

Testimony of Alan Charles Raul
Vice Chairman, Privacy and Civil Liberties Oversight Board
Before the House Judiciary Subcommittee on Commercial and Administrative Law
July 24, 2007

Chairman Sanchez, Ranking Member Cannon and Members of the Subcommittee:

On behalf of Chairman Carol Dinkins and Members Ted Olson and Frank Taylor, I want to thank you for the opportunity to testify this afternoon regarding the Privacy and Civil Liberties Oversight Board. The Board recently discussed its mission, activities and accomplishments in its first Annual Report to Congress, issued in April and available on the Board's website at www.privacyboard.gov. I appreciate the Subcommittee's interest in the Board and its mission.

Before discussing some of the Board's activities, accomplishments and plans for the year ahead, I believe it is important to address certain structural issues that are relevant to legislation currently pending in both Houses of Congress that would dramatically affect the Board's future. It is significant that the pending legislation was passed by both Houses without any hearing or testimony on the subject of the Board's operations, or any relevant information having been requested of the Board. I respectfully submit that Congress would have been well served to hear from the Board before adopting possible legislative changes. Accordingly, while the request for today's testimony did not mention or arise in the context of the pending legislation, I will seek to provide some perspective on this subject. I will conclude with some suggestions I would recommend for strengthening the role of the current Board.

I. Background on the Board

As you know, Congress created the Board as part of the Intelligence Reform and Terrorism Prevention Act of 2004, which placed it in the Executive Office of the President. Among other things, the Intelligence Reform Act implemented the recommendations of the 9/11 Commission. In its report, the Commission acknowledged that many of its recommendations "call[ed] for the government to increase its presence in our lives – for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies." THE 9/11 COMMISSION REPORT, 393-94 (2004). However, the Commission also noted that "[t]he choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home." *Id.* at 395. Consequently, the Commission also recommended the creation of "a board within the Executive Branch to oversee . . . the commitment the government makes to defend our civil liberties." *Id.*

The President appointed the five Members of the Board, and Chairman Dinkins and I were confirmed by the Senate. Congress appropriated funds for the Board directly to the White House Office, rather than to the Board as a separate entity within the Executive Office of the President.

The Board’s mandate is to provide advice and oversight to help ensure that privacy and civil liberties are appropriately considered in the development and implementation of laws, regulations, and policies related to the Executive Branch’s efforts to protect the Nation against terrorism. In carrying out this mandate, the Board has two primary tasks. *First*, it must “*advise* the President and the head of any department or agency of the Executive Branch to ensure that privacy and civil liberties are appropriately considered in the development and implementation,” *id.* § 1061(c)(1)(C) (emphasis added), of “laws, regulations, and executive branch policies related to efforts to protect the Nation from terrorism.” *Id.* § 1061(c)(1)(B). *Second*, it must exercise *oversight* by “continually review[ing] regulations, executive branch policies, and procedures . . . and other actions by the executive branch related to efforts to protect the Nation from terrorism to ensure that privacy and civil liberties are protected.” *Id.* § 1061(c)(2)(A). The statute also expressly requires the Board to advise and oversee the creation and implementation of the Information Sharing Environment (ISE). *Id.* §§ 1061(c)(2)(B), (d)(2).

As shown in the Board’s location, assigned roles, and authority, IRTPA did not create an independent watchdog entity in the nature of an inspector general. Rather, the statute created a Board that operates *within* the Executive Office of the President and ultimately reports *to* the President. The statute requires the Board to produce an annual report to Congress “on [its] major activities” – not on all of its internal deliberations and recommendations. *Id.* § 1061(c)(4). The statute expressly places the Board within the Executive Office of the President (EOP), an office whose sole purpose is to support the Executive. Consistent with that placement and with the goal of offering candid advice, the President has located the Board even more closely to him by placing it within the White House Office (WHO). Congress acknowledged this placement by earmarking certain WHO appropriated funds for Board use rather than appropriating funds to a specific EOP entity. As the statute explicitly acknowledges, all five Board Members (like other EOP and WHO employees) serve at the pleasure of the President. *Id.* § 1061(e)(1)(E). By empowering the Board with broad access to records, IRTPA has created a Board that can offer a distinctly independent perspective to the President, along with oversight of Executive agencies.

