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Privacy and Civil Liberties Oversight Board: New Independent Agency Status

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Summary

Recommended by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission), the Privacy and Civil Liberties Oversight Board (PCLOB) was initially established as an agency within the Executive Office of the President (EOP) in 2004. Critics, however, maintained that the board appeared to be a presidential appendage, devoid of the capability to exercise independent judgment and assessment or to provide impartial findings and recommendations. This viewpoint gained acceptance in the 110th Congress when the PCLOB was reconstituted as an independent agency within the executive branch by the Implementing Recommendations of the 9/11 Commission Act (IR9/11CA), signed into law on August 6, 2007. Monitoring the transition of the PCLOB to, and its initial operations in, its new independent status, this report will be updated as events warrant.

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Privacy and Civil Liberties Oversight Board: New Independent Agency Status

The final report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission), released on July 22, 2004, recommended that “there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”¹ This recommendation was the third and final one made in a section of the report captioned “The Protection of Civil Liberties.” In the other two, the commission recommended that (1) the President, in the course of determining the guidelines for information sharing among government agencies and by them with the private sector, “should safeguard the privacy of individuals about whom information is shared”; and (2) the “burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. If the power is granted,” the report added, “there must be adequate guidelines and oversight to properly confine its use.”² Read together, these recommendations called for a board to oversee adherence to presidential guidelines on information sharing that safeguard the privacy of individuals about whom information is shared, and adherence to guidelines on the executive’s continued use of powers that materially enhance security. The report offered no additional commentary on the composition, structure, or operations of the recommended board. Such a board, however, had been proposed in December 2003 in the fifth and final report of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, chaired by former Virginia Governor James S. Gilmore III.³

Initial Responses

An initial response to the 9/11 Commission’s recommendation was made by President George W. Bush on August 27, 2004, when he issued E.O. 13353 establishing the President’s Board on Safeguarding Americans’ Civil Liberties.⁴ Located in the Department of Justice and chaired by the Deputy Attorney General, this 20-member board consisted largely of senior attorneys from the Departments of

¹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 395.

² *Ibid.*, pp. 394-395.

³ U.S. Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *V. Forging America’s New Normalcy: Securing Our Homeland, Preserving Our Liberty* (Arlington, VA: Rand Corporation, 2003), pp. 22-23.

⁴ 3 C.F.R., 2004 Comp., pp. 211-213.

Defense, Justice, and State, Central Intelligence Agency (CIA), National Security Agency, and Office of Management and Budget, as well as a few senior administrative officials from the Departments of Homeland Security and the Treasury and the CIA. The directive specified the following policy: “The United States Government has a solemn obligation, and shall continue fully, to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions.”⁵ Among the functions prescribed for the board were advising the President on effective means to implement this policy; periodically requesting reports from the departments and agencies concerning policies and procedures that ensure implementation of this policy; recommending to the President policies, guidelines, and other administrative actions, technologies, and legislation to implement this policy; and obtaining information and advice relating to this policy from representatives of entities or individuals outside the federal executive branch.

The 108th Congress also responded to the commission’s recommendation in the course of developing intelligence reform legislation. A Senate bill (S. 2845), among other provisions, mandated the establishment of a Privacy and Civil Liberties Oversight Board (PCLOB) within the Executive Office of the President (EOP). Its chair and four additional members would be appointed by the President with Senate confirmation for six-year terms. These provisions regarding the board remained in the bill, which the Senate adopted in amended form on a 96-2 vote on October 6, 2004.

The House counterpart bill (H.R. 10), as introduced, made no provision for a PCLOB. The version of the bill ordered reported by the Committee on the Judiciary included a provision, added during markup, establishing a PCLOB very similar to the one which would have been created by the Senate measure (S. 2845), except it would have been an independent agency within the executive branch. This provision, however, was omitted from the version of the bill reported from the Committee on Rules on October 7.⁶ The version of the House bill adopted on a 282-134 vote on October 8 made no provision for a civil liberties oversight board.

The conference committee version of the intelligence reform legislation retained the mandate for a PCLOB.⁷ Located within the EOP, the board would consist of a chair, vice chair, and three additional members, all appointed by, and serving at the pleasure of, the President. Nominees for the chair and vice chair positions would be subject to Senate approval. Although the board would have most of the review and advice responsibilities contained in the Senate-adopted version of the legislation, it would not have subpoena power, but was authorized to request the assistance of the Attorney General in obtaining desired information from persons other than federal departments and agencies. On December 7, 2004, the House, on a 336-75 vote,

⁵ *Congressional Record*, daily edition, vol. 150, October 7, 2004, pp. H8726-H8792.

⁶ See *ibid.*, October 7, 2004, pp. H8726-H8792.

