 information sources and methods. And an
3 Australian trip revealed much of the same
4 thing, so I think we're the envy of the world.
5 Congressional -- the oversight, of course, is
6 vast. I think we could probably work in many
7 ways to make sure that we had more staff with
8 professional and technical backgrounds to be
9 able to tackle this stuff. I'm happy in the
10 Q&A to go over how we staffed each aspect of
11 12333 and the collection programs.

12 But finally, I think the last
13 thing I'll mention is that another way to
14 strengthen Congressional oversight is for the
15 National Security Council to resist the impulse
16 to limit who gets briefed in on what program.
17 For example, often the gang of eight is invoked
18 too frequently and I think we should do less of
19 that so more members feel empowered and have
20 access to information. I'll stop right there.

21 MS. BRAND: Thank you very much.
22 Our next speaker is Timothy Edgar. He is a
23 visiting fellow in International Studies at
24 Brown University's Watson Institute for

1 International Studies and has also taught at
2 Georgetown University Law Center. Mr. Edgar
3 served under President Obama as the first
4 director of Privacy and Civil Liberties for the
5 White House National Security Staff. From 2006
6 to 2009, he was the first Deputy for Civil
7 Liberties for the Director of National
8 Intelligence. Thank you for being here.

9 MR. EDGAR: Thank you very much,
10 Ms. Brand and Chairman Medine. I'm pleased
11 that you're examining this issue, Executive
12 Order 12333, particularly because of the
13 importance of the activities that are conducted
14 under this order. My perspective on these
15 activities has been shaped by my experience
16 inside and outside of government in ensuring
17 that national security activities are
18 constrained by privacy and civil liberties
19 safeguards. So, in addition to my government
20 experience, I was also an attorney at the
21 American Civil Liberties Union. So, I
22 understand the perspective of the outside
23 advocates as well. And I would say that the
24 job of lawyers and privacy officials inside the

1 intelligence community is really mostly to
2 administer the two basic systems of oversight
3 that were first established by the Church
4 Committee Reforms of the 1970's -- the Foreign
5 Intelligence Surveillance Act and E.O. 12333.
6 And of these two, in my experience, E.O. 12333
7 is by far the more important of the two, even
8 though it receives less attention. And that's
9 because FISA has a definition of electronic
10 surveillance that is very specific as to where
11 and how information is collected. It requires
12 court orders, it involves considerable effort
13 by government attorneys and involves all three
14 branches of government in oversight. So,
15 there's a lot of oversight involved when you
16 get the FISA court involved.

17 On the other hand, E.O. 12333
18 governs everything else. Those that are not
19 regulated by statute do not require a court
20 order and as a result, as a practical matter,
21 these activities are less transparent, even
22 when you look at the standards of classified
23 programs. And that's because they're less well
24 documented and they involve less people really.

1 Realistically, they usually involve just the
2 Executive Branch, although Congress often does
3 get involved in oversight of the activities.
4 There's just so many of them and across such a
5 wide array of programs that it's difficult for
6 Congress to oversee them without the kind of
7 prompt that FISA provides.

8 Since the Snowden revelations
9 began in 2013 there's been a lot of debate here
10 as well as abroad about surveillance reform.
11 While much of the debate in this country has
12 focused on bulk collection of telephone records
13 and other FISA activities like prism, in the
14 rest of the world the attention has really been
15 on the continuing revelations of a variety of
16 NSA activities that are conducted overseas
17 under E.O. 12333. These include reports of
18 very intrusive activities like collection of
19 massive quantities of communications -- the
20 practice the government calls bulk collection
21 and that critics call mass surveillance -- as
22 well as alleged activities that undermine
23 encryption or securitive communication systems.
24 These are all areas I think that you should be

1 considering looking at.

2 President Obama has actually

3 addressed many of the concerns or some of the

4 concerns about privacy and civil liberties in

5 intelligence collection and signals

6 intelligence collection under Executive Order

7 12333 in Presidential Policy Directive 28, PPD

8 28, which we haven't talked about much this

9 morning. Hugely important as a matter of

10 policy and as a matter of law, it limits bulk

11 collection under any authority for signals

12 intelligence to six specified national security

13 threats. Those are counterintelligence,

14 terrorism, WMD, cyber security, threats to

15 military forces and transnational crime. Those

16 are all very important topics, but that's a

17 relatively narrow slice of the total topics

18 that are usually covered in foreign

19 intelligence collection. And it also does

20 things like saying that the government needs to

21 consider the privacy and civil liberties of

22 everyone around the world -- that is, foreign

23 citizens -- in deciding whether to go forward

24 with signals intelligence. That's a pretty

1 soft requirement. You just have to consider
2 and weigh these. But that's still pretty
3 important. That's really quite significant
4 because when I was in government, both at the
5 White House level and at the ODNI, this simply
6 wasn't a consideration. There was no
7 Presidential Directive or policy that said,
8 hey, this activity may be producing some
9 intelligence, but when you compare it to the
10 huge impact on the privacy of a very large
11 number of people overseas, it's not worth it.
12 That just didn't compute. Privacy of people
13 overseas didn't count. It wasn't covered by
14 Executive Order 12333. It wasn't covered by
15 FISA. It wasn't covered by other statutes.
16 Now it does under PPD 28.

17 It also includes this language,
18 which came to mind when we had the discussion
19 of the First Amendment in the last panel. The
20 assumption in that panel was really when we're
21 talking about the First Amendment, it's really
22 we're talking about U.S. persons. Yes,
23 certainly, but under PPD 28 there's at least a
24 nod to the interests of foreigners when it

1 comes to First Amendment type rights as well as
2 other things. PPD 28 contains this language:
3 The United States shall not collect signals
4 intelligence for the purpose of suppressing or
5 burdening criticism or dissent or for
6 disadvantaging persons based on their
7 ethnicity, race, gender, sexual orientation or
8 religion. This is a sentence which applies to
9 everyone around the world -- not just to
10 American citizens. I discuss some of this in
11 an article which I have also left out on the
12 table following the advice of Professor Slick.

13 So, the question really I think
14 you need to look at is very welcome and very
15 timely. I have asked -- in my written
16 statement I have suggested there are several
17 examples of factual issues that you could be
18 helpful in. One is how effective have programs
19 under E.O. 12333 been in preventing terrorism?
20 I think this is going to be a relatively easy
21 case for the government to make, but I still
22 think it's worth it for you to make them make
23 that case. We'll learn a lot about the
24 importance of those activities as well as any

1 pitfalls.

2 The other is what percentage or
3 proportion of the government's efforts under
4 E.O. 12333 have been directed at preventing
5 terrorism versus other national security
6 priorities or other foreign policy priorities?
7 This limitation of bulk collection I talked to
8 you about -- that was six threats. So, I think
9 that's useful. It would be helpful to the
10 public to understand is this 50 percent of what
11 the intelligence community does? Is this 80
12 percent? Is it 10 percent? This can be
13 helpful to understanding the impact on privacy.

14 And then are there limits beyond
15 what's in PPD 28 that should be put on
16 particularly intrusive activities such as bulk
17 collection and what about this undermining
18 encryption and security? That's a subject
19 which PPD 28 doesn't cover, but which
20 recommendations by the President's Review Group
21 were made and I think that's an important
22 issue.

23 And then really how has PPD 28
24 actually affected intelligence activities under

1 E.O. 12333? Its early days, PPD 28 was only
2 signed last year. It was implemented earlier
3 this year. But I think it's worth taking an
4 early check-in to see has this changed
5 practice, has it helped just codify what the
6 government was already doing. That may impact
7 what we think the government was doing.

