



ELECTRONIC PRIVACY INFORMATION CENTER

Prepared Statement for the Record of
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Public Meeting Before the
Privacy and Civil Liberties Oversight Board

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My name is Jeramie Scott. I am the National Security Counsel for the Electronic Privacy Information Center (EPIC). EPIC is a public interest research center in Washington, D.C. established in 1994 to focus public attention on emerging privacy and civil liberties issues as well as protect constitutional values and the rule of law.

EPIC has particular interest in issues related to national security and surveillance. EPIC regularly updates and maintains multiple webpages to provide valuable information to the public about current and developing issues involving government surveillance authority and programs.

In addition, EPIC contributes to the government's understanding of these issues through amicus briefs filed in the Supreme Court and other courts across the country. Various branches of the government, including this Board, have recognized EPIC's expertise in these areas through invitations to testify in matters of government surveillance.

I would like to thank the Privacy and Civil Liberties Oversight Board for convening this public meeting today and also acknowledge the hard work of the Board over the past several months reviewing the use of Sections 215 and 702 of the Foreign Intelligence Surveillance Act.

Today though, I would like to urge the Board to expand its agenda beyond Sections 215 and 702, and specifically urge the Board to shift its focus to Executive Order 12333. President Ronald Reagan signed Executive Order 12333 in December of 1981, and it established broad new surveillance authorities for the intelligence community outside the scope of public law with little to no oversight in place.

In a prepared statement before the Senate Judiciary Committee, the former Director of the NSA, General Keith Alexander, stated the "NSA conducts the majority of its SIGNIT activities solely pursuant to the authority provided by Executive Order (EO) 12333."¹ Through the disclosures over the past year, the American public and the rest of the world have begun to realize the extent of this surveillance conducted under 12333. For example, under Executive Order authority, the NSA's MYSTIC and RETRO programs allow for the collection of 100% of a foreign country's telephone calls and the subsequent retrieval of those calls at a later date.² The NSA has also tapped directly into the main communication links between Google and Yahoo data centers located around the world in order to scoop up massive amounts of data.³ Additionally, it has been reported that the NSA has collected hundreds of millions of contact lists

¹ *Continued Oversight of the Foreign Intelligence Surveillance Act: Hearing Before the S. Judiciary Comm.*, 113th Cong. 4 (2013) (statement of Gen. Keith Alexander, Director, NSA), available at <http://www.judiciary.senate.gov/imo/media/doc/10-2-13AlexanderTestimony.pdf>.

² Barton Gellman and Ashkan Soltani, *NSA Surveillance Program Reaches 'into the past' to Retrieve, Replay Phone Calls*, *Washington Post*, March 18, 2013, available at http://www.washingtonpost.com/world/national-security/nsa-surveillance-program-reaches-into-the-past-to-retrieve-replay-phone-calls/2014/03/18/226d2646-ade9-11e3-a49e-76adc9210f19_story.html.

³ Barton Gellman and Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, *Washington Post*, Oct. 30, 2013, available at http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html.

from email and instant message accounts.⁴ Undoubtedly, the NSA's mass surveillance conducted under 12333 captures huge amounts of data unrelated to the mission of national security, including information on millions of Americans.

Although 12333 requires a court order to target a United States Person, this is of little comfort. Given the global nature of communications, the indiscriminate mass surveillance the NSA conducts overseas captures the information of United States Persons. Furthermore, the government can use and share this information without any order from a judge or oversight from Congress.

As a matter of fact, the only check on surveillance under 12333 comes from Executive oversight. This type of self-regulation has proven to be ineffective at best in limiting surveillance overreach. The minimal oversight in place does not even give the appearance of the checks and balances provided by judicial or congressional oversight. Congress has admitted to very little oversight of the activities under 12333. Additionally, Executive Order 12333 does not fall within the purview of the Foreign Intelligence Surveillance Court; thus, no neutral arbiter reviews 12333 surveillance for compliance with the Fourth Amendment.

As the Chief Justice recently explained, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search of evidence of criminal activity."⁵

It is clear that the surveillance programs and activities under Executive Order 12333 require further scrutiny and these activities fall squarely within the Board's jurisdiction. I urge the Board to review 12333 and recommend the Board oversee:

1. The extent to which information on United States Persons is captured by surveillance conducted under 12333.
2. The extent to which collection under 12333 results in the retention and/or dissemination of non-target data.
3. The effectiveness of current oversight and minimization procedures.

Furthermore, EPIC recommends a public report of the Board's findings.

Thank you for the opportunity to appear before the Board today.

⁴ Barton Gellman and Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, Washington Post, Oct. 14, 2013, available at http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_print.html.

⁵ *Riley v. California*, 134 S.Ct. 2473, 2494 (2014).

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EPIC: Executive Order 12333

<http://epic.org/privacy/surveillance/12333/>