

Revision of Executive Order 12333
Privacy and Civil Liberties Information Paper¹

- A. **General.** Executive Order 12333 establishes the Executive Branch framework for the country's national intelligence efforts, and for protecting privacy and civil liberties in the conduct of intelligence activities. The revised Executive Order focuses on clarifying and aligning DNI and intelligence community authorities with the post-9/11 environment – making it consistent with the authorities granted by law under the Intelligence Reform and Terrorism Prevention Act of 2004, implementing recommendations of the 9/11 Commission and the WMD Commission, and making other changes and enhancements to further integrate the intelligence community (IC). The goal is to strengthen the nation's intelligence leadership and integration while preserving – and enhancing – the Order's civil liberties safeguards.
1. Part 1 of the Order lays out the various roles and responsibilities of our national security and intelligence elements of the Executive Branch. Restrictions on the conduct of intelligence activities are contained in Part 2 of the Executive Order. Definitions and general terms are addressed in Part 3.
 2. Changes are concentrated in Part 1 of the Order. Minimal changes are made to Parts 2 and 3 of the Order.
- B. **Changes to Part 1.** The changes in Part 1 are intended to clarify and align DNI and IC authorities, and to better integrate the IC. These changes also contain enhanced protections for privacy and civil liberties. Most changes to Part 1 are drawn from Executive Order 13355 (which amended EO 12333 in 2004 following the 9/11 Commission report), and from the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which amended the National Security Act of 1947.
1. *New Policies, Guidelines, and Procedures, including Attorney General Approval.* Part 1 calls for the Director of National Intelligence (DNI) to develop 15 new policies, guidelines, and procedures to implement its changes. Requiring that the exercise of authorities be documented in this manner helps protect privacy and civil liberties interests and ensures compliance with laws.
 - a. Three of these guidelines must be approved by the Attorney General (AG). AG approval helps ensure compliance with applicable laws, as well as with the U.S. person guidelines set forth in Part 2 of the Order, which the AG must also approve. AG approval in Part 1 is required for:
 - Guidelines for determining how information or intelligence is provided to or accessed by the IC, and for how it may be used and shared by the IC [1.3(a)(2)];

¹ This paper was prepared by the Civil Liberties and Privacy Office of the Office of the Director of National Intelligence. This paper presents privacy and civil liberties aspects of the recent revision of Executive Order 12333. It is intended for information purposes, to facilitate review of the revised Order; it is not intended to be an exhaustive listing of relevant provisions or a formal assessment of privacy and civil liberties implications.

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- Procedures for implementing advisory tasking authorities and monitoring or evaluating USG responsiveness [1.3(b)(18)]; and
 - Policies and procedures for coordinating all counterintelligence activities and clandestine collection of foreign intelligence inside the U.S. [1.3(b)(20)(C)].
- b. Moreover, the Office of the Director of National Intelligence (ODNI) includes the Civil Liberties Protection Officer (CLPO), a statutory position with the mission of ensuring that IC policies and procedures contain adequate protections for privacy and civil liberties. Requiring the DNI to put policies in place to implement authorities will result in a civil liberties and privacy review by the CLPO.
2. *Role of Attorney General on Intelligence Matters inside the United States.* The revised Order makes clear the Attorney General’s role on intelligence matters inside the United States.
- a. *FBI coordination.* The FBI, which is subject to the direct supervision of the AG, coordinates the clandestine collection of foreign intelligence collected through human sources or through human-enabled means and counterintelligence activities inside the US. [1.3(b)(20)(A)]
- b. *AG Approval of Coordination Procedures inside the United States.* The DNI must ensure, through appropriate policies and procedures, the deconfliction, coordination, and integration of all intelligence activities conducted by an IC element or funded by the National Intelligence Program (NIP). [1.3(b)(20)] The AG approves all such policies and procedures for coordination of counterintelligence activities and the clandestine collection of foreign intelligence inside the United States. [1.3(b)(20)(C)] Note the distinction between this subparagraph (C), and subparagraph (A) – the AG’s approval extends to coordination procedures for all clandestine collection of foreign intelligence inside the US – not just for collection through human sources or human-enabled means.
- c. *Requirement to Inform AG of Activities inside the United States.* In addition, all departments and agencies are obligated to inform the AG of clandestine collection of foreign intelligence or counterintelligence activities inside the US. [1.5(h)] Thus, the AG is provided the direct oversight authority (via its supervision of FBI), approval of policies, and receipt of information, to oversee the clandestine foreign intelligence and counterintelligence activities inside the United States.
3. *Additional Provisions in Part 1.*
- a. *Goals.* A stand-alone statement of objectives has been added regarding protection of civil liberties and privacy rights, in section 1.1(b):