8 MS. BRAND: Thank you.

9 MR. EDGAR: I see I'm out of
10 time.

11 MS. BRAND: You're out of time.
12 Thank you for observing the clock. Our next
13 speaker is Mieke Eoyang. She is the National
14 Security Director at the Third Way. Prior to
15 joining the Third Way, Mieke had a long career
16 on Capitol Hill, most recently serving as Chief
17 of Staff to Representative Anna Eshoo. From
18 2007 to 2010, Ms. Eoyang served as a
19 professional staff member on the House
20 Permanent Select Committee on Intelligence.
21 From 2002 to 2007, Ms. Eoyang was the Defense
22 Policy Adviser to Senator Kennedy and before
23 that was a professional staff member on the
24 House Armed Services Committee. Thank you for

1 being here.

2 MS. EOYANG: Thank you,
3 Commissioner Brand, Chairman Medine,
4 Commissioners Collins, Dempsey and Wald. Thank
5 you for inviting me. First I'd like to say I
6 agree with everything that Michael Allen said
7 and I cannot emphasize that enough in terms of
8 the seriousness and the importance of
9 Congressional oversight and the seriousness
10 with which members approach their task. In the
11 interest of not repeating that, I am going to
12 focus my remarks on the limits of Congressional
13 oversight -- in particular, as members of
14 Congress understand the limits of intelligence
15 oversight in comparison to their oversight
16 tools that are available to them on other
17 national security committees, having served on
18 both Intelligence and Armed Services.

19 There are some differences
20 between the tools that the committee staff and
21 the members have available to them when they
22 conduct oversight over the intelligence
23 programs. First, we often hear that from
24 members of the intelligence agencies that

1 Congress has access to everything -- or
2 Congress sees everything. And I want to just
3 first draw a distinction between having access
4 and the ability to see everything and actually
5 being able to see everything. The assumption
6 that Congress has seen everything that the
7 intelligence committee does and therefore has
8 approved of it is both logistically impossible
9 and I think factually incorrect and an unfair
10 assumption about Congressional oversight. A
11 \$70 billion enterprise, as discussed in the
12 last budget submission, it's just too large an
13 enterprise for the staffs of the two committees
14 to get their hands around completely.

15 The other thing is that
16 Congressional review is not a guarantee of
17 either civil liberties protections or
18 Constitutional sufficiency. And for good
19 reason, members of Congress, when they're
20 approaching these programs, are often thinking
21 first of their effectiveness at protecting the
22 country and, second, of the budgetary
23 effectiveness and good stewardship of taxpayer
24 dollars. Civil liberties concerns and privacy

1 concerns are a question for them, but they may
2 not be the primary or secondary concerns. It
3 may be tertiary or even lower than that,
4 depending on what interests are at stake.

5 Then in thinking about those
6 issues, Congress doesn't always get to review
7 the legal basis for programs. There's an
8 assumption -- there's often assumption that
9 programs that come under 12333 that it's such a
10 well established Executive Order that you may
11 not go back and review the legal basis on which
12 those programs lay. We have seen and there
13 have been public reports of times in which
14 members of Congress were not given the legal
15 opinions that would underlie some intelligence
16 programs. My understanding is recently that's
17 changed, thought I would say that being on the
18 Intelligence Committee's a little bit like
19 being in the movie Memento -- you only know the
20 time period in which you're there. Michael
21 Allen and I did not serve at the same time, so
22 we may have different -- slightly different
23 perspectives on the ways in which the
24 relationship worked.

1 But most importantly, the
2 Congressional Intelligence Committees do not
3 have full access to the range of oversight
4 tools that are available to other national
5 security committees -- sometimes for good
6 reasons. Because of the sensitivity of the
7 programs involved, Congressional tools like the
8 Congressional Budget Office or the
9 Congressional Research Service or the American
10 Law Division of the Congressional Research
11 Service are not available to them for their
12 expert analysis on those programs. Reading in
13 that many people would be problematic and a
14 risk to security. However, the committee had
15 made an attempt while I was there and I know it
16 has worked with intelligence agencies to try
17 and get the General Accountability Office in to
18 be able to conduct the kinds of financial
19 audits and systemic audits of functions of the
20 intelligence community that the committee staff
21 themselves are not properly resource to be able
22 to do. For a long time the intelligence
23 agencies were resisting that kind of oversight
24 and I'm not sure whether or not the committee

1 has ever successfully gotten GAO to come in and
2 do an audit of a program. However, if you look
3 in the most recent National Defense
4 Authorization Act, the Armed Services
5 Committees regularly use the GAO to review
6 highly classified intelligence programs and the
7 results of those audits may remain secret and
8 classified, so only available to appropriately
9 cleared audiences.

10 The other challenge -- one of the
11 other challenges that the Congressional
12 intelligence committees have is their access to
13 whistle blowers. There has been a fair amount
14 of Congressional debate about the intelligence
15 community Whistle Blower Protection Act and
16 whether or not that actually encourages or
17 stifles Congressional whistle -- or whistle
18 blowers from coming in to Congress. There have
19 been public reports of whistle blowers who have
20 said that their treatment and the difficulties
21 they've had coming to Congress inside the
22 classified spaces have led them to go to the
23 press, which in many cases can be very harmful
24 to national security. If Congress had a

1 clearer path to whistle blowers, it is possible
2 that people would not bring those to the press.
3 But part of the challenge of having an
4 effective whistle blower regime in the
5 classified environment is that it is difficult
6 to communicate back to the community of people
7 who might be able to uncover waste, fraud and
8 abuse that their concerns will get adequately
9 addressed when they are addressed in secret and
10 behind closed doors. However, the perceptions
11 of some whistle blowers based on the treatment
12 of others that were public has certainly
13 suggested that there is a chilling effect of
14 whistle blowers not coming to the community.

15 And then the other thing is that
16 the members of the two intelligence committees
17 are not equally situation when it comes to
18 intelligence oversight. The House intelligence
19 committees are staffed by a core staff which is
20 controlled by the chairman and ranking member.
21 On the Senate side, individual senators will
22 have their own designee who is cleared in
23 addition to the core staff. That means when
24 members of the Senate disagree with the

1 position of their chair or ranking member, they
2 can have the assistance of a staffer to help
3 them wade through the legal or technical issues
4 to help them given all the other demands on
5 their time. The House has chosen under House
6 rules not to have that system to provide a
7 cleared staffer to the members of the House
8 Intelligence Committee, providing those
9 resources costs would increase the legislative
10 branch appropriation, so that's a larger
11 decision. But they are not equally situated
12 that way.

13 The Senate also has a technical
14 support working group. And during my time
15 there, the House did not have access to a group
16 of cleared independent intelligence experts who
17 they could turn to for advice on the technical
18 nature of programs. You have to remember,
19 these members are not automatically familiar
20 with intelligence programs, the business of
21 national security or experts in the law, so
22 they need some additional expertise to help
23 them.

24 And then the House and the Senate

1 are differently situated when it comes to
2 access of the entire body to seek classified
3 information. House rules set up a very
4 rigorous process for members not on the
5 committee to seek classified information that's
6 in the control of the Intelligence Committees.
7 The Senate has as a practice allowed all
8 Senators to see that. So, thank you.

9 MS. BRAND: Thank you very much.
10 Our last speaker of the day is Matt Olsen.
11 He's a lecturer at Harvard Law School, an ABC
12 News contributor, and cofounder of a cyber
13 security technology firm. From 2011 to 2014,
14 Mr. Olsen served as Director of the National
15 Counterterrorism Center or NCTC. Prior to
16 joining the National Counterterrorism Center,
17 Mr. Olsen was the General Counsel of the
18 National Security Agency. Mr. Olsen also
19 served as the Deputy Assistant Attorney General
20 for the Justice Department's National Security
21 Division. That was from 2006 to 2009 -- sorry.
22 And he also served as a federal prosecutor for
23 over a decade. So, thank you for being here.