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

II. Pending Legislation

As I mentioned earlier, the Board is of course fully aware that both the House of Representatives and the Senate have passed separate legislation that if enacted in substantially the form of the House bill would drastically alter the present construct of the Board. In fact, whether intended or not, if so enacted, the changes would result in the termination of the present

Board, elimination of the current staff, and closure of the existing office. At the very least, this would be highly inefficient and would require lengthy new selection, confirmation and security clearance processes that would leave the Executive Branch without any privacy board for perhaps the duration of the current Administration.

The Senate bill, S.4, leaves the Board within the Executive Office of the President, but requires that the position of chairman be full time. It requires Senate confirmation to be staggered with six year terms for all Members.

The House bill, H.R. 1, would impose the same appointment restrictions, but would also establish the Board as a new independent entity with subpoena authority. In effect, the House bill would create an institution potentially resembling certain data protection authorities found within European Union member Countries: namely, independent privacy czars that are effectively disconnected from the policymaking and implementing process in the Executive Branch, and are thus able to second guess policy without understanding the consequences and/or alternatives.

This is potentially unwise for a number of reasons. First, it should be recognized that the 9/11 Commission itself did not recommend creating an independent agency; rather, the Commission's Report said "there should be a board within the executive branch to oversee adherence to the [counterterrorism] guidelines . . . we recommended and the commitment the government makes to defend our civil liberties." Thus, in the Intelligence Reform Act, Congress expressly placed the Board in the Executive Office of the President, and stipulated that the Board "shall perform its functions within the executive branch and under the general supervision of the President." Second, removing the Board from the Executive Office of the President would deprive the Board of some of its greatest assets and tools, namely the access, influence and authority that comes from working directly in the Executive Office of the President. The Board has in fact benefited from unparalleled access to the relevant policy makers and program managers. Third, an independent agency may not be operational before the end of the present Administration, and the learning curve for its members will be significant.

An independent agency – designed to operate like an Inspector General – will inevitably experience a different level of access than the current Board has enjoyed. But most importantly, an independent agency may not be brought into sensitive programs before, or even *while*, they are being developed and executed. To the contrary, it would be more realistic to expect that an independent agency will be engaged after the fact – that is, once programs have been fully implemented programs. Of course, an independent agency, no matter how well intentioned or how distinguished its members, will not have the access or clout of Congress itself to judge whether programs have been devised and conducted in a satisfactory manner. Thus, a new independent agency will not be able to (and should not) perform Congress' oversight function, and will also not be able to operate as an influential adviser of the Executive Branch.

The provisions of the legislation requiring all five Members to be confirmed by the Senate also produce what may be an unintended consequence. By applying the Freedom of Information Act (FOIA) *and* requiring confirmation of all five Members, the Board would have to meet publicly unless it satisfied logistical procedures of the Sunshine in Government Act. 5 U.S.C. § 552b. Inhibiting the agency from meeting together frequently and informally would not

be desirable. The better approach, we believe, is to stay with the current structure, with the Chairman and Vice Chairman subject to Senate confirmation. If the current Board remains in place, we are fully committed to holding public sessions throughout the coming year and inviting public comments and concerns regarding relevant government policies. We held our first public hearing last December, which we thought was very successful in stimulating debate.

Indeed, I question whether Congress is well served to establish an independent review agency that would tend to supplant or duplicate Congress' own role – but with less authority to do so effectively. Congress should not create an agency that would be free to criticize the Administration (presumably the next one, given how long it will take to start up a new Board) on the most sensitive national security matters, but without any accountability. If the independent agency does not work for and report to the President, then the Executive Branch would not be responsible or accountable for the new agency. If the independent agency were not an arm of Congress, then the new agency would be free to question the counterterrorism, privacy and civil liberties judgments of the Executive Branch without any accountability to either Branch. This is not the type of system of checks and balances that the Constitution envisions. Freestanding commissions are useful for conducting particular investigations (e.g., 9/11 Commission, WMD Commission, etc.), or addressing discrete issues (e.g., Social Security, Budget, etc.), with a finite lifespan and defined work product. However, with respect to the ongoing need for vigilance regarding privacy and civil liberties in the war against terrorism, it would be constitutionally and democratically preferable, in my opinion, for Congress to take the lead in providing fully independent oversight of the Executive Branch rather than to sub-contract out this fundamental role to a free-floating body.