The United States Government has a solemn obligation, and shall continue in the conduct of intelligence activities under this order, to protect fully the legal rights of all

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United States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law.

- b. *Definition of National Intelligence.* Section 1.3(a) deals with the definition of “national intelligence” in the IRTPA, and assigns to the DNI the task, contemplated by the IRTPA (Section 3(5) of the National Security Act of 1947), to determine whether “intelligence” pertains to more than one agency. It also provides that the DNI must develop guidelines for how information is to be provided to, accessed by, used, and shared within the IC. AG approval of these guidelines is required as stated above. In addition, the requirement has been added that these guidelines must be consistent with guidelines issued pursuant to Section 1016 of IRTPA, which include the Guidelines to Ensure that the Information Privacy and Other Legal Rights of Americans are Protected in the Development and Use of the Information Sharing Environment.² [1.3(a)(2)]
- c. *Access to National Intelligence.* Section 1.3(b)(9) provides that the DNI will establish guidelines for access to and dissemination of intelligence. Note that the Act requires that the DNI be provided with access to national intelligence (102A(b)), and provides that the DNI shall have principal authority to ensure maximum availability of and access to intelligence information within the IC consistent with national security requirements (102A(c)). Section 1.3(b)(9) specifically provides that “access to and dissemination of information concerning United States persons shall be governed by procedures developed in accordance with Part 2 of this Order.”
- d. *Advisory Tasking.* Section 1.3(b)(18) reflects the National Security Act’s authority [102A(f)(3)] – and the Order’s pre-existing authority – for the DNI to provide “advisory tasking” to agencies of the United States Government outside of the IC. This section further provides that the DNI “shall establish procedures, in consultation with affected heads of departments and agencies and subject to the approval of the Attorney General, to implement this authority,” as well as to evaluate responsiveness.
- Requiring the DNI to establish procedures necessarily involves review by the DNI’s CLPO.
 - Recognizing the potential sensitivity of the “advisory tasking” authority granted in the National Security Act and reflected in 1.3(b)(18), Section 1.3(b)(19) further emphasizes that the DNI “[s]hall fulfill the responsibilities in section 1.3(b)(17) [tasking – also granted in the National Security Act, 102A(f)(1)] and 1.3(b)(18), consistent with applicable law and with full consideration of the rights of United States persons, whether information is to be collected inside or outside the United States.”³

² These are otherwise known as the “ISE Privacy Guidelines.” See <http://www.ise.gov/pages/privacy-implementing.html> for more information.

³ In addition, the Order provides, as it did before, that agencies shall “[p]rovide, to the maximum extent permitted by law, subject to the availability of appropriations and not inconsistent with the mission of the department or agency, such further support to the Director as the Director may request...” [1.5(d)] The revised Order adds that agencies shall “[r]espond to advisory tasking from the Director under section 1.3(b)(18) of this order to the greatest extent possible, in