24 MR. OLSEN: Thank you very much

1 and thank you to the Board for inviting me and
2 for your focus on Executive Order 12333. In my
3 last position as the Director of National
4 Counterterrorism Center, I had the opportunity
5 to work on many occasions with the Board and
6 with your staff and we always benefitted from
7 your direction and guidance and advice. So,
8 again, I appreciate the opportunity to be here.

9 So, I'll focus my remarks on the
10 operational aspect of Executive Order 12333,
11 how it works in practice. Obviously, my views
12 are shaped by my experience both at NSA and
13 NCTC and the Department of Justice. I'll begin
14 just with a few comments about how I see the
15 executive order, how it's important in practice
16 and then I'll talk a little bit about the
17 limitations or restrictions that the order
18 imposes on the activities of the intelligence
19 community, particularly with respect to NSA,
20 since that's what I know best.

21 The first point I'll make and I
22 know the Board knows this, but I think it bears
23 repeating -- Executive Order 12333 is not
24 itself the source of any authority. It is the

1 foundational Executive Branch document for the
2 organization of the intelligence community and
3 the conduct of its activities. It imposes
4 structure in the intelligence community, it
5 provides direction to intelligence agencies to
6 make sure that their activities support policy
7 makers who are responsible for national
8 security, but it doesn't itself provide the
9 authority for any particular program or any
10 particular collection. It instead operates
11 against the backdrop of authority that is
12 provided to the President and to the
13 intelligence community under the Constitution
14 and under Federal law.

15 Okay. From an operational
16 perspective, intelligence agencies like NSA,
17 again, which I know best, rely on Executive
18 Order 12333 really every day to delineate their
19 role and their responsibility. In addition to
20 describing the general responsibilities of the
21 community, the order essentially lays out the
22 specific role of each department and agency.
23 For example, Section 1.7(c) says that NSA shall
24 collect, process, analyze, produce and

1 disseminate signals intelligence. And it also
2 says that no other agency has that same
3 responsibility. I know that NSA personnel are
4 keenly aware of the specific provisions of the
5 order and the duties that it expressly provides
6 to NSA as well as those that it reserves to
7 other elements of the community. So, in my
8 experience the Executive Order really stands
9 out among any other Executive Order as far as
10 I'm aware in that it is a handy on-the-desk
11 reference guide to just about every employee at
12 NSA for what they're supposed to do every day.
13 I'm not aware of any other Presidential order
14 or directive that plays such a central role in
15 the day-to-day role and duties of people up and
16 down the chain.

17 So, beyond just assigning
18 responsibility to intelligence agencies, the
19 order imposes significant restrictions on their
20 activities. And I think this is probably the
21 most important function of the executive order.
22 Many of these restrictions aren't necessarily
23 mandated by law, but they do give force to the
24 language in the first section of the order,

1 which says that the U.S. government has a,
2 quote, solemn obligation to protect freedom,
3 civil liberties and privacy rights of U.S.
4 persons. So, for a couple examples --
5 intelligence agencies must use the least
6 intrusive collection techniques feasible within
7 the United States or against U.S. persons
8 overseas. The FBI is generally the only
9 intelligence element authorized to conduct
10 physical searches inside the United States and
11 the borders of where the other ways in which
12 the order restricts the activities of the
13 intelligence community.

14 From the perspective of
15 protecting civil liberties, the most critical
16 provision, from my perspective, in the
17 executive order is the one that mandates that
18 intelligence agencies may only collect, retain
19 and disseminate information concerning U.S.
20 persons in accordance with procedures approved
21 by the Attorney General. This provision is the
22 one that gives rise into all of the Attorney
23 General guidelines that every element of the
24 intelligence community is obligated to have and

1 that must control its activities -- often
2 referred to as AG Guidelines or Minimization
3 Procedures.

4 NSA, for example, operates in
5 accordance with Attorney General approved
6 procedures that are set forth in U.S. Signals
7 Intelligence Directive 18, sort of an obscure
8 term to everybody except for everybody at NSA,
9 who has to touch U.S. person information who
10 knows USSID 18 or back and forward. They are
11 trained on it before they can touch signal
12 data. They have to prove every year that they
13 know it well. The way in which it operates is
14 on a daily basis for those who are involved in
15 the SIGINT collection or handling of SIGINT
16 information that may touch on U.S. person
17 information.

18 It, itself -- those rules, those
19 AG rules have a number of rules and limitations
20 that apply to protect U.S. persons' privacy and
21 civil liberties. Importantly, NSA may not use
22 a U.S. person as a selection term -- name,
23 telephone number, e-mail address -- to search
24 databases containing information collected

1 under 12333. There's an exception to this
2 prohibition in that NSA may conduct such
3 searches if the Attorney General finds probable
4 cause to believe that that U.S. person is him
5 or herself an agent of a foreign power. NSA
6 generally may not identify a U.S. person in a
7 disseminated intelligence report unless the
8 identify of that person is necessary to
9 understand the foreign intelligence of the
10 report or to assess its importance.

11 So, NSA's compliance with these
12 rules is subject to extensive oversight within
13 the Executive Branch. My former office, the
14 General Counsel's office, the Office of
15 Compliance and the Civil Liberties and Privacy
16 Office at NSA all have a role there. I think
17 we've talked about Congress' role in overseeing
18 these activities. And then beyond the letter
19 of the executive order and these rules that
20 implement its mandates, in my experience the
21 spirit of protecting the rights of Americans is
22 deeply imbedded in the culture of NSA's
23 workforce. My experience is that they take
24 these rules seriously and they strive to follow

1 them. There's a recognition that a heightened
2 standard applies to information about
3 Americans. And that really NSA's authority to
4 conduct its mission depends on its ability to
5 comply with these standards. And it would be
6 my expectation that the Board in its prior
7 reviews has made similar observations about the
8 NSA workforce.

9 So, again, I appreciate the
10 Board's focus on the order. I do think that
11 many of the discreet counterterrorism
12 activities carried out under the order are
13 classified, but the general information about
14 the order and how it serves in directing and
15 constraining these activities can and should be
16 discussed publicly as you're doing so here
17 today. And the Board can continue to provide
18 valuable advice and guidance to the
19 intelligence community on the specific
20 activities relating to the executive order and
21 counterterrorism activities in a classified
22 setting, if that's necessary. So, thanks
23 again. I look forward to your questions.

24 MS. BRAND: Thank you. The Board

1 members will also be subject to the yellow and
2 red card system, just so you know. And I'll
3 start with my questions. Michael, I wanted to
4 ask you -- we may have, because of the time,
5 cut you off when you were talking about your
6 suggestions for improvement of Congressional
7 oversight. Was there anything that you didn't
8 get to that you'd like to say now?

9 MR. ALLEN: There definitely was.
10 I mean, one is that I think that the members of
11 Congress and the intelligence committees need
12 to strive honestly for more transparency. In
13 this day and age I think we have to try and get
14 the support of the American people. I think,
15 as President Obama said frankly in his speech
16 last January, so much of the media about the
17 Snowden revelations is sensationalist. I think
18 we're now in a different mindset. The previous
19 mindset was let's never talk to the press,
20 let's -- you know, many in the intelligence
21 community ironically didn't like the one annual
22 unclassified hearing we held each year, the
23 Worldwide Threats Hearing. But I think we're
24 in a different place now where we need to

1 strive for transparency -- not only because I
2 think the American people deserve to know more,
3 consistent with sources and methods, but also I
4 think it will support the critical intelligence
5 gathering mission of the country.

6 MS. BRAND: I want to ask you and
7 Ms. Eoyang both, based on your experience on
8 HPSCI, about the extent to which the budget is
9 an effective oversight tool. You mentioned it.
10 I've heard a little about it. I frankly don't
11 personally understand how the HPSCI and the
12 Appropriations Committee would intersect on
13 budget issues and whether -- you referred to
14 fencing off funds. Is that used as a club?
15 How does it facilitate oversight? If you could
16 just explain how that works.