In short, Congress' independent oversight of these crucial – and delicate – national security policy matters should not be delegated to an unaccountable, independent agency.

III. Accomplishments and the Year Ahead

As our first annual report to Congress notes in considerable detail, the present Board has accomplished a great deal since its first meeting in March, 2006. We have established the means and infrastructure necessary to support our statutory mission. We have engaged in discussion with policy officials and experts both within the government and in the private, academic and non-profit sectors. Finally, we have undertaken a substantive review of existing programs and policies. For example, the Board has evaluated, among others, National Security Agency surveillance programs, the Treasury Department's Terrorist Finance Tracking Program, the Department of Defense's Counterintelligence Field Activities Threat and Local Observation Notices program, the State Department's e-Passport initiative, and the National Counterterrorism Center's National Implementation Plan. It has helped coordinate the drafting and inter-agency approval of a Memorandum of Understanding to standardize and improve procedures for obtaining redress for watch list grievances. The Board has also been integrated into the drafting and implementation of the Information Sharing Environment guidelines. Significantly, the Board has also delved deeply into the FBI's use of National Security Letters. We issued a highly critical preliminary assessment, in conjunction with the Board's annual report, in which we set forth the Board's concerns about the Bureau's lack of compliance with legal requirements in using NSLs.

A. Establishing Necessary Infrastructure

In carrying out its substantive statutory mandates, the Board has formally met thirty-five times since March 2006. All meetings took place in or around Washington, DC – within the White House complex, at various departments and agencies, and one meeting at Georgetown University. To place the activity of the Board’s part-time membership in perspective, the Board has formally met an average of about once every two weeks. Members always remain in near-constant communication with each other and the staff through e-mail and telephone. In the first few months of operation, the Board adopted a number of formative procedures and policies, including issue prioritization, everyday operations, public communications, and analytical methodologies.

As an initial matter, the Board adopted its first annual agenda. The agenda functioned as a business plan by allocating responsibility for tasks among staff and setting expectations regarding how the Board would function. It also served as a substantive agenda by laying out an initial list of issues on which the Board agreed to focus its energies. As part of a comprehensive communications plan, the Board approved the creation of a web site – www.privacyboard.gov – to discuss the Board’s history, mission, and activities and provide the public access to Board Member biographies, Board statements, and other related documents. The web site also serves as a means by which the public may contact the Board.

The Board also developed a series of preliminary processes, procedures, and methods by which it could fulfill its advice and oversight responsibilities to the President and Executive Branch agency heads. Of greatest importance, it agreed upon a methodology for analyzing and evaluating proposed programs. It established both a regular means for Board staff to report their activities to the Members and a means of discussing issues and offering possible actions for the Board to take.

In construing the mandate contained in IRTPA, the Board has initially determined that it will focus its efforts on issues concerning U.S. Persons or occurring on American soil. A “U.S. person” is defined, *inter alia*, as a United States citizen and a lawful permanent resident alien. *See, e.g.*, 50 U.S.C. § 1801(i); Executive Order 12333 § 3.4(i). As a result, it will not evaluate specific issues associated with the uniformed services’ efforts against terrorism or activities directed against non-U.S. persons abroad. IRTPA instructs the Board to ensure the consideration and protection of “privacy and civil liberties” but neither defines this phrase nor guides the Board in determining whose privacy and civil liberties should warrant the Board’s attention. In order to maximize the Board’s effectiveness and to prevent the diffusion of its limited resources across too many programs, the Board has elected to concentrate on the United States and U.S. Persons. The Board reserves the right to revisit this determination as circumstances or events may warrant.

