

December 11, 2015

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

Dear Majority Leader McConnell and Minority Leader Reid:

We write to urge you not to gut the Privacy and Civil Liberties Oversight Board's authority by denying it access to the information it needs to do its job, which includes information related to covert action. Section 305 of the 2016 Intelligence Authorization Act (H.R. 4127), which the House passed on December 1, would deny PCLOB access to this information. Enacting this limitation in the upcoming omnibus or in any other legislative vehicle would jeopardize effective oversight of U.S. counterterrorism programs at a time when it is needed most.

The PCLOB is an independent agency within the executive branch that was established by Congress in response to recommendations by the 9/11 Commission. The Board is charged with ensuring that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties. To ensure that the Board is able to fulfill this mission, it is authorized by statute to access all relevant executive agency records, reports, audits, reviews, documents, papers, recommendations, and any other relevant materials, including classified information.

Section 305 would carve out an unnecessary and expansive exception to this requirement by allowing agencies to withhold from the Board any information "regarding" covert action. Covert action, defined in section 503(e) of the National Security Act of 1947, means any "activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."

Allowing agencies to withhold information "regarding" such action would severely restrict the Board's ability to fulfill its statutory mission of conducting oversight of our nation's counterterrorism efforts. Many counterterrorism programs and policies that the Board is charged with overseeing fall within the covert action definition. The Board simply cannot conduct oversight if it is unable to access information about the very programs it is charged with overseeing. Moreover, oversight of non-covert programs could be hampered as well depending on how broadly the phrase "information *regarding*" covert action is construed. We are also concerned that allowing agencies to withhold this information would prevent the PCLOB from reviewing information related to credible allegations of violations of human rights law and the laws of war, which the United States is legally bound to investigate.

Perhaps most importantly, such a restriction is entirely unnecessary. Under its enabling statute, the PCLOB may only access information that is relevant to its mission of ensuring that counterterrorism programs adequately respect privacy and civil liberties. Its Board and staff have top secret security clearances and routinely handle classified information. Its reports are made public only to the greatest

extent that is consistent with the protection of classified information. Similarly, its public hearings must be conducted in a manner that is consistent with the protection of classified information. There is no indication that any classified information has been compromised as a result of the PCLOB's oversight function, including after two in-depth inquiries into surveillance programs.

Troubling news reports indicate that Section 305 of the bill may have been motivated by the PCLOB's current inquiry into counterterrorism programs under Executive Order 12333 or the suggestion, made by the Board's Chair in an opinion piece, that the PCLOB be tasked with a role related to drone strikes.¹ We urge you to reject such backlash against an important independent oversight agency.

Sincerely,

Access Now

Advocacy for Principled Action in Government

American-Arab Anti-Discrimination Committee

American Civil Liberties Union

Amnesty International USA

Appeal for Justice

Association of Research Libraries

Bill of Rights Defense Committee

Brennan Center for Justice

Campaign For Liberty

Center for Democracy and Technology

Center for Victims of Torture

The Constitution Project

Defending Dissent Foundation

Electronic Frontier Foundation

Government Accountability Project

Human Rights Watch

National Religious Campaign Against Torture

National Security Counselors

New America's Open Technology Institute

Niskanen Center

OpenTheGovernment.org

Restore The Fourth

RootsAction.org

TechFreedom

Signatories as of 12/14/2015

¹ Ellen Nakashima, Upset Over Op-ed, GOP Lawmakers Seek to Curb Privacy Board, WASH. POST, (June 10, 2015), available at http://www.washingtonpost.com/world/nationalsecurity/upset-over-op-ed-gop-lawmakers-seek-to-curb-privacy-board/2015/06/10/11ee864e-0f12-11e5-aded-e82f8395c032_story.html; Julian Hattem, GOP Accused of Trying to Hobble Privacy Watchdog, THE HILL, (June 10, 2015), available at <http://thehill.com/policy/technology/244574-gop-accused-of-trying-to-hobble-privacy-watchdog>.