17 MR. ALLEN: Yeah, sure. The
18 authorizing and the Appropriations Committees
19 sometimes get along very well; sometimes they
20 don't. I guess the best way to look at it is
21 that we're supplying the authority to do
22 certain activities. The National Security Act
23 requires that each intelligence activity be
24 specifically authorized, which is the reason

1 why the intelligence committees have got a seat
2 at the table, frankly. And the appropriators
3 are literally the check writers. We work
4 together in many cases to set funding levels
5 together and personnel levels together. It's a
6 different set of eyes that approach the same
7 problem, but primarily from a budgetary, hard
8 core numbers perspective.

9 Your second question --

10 MS. BRAND: And how does the
11 fencing off work?

12 MR. ALLEN: The fencing works
13 this way: For example, if the Congress has
14 issues with a particular program or, as was
15 mentioned earlier, issues that the community is
16 not focusing on a particular issue or has a
17 problem with an NSA collection program, we
18 would, the staff under the members' guidance,
19 write in particular conditions that must be met
20 before the CIA or the NSA or whoever the case
21 may be is able to access the funds. So, we
22 would often fence \$80 million until such time
23 that the committees have been reassured of A, B
24 and C. And so, this is a strong means by which

1 we exercise Congressional oversight.

2 The other way is frankly
3 reprogramming requests. I didn't have time to
4 talk about that, but you all know the problems
5 with the federal budget process. We have to go
6 annually -- so many things change. By the time
7 you ask for things, by the time the money's
8 appropriated, each committee is bombarded with
9 reprogramming requests, and the practice is
10 that the intelligence committees have to sign
11 off on reprogramming requests, which is
12 essentially where we, the CIA or the NSA, are
13 redirecting money from this purpose to another
14 purpose. We have to sign off on those, and
15 that is another leverage point for the
16 Congress, which frankly uses it for not just
17 changes to what's before them, but often about
18 particular programmatic, some would say sort of
19 intel policy issues that are related. So,
20 Congress, I think, has a lot of tools at its
21 disposal, if it operates fair and bipartisanly
22 and does its job.

23 MS. BRAND: I'd like to give Ms.
24 Eoyang a chance, too.

1 MS. EOYANG: To Michael's point
2 about the importance of the Intelligence
3 Authorization Bill, I was on the committee in
4 the years when we didn't have them, and the
5 challenge is that the fences only work if the
6 bill is enacted. And so, if there's no bill
7 enacted, then it really reduces the leverage of
8 the committees and their ability to make policy
9 that way. The Appropriations Committees got
10 into the habit in that time of putting in
11 language that said that any program that was
12 appropriated was also authorized, making them
13 king of the hill in terms of all policy
14 decisions. When the two committees don't play
15 well, the authorizers lose tremendous power to
16 the appropriators because if the appropriators
17 can carry that provision, notwithstanding an
18 Intelligence Authorization Bill, but all the
19 fences that the intelligence committees have
20 are moot.

21 And this is particularly
22 important given the staff sizes between the two
23 committees. The Appropriations Committees have
24 smaller numbers of people looking at the same

1 programs than the Authorization Committees do.

2 MS. BRAND: Okay. Thank you.

3 Matt, I wanted to ask you: In practice, you
4 talked about how employees of the NSA and other
5 agencies -- they know USSID 18, they know
6 12333, they take this stuff very seriously.
7 How is it exactly that they feel the
8 consequences if they don't? How does the
9 rubber hit the road there?

10 MR. OLSEN: You know, in the most
11 extreme example, there's disciplinary action
12 for those who, you know, purposely violate
13 those rules. And there have been a handful of
14 those instances. The -- you know, in those
15 instances where mistakes, people make mistakes,
16 you know, in good faith, you know, I'm trying
17 to think if I can think of a specific example
18 to be really concrete, but I can't think of one
19 off the top of my head. But what my sense is
20 is that people are taken off the access to the
21 SIGINT information, so they're removed until
22 they have additional training and then can pass
23 the test. I mean, they literally have to pass
24 the test before they can touch the data. So,

1 that's I think it happens. I mean, that's when
2 the rubber hits the road.

3 MS. BRAND: Okay. Go ahead.

4 MR. EDGAR: Yeah. I was just
5 going to say that one of the requirements is
6 that these violations be reported to the
7 Intelligence Oversight Board on a quarterly
8 basis. That creates an entire compliance
9 culture, compliance system in which violations
10 are collected. And some of the Snowden leaks
11 have actually been the result of exactly those
12 processes. In other words, the reason we know
13 that these violations happened is because NSA
14 and other agencies were collecting them and
15 monitoring them in order to prevent them from
16 happening as much in the future.

17 And my view is that your
18 compliance system is only working if you do see
19 violations. If you see a bunch of reports that
20 say zero, zero, zero with, you know, hundreds
21 of thousand of people working in a huge
22 program, that means your compliance isn't being
23 measured correctly.

24 MS. BRAND: Okay. I have another

1 question for you: You said that we should look
2 into how much 12333 activity is
3 counterterrorism-related versus other foreign
4 intelligence purposes. And that question is
5 important to us because it goes with our
6 statutory mandate, which is limited to
7 counterterrorism. But I don't think that's
8 what you were talking about. Can you elaborate
9 on why you think that's important for the
10 public to know?

11 MR. EDGAR: Well, I mean, it's
12 important for you for that purpose clearly, but
13 it's also important, I think, because you have
14 this mismatch between the government officials
15 often saying, look, we need these important
16 surveillance programs to keep us safe, and that
17 often gets translated into this is about
18 terrorists. And there's a significant portion
19 of NSA and other agencies which are directed
20 towards that goal. There's also these broader
21 issues. And then sometimes you get critics and
22 civil libertarians saying, ah ha, this really
23 isn't about terrorism, this is about something
24 else and somehow that's nefarious.

1 I just think that having more
2 transparency about, you know, not getting into
3 sources and methods, but just saying, you know,
4 this is roughly speaking how much of our
5 efforts are devoted to these things is
6 extremely helpful. And your reports earlier on
7 some of the FISA activities were helpful just
8 in getting out a public record that allowed
9 that debate that we've been having to be more
10 informed. And this is a place where you might
11 be able to show some of that, you know, if it's
12 50 percent, if it's 20 percent, if it's 80
13 percent. If you're talking about something
14 very intrusive like a very large amount of
15 collection of signals or other types of things
16 that are controversial, it's going to matter to
17 the public whether this is mostly about
18 terrorism or this is mostly about something
19 else.

20 MS. BRAND: Okay. Unless anyone
21 else had anything on that, I'll give up the
22 remainder of my time. Do you want to go next,
23 David? Beth? Okay.

24 MS. COLLINS: So, I'll have a

1 comment and then a question. I will say all I
2 could think, Matt, when you talked about the AG
3 guidelines and how much we should look at those
4 and the effectiveness of those and the
5 implementing policies, we're, I think,
6 unanimously concerned about the age of many of
7 those guidelines, the lack of updates even in a
8 changing technological world and then perhaps
9 the development of a separate process under PPD
10 28, which may not always fit completely well
11 with the 12333 guidelines. So, that's more my
12 comment.

13 But my question -- and I want to
14 take the view of the experts here to --
15 shamelessly here to try and do my job better.
16 How do you know the questions to ask to figure
17 out what the IC is doing? How do you avoid the
18 if you can guess what we're doing I'll tell you
19 about it phenomenon?

20 MR. ALLEN: Well, at different --
21 I think at different times in the committee's
22 history there have been different views on
23 this. When the committee is in a hyper
24 partisan mode, I definitely think that the IC

1 begins to get in a more defensive posture when
2 they come up to the Congress. I think when the
3 Intelligence Committees --

4 MS. COLLINS: Sorry -- by hyper
5 partisan, is that because they feel like no
6 matter what they answer they're going to be --
7 they're going to catch hell for it or do you
8 find that it goes with party?