In addition to determining the general reach of its mandate, the Board established a standardized means to evaluate how well privacy and civil liberties have been considered in the development and implementation of anti-terrorism policies and programs. To that end, the Board has developed an “issues and process analysis methodology” that will bring full and consistent consideration of all issues that come before it. This methodology allows the Board to

consider separate substantive questions and the extent to which privacy and civil liberty officers within the relevant agency have meaningfully participated in the development and implementation of the policy or program. The Board wishes to acknowledge and thank Jim Harper, Director of Information Policy Studies at the Cato Institute, and the Department of Homeland Security Data Privacy and Integrity Advisory Committee, on which Mr. Harper sits, for their guidance and earlier work product, upon which much of this is based. The methodology takes into account five large issues, as well as a number of subsidiary questions. The larger questions include: The scope of the program; the program's legal basis; how the program supports efforts to protect the Nation against terrorism from the perspective of managing risk to privacy or to survival; the extent to which officials within the relevant department or agency analyzed the privacy and civil liberties interests implicated by the policy, program or issue; and processes employed by the government to review privacy and civil liberties interests.

B. Engaging Policymakers and Interested Parties

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

The Board has met personally with numerous principal senior White House officials, including: the current and previous Chiefs of Staff; the National Security Advisor; the Homeland Security and Counterterrorism Advisor; current and previous Counsel to the President; Staff Secretary; Chairman of the Intelligence Oversight Board and a member of the President's Foreign Intelligence Advisory Board.

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

The Board has also met with senior administration officials throughout the Executive Branch who have responsibilities for developing and implementing war-on-terrorism policies and strategies. These officials include: the Attorney General, Deputy Attorney General, Assistant Attorney General for Legal Policy, Assistant Attorney General for National Security, and Acting-Assistant Attorney General for Legal Counsel; FBI Director; Secretary for Homeland Security; Department of the Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey, as well as the Assistant Secretary for Intelligence and Analysis; the current and

previous Director of National Intelligence, the previous Deputy DNI, the ODNI General Counsel, and Information Sharing Environment (ISE) Program Manager; Director and senior supporting staff of the National Security Agency; and Director and senior staff of the Director of the National Counterterrorism Center.

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

Perhaps most importantly, the Board has established strong working relationships with the developing privacy and civil liberties offices within the government's anti-terror agencies. These offices and officers advance privacy and civil liberties at the ground level and generally have the greatest practical impact on the development and implementation of policies within their respective agencies. The privacy and civil liberties offices with which the Board works most closely include those at the Department of Justice, the Department of Homeland Security, and the Office of the Director of National Intelligence. These officials have likewise developed lines of communication and authority within their organizations' structure. These relationships allow the Board to encourage the sharing of information and best practices among those offices. The relationships have also allowed the Board to coordinate and offer assistance when the privacy or civil liberties officers encounter problems. The Board has helped and will continue to help coordinate and foster the development of a privacy and civil liberties infrastructure throughout the Executive Branch.

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

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

Marcus. The Board is dedicated to meeting the letter and spirit of the 9/11 Commission's recommendations, consistent with its statutory authority, and looks forward to continued contact with the Commission's co-chairs.

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

C. Reviewing Critical National Security Programs and Policies

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

In each briefing, Board members were free to engage in a probing inquiry and ask unfettered questions, all of which were answered. Following each briefing, the Board met to consider further areas of inquiry, additional issues associated with these specific programs, and underlying documents to review.

i. Anti-Terrorist Surveillance

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

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

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

The Board was briefed on the multiple levels of review, approval and oversight for conducting this surveillance. At the NSA, operators must carefully justify tasking requests, and multiple levels of review and approval are required to initiate collection. Ongoing audits and legal reviews are conducted by the NSA's Office of Inspector General, General Counsel and Signals Intelligence Directorate Office of Oversight and Compliance. No surveillance may be conducted without leaving a reviewable audit trail that can be and routinely is subject to extensive continuing examination by Inspector General and Compliance staff.

