

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

June 15, 2015

The Honorable John Boehner
Speaker
United States House of Representatives

The Honorable Nancy Pelosi
Minority Leader
United States House of Representatives

The Honorable Kevin McCarthy
Majority Leader
United States House of Representatives

The Honorable Steny Hoyer
Democratic Whip
United States House of Representatives

The Honorable Steve Scalise
Majority Whip
United States House of Representatives

The Honorable Adam Schiff
Ranking Member, Permanent Select
Committee on Intelligence

The Honorable Devin Nunes
Chairman, Permanent Select Committee
on Intelligence

RE: Authority of the Privacy and Civil Liberties Oversight Board

Dear Speaker Boehner, Majority Leader McCarthy, Majority Whip Scalise, Chairman Nunes, Minority Leader Pelosi, Democratic Whip Hoyer, and Ranking Member Schiff:

We write as members of the bipartisan Liberty and Security Committee of The Constitution Project, a non-profit think tank and advocacy organization that brings together former elected officials and members of the law enforcement and intelligence communities, as well as legal academics and practitioners from across the political spectrum to develop consensus-based solutions to some of the most difficult constitutional challenges of our time. Today we call upon you to reject attempts to weaken the authority of the Privacy and Civil Liberties Oversight Board (PCLOB), an important watchdog agency critical to oversight and accountability on issues of national security.

As you know, the PCLOB was created based on the recommendations of the 9/11 Commission. The Commission noted the absence of any "office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to ensure that liberty concerns are appropriately considered." To address this concern, the 9/11 Commission recommended establishing a board within the executive branch to oversee the government's adherence to the protection of civil liberties in its efforts to prevent terrorism.

In response, Congress created the PCLOB, an independent agency within the executive branch designed to ensure that our counterterrorism programs, laws, policies, and practices incorporate sufficient safeguards for protecting privacy and civil liberties. Such oversight helps us ensure as a nation that we uphold our constitutional values and maintain proper limits on government power. For this reason, the Constitution Project Liberty and Security Committee has long supported the creation of a strong, independent, and bipartisan PCLOB to fulfill this important role in protecting core American values.

We are deeply troubled by a provision in the Intelligence Authorization Act for Fiscal Year 2016 reported out of the House Permanent Select Committee on Intelligence that would severely undercut the important oversight authority of the Board. That provision, Section 306 of the Intelligence Authorization Act, states that “[n]othing in this section shall be construed to authorize the Board, or any agent thereof, to gain access to information that an executive branch agency deems related to covert action, as such term is defined in section 503(e) of the National Security Act of 1947 (50 U.S.C. 3039(e)).”

Effective oversight authority requires that the Board have access to all relevant information regarding counterterrorism laws, policies, and programs. Many such laws, policies, and programs will involve covert action, which by statute is defined as any activities of the United States designed to influence the political, economic, or military conditions abroad where the role of the United States will not be apparent or acknowledged publicly. Allowing executive branch agencies to refuse to provide such information to the Board will prevent the Board from being able to carry out the vital *independent* review of government counterterrorism programs it is tasked with conducting.

Claims that classified information, including information about covert action, must be hidden from the Board because it issues public reports and holds public hearings are unwarranted. Federal courts similarly issue public decisions and Congressional oversight committees often hold public hearings, but that has never been a basis for denying them access to classified information where necessary to perform their duties. By law, the Board makes its reports available to the public only to the extent “that is consistent with the protection of classified information...”¹ It must also, by law, hold public hearings and inform the public of its activities “in a manner consistent with the protection of classified information...”² There is no indication that the Board or its staff, who all hold security clearances, have ever mishandled classified information. It also bears noting that review by the independent bipartisan Board is in fact most needed when secret government action is involved and the public will likely be unaware of any infringements that are occurring.

The legislation creating the Board has had broad bipartisan support. In 2007, President George W. Bush signed legislation granting the Board independence and subpoena power. We urge you to

¹ 42 U.S.C. § 2000ee(f)(1).

² 42 U.S.C. § 2000ee(f)(2).

reject attempts to dilute the Board's authority by allowing executive agencies to sidestep the Board's oversight when it is most needed to protect our liberties.

Sincerely,

David Cole (co-chair)

Hon. George J. Mitchell Professor in Law and Public Policy at Georgetown University Law Center

David Keene (co-chair)

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Hon. James Robertson (Ret.)

Neutral Arbitrator and Mediator, JAMS; U.S. District Judge for the District of Columbia, 1994-2010

William S. Sessions

Holland & Knight, LLP; former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Neal R. Sonnett

Past Member, American Bar Association Board of Governors; Past Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; Past Chair, American Bar Association Criminal Justice Section; former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida, 1967-1972.

John W. Whitehead

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Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell; Colonel, United States Army (Ret.)