9 MR. ALLEN: They are being
10 berated for particular programs or the way
11 particular analytical judgments have come out
12 and they're being very clearly used by, in some
13 cases, both parties for a political purpose.

14 MS. COLLINS: So politicized
15 maybe rather than partisan atmosphere; is that
16 fair?

17 MR. ALLEN: Well, I use partisan
18 because I think, of course, politics is endemic
19 to Congress. It's a political body. I think,
20 but I guess I understand it could be used in
21 the sense of the word, too, but I think we're
22 talking about the same thing more or less.

23 But I think when the committees
24 are at their best, they're working together and

1 they're strict but fair and I think if they are
2 that way and the committees know that they can
3 share more information, they do. By the way,
4 most committees are -- this is going to be a
5 real surprise to people -- are very -- I'm
6 sorry -- most of the agencies are very
7 interested in coming up to talk to the
8 committees I think because they want to know
9 that the people's representatives have their
10 backs. People like to say, oh, well, the only
11 power Congress has is power of the person.
12 That's not going to be applicable until the end
13 of the year when you pass the bills. That's
14 not always the case, I'm sure. And I know of
15 examples, especially a report that was done
16 when Mieke was on the committee, of examples
17 where they believed that there were instances
18 where the CIA didn't keep the committee fully
19 and currently informed.

20 But in some of the most
21 controversial programs, generally it's been my
22 experience that people want to come up to the
23 House and Senate Intelligence Committee and
24 say, hey, guys, here's what I'm doing, please,

1 you know, I want to hear about it. And I know
2 of covert action programs and other programs
3 that have received a negative reception from
4 the Congress right there at the table and the
5 CIA and others have gone back to the National
6 Security Council and said, you know what, the
7 Congress is not with us on this, and that
8 matters to them. So, I think that, you know,
9 that helps induce more information out of the
10 agencies

11 MS. COLLINS: Let's actually turn
12 to a time where if there was a perception that
13 the community was not being as forthcoming as
14 they could or should have been.

15 MS. EOYANG: So, I would actually
16 like to disagree with that characterization
17 that Mike makes about it being partisan. I
18 think it has more to do with the Executive
19 Branch's mindset about sharing. My experience
20 is that when the Executive Branch has a very
21 strong view of, say, a unitary executive and
22 they are not interested in sharing, it doesn't
23 matter which party controls the chair in
24 Congress for them to withhold information.

1 Likewise, it does not matter if the President
2 and the Chair are of the same party and the
3 Chair takes a very aggressive role towards a
4 particular intelligence program for the
5 community to get in a, as Mike says, a
6 defensive crouch. It's more about the
7 relationship between the heads of the agencies,
8 the White House and the Chair themselves and
9 the ways in which they get along and the ways
10 in which they feel like they can trust each
11 other to share information. They may be of the
12 same party and they may be of different
13 parties. That just varies and I think that
14 varies from time to time.

15 It is very difficult, I think,
16 for the committee to -- when the relationship
17 changes to feel like they have the sense of
18 trust in the information. So, a hangover from
19 a previous time when the committee discovered
20 there were things to which they were not
21 briefed may result in them being more
22 aggressive and questioning more doggedly
23 against an administration that is willing to
24 share. And so, I think that is part of the

1 challenge. The tone of the questioning really
2 affects the quality of the relationship.

3 But to your question about how
4 you ask -- how do you know what you don't
5 know -- part of it is in the access to
6 documents. And as committee staff and the
7 members of the committee, we are reliant upon
8 the representations made by the Executive
9 Branch officials to the best of their ability
10 to make them. So, if they make them in error
11 or they make them with an intent to limit the
12 information, it is really difficult.

13 One of the things we have done
14 and you see Congress doing is asking for the
15 supporting documentation on that so that you
16 get a better sense of not just the
17 representation made in the briefing, but how is
18 the program described, what are their internal
19 documents to characterize it for themselves.
20 That sometimes helps. Summaries made by the
21 Executive Branch to characterize a particular
22 program may not capture the fullness of it or
23 may not capture the complexity of questions
24 that a particular oversight actor may have in

1 mind.

2 MR. OLSEN: May I make a very
3 quick comment, which is to say that it would
4 be, I think, a misimpression to leave here
5 that, in my experience at least, the
6 intelligence committees have so much more
7 information and there's such a degree of
8 cooperation with the Executive Branch against a
9 back drop of a system of separation of powers
10 as compared to my experience at justice and the
11 judiciary committees -- just night and day.
12 Much less flow of information to the judiciary
13 committees, much less interaction. The
14 intelligence committees and the intelligence
15 community have a synergistic relationship that
16 I've never seen anywhere else across Congress
17 with respect to -- and the Executive Branch.
18 So, I think that's an important point.

19 MR. ALLEN: I would just say
20 quickly -- I know you want to get to another
21 question -- the CN's, as we call them --
22 Congressional notification processes -- I mean,
23 they pretty much paper you with every success
24 story and every program that goes off the

1 rails. And so, I think they're very interested
2 in building a paper trail. And also, frankly,
3 travel. People like to lampoon members of
4 Congress for exotic trips. You learn a lot
5 when you go out in the field and see the
6 station chief and talk to the individuals who
7 are doing the jobs in the field. And we often
8 learn more out there than we do back in
9 Washington and we can follow back up on these
10 particular issues.

11 MS. COLLINS: Tim, did you want
12 to weigh in on this? I know you've been in
13 various roles.

14 MR. EDGAR: This is a huge issue.
15 It's an issue even within the Executive Branch
16 and I think having these formal processes, CN's
17 or programatic reviews, are absolutely vital.
18 You know, in 702 you've got a whole system for
19 the FISA court to weigh in on what is
20 essentially programatic reviews of surveillance
21 programs. I think that we should explore every
22 way to make it more programatic so that you
23 don't have to be guessing the question of what
24 should I ask you because I do think that's a

1 problem, even with the best intentions and with
2 the best relationship.

3 MS. COLLINS: I doubt I have
4 enough time for another question, so I'll pass
5 along -- how are we doing this?

6 MR. MEDINE: Thank you to the
7 witnesses for sharing your perspectives with us
8 today -- very helpful. Matt Olsen referred to
9 the relationship between the agencies and the
10 intelligence committees and you used the word
11 synergistic. At a certain point, you could get
12 over into too close of a relationship. So, a
13 question for Michael and Mieke: What do you
14 think was most effective in preventing, for
15 lack of a better word, capture or too much of a
16 closeness between the oversight committees and
17 the agencies?

18 MR. ALLEN: Yeah. I mean, I
19 think there's an urban myth out there that I've
20 heard repeated to me hundreds of times that,
21 oh, well, the CIA recruits people for a living
22 and they're going to recruit the members of
23 Congress. I really don't -- I really don't
24 subscribe generally to that theory. I think at

1 some point there is -- there's definitely
2 occasionally a wow factor at some of the things
3 that are happening in a respect that follows
4 for their particular mission. But I don't
5 think that any of the members of Congress just
6 become captured by what they hear from the CIA.
7 I like to say when witnesses would come to me
8 and say how should I approach this particular
9 hearing, I would often say, listen, members of
10 Congress, for all their faults, understand
11 spin. They recognize spin immediately because
12 that's part of what American politics is all
13 about. And so, you should be as forthright as
14 you can because if you're not, a member of
15 Congress is going to smell it and you're going
16 to be in trouble.

17 MS. EOYANG: I would say that's
18 right that the oversight that occurs behind
19 closed doors is quite robust and I think a lot
20 of people assume that because they can't see it
21 to being robust, therefore it's not, and I
22 don't think that's true. We have had
23 experiences where the senior defensive -- or
24 senior intelligence officials were expecting

1 the members of the committee to go out and
2 defend and validate the community's activities.
3 And on a bipartisan basis, they rejected that
4 characterization of their role. I think that
5 it is not -- that they may have certain
6 programs that are their favorites for various
7 reasons -- personal, constituents, interests,
8 what have you. But that's different than
9 overall capture.

