

## PREPARED REMARKS

Judge Patricia Wald

EPIC Champions of Freedom Awards Dinner

National Press Club

Washington, DC

June 5, 2017

Wald Remarks at Epic Award June 5,2017

Thank you so much for this award. It means a great deal to me, in part as recognition of the good work of PCLOB, now in a relatively dormant state with no chair and only one out of its other four authorized Board members on Board, accomplished in its more robust first few years. Marc has given me 5 minutes to say a few words about PCLOB's future.

First let me say it is my fervent hope that PCLOB will rise again to its full potential; we need a PCLOB and despite problems encountered in what was its third incarnation I still hold to the firm belief that an agency dedicated to protecting privacy and civil liberties inside the intelligence community with access to classified material is a uniquely valuable asset in the ever difficult search for the right balance between national security and democratic values. The need for that kind of insider watch only intensifies as our foes, foreign and domestic, accelerate their efforts to undermine both our national security and the essence of our democracy. Legitimate concerns in keeping the intel community's own integrity intact in no way detract from the parallel necessity of preserving statutory and constitutional rights of our citizens including their right to be reasonably informed of basic information on the fundamental structures of how the intelligent agencies operate, without disclosure of critical sources or methods.

But, and this is my second point, any new incarnation of PCLOB must operate independently of Administration and Congressional politics. In my view it would be disastrous if PCLOB were allowed to become merely a cheering section for the intel agencies or Administration policy bestowing a kind of Good Housekeeping seal of approval or blessing on all issues presented to it. Not everyone in the security landscape however has consistently acknowledged the value of responsible challenge; there have been attempts to temper our independence, which have come principally not from the intel community itself but from outside sources including some in Congress.

A reinvigorated PCLOB will need allies on the outside like EPIC not only to resist any such misguided efforts but to scrutinize new nominees for their independence under fire. For

example some both inside and outside PLOB have argued that it should not take on statutory or constitutional issues in its oversight or advice functions but rather confine itself to policy concerns and best practices. I disagree heartily with this approach, and hope it will not prevail in future PCLOBs. In my view PCLOB's best effort was on Section 215 of the Patriot Act, which concluded (3-2) that the handover to NSA of broad telephonic metadata collections from communication companies was not in fact contemplated or authorized by the statutory provision on which it purported to rely. This despite 14 prior FISA court orders approving the collections. PCLOB's decision was unanimously upheld by the 2d circuit, and proved instrumental in bringing about the Freedom Act establishing a new and less intrusive system for identifying suspicious calls.

If indeed PCLOB is to be part of a government based on the rule of law its power to examine the basis of intel programs purportedly based on those laws should not be curtailed. I disagree as well with those who argue that PCLOB should place a stronger emphasis on our advice function to intel agencies in the development of new or revised policies rather than on oversight of the implementation of intel programs in actual operation. Although I agree that if PCLOB's advice is sought early enough in the process to make a difference in the final product, PCLOB's input into new or revised initiatives can be valuable, it is also the case that its advice remains privileged and not available for public discourse (whether classified or not) so that vigorous oversight which can be shared with the public needs to remain an indispensable part of PCLOB's work.

Indeed I believe that perhaps the most vital area in which an independent PCLOB can contribute to a national dialogue on privacy and security is greater transparency of how intelligence operations are conducted –not their sources and methods- but their overall structure of governance and oversight; the processes by which operations are initiated and overseen and under what strictures. Virtually everyone in contact with the intel community acknowledges a vast over classification of information including much that may be vital to an informed electorate but does not endanger/security of specific operations. The intel community itself has in the past few years and in many cases pursuant to PCLOB's recommendations moved toward greater transparency and I hope that trend continues even as security threats rise. It is against that backdrop that I admit the greatest disappointment of my 41 years at PCLOB is that we did not produce the public report, on which we promised (with one dissent) in 2015 to prioritize, involving Executive Order 12333, which predominantly governs our intelligence operations abroad, a project our nongovernmental colleagues in national security identified as a prime concern as well.

By the time I left PCLOB in January 2017 there had been literally dozens of drafts of a proposed 12333 report circulated to the Board, a majority of which in my view contained much useful and balanced information about the overall structure of 12333 oversight and process without infringing on national security. And of course any proposed public report would have had to undergo official classification review to prevent undue disclosures. Yet after the Chair announced his resignation effective July 1, 2016, all attempts to reach consensus or even a majority among the remaining Board Members who split evenly on draft after draft failed for

reasons I was never able to fully discern; it seemed never a particular sentence or paragraph or even a particular issue we could not get past; some of us were quite amenable to compromise on specifics in what was basically a descriptive not a prescriptive report. In the end it seemed rather to come down to a decision on whether there should be a bipartisan public report at all. At any rate by last fall the clock had run out- there was no time for a report to be processed through classification and accuracy reviews before the scheduled departures of a working majority of the Board. And one of PCLOB's most significant opportunities for contribution to transparency and an informed electorate evaporated.

There may be lessons to be gleaned from this disappointing ending. Some might involve statutory changes. The experience of other bipartisan Boards like the FEC and, especially 3-2 Boards, is that they gravitate more readily than other structures to stalemate through resignation or abstention of a single member. The "team of rivals" concept we hear so much about does not work when there is no decision maker at the top to pick between the teams. If Congress chooses to take a second look at PCLOB it should also exempt it from the Sunshine Act which for PCLOB has resulted in a dysfunctional decision making process which does not allow more than 2 Board members to discuss anything substantive face to face without a formal Federal Register preannounced and presumably open meeting. And short of structural change, those who select or are "consulted" on nominations for these potentially boards might temper ideological purity with heightened concern in evaluating candidates' past records at working across philosophical and partisan lines. It takes only one vacancy to drastically impede a 3-2 bipartisan Board's efficacy to perform its most basic functions.

There are critical issues still on the horizon for a new PCLOB: how if at all can the 4th amendment search and seizure clause be made to apply to the new and awesome technological capabilities of our intel agencies developed to protect us in an ever threatening world and if that debate cannot be conducted entirely in public, what responsibilities does the intel community itself or its Congressional overseers have for insuring the debate takes place at all? And do unsuspected Americans -or even foreign subjects- have any enforceable rights to privacy in their "incidentally" collected communications which may be retained for years in data banks or clouds without any clear cut requirement that they be evaluated for any foreign intelligence value. These are only 2 of many unresolved facets of the privacy/civil rights national security debate and as new appointments are made to PCLOB some things about which both the nominators and the nominees might think seriously.

\* \* \*