

## Comments from the Global Network Initiative to the Privacy and Civil Liberties Oversight Board



Docket ID: PCLOB-2013-0005-0001

August 1, 2013

Protecting and Advancing  
Freedom of Expression and  
Privacy in Information and  
Communications Technologies

The Global Network Initiative welcomes the opportunity to submit comments to the Privacy and Civil Liberties Oversight Board (PCLOB) regarding surveillance programs operated pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the FISA Amendments Act.

GNI is a multi-stakeholder group of companies, civil society organizations (including human rights and press freedom groups), investors and academics, who have created a collaborative approach to protect and advance freedom of expression and privacy in the Information Communications and Technology (ICT) sector. GNI has developed a set of principles and implementation guidelines to guide responsible company, government and civil society action when facing requests from governments around the world that could impact the freedom of expression and privacy rights of users. Those principles are rooted in international human rights law, while also recognizing that companies are compelled to obey domestic law in countries where they operate.<sup>1</sup>

Worldwide concerns about U.S. surveillance practices seriously threaten the United States' reputation as a champion of Internet freedom. Keeping in mind the global leadership role of the United States, we urge the Board to protect the privacy rights of people around the world, not just in the United States, and demand greater transparency on the part of U.S. government agencies. Specifically, we recommend that the Board urge all government agencies to:

1. Address the international human rights implications of U.S. communications surveillance programs.
2. Create a process to declassify significant legal opinions to enable oversight of government actions and inform public debate.
3. Revise the provisions that restrict discussion of national security demands.
4. Encourage the United States to report on its own surveillance requests.

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<sup>1</sup> See <http://globalnetworkinitiative.org/principles/index.php>.

<sup>2</sup> 42 USC §2000ee, available at [http://www.pcllob.gov/All%20Documents/PCLOB%20enabling%20statute\\_42\\_USC\\_SE\\_2000ee.pdf](http://www.pcllob.gov/All%20Documents/PCLOB%20enabling%20statute_42_USC_SE_2000ee.pdf).

## **Role of the Board**

The Board is charged with ensuring that “liberty concerns are appropriately considered in the developments of laws, regulations and policies related to protecting the Nation against terrorism.”<sup>2</sup>

GNI believes that the best approach is to define as narrowly as possible the circumstances under which surveillance can take place. We urge the Board to base its interpretation on internationally recognized human rights standards. The Board should take note of the recent United Nations report on the human rights implications of government surveillance which states: “In order to meet their human rights obligations, States must ensure that rights to freedom of expression and privacy are at the heart of their communications surveillance frameworks.”<sup>3</sup>

## **The Unique Role of U.S. companies in a global market**

The U.S. government and private industry have played a critical role in the development of the Internet. Due to these historic factors, a significant proportion of global Internet traffic continues to flow through the United States.

Worldwide concern about U.S. surveillance practices—including but not limited to the PRISM program—have already caused serious damage to the global reputation of the United States and hampered the government’s ability to advocate on behalf of U.S. interests. The revelations have also severely weakened the United States’ ability to advocate globally for rights of freedom of expression and privacy, and have vast technological and commercial implications.

## **Recommendations for the PCLOB**

GNI recommends that the Board take action to both recognize the international implications of U.S. surveillance programs and make those programs and regulations far more transparent. We recommend that the Board urge all government agencies to:

### ***1) Address the international human rights implications of U.S. communications surveillance programs.***

Given the commitment of the U.S. government to international human rights standards, and the extension of human rights standards to the realm of digital communications, GNI recommends that the Board acknowledge the implications of U.S. government

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<sup>2</sup> 42 USC §2000ee, available at

[http://www.pcllob.gov/All%20Documents/PCLOB%20enabling%20statute\\_42\\_USC\\_SE\\_2000ee.pdf](http://www.pcllob.gov/All%20Documents/PCLOB%20enabling%20statute_42_USC_SE_2000ee.pdf).

<sup>3</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, Human Rights Council Twenty-third Session, A/HRC/23/40, available at

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf).

surveillance programs for the free expression and privacy rights of billions of people in and outside of the United States. In particular, the Board should consider the rights of non-U.S. persons affected by U.S. government surveillance programs. All governments engage in communications surveillance for foreign intelligence purposes to some degree, but the degree of control that the United States is able to exert over global communications providers and the access it has to global communications traffic means that the U.S. is now the focus of global attention on this issue. The Board has an opportunity to articulate how concrete reforms could shape a communications surveillance regime with sufficient transparency, oversight, and accountability to be worthy of imitation by other governments.

**2) Create a declassification process for significant legal opinions to enable oversight of government actions and inform public debate.**

GNI welcomes the declassification of documents pertaining to the collection of telephone metadata under Section 215 of the PATRIOT Act and supports recently proposed legislation to facilitate declassification of significant legal decisions by the Foreign Intelligence Surveillance Court (FISC) and the FISC Court of Review. We recognize that unclassified summaries of FISC opinions may be necessary in some cases but believe that greater declassification will enable informed public debate as well as improve public oversight of the nature and the scope of the government's use of FISA authorities.

**3) Revise the provisions that restrict discussion of national security demands.**

While understanding the need for confidentiality in matters of national security, GNI is deeply concerned by the nondisclosure obligations imposed on companies that receive FISA orders and National Security Letters (NSLs). These directives effectively and perpetually prohibit companies from reporting even in general terms, after the fact, on the national security orders they receive. The Board should recommend reforms that would require government authorities to make a factual showing to the court to demonstrate that harm would result from disclosure, before issuance or renewal of gag orders, or placing a specific time limit on those orders. This would increase the level of trust that users have in companies providing online communications services.<sup>4</sup>

Regarding transparency reporting, the US government should ensure that those companies who are entrusted with the privacy and security of their users' data are allowed to regularly report statistics reflecting:

- The number of government requests for information about their users made under specific legal authorities such as Section 215 of the USA PATRIOT Act,

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<sup>4</sup> *Ibid.* UN Special Rapporteur Frank La Rue also notes that "Individuals should have a legal right to be notified that they have been subjected to communications surveillance" and "have the possibility to seek redress" after surveillance has been completed.

Section 702 of the FISA Amendments Act, the various National Security Letter (NSL) statutes, and others;

- The number of individuals, accounts, or devices for which information was requested under each authority; and
- The number of requests under each authority that sought communications content, basic subscriber information, and/or other information.

***4) The United States should lead by example and report on its own surveillance requests.***

GNI has commended the U.S. government for its commitment to Internet freedom, and for its leadership together with the other governments in the Freedom Online Coalition. However, the credibility of these efforts ultimately rests on the example the U.S. government sets through its domestic laws and policies. Contradictions between domestic surveillance policies and practices and foreign policy positions on Internet freedom and openness fundamentally undermine the U.S. government's ability to advocate that other governments should also support Internet freedom.

To begin to address this issue, the U.S. government should augment the annual reporting that is already required by statute by issuing its own regular "transparency report" providing the same information that companies should be allowed to report as outlined above: the total number of requests under specific authorities for specific types of data, and the number of individuals affected by each.