10 And the thing that I think
11 prevents the members from being captured is the
12 reminder that at some point some day things may
13 become public, either through mandatory
14 declassification or, as we've seen over and
15 over again, through leaks. And what they have
16 said on the record, though classified, may
17 define them.

18 MR. DEMPSEY: Another question
19 for Michael and Mieke, again along the lines of
20 that question about how do you do this well:
21 Do the committees adopt an oversight agenda?
22 Do you tell the agencies this is where we're
23 going for the next year or this is what we're
24 looking at?

1 MR. ALLEN: Most definitely. I
2 mean, what Chairman Rogers did was reinstitute
3 a regular oversight schedule over covert action
4 programs, for example. So, we had a quarterly
5 covert action review where the staff would work
6 to prepare for that quarterly hearing and do a
7 deep dive on the particular program, brief the
8 members, so that on the Thursday that these CIA
9 officers or whoever came before us, that we
10 were in a position to go deep, so to speak.

11 The chairman also reinstated,
12 for example, the quarterly CI and CT briefings
13 from the FBI. I think that we have a long
14 history, in part because of abuses in our
15 history of the Congress asserting its oversight
16 over the Central Intelligence Agency, and I
17 think we have less of that in the FBI context.
18 I think they paper the committees less. I
19 think that generally it's harder for them to
20 talk about open law enforcement investigations,
21 and that makes them uncomfortable and that's
22 understandable. But I think that we tried to
23 reinstitute the process where we would
24 quarterly do these basic staple reviews. And

1 in addition, the chairman would announce, here
2 are the three things I'm going to focus on this
3 year. Often they were a covert action program
4 and the like. And the staff director made
5 sure, consistent with the chairman and the
6 ranking members' priorities, that each of the
7 budget examiners for each of the 17
8 intelligence agencies had an agenda of the two
9 or three things that they were going to look
10 at.

11 And for your purposes, I think
12 it's important to remember also, we've got a
13 suite of lawyers as well. So, we have
14 budgetary people looking at the NSA from a
15 personnel and programatic approach and we have
16 lawyers looking at it from a legal and I guess
17 privacy and civil liberties approach.

18 MS. EOYANG: On that though,
19 Mike, you said the word reinstated raises
20 something really important, which is that the
21 regularity of the agenda and the processes that
22 are set are determines by the Chair themselves.
23 On HPSCI, at least on the Democratic side,
24 there are term limits so that they have regular

1 turnover of the head of the committees, so the
2 processes may change from time to time. I am
3 not sure what the current processes were, but
4 obviously they were not the same under Chairman
5 Rogers as they had been under previous
6 chairmen.

7 MR. DEMPSEY: Tim, hang on just
8 one second. I want to ask Matthew this
9 specific point: You were on the receiving end
10 of the oversight process both at the NSA and at
11 the NCTC. From your perspective and really
12 looking at it as objectively as you can because
13 maybe you thought that it was a bit of a pain,
14 but leaving that aside, what was the most
15 effective oversight or methodology of oversight
16 that you experienced? Or what were the
17 elements of an effective --

18 MR. OLSEN: One thing that comes
19 immediately to mind is that what I did on a
20 regular basis, which was to have a round table
21 format discussion with the members -- not a
22 hearing format, but just sitting around the
23 table, literally a round table, and have a
24 discussion about the top terrorism threats that

1 we were tracking. And we did that, you know,
2 on a, I would say, three or four times a year,
3 obviously classified. That broke down the sort
4 of five-minute rule. You know, it broke down
5 many of the things that I think sort of impede
6 the free flow of information or make it a
7 little bit harder to formality and, I found, a
8 great way to impart information to the members.
9 So, that was one -- you know, lots of
10 interaction with the staff, having the members
11 come out to the agency, also, you know, again,
12 the lack of formality there.

13 But to your original overarching
14 point, Jim, on the receiving end of this, I
15 found the interaction, you know, synergistic
16 might be an overly strong word. I don't
17 disagree with the concern on one end that it
18 could be too close. But the -- I felt that it
19 was important and useful for me to talk about
20 these issues, to get the advice -- you know,
21 literally, truly to get the advice of the
22 members who have real thoughtful reactions to
23 what we were doing and where we were going.

24 MR. MEDINE: Tim, you wanted to

1 offer something?

2 MR. EDGAR: Yeah. Just I think
3 that the capture issue is a real one and it's
4 also a very serious public perception problem
5 that reminds me of the FISA court capture
6 concerns. The same exact set of concerns, same
7 exact attempt to push back by many of the
8 judges for many years, even decades, saying,
9 no, we're not a rubber stamp, that's just not
10 the way things really work, if you could only
11 see what we do. And I think that by
12 declassifying many of the FISA court opinions
13 there has been a benefit to sort of prove that
14 that is clearly the case. And I guess, you
15 know, the old adage is that Congress is always
16 calling for reform and never reforms itself.
17 This may be an example where some additional
18 transparency in exactly what we're talking
19 about in letting in more transparency into
20 these Congressional reviews. I mean, every
21 Congressional hearing is noted as, you know,
22 closed hearing on intelligence matters. You
23 know, could we do a little better than that?
24 Here's the general topic of the hearing, here's

1 some unclassified comments about the hearing,
2 here are some examples where Congress is
3 pushing back, here's some declassified reviews
4 that were conducted. That would go a great
5 deal towards, you know, kind of showing the
6 public that these reviews were quite
7 substantive and useful.

8 MR. ALLEN: So, that's happened.
9 I mean, the Abdulmutallab underwear bomber --
10 the Senate Intelligence Committee put out a
11 report that, I think, helped the NCTC along the
12 way of creating pursuit teams. The joint
13 inquiry after 9/11 was a voluminous multi month
14 process and, of course, also -- well, many
15 other public reports that we've put out.

16 MR. OLSEN: The HPSCI report on
17 Benghazi was also in -- largely public and very
18 useful.

19 MR. DEMPSEY: Let's hold it
20 there. Thank you very much. I really
21 appreciate it. Thank you.

22 MS. WALD: Okay. I've been
23 listening carefully and I'm getting two
24 viewpoints and it may be that they come

1 together. But I think some of you are telling
2 us that overall, if you look at it, the
3 intelligence committees are doing a pretty good
4 job of oversight. But we're also hearing some
5 of the specific questions about -- I think,
6 Mike Allen, you raised the question about, for
7 instance, the NSC having the -- currently the
8 authority to decide who gets briefed on what
9 and perhaps there could be more push back on
10 that or however that's dealt with. And, Ms.
11 Eoyang, you raised the question about
12 inaccessibility to the GAO, to the CBO office,
13 to -- somebody raised a question about not
14 having -- oh, you did, too -- about not
15 having -- being able to review the legal -- I
16 assume you mean OLC type opinions on that.

