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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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July 13, 2016

The Honorable Richard Burr
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Chairman Burr and Vice Chairman Feinstein:

I write to express serious concerns about provisions contained in both Senate and House intelligence authorization bills that would undermine the authority of the Privacy and Civil Liberties Oversight Board (PCLOB).

In the Senate, the Judiciary Committee has primary jurisdiction over the PCLOB. PCLOB nominees are referred to the Judiciary Committee, as is legislation focused on the PCLOB. For example, in the last Congress and in this Congress, the Strengthening Privacy, Oversight, and Transparency Act (S. 1337 (114th Cong.); S. 2903 (113th Cong.)), a bill to reform the PCLOB, was referred to the Judiciary Committee. Further, the PCLOB is not part of the National Intelligence Program that is traditionally the focus of the intelligence authorization bills.

Nonetheless, a pattern is emerging of the Senate Intelligence Committee considering and adopting behind closed doors provisions that undermine the PCLOB. Last year the Intelligence Authorization Act for FY 2016 included a provision limiting the PCLOB's access to certain information. Unfortunately, that legislation was ultimately included in the FY 2016 omnibus appropriations bill, making it impossible to strip this controversial provision. This year, the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) have each included harmful PCLOB provisions in versions of the Intelligence Authorization Act for Fiscal Year 2017, H.R. 5077 and S. 3017.

HPSCI is evidently asserting jurisdiction to authorize the annual spending of the PCLOB. But the way it has done so appears designed to undercut and possibly eliminate the Board altogether. Section 303 of the House bill sets an authorization level of roughly \$10 million for

the PCLOB in FY 2017, but repeals its spending authorization for future years. It further states that without a specific authorization of appropriations in subsequent years, the PCLOB may not expend any additional appropriated funds. This provision is entirely unnecessary, as existing law already authorizes appropriations for the PCLOB going forward. But more than that, this provision has the potential to cut off PCLOB funding in the future. This provision requires that Congress pass a new authorization for appropriations every year for the PCLOB in order for the PCLOB to continue to expend appropriated funds. But the PCLOB is not subject to an annual authorization bill. In fact, the only authorization bill that consistently passes Congress every year is the National Defense Authorization Act. Intelligence authorization bills are neither the appropriate vehicle for authorizing spending for the PCLOB, nor do they pass every year. Under the House bill, if PCLOB spending were not specifically authorized next year, it appears possible that the PCLOB would be unable to expend appropriated funds. This is completely unacceptable.

Section 603 of the Senate legislation likewise raises serious concerns. It would unnecessarily constrain the PCLOB to scrutinizing only programs that implicate the privacy rights of U.S. persons. But many national security and intelligence programs can impact the privacy and civil liberties of both U.S. persons and non-U.S. persons, and in some cases, it may be unclear whether the rights of U.S. persons are affected. The PCLOB itself raised significant concerns about the effect of this provision on their current activities. It explained that it would be prohibited from “weighing in on matters where the President or elements of the Intelligence Community have specifically solicited the Board’s advice on issues concerning non-U.S. persons,” such as Presidential Policy Directive 28. As made clear by the bipartisan Board’s statement opposing this provision, drawing this artificial line is counter-productive and entirely unnecessary. Additionally, this section of the Senate bill eliminates the PCLOB’s future spending authorization – although I understand this may not have been intended.

Both the Senate and House bills also included identical provisions (Section 601 and Section 307, respectively) that mandate that the PCLOB keep the Director of National Intelligence, the heads of other intelligence agencies, and the intelligence committees “fully and currently informed” of its activities. This misguided provision would undermine the independence of PCLOB. As the PCLOB itself explained, while it already keeps the Intelligence Community informed of its reviews, “it would be improper for the Board, as the oversight agency, to be required to report to the agencies over which it has oversight.” With respect to congressional reporting, the PCLOB is already required to report twice a year with a “description of the major activities of the Board” to several congressional committees – including the Senate and House Judiciary Committees, Senate Homeland Security and Governmental Affairs Committee, House Oversight and Government Reform Committee, House Homeland Security Committee, Senate Select Committee on Intelligence, and the House Permanent Select Committee on Intelligence. 42 U.S.C. 2000ee(e). The additional reporting required by these bills is duplicative and should not be directed only to the Intelligence Committees.

The PCLOB has served a valuable role in reviewing government surveillance programs and recommending reforms that have largely been implemented by the executive branch. It is particularly inappropriate to debate and report legislation in a closed markup that is designed to

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diminish the authority of a public, independent oversight board. Congress should be enhancing its role, not undercutting it.

As the intelligence authorization bill proceeds, I request that you remove provisions limiting the PCLOB's important oversight role, and I strongly object to those in the House bill as Ranking Member of the authorizing committee. If Senators on the Senate or House Intelligence Committees wish to make changes to the PCLOB's authority, including its scope and funding authorization, they are free to introduce legislation, which would then be referred to the Judiciary Committee to consider in a public setting.

Sincerely,



PATRICK LEAHY
United States Senator