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

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

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

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

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

ii. National Implementation Plan

The National Implementation Plan was approved by the President in June, 2006, and is intended to coordinate and integrate all instruments of national power in a unified effort to protect the Nation against terrorism. Toward that end, it assigns hundreds of specific tasks to various Federal departments and agencies. Participating departments and agencies are now adopting and implementing their own supporting plans, and an annual strategic review of the entire NIP is in progress. The Board has reviewed the entire NIP and has had the opportunity to direct additional questions to the appropriate White House and Intelligence Community officials. The Board is also working with the National Counterterrorism Center to ensure that it has access to NIP tasks and activities that could raise privacy or civil liberties concerns.

iii. Terrorist Finance Tracking Program

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

The Board has also examined or begun to examine privacy concerns connected to other programs and issues, including CIFA TALON, the Department of State E-Passport Program, Passenger Name Recognition data, US-VISIT, and the reauthorized PATRIOT Act. Comments regarding these programs are located on pages 30-32 of the Board's 2007 Report to Congress.

D. Becoming Involved in Policy Development and Implementation

i. Watchlist Redress

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

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

TSC's redress process consists of a procedure to receive, track, and research watch list-related complaints and to correct the watch list or other data that caused an individual unwarranted hardship or difficulty during a screening process. Throughout 2005, TSC worked closely with screening agencies to establish a standardized process for referral of and response to public redress complaints. In the fall of 2005, TSC undertook to document formally the participating agencies' mutual understanding of their obligations and responsibilities arising out of the watch list redress process. Competing priorities within participating agencies, however, slowed progress.

On June 20, 2006, I convened a meeting of all relevant agencies and called for a renewed effort to prioritize this project. In attendance were representatives from TSC, the Departments of State, Defense, Treasury, Justice, and Homeland Security, the Office of the Director of National Intelligence, the FBI, the CIA and the National Counterterrorism Center. The resulting draft Memorandum of Understanding (MOU) is a constructive and positive step intended to secure a commitment from these agencies that participate in the watch list process actively to engage in and support the redress process. The MOU resulted from a six-month period of negotiations between the agencies mentioned previously. I convened a final working group meeting on November 30, 2006; in January 2007, a final draft of the MOU was approved and submitted for the signature of the heads of these agencies.

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

manner. Finally, each agency must designate a senior official that is responsible for ensuring the agency's full participation in the redress process and overall compliance with the MOU. Once the MOU has been executed and implemented, the Board intends to continue efforts to bring all possible transparency and public understanding to this process.

ii. Information Sharing Environment

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

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

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

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

The ISE Privacy Guidelines also provide for an ISE Privacy Guidelines Committee, consisting of the ISE Privacy Officials of the departments and agencies comprising the Information Sharing

Council (ISC), and chaired by a senior official designated by the Program Manager. Working closely with the Privacy and Civil Liberties Oversight Board as it exercises its oversight mission, the committee will seek to ensure consistency and standardization in implementation, as well as serve as a forum to share best practices and resolve inter-agency issues. The Program Manager has designated Alex Joel and Jane Horvath to serve as co-chairs of this ISE Privacy Guidelines Committee, which will include the Board's Executive Director as a member. The Board instructed its staff to meet with the Program Manager and provide options concerning its on-going oversight role and how that role can be most effectively and efficiently exercised.

E. Examining National Security Letters

Recently, the Board began a substantive review of the FBI's use of National Security Letters. The Board chose to undertake this review at the invitation of the Attorney General and immediately prior to the release of the Department of Justice Inspector General's report on this subject. *See A Review of the Federal Bureau of Investigation's Use of National Security Letters*, Report of the Inspector General (March 2007). The report described a number of troubling deficiencies in the use and management of NSLs and NSL-derived information. Such deficiencies included issuing letters without complying with appropriate statutory and internal regulations, failing adequately to document and track information provided in response to NSLs, and issuing "exigent letters" that contained inaccurate information. The Board and its staff have met with the Inspector General, the Director of the FBI and other senior officials, senior DOJ officials within the National Security Division, and representatives from privacy advocacy organizations. The Board has asked follow-up questions of those officials and has reviewed Bureau guidance and internal memoranda regarding possible corrective actions. The Board will shortly deliver recommendations regarding this program to the Attorney General.

