May 8, 2007

Carol E. Dinkins
Chairman
Privacy and Civil Liberties Oversight Board
The White House
Washington, D.C. 20500
Fax: 202-456-1066

Dear Chairman Dinkins:

Thank you for a copy of the Privacy and Civil Liberties Oversight Board's 2007 Annual Report to Congress. We strongly support and believe deeply in the mission of the Board, and we welcome your work. Therefore, we appreciate the opportunity to review your first annual report, and would like to ask you a number of questions.

- What civil liberties have been specifically protected or enhanced by your actions?
- What corrections in policies, procedures, or regulations have you achieved?
- What problems with respect to the protection of privacy and civil liberties have you uncovered through your work that had not previously been identified?
- Has the Board had full cooperation from all agencies? If not, which agencies have not cooperated fully?
- To what extent have you heard from critics of current policies, practices, and regulations, and investigated the accuracy of their criticisms?
- To what extent do you believe you have been able to foster greater transparency by the Executive branch in its consideration of privacy and civil liberties?
- In the course of your work, what public criticisms have you made?

Scope and Process

You note that the Board (p. 22) "has initially determined that it will focus its efforts on issues concerning U.S. Persons or occurring on American soil." While we appreciate that every organization must choose priorities, we would like to draw to your attention to the very broad authorities for the Board. Section 1061 (c) of PL 108-458, relating to the functions of the Board, authorizes broad authorities for (1) Advice and counsel on development and implementation of policy; (2) Oversight; and (3) Scope. None of these authorities are limited to U.S. persons or American soil. Indeed, the operative word in Section 1061 (c) 3 relates to *concerns*:

> The Board shall ensure that *concerns* with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism. [Italics added.]

There are wide-ranging concerns expressed by the American public with respect to privacy and civil liberties beyond those you raise in your report.

For example, we cannot speak to an audience, foreign or domestic, on the question of civil liberties without the topic of Guantanamo coming up. The civil liberties questions raised by the detention, interrogation, and treatment of detainees at Guantanamo (and at other secret facilities) are central to the current debate. They include:

- Limited or no access to counsel;
- No habeas corpus;
- No limits on detention; and
- Limited access to the evidence.

Furthermore, we believe you should examine:

- Practices used in interrogations, including the alleged use of torture;
- The use of evidence obtained through physical abuse or coercion; and
- The nature of the entire legal system for the handling of prisoners at Guantanamo, including the category of "illegal enemy combatants."

The Board's activities are constructive and useful to the extent that they address and help resolve issues the American people believe are contentious and controversial. Indeed, it is the defense of rights and civil liberties at the margins that ensure the health of those rights and civil liberties for all citizens and U.S. persons. Therefore, we would urge the Board to revisit (as you suggest in footnote 46) the definition of its mission and mandate to include the serious issues raised by the treatment of detainees.

Terrorist Surveillance Program

On pp.27-29, you report on the Terrorist Surveillance Program and the January 10, 2007 Orders of the Foreign Intelligence Surveillance Court (which makes any electronic surveillance under the Terrorist Surveillance Program subject to the approval of the Foreign Intelligence Surveillance Court). You state the following (p. 29):

> 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.

Given the considerable public interest in, and inherent sensitivity of, a surveillance program that initially began outside of FISA Court review, we believe a

more detailed public explanation in support of your conclusions is necessary and is possible consistent with requirements of operational security.

-- What is the nature of your own review that leads you to conclude that the Executive Branch has appropriately considered and reasonably protected the privacy and civil liberties of U.S. persons?

-- With respect to this program, what steps are required within the Executive branch to protect privacy and civil liberties?

-- What internal oversight mechanisms exist to ensure that these steps are followed?

-- Are you confident that these oversight mechanisms are working effectively?

-- Did the Board conclude that privacy and civil liberties protections were adequate even before the program was revised to comply with the Foreign Intelligence Surveillance Act? If so, what was the basis for the conclusion?

-- What additional protection does review by the Foreign Intelligence Surveillance Court provide?

-- How do you intend to evaluate reviews conducted by the Foreign Intelligence Surveillance Court?

-- What will be the nature of your "continuing advice and oversight with respect to NSA's surveillance activities'?

-- What recommendations do you now have with respect to this program?

Watch List Redress

We want to commend the Board for its efforts to catalyze the Executive Branch to establish a formalized, unified, and simplified redress procedure for individuals with adverse experiences with the government's watch list or screening procedures. Such an effort is long overdue. It is noteworthy and positive that the Board has taken on this issue as a priority. Can you keep us apprised as to:

- When Executive branch agencies have signed the relevant Memorandum of Understanding on watch list redress?
- What steps have been taken to implement the Memorandum of Understanding?
- What problems exist in securing agreement or effective implementation from Executive branch agencies of this Memorandum of Understanding? and
- What additional efforts are necessary to bring greater transparency and public understanding to the watch list redress process?

National Security Letters

You note (p.iii) that the Attorney General and White House Counsel have asked you to commence a substantive review and provide recommendations concerning the report of the Department of Justice's Inspector General on the FBI's use of National Security Letters. We share your view that the serious problems identified by the IG "cannot be tolerated and must not be repeated."

- Given that the Department of Justice's Inspector General believes that reports to Congress were inaccurate and significantly understated the total number of requests, how extensive has been the request and use of National Security Letters?
- Has the FBI shared data from National Security Letters with other agencies?
- Who controls the data collected, and what is happening to that data?

Furthermore, we would appreciate it if you would keep us informed with respect to your forthcoming recommendations on National Security Letters for improving:

- accountability;
- oversight;
- internal controls;
- effective guidance and training on this issue throughout the FBI; and
- your plans for monitoring the implementation of steps by the FBI to comply with the law and requirements to protect privacy and civil liberties.

We look forward to future reports that detail your activities and spell out and support the judgments you make. We look forward to future reports that demonstrate your vigor in taking on the wide range of important issues in your challenging mandate. We wish you every success in your important work.

With best regards,

Thomas H. Kean

Lee H. Hamilton