Written by **Jack Kenny** on January 23, 2014

Federal Panel Says NSA Data Collection Illegal, Should be Ended

The National Security Agency's bulk collection of phone records is illegal and should be ended, an independent federal watchdog agency concluded in a report released Thursday. The report by the Privacy and Civil Liberties Oversight Board also concluded the NSA program has resulted in only "minimal" benefits to efforts to protect the nation from terror attacks, according to the *New York Times*, which obtained an advance copy of the 238-page document.

The report comes less than one week after President Obama's high-profile speech last Friday at the Justice Department, where the president proposed some modest reforms, while defending the NSA program as a necessary national security tool. Even as presently conducted, he said, the massive daily collections of telephone, e-mail, and other electronic communications has not violated privacy and civil liberties rights, though he acknowledged the potential for abuse exists.

"We simply disagree with the board's analysis on the legality of the program," Jay Carney, the president's press secretary said Thursday.

The findings of the privacy board add what the *Times* report described as "a significant new voice into the debate over surveillance, underscoring that the issue was not settled" by the president's lengthy analysis and defense of the program last week. The finding that the "metadata" collections have made a "minimal" contribution to national security follows a report of the president's own advisory panel's review of the program, which found no single case of a terror plot being thwarted as a result of information collected through the controversial NSA program. One federal district court judge last month reached a similar conclusion and found the program unconstitutional, while another, in a separate challenge, ruled in favor of the government's claim that the program is legal.

The NSA data collections have been the subject of intense debate since last June when intelligence analyst Edward Snowden, a contractor with the agency, released to news media classified documents revealing the nature and scope of the program. Civil liberties and privacy advocates have decried the random "dragnet" nature of the records collections, while the Obama administration, the chairmen of the House and Senate intelligence committees, and others have defended the program and demanded Snowden's arrest and prosecution for release of classified information. Snowden, who fled to Hong Kong before finding temporary asylum in Moscow where he currently resides, has been charged with espionage and theft of government documents.

The board's report reveals that in the secret proceedings of the Foreign Intelligence Surveillance Court, government investigators have maintained the data collection is legal under Section 215 of the PATRIOT Act of 2001, which authorizes the seizure of business records judged to be relevant to an

investigation into activities conducted or directed by foreign agents. Though the court has been issuing orders to phone companies to provide investigators with the call records since May 2006, the report reveals it produced no judicial opinion detailing its rationale for approval of the program until last August.

The program "lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value," the privacy board concluded."As a result, the board recommends that the government end the program."

The finding of illegality was not unanimous, however. Three of the board's five members endorsed it, while two dissented, saying the legal questions should be left to the courts. The majority consisted of David Medine, the board's chairman and a Federal Trade Commission official in the Clinton administration; Patricia M. Wald, a retired federal appeals court judge named to the bench by President Jimmy Carter; and James X. Dempsey, a civil liberties advocate who specializes in technology issues. Rachel L. Brand and Elisebeth Collins Cook, both Justice Department lawyers in the George W. Bush administration, were the pair who rejected the finding that program is illegal.

The board was unanimous in recommending a series of changes to the program, however, with the majority endorsing the changes as a preliminary step in winding down and eliminating the program, while the minority recommended them as lasting reforms. The recommendations, similar to the reforms President Obama proposed last week, include limiting the intelligence analysts' access to records to those of persons no more than two links removed from a suspect instead of three and creating a panel of lawyers to act as public advocates in major cases in secret surveillance programs.

The proposed reforms offer a continuation of a long-standing approach to solving government-created problems by adding another panel or layer of bureaucracy, while Congress continues to keep itself and the public in the dark. The secret surveillance court itself was created by Congress in the 1970s to provide some oversight to government investigations after a congressional committee had uncovered CIA and FBI surveillance practices that involved widespread spying on and warrantless investigations of citizens involved in legal, constitutionally protected political activities.

Both privacy rights and the nation's safety might be more secure if Congress stopped passing off oversight responsibilities to newly created panels and instead used its legislative power to reign in federal agencies to ensure they respect the Fourth Amendment guarantee of "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." Our elected representatives and senators might also insist that federal investigators refrain from random, dragnet searches of the communications records of the American people and that judges recall the Fourth Amendment's requirement that "no Warrants shall issue but on probable cause" and that they describe in particular "the place to be searched and the persons or things to be seized."