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- e. *Role of FBI and Attorney General.* As noted previously, Sections 1.3(b)(20)(A) and (C), and 1.5(h), provide for the FBI and the AG to have lead roles or oversight responsibility for counterintelligence activities and the clandestine collection of foreign intelligence inside the United States.
- f. *Ensuring Compliance by Non-IC Elements with Part 2 of Order.* A new requirement has been added for all departments and agencies. Section 1.5(f) requires department and agency heads to “[e]nsure that all elements within the department or agency comply with the provisions of Part 2 of this Order, regardless of Intelligence Community affiliation, when performing foreign intelligence or counterintelligence functions.”⁴
- g. *IOB Reporting.* Section 1.6(c) maintains the obligation of IC elements to report to the Intelligence Oversight Board (IOB) “any intelligence activities of their elements that they have reason to believe may be unlawful or contrary to executive order or presidential directive.” A change was made to this section to include a cross-reference to the new Executive Order for the President’s Intelligence Advisory Board, and to replace the phrase “keep the Director of Central Intelligence appropriately informed” with “provide copies of such reports to the Director.”
- h. *Privacy and Civil Liberties Officials.* Section 1.6(h) of the Order previously provided for inspectors general and general counsels to have access to information necessary to perform their duties. It now adds officials responsible for protecting privacy and civil liberties to that list.

C. Changes in Part 2.

1. Section 2.3, adds “after consultation with the Director” in relation to development of procedures to be approved by AG to collect, retain, and disseminate information concerning United States Persons. This consultation role is intended to help ensure that the rules for collecting, retaining, and disseminating USP information are consistent and harmonized in a manner that facilitates information sharing while protecting privacy and civil liberties, consistent with a recommendation from the WMD Commission. It will also, among other things, involve the CLPO, with its statutory duty to ensure that the policies and procedures of IC elements contain adequate safeguards for privacy and civil liberties.
2. The first unnumbered full paragraph at the end of Section 2.3 has been amended to address the sharing of information derived from signals intelligence.

accordance with applicable policies established by the head of the responding department or agency.” [1.5(e)] Thus, the agency’s “response” must not only be in accordance with applicable law, subject to availability of appropriations, and not inconstant with its mission, but must also be in accordance with its own internal policies.

⁴ Previously, the Order contained a more limited provision under Section 1.12, Intelligence Components Utilized by the Secretary of Defense. Section 1.12(e) provided: “In carrying out the responsibilities in section 1.11, the Secretary of Defense is authorized to utilize ... [o]ther offices within the Department of Defense appropriate for the conduct of the intelligence missions and responsibilities assigned to the Secretary of Defense. If such other offices are used for intelligence purposes, the provisions of Part 2 of this Order shall apply to those offices when used for those purposes.”

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- a. Section 2.3 provides that IC elements may collect, retain, and disseminate information concerning U.S. persons, pursuant to AG-approved procedures. It then lists the types of information as to which the procedures will permit collection/retention/dissemination (e.g., publicly available information, foreign intelligence information, etc.).
- b. At the end of this list, section 2.3 provides that in addition, agencies may disseminate information to other elements of the IC for purposes of allowing the recipient to determine whether the information is relevant to its responsibilities and can be retained. Each IC element would still apply its “U.S. Person rules” to determine whether it could retain the information. This paragraph previously excluded “information derived from signals intelligence” from this formulation. It now says that information derived from signals intelligence can only be disseminated in accordance with procedures established by the DNI in coordination with the Secretary of Defense, and approved by the AG.

Note that any information protected by statute – such as electronic surveillance covered by the Foreign Intelligence Surveillance Act (FISA) – would only be disseminated pursuant to the provisions of that statute. For example, Section 2.8 of the Order, which remains unchanged, provides that “[n]othing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.” In addition, Section 2.5 of the Order, as discussed below, explicitly refers to FISA.

