

July 31, 2013

Protecting Human Rights and Civil Liberties of Non-US Persons

*Commentary on Surveillance Programs in response to
PCLOB's request ID: PCLOB-2013-0005-0001*

To Members of the Privacy and Civil Liberties Oversight Board:

We, the undersigned organizations and individuals from the U.S. and around the world, welcome this opportunity to submit comments to the U.S. Privacy and Civil Liberties Oversight Board (PCLOB).

We are concerned that surveillance conducted by the U.S. National Security Agency (NSA) under Section 702 of the U.S. Foreign Intelligence Surveillance Act (FISA) and other legal authorities is inconsistent with international human rights norms and U.S. international commitments, as embodied in the International Covenant on Civil and Political Rights (ICCPR)¹ and resolution 20/8 of the UN Human Rights Council (UNHRC)². We are particularly concerned about the human rights and civil liberties of non-U.S. persons, as defined under FISA, and urge you to give full consideration to the rights of non-U.S. persons in your findings and recommendations. Human rights are universal and must be guaranteed to all persons. We strongly advocate that current and future legal provisions and practices take this principle into consideration.

As you are aware, Section 702 permits the government to target non-U.S. persons -- persons who are not citizens or permanent resident aliens and are located outside the U.S. -- for foreign intelligence purposes without obtaining a specific warrant or court order. This may include the overseas family, friends, and business associates of people in the U.S., as well as individuals whose communications flow through or are stored within the U.S. even if they have no direct communications with anyone located in the U.S.

While the U.S. FISA Court approves targeting and minimization guidelines designed to protect U.S. persons whose communications have been swept into foreign surveillance activity, those guidelines do not protect non-U.S. persons. The targeting guidelines purport to focus the surveillance on non-U.S. persons who are outside the U.S. and the minimization guidelines impose no restrictions on use and retention of foreign

¹ ICCPR at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

² UN, Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/20/8 (June, 2013)

communications that do not concern or involve U.S. persons.

Further, surveillance under Section 702 is permissible if it is conducted for “foreign intelligence” purposes. This concept is so elastic as to allow even the collection of information about activities outside the U.S. that merely “relate to” U.S. foreign affairs³. This encompasses everything from monitoring of protesters outside a U.S. base in one country to monitoring communications about a protest of rising food prices in another. Section 702 empowers the NSA to compel U.S. communications service providers to turn over the communications of global citizens even when the targets have no ties to crime, terrorism, or espionage. Secret surveillance of entirely lawful activities – including the type of political organizing and protest that is fundamental to a democratic society – chills freedom of opinion and expression and limits the right of association.

As stated in letters from the Best Bits Coalition - a coalition of civil society organizations, think tanks, academics and experts on internet governance and human rights from around the world⁴ - to the U.S. Congress⁵ and to the UNHRC⁶, the introduction of surveillance mechanisms by the U.S. under section 702 strikes at the heart of global digital communications and severely threatens human rights in the digital age. The threat of unnecessary, disproportionate, and unaccountable extra-territorial surveillance not only violates rights to privacy and human dignity, but also threatens the fundamental rights to freedom of thought, opinion and expression, and association that are at the center of any democratic practice.⁷ Such surveillance must be scrutinized through ample, deep, and transparent debate. Interference with the human rights of citizens by any government, their own or foreign, is unacceptable. As UN Special Rapporteur on the promotion and protection of freedom of opinion and expression Frank La Rue notes in his recent report, the inability of citizens to know the extent of foreign surveillance, to challenge such surveillance, or to seek remedies is even more alarming.⁸

We, the signatories, are disappointed that disclosure statements to date by U.S. authorities in response to the revelations on NSA surveillance have almost only focused on the impact of these surveillance programs on U.S. persons. There has been little attention paid to communications of non-U.S. persons, which, as noted above, poses grave threats to the human rights of individuals around the world.

We urge you to make findings and recommendations to ensure that surveillance of

³ 50 U.S.C. 1801(e)

⁴ For more information refer to <http://bestbits.net/about/>

⁵ <http://bestbits.net/prism-congress/>

⁶ <http://bestbits.net/prism-nsa/>

⁷ Articles 17, 19 and 21 of the ICCPR. In particular, Article 17 of the International Covenant on Civil and Political Rights, to which the U.S. is a party, provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, and that everyone has the right to the protection of the law against such interference or attacks.

⁸ A/HRC/23/40 , available at

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

communications conducted under Section 702 meets international human rights standards for surveillance, as reflected in the recent report of Frank LaRue,⁹ the July 2013 International Principles on the Application of Human Rights to Communications Surveillance,¹⁰ and other US commitments, international instruments and law.