17 And there are various other
18 things which raise questions to me about it
19 which are before the intelligence
20 communities -- or I agree with everybody
21 else -- an essential party of the apparatus of
22 the whole intelligence community. Is it just
23 that Congress is a political body and the
24 intelligence committees don't have the -- don't

1 always have the push, the whatever it is it
2 would take to get those kinds of resources that
3 they think they need? Or, as we all know,
4 sometimes the political -- current example, I
5 don't even need to specify -- you know, it
6 becomes clear that they're really divided in
7 substance wise, but since they are so
8 essential, I keep wondering why there isn't
9 more sort of push back to say, look, we need
10 this to perform our Article One function of
11 oversight and so, why should the NSC say to us,
12 we're going to decide who -- you know, you, et
13 cetera -- I don't mean to overemphasize that
14 example, but just I keep thinking is this at
15 all, to put it bluntly, a conundrum of their
16 lawmaking in the sense that they don't fight
17 hard enough or is it they simply don't have --
18 you know, the access to whistle blowers, they
19 just don't have the clout with the political
20 leadership of Congress to get what they think
21 they would like to have for their --

22 MR. ALLEN: I can address these,
23 I think, quickly and then I'm sure Mieke would
24 like to get in here, too.

1 MS. WALD: Oh, I'd like everybody
2 who wants to. That's my only question, so...

3 MR. ALLEN: No problem. Look,
4 this may surprise you coming from the Bush
5 White House -- I think we over used the Gang of
6 Eight model. I think it was born from a fear
7 post 9/11 that we needed to keep things as
8 quiet as possible. I think by the end of the
9 Bush second term, we had largely abandoned the
10 Gang of Eight process and President Obama
11 has -- well, not abandoned the process, but
12 used it in much fewer cases. And I think
13 President Obama has also not used it very
14 frequently. He used it for the Osama Bin Laden
15 raid, which has now been declassified, of
16 course, and another instance that I can think
17 of. And that is because Congress has pushed
18 back. Members of the Gang of Eight have said
19 to the NSC and to the CIA, I hate it when you
20 tell me things that I can't tell my membership.
21 And so, I think there has been a push back over
22 the last ten years so that -- and I think
23 Congress has succeeded.

24 On the GAO, there's just -- there

1 are differences, there are ideological
2 differences about this. We have let them in
3 the door on certain programs, but it's -- let's
4 just say that it's not all Executive Branch
5 people are people favorable to the view of the
6 Executive Branch are excited about the GAO
7 getting into some of these areas. Congress is
8 united on OLC opinions. They think it's
9 ridiculous that these are held back and they
10 frequently make such a big stink about it that
11 they win at the end of the day. I can think of
12 three or four examples.

13 And on whistle blower, it might
14 surprise you that the Republican majority
15 unified with our Democratic minority supports
16 changes, at least under Chairman Rogers, to the
17 whistle blower statute so that whistle blowers
18 wouldn't have to check in with someone in their
19 building before they were able to come to
20 Congress because we found that to be
21 inhibiting. It's not been enacted yet.

22 MS. WALD: Do you think that's a
23 trend that because of the heightened public
24 attention that's been given in recent times to

1 the whole intelligence and intelligence
2 surveillance and oversight that that's a trend
3 that after all of those -- I can remember the
4 9/11 Commission itself, the WMD Commission,
5 almost every commission always came up with
6 saying Congress needs to give more vigorous
7 oversight to the intelligence community and
8 here's a long list of things we think you ought
9 to do, most of which have not been accepted.
10 Maybe they're not all good to be accepted. I
11 don't suggest that, but it seems as though
12 nothing sort of happened, but do you think
13 that's a trend they're going in the right
14 direction towards more vigorous oversight, more
15 wanting to know more information about on which
16 they can operate --

17 MR. ALLEN: There's certainly a
18 trend that the committees want more information
19 and I think they demanded and they largely get
20 it. But the effectiveness of the oversight
21 function I think does wax and wane, depending
22 on, again, who the chairman and ranking are,
23 who the members are, the spirit with which they
24 attack the oversight mission and the rest. But

1 what I was trying to do with my remarks today
2 was sort of advance the state of the debate
3 about Congressional oversight.

4 MS. WALD: Yeah, sure.

5 MR. ALLEN: I'm not saying it's
6 perfect. I can give you another ten ways to
7 improve it, but --

8 MS. WALD: You can do that by
9 writing us a letter --

10 MR. ALLEN: I'll write you a
11 letter. I'm not going to do it now, but
12 everyone is stuck on the same 9/11 Commission
13 talking points, which is Congressional
14 oversight is dysfunctional and there's been 15
15 years since that and I think we need to -- we
16 need to update with conventional wisdom.

17 MS. EOYANG: I would say just in
18 response to one of the 9/11 Commission
19 recommendations, though -- sorry -- this is not
20 on. In response to one of the 9/11 Commission
21 recommendations that they consolidate committee
22 oversight on that, I actually think that
23 consolidating committee oversight runs a
24 greater risk of committee capture than by

1 having the different committees approaching
2 Appropriations, House, Senate, different
3 aspects of it under other committees, Armed
4 Services, because then you are not so dependent
5 on the one Chair or ranking members' attitude
6 towards the community, but you have a bunch of
7 different philosophies about it and so you get
8 different results and different levels of
9 oversight in that.

10 MS. WALD: What about -- just the
11 last sub question on that -- we hear in many
12 quarters that a great deal of difficulty lies
13 in the fact that the staff members, even some
14 of the leading staff members, don't and can't
15 seem to get -- I don't know why -- security
16 clearances so that they, too, can participate
17 in looking at the classified material and talk
18 with their members about that, which seems,
19 considering all the people in the contractors
20 and subcontractors in the country that have
21 security clearances, why that seems like it's
22 simple enough.

23 MS. EOYANG: That's been actually
24 a matter of great frustration for the members

1 when they are told we can tell the members
2 something, but then they cannot tell the
3 staff -- they cannot consult and get the
4 benefit of their staff. There have been at
5 least one publicly reported example of this
6 where it was a dispute between the members and
7 the previous administration. There is, I
8 think, a Constitutional question that underlies
9 that --

10 MS. WALD: What is that?

11 MS. EOYANG: -- about whether or
12 not the Executive Branch, once they've given
13 the information to Congress, that they can
14 control the flow of that information. There
15 are House rules and Senate rules that control
16 the flow of the information inside the
17 branches. But I don't think it a settled
18 question that the Executive Branch -- on a
19 classification system that is based on
20 Executive Order and executive regulation can
21 bind a separate but equal branch of Congress if
22 the chairman of the committee says I have heard
23 this thing and I want to consult my lawyer who
24 is appropriately cleared to other programs

1 inside classified spaces. If the members can
2 have that conversation under the Speech and
3 Debate Clause on the floor of the chamber and
4 are able to do that constitutionally, I'm not
5 sure what the application is for the Executive
6 Branch to say to Congress you can't choose who
7 inside your branch you can consult with,
8 assuming that appropriate security measures are
9 taken.

10 MS. WALD: It does sound like a
11 kind of question, though, that if you really do
12 want to have it, the Intelligence Committee
13 wants to have effective oversight that it would
14 be at least a plausible subject for negotiation
15 or --

16 MR ALLEN: I really think this
17 has gone away.

18 MS. WALD: Really? It's still
19 talked about a lot.

20 MR. ALLEN: It is. I'm sorry --
21 I see the red light. But I think honestly that
22 a lot of this happened in the Bush years when
23 we restricted billets on programs that have
24 since been declassified. I didn't have that

1 experience in the HPSCI. I think the SSCI has
2 it a little bit more because they have more
3 people. But by and large, we did not get a lot
4 of resistance on the number of staff read into
5 programs.