3. Section 2.5 requires AG approval for use of techniques for which a warrant would be required for law enforcement purposes. Section 2.5 has been in place since 1981.
 - a. Even though it overlaps with FISA, it remains in place as an additional Executive Branch requirement for conducting activities covered by FISA.
 - b. In addition, prior to the FISA Amendments Act of 2008 (FAA), Section 2.5 was the authority used to conduct certain surveillance and searches on U.S. persons overseas. The FAA now requires a FISA court order for such searches.
 - c. Only the last sentence of this provision has been adjusted. When Section 2.5 was first written in 1981, FISA only covered electronic surveillance. Therefore, Section 2.5’s last sentence read: “Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act, shall be conducted in accordance with that Act, as well as this Order.” This sentence has been updated to reflect the fact that FISA covers more than electronic surveillance – it now states that all authority delegated to the AG under Section 2.5 must be exercised in accordance with FISA.
4. Section 2.6 – Assistance to Law Enforcement and Other Civil Authorities – has been expanded to include a reference to “other civil authorities” in paragraph (d), after “render any other assistance and cooperation to law enforcement.” Note that providing specialized equipment, technical knowledge, or assistance of expert personnel “for use by any department or agency” was previously in section 2.6(c). This section was revised for clarity and to reflect current lawful practices such as sharing imagery information to assist with the battle against California wildfires or after natural disasters such as Hurricane Katrina.

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5. Section 2.9 – Undisclosed Participation – the only change to this limitation was that AG-approved procedures be established “after consultation” with the DNI.
6. A new Section 2.13 has been added relating to prohibiting covert action for purposes of influencing US domestic activities. This language appears in the National Security Act of 1947, and was part of the definition of “special activities” in the prior Order. The revised Order does away with the term “special activities” and replaces it with the statutorily defined term “covert action.”

D. Basic protections remain unchanged:

1. *Limitations on Collection, Retention, and Dissemination of U.S. Person Information.* IC elements continue to be limited in how they can collect, retain, and disseminate information about “U.S. persons.” These limitations are outlined in Section 2.3. None of the categories in section 2.3 have been changed. The only change made was to regulate the dissemination of signals intelligence information, as noted above (recognizing that FISA information is subject to the provisions of FISA and cannot be affected by Executive Order).
2. *AG Guidelines Requirements.* IC elements continue to require implementing guidelines that must be approved by the AG, also under Section 2.3.
3. *Restrictions on Collection Techniques Inside the U.S.* Restrictions on collection techniques remain unchanged. These restrictions continue to be outlined, without alteration, in Section 2.4, and include limitations on CIA electronic surveillance inside the United States, and physical searches and surveillance by IC elements other than FBI inside the United States.
4. *Restrictions on Undisclosed Participation in Organizations Within the U.S.* The Order continues to limit undisclosed participation in any organization within the United States. These restrictions are set forth in Section 2.9, without alteration.
5. *Human Experimentation.* The requirement that IC elements comply with HHS guidelines for research on human subjects, including documenting consent as required by such guidelines, continues as before. Section 2.10 on Human Experimentation has not been changed.
6. *Prohibition on Assassination.* The prohibition on assassination, set forth in Section 2.11, is unchanged.
7. *Indirect Participation.* IC elements may not “participate in or request any person to undertake activities forbidden by this Order.” This prohibition is set forth in Section 2.12, and remains unchanged.
8. *Definition of “United States person.”* The definition of United States person remains unchanged – and expansive. It includes not only citizens and permanent residents, but also

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U.S. corporations and unincorporated associations substantially comprised of citizens and residents.

To be clear, other than the changes highlighted and a few minor technical edits, Part 2 as a whole remains unchanged.

E. Other Matters.

1. *Definition of “Covert Action.”* This definition is taken from the National Security Act of 1947, and is used in lieu of the definition of “special activities” previously used in the Order.
2. *Definition of “Electronic Surveillance.”* This definition remains unchanged from the 1981 version. Note that any matter covered by the Foreign Intelligence Surveillance Act – including electronic surveillance as defined in that Act – must be conducted pursuant to the provisions of that Act.
3. *Definition of “National Intelligence.”* This definition is taken nearly verbatim from Section 3(5) of the National Security Act of 1947. There is a minor difference in wording. Section 3(5) provides that whether intelligence “pertains ... to more than one United States Government Agency” will be “as determined consistent with any guidance issued by the President.” The Order removes the reference to such guidance, because the President has explicitly assigned that task to the DNI under Section 1.3(a)(1) of the Order.