Among other criteria, government surveillance must be subject to a strong legal framework that is transparent, necessary to achieve a legitimate goal and proportionate to that goal, authorized by a competent judicial authority, and subject to public oversight. We believe that the Section 702 surveillance regime fails to meet these standards.

Though the privacy and civil liberties of non-U.S. persons were barely mentioned at the Privacy and Civil Liberties Oversight Board's July 9th public workshop¹¹, we strongly believe that they are within PCLOB's statutory mandate.¹² PCLOB must ensure that U.S. government actions related to national security are balanced against the need to protect privacy and civil liberties. It also must ensure that privacy and civil-liberties-related concerns are appropriately considered in the development and implementation of anti-terrorism laws, regulations, and policies. There is nothing in this mandate, and no compelling reason, to restrict PCLOB's focus narrowly to U.S. persons or to people within the U.S. The civil liberties and privacy interests of individuals across the globe are at stake, and there is a desperate need for leadership in holding the U.S. government accountable to its human rights obligations.

We urge you to make recommendations and findings designed to protect the human rights not only of US-persons, but also of non-U.S. persons. We believe that such findings and recommendations would not only be consistent with the US government's frequently stated commitment to 'freedom online', but would also constitute a valuable contribution to the developing global framework for such protections.

Sincerely

[groups]

(note that individual signatures will also be gathered through the BestBit platforms, but the organizations signatures are the ones that will appeared in the consolidated version delivered to PCLOB)

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http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

¹⁰ <https://necessaryandproportionate.org/>

¹¹ <http://www.pclob.gov/9-July-2013>

¹² http://www.pclob.gov/All%20Documents/PCLOB%20enabling%20statute_42_USC_SE_2000ee.pdf As amended, this mandate establishes PCLOB as an independent entity within the Executive Branch of the U.S. government that analyses actions the executive branch takes to protect the U.S. from terrorism.

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BACKGROUND INFORMATION (not to be included with letter)

OBJECTIVE

To answer the call for commentary from PCLOB, with a short joint letter that emphasizes a) the lack of consideration of the human rights of “non-US-persons” b) demonstrates that consideration of such rights are well within PCLOB’s mandate and thus c) urges PCLOB to make recommendations regarding the protection of all persons’ human rights.

<http://www.regulations.gov/#!documentDetail;D=PCLOB-2013-0005-0001>

“Written comments may be submitted at any time prior to the closing of the docket at 12:00 p.m. Eastern Time on August 1, 2013.”

BACKGROUND RESOURCES ON PCLOB

Transcript of July 9th public meeting :

<http://www.regulations.gov/contentStreamer?objectId=0900006481365123&disposition=attachment&contentType=pdf>

story:

<http://www.aclu.org/blog/national-security-technology-and-liberty/small-significant-privacy-oversight-institution-almost>

<https://www.cdt.org/blogs/0807pclob-privacy-panther-or-panda-bear>

<https://www.accessnow.org/blog/2013/06/21/privacy-board-awakens-after-nsa-spying-is-revealed>

PCLOB - WHAT IS IT? -

<https://www.federalregister.gov/agencies/privacy-and-civil-liberties-oversight-board>

The Privacy and Civil Liberties Oversight Board is an advisory body to assist the President and other senior Executive branch officials in ensuring that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations, and executive branch policies related to war against terrorism.

Recommended by the July 22, 2004, report of the National Commission on Terrorist Attacks Upon the United States, the Privacy and Civil Liberties Oversight Board was established by the Intelligence Reform and Terrorism Prevention Act of 2004. It consists of five members appointed by and serving at the pleasure of the President. The Board is part of the White House Office within the Executive Office of the President and supported by an Executive Director and staff. The Board advises the President and other senior executive branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the

implementation of all laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism. This includes advising on whether adequate guidelines, supervision, and oversight exist to protect these important legal rights of all Americans. In addition, the Board is specifically charged with responsibility for reviewing the terrorism information sharing practices of executive branch departments and agencies to determine whether guidelines designed to appropriately protect privacy and civil liberties are being followed, including those issued by the President on December 16, 2005. In the course of performing these functions within the executive branch, the Board seeks the views of private sector, non-profit and academic institutions, Members of Congress, and all other interested parties and individuals on these issues.

This agency has published [13 articles](#) since 1994.

supporting documents for DRAFT:

BEST BITS: <http://bestbits.net/prism-congress/> and <http://bestbits.net/prism-nsa/>

MERCOSUL:

<http://advocacy.globalvoicesonline.org/2013/07/15/mercosur-and-the-future-of-the-internet-in-latin-america/>

Surveillance principles: <http://www.necessaryandproportionate.net/>