6 MR. MEDINE: To continue that
7 line because we've heard from staff members who
8 were not on HPSCI and SSCI.

9 MR. ALLEN: To repeat, we've
10 heard concerns raised about staff of non HPSCI
11 and non SSCI Senators and Congressmen and
12 Congressmen just don't have the time to go and
13 read classified documents and they typically
14 rely on staff, as they do across the board, so
15 it puts them at a real disadvantage to
16 committee members who have staff -- but have
17 clearances and the staff to analyze. So,
18 thoughts about -- and therefore, it makes it
19 harder for the members not on the committees to
20 vote intelligently on surveillance legislation
21 when they haven't really been fully briefed. I
22 think that's sort of in some ways the point
23 that was raised earlier about expanding the
24 number of members of Hill staff who have

1 clearances and also if the Hill staff, Hill
2 members feel that way, why don't they pass a
3 law mandating it?
4 MS. EOYANG: I think, to
5 Michael's point, we have seen a more openness
6 from the administration to talking about this.
7 But in terms of the administration's ability to
8 lean forward and be more transparent, when
9 there are legal rationales or legislation
10 pending before the Congress, I think it's
11 incumbent on the Executive Branch to try and
12 declassify as much of the public policy debate
13 as they can to give those members who do not
14 have cleared staff access to what's necessary
15 to decide good public policy on behalf of the
16 American people. I think we have a slow
17 thawing of a very intense secrecy regime. I'm
18 not sure what happens in a future
19 administration on that. But I think because of
20 the sensitivity of some of the programs
21 involved, it would be difficult to give all 435
22 members of the House a staffer who has access
23 to some of these programs. I think that that's
24 a bridge too far. But -- and I know that the

1 committees have tried to -- at least we
2 certainly did -- tried to make available the
3 committee staff to members who wanted to come
4 read the documents, but that does not
5 necessarily obviate the schedule pressures on a
6 member.

7 MR. MEDINE: I'd like -- given I
8 have limited time, I want to move on to a
9 different question and I'd appreciate each of
10 your answers to it, which is the following: In
11 the course of our 702 study, we looked at the
12 oversight of that program and we saw a judicial
13 oversight in the FISA Court approved 702
14 request to companies. We saw intra-agency
15 review, supervisors reviewing what analysts
16 were targeting and how they're using the
17 information. We saw very rigorous inter-agency
18 review of Justice Department and review by the
19 Director of National Intelligence as well as
20 Congressional review. And I was very impressed
21 with the scope and the depth of that oversight
22 process. In 12333 we don't have judicial
23 review and we don't -- and I guess we really
24 want to look into whether there is

1 inter-agency -- I don't know if you want to
2 address that or not -- or are we just limited
3 to intra-agency review? So, I'd appreciate
4 each of your thoughts as to whether there is
5 sufficient rigor in the 12333 oversight and, if
6 so, where does that come from?

7 MR. ALLEN: Well, as I said in my
8 testimony or at least I tried to get to this
9 point, I mean, it's obviously a vast amount
10 when you're talking about \$70 billion over
11 100,000 employees and 17 agencies, so every
12 Congressional committee has to pick and choose
13 what it focuses on. But 12333 is just sort of
14 shorthand for everything else. It's often
15 shorthand for the foreign intelligence
16 collection programs overseas and I'd -- you
17 know, there's not to say we couldn't do more
18 work on it, but we do. We have the covert
19 action reviews, we have the counterintelligence
20 and the counterterrorism reviews, we do a host
21 of other programatic reviews throughout the
22 year. So, it's true it isn't bound up nicely
23 and says 12333 review, et cetera, et cetera.
24 That's because generally we sort of think of

1 that as everything that's foreign intelligence
2 collection and that's sort of like what we do
3 everyday down at the committee in addition to
4 FISA and some of the domestic intelligence
5 authorities. But that's really the vast
6 majority of, I think, what we thought we were
7 doing and what our job was and so, I would
8 submit to you that we do have -- we do have
9 oversight over 12333.

10 MR. EDGAR: So, I think Mike and
11 Mieke made fantastic points about the
12 rigorousness of Congressional oversight, but I
13 do think that the lack of any judicial or
14 quasi-judicial oversight is really quite
15 glaring in some E.O. 12333 activities that
16 raise some of the same privacy and civil
17 liberties issues as FISA activities. I think
18 there's a whole range of reasons. You've
19 talked about members who don't have cleared
20 staff, you've talked about, you know, the very
21 wide range of questions that members of
22 Congress are asking precisely because they are
23 asking all the policy questions that you don't
24 get in a more legal focused review. So, I

1 guess I would say that it's important but it's
2 not a substitute for other kinds of review and
3 there may be activities that require either
4 judicial or some kind of quasi-judicial type of
5 review.

6 That said, I also think that it
7 is absolutely the case that the United States
8 leads the world in terms of the quality of our
9 intelligence oversight -- judicial,
10 Congressional, internal Executive Branch
11 oversight. And one of the recommendations that
12 I make is that we should not be shy about that
13 in a way that I think we have been. I think
14 we've been in a defensive crouch frankly since
15 the Snowden revelations started and I think we
16 should be out there saying, hey, where are
17 your, you know, cleared staff for your
18 intelligence committees, which, you know, some
19 of our closest allies don't have. Where are
20 your reviews? Where's your FISA court? You
21 don't have any of this and you're coming and
22 complaining to us about, you know, allegedly
23 runaway surveillance programs. So I think
24 there's a way for us to both improve and reform

1 our surveillance programs and maybe even add
2 more oversight and review where it's necessary
3 where the issues are there and at the same time
4 not be defensive about it but say we think this
5 is a great system and we want to make this
6 system even better and this is what we're doing
7 about it and what are you doing about it.

8 MS. EOYANG: I'll let Michael's
9 comments stand --

10 MR. MEDINE: Okay. Mr. Olsen.

11 MR. OLSEN: It's very hard really
12 to answer that question, I think, because of
13 the breadth of activities that take place under
14 12333, as the Board is aware, as you're aware.
15 You know, so, I mean, to Tim's point on the
16 judicial review for covert action that's done
17 under 12333, but it doesn't seem likely -- you
18 know, so I mean to recruit a source that's done
19 under 12333, no. Certain surveillance
20 activities that don't involve any U.S. persons,
21 you know, specifically tapping a phone, you
22 know, or -- so, it's hard to answer that
23 question, I think, meaningfully, to be honest
24 with you.

1 MS. EOYANG: Actually, I do have
2 one thing to say about it

3 MR. MEDINE: Okay. Very quick,
4 yes.

5 MS. EOYANG: Which is that Mike's
6 point about it being foreign means that unlike
7 some of the surveillance programs where we're
8 talking about not knowing incidental -- knowing
9 that you're going to incidentally sweep up some
10 communications of Americans, on 12333 we're
11 mostly focused on non U.S. persons outside the
12 United States. So, the questions about
13 judicial oversight and Constitutional review,
14 it's -- the laws and the legal framework there
15 is very different, so we are talking about the
16 President in his Article Two authorities and
17 the limits of extraterritorial application of
18 the Constitution for those kinds of reviews
19 it's not clear that they apply the same way

20 MR. MEDINE: Thank you very much
21 for the panel. We really appreciate your
22 thoughtful responses and extremely helpful to
23 us as we approach 12333, as with all the other
24 panelists today as well. This concludes

1 today's public meeting. It's 4:17 p.m. A
2 transcript of the meeting will be posted on the
3 Board's website, pclob.gov. Members of the
4 public are also welcome to submit comments on
5 today's meeting and 12333 generally by visiting
6 regulations.gov. Comments there are being
7 accepted until June 16th.

8 And now, all in favor of ending
9 today's meeting, please say aye.

10 VOICES: Aye.

11 MR. MEDINE: That was a vigorous
12 aye. The meeting is concluded. Thank you.

13 - - -

14 (Whereupon, the meeting was
15 concluded at 4:45 p.m.)

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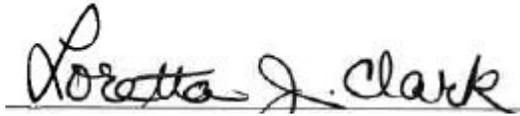
1 C E R T I F I C A T I O N

2

3 I, Loretta J. Clark, a Court
4 Reporter and Commissioner of Deeds, do
5 hereby certify the foregoing to be a true
6 and accurate transcript of my original
7 stenographic notes taken at the time and
8 place hereinbefore set forth.

9

10



11

LORETTA J. CLARK
Court Reporter
Commissioner of Deeds

12

13

14 DATED: 5/26/15

15

16

17

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18 of this transcript does not apply to any
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Public Meeting 05-13-2015

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