This project is a good example of the value the present Board brings to promoting consideration of privacy and civil liberties. Prior to the release of the Inspector General's report, the Attorney General invited Board review of FBI procedures. The Board had full access to all individuals and materials needed for a comprehensive review. Our discussions, observations, and suggestions along the way have been incorporated into the FBI and DOJ remedial actions. We believe that DOJ and FBI officials take our mission seriously and will fully consider the findings and recommendations of our final report.

F. Planning the Year Ahead

The Board has laid out an ambitious and aggressive agenda for the year ahead, building on our organizational and educational efforts of the past year. As required by statute, we will stay involved in the development of the Information Sharing Environment. We are continuing to look into government surveillance operations and terrorist watch list redress issues. Other areas of interest include:

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

- *Federal data analysis and management issues.* Board Members intend to enhance significantly their understanding of issues associated with data mining activities, data sharing practices, and governmental use of commercial databases. This level of understanding will assist the Board in its review of many Federal anti-terrorism programs. Toward this end, the Board will follow up on recommendations of the March, 2004 report of the Technology and Privacy Advisory Committee (TAPAC) to the Secretary of Defense, *Safeguarding Privacy in the Fight Against Terrorism*.
- *U.S. Persons Guidelines.* These guidelines limit the government's ability to collect, retain, and distribute intelligence information regarding U.S. Persons. These guidelines are applicable to agencies in the intelligence community pursuant to Executive Orders 12333 and 13284. As was noted in the 2005 report to the President on Weapons of Mass Destruction, these rules are complicated, subject to varying interpretations, and substantially different from one agency to another. The Attorney General and the Director of National Intelligence have established a staff level working group to review these guidelines and propose appropriate reforms. The Board intends to participate in this process.
- *State and local fusion centers.* State and local law enforcement entities are establishing joint centers where they share information and data of value to their common missions. Federal agencies are developing partnerships with these centers. The Board will review these sharing practices to ensure that privacy rights and civil liberties concerns are taken into appropriate consideration.
- *National Implementation Plan.* The Board will continue to monitor those tasks and activities that might raise privacy or civil liberties concerns.
- *Department of Homeland Security Automated Targeting System (ATS).* ATS is a decision support tool used by Customs and Border Protection to assist in making a threshold assessment in advance of arrival into the U.S. based on information that DHS would otherwise collect at the point of entry. The Board intends to review this system.
- *Material Witness Statute.* As a result of concerns raised at its December 5, 2006 Georgetown University forum, the Board will investigate public expressions of concern over how this statute is being used in Federal anti-terrorism efforts. The Board will meet with senior Department of Justice officials to gain an understanding of the statute's use and to ask questions regarding its possible abuse.

IV. Possible Areas of Improvement

Finally, I would like to propose a few suggestions going forward that Congress and the Administration could consider if the current Board is not essentially terminated by new legislation. As we enter the mid-point of our second year in existence, I would expect the Board to begin hiring additional staff and bring on detailees as soon as possible. We would engage even more actively with the public over counterterrorism policies and programs. In addition, the

Board would benefit from an enhanced stature within the Executive Office of the President, with its Executive Director holding a position of program authority comparable to the counterparts he works with on a daily basis. Moreover, additional opportunities should be sought to further institutionalize the Board's role and responsibilities within the Executive Branch,

I would also recommend that the Board obtain both periodic and ad hoc written reports from policy and legal officials from all the relevant agencies documenting their consideration of privacy and civil liberties considerations. And finally, the existing, very strong relationship between the Board and the privacy and civil liberties officers in place throughout the Executive Branch should be further strengthened and institutionalized by requiring periodic formal reporting from those officials to the Board.

Of course, whether the present Board continues in existence is out of our hands at this point. Should Congress pass legislation creating a new independent agency, and it becomes law, my colleagues on the Board and I stand ready to assist fully in the transition in order to ensure that privacy and civil liberties continue to be appropriately considered and protected in the country's efforts to combat terrorism. Should a new Board take our place, we will cooperate with it to help promote our shared mission.

Again, thank you for the opportunity to speak with you today, and I look forward to answering any questions you may have.