⁷ See U.S. Congress, House Committee of Conference, *Intelligence Reform and Terrorism Prevention Act of 2004*, H.Rept. 108-796, report to accompany S. 2845, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 49-53.

agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote. On December 17, President George W. Bush signed the legislation into law.⁸

As initially chartered, the PCLOB was vested with responsibilities in three areas. First, for “the purpose of providing advice to the President or to the head of any department or agency of the executive branch,” the board was directed to:

(A) review proposed regulations and executive branch policies related to efforts to protect the Nation from terrorism, including the development and adoption of information sharing guidelines [authorized elsewhere in the statute];⁹

(B) review the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation from terrorism, including the implementation of information sharing guidelines [authorized elsewhere in the statute];

(C) advise the President and the head of any department or agency of the executive branch to ensure that privacy and civil liberties are appropriately considered in the development and implementation of such regulations and executive branch policies; and

(D) in providing advice on proposals to retain or enhance a particular government power, consider whether the department or agency, or element of the executive branch concerned has explained —

(i) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties;

(ii) that there are adequate guidelines and oversight to properly confine the use of the power; and

(iii) that the need for the power, including the risk presented to the national security if the Federal Government does not take certain actions, is balanced with the need to protect privacy and civil liberties.¹⁰

Second, the PCLOB was to “continually review”:

(A) regulations, executive branch policies, and procedures (including the implementation of such regulations, policies, and procedures), related laws pertaining to efforts to protect the Nation from terrorism, and other actions by the executive branch related to efforts to protect the Nation from terrorism to ensure that privacy and civil liberties are protected; and

(B) the information sharing practices of the departments, agencies, and elements of the executive branch to determine whether or not such practices appropriately protect privacy and civil liberties and adhere to the information sharing guidelines [authorized elsewhere in the statute] and to other applicable laws,

⁸ P.L. 108-458; 118 Stat. 3638.

⁹ The reference is to Sec. 1016 and the creation of the Information Sharing Environment (ISE) by the President.

¹⁰ 118 Stat. 3684.

regulations, and executive branch policies regarding the protection of privacy and civil liberties.¹¹

Third, the board was to “ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism.”¹²

The PCLOB, however, was not vested with potent authority to obtain information relative to the execution of these responsibilities. Instead of subpoena power to compel the production of information, documents, reports, answers, records, accounts, papers, or other documentary and testimonial evidence from entities other than departments, agencies, and elements of the federal executive branch, it could request the assistance of the Attorney General to obtain such material. The Attorney General was authorized to exercise a discretion in this regard, “and may take such steps as appropriate to ensure compliance” with the board’s request.¹³

In the case of departments, agencies, and elements of the federal executive branch “unreasonably” refusing to furnish or otherwise not providing information sought by the PCLOB, the board was authorized to “report the circumstances to the head of the department or agency concerned without delay.” In such instances, the department or agency head “shall ensure compliance with such request” when, in his or her determination, “the requested information or assistance may be provided to the Board in accordance with applicable law.” Allowance was also made for the Director of National Intelligence to override PCLOB information requests “to protect the national security interests of the United States,” and for the Attorney General to do the same “to protect sensitive law enforcement or counterterrorism information or ongoing operations.”¹⁴

Implementation

No nominations to membership positions on the PCLOB were made in the early weeks of 2005, and the President’s initial FY2006 budget documents contained no request for funds for the panel, although a later justification document requested \$750,000.¹⁵ In mid-May, a bipartisan group of Senators sent a letter to White House Chief of Staff Andrew H. Card, Jr., asking for a timetable and details on how the membership and staff of the board would be put in place. The letter also noted that the proposed budget for the board was well below the \$13 million sought for the Office of Civil Rights and Civil Liberties at the Department of Homeland Security, the \$39 million requested for the Office of the Trade Representative, and the \$4 million for the Council of Economic Advisers. A White House spokesman indicated

¹¹ 118 Stat. 3685.

¹² Ibid.

¹³ 118 Stat. 3686.

¹⁴ Ibid.

¹⁵ U.S. Office of Management and Budget, *Executive Office of the President: Fiscal Year 2006 Congressional Budget Submission* (Washington: n.d.), p. 111.

that “the hope is to move quickly” on the appointment of board members.¹⁶ On June 10, the White House announced that President Bush would nominate Carol Dinkins to be chair and Alan Charles Rauls to be vice chair of the board, both subject to Senate approval. The President also would name Lanny Davis, Theodore Olsen, and Francis Taylor to serve as members of the board.

On December 5, 2005, the former members of the 9/11 Commission issued a final report on the actions taken by the federal government to implement the recommendations of the panel. The report saw “little urgency” in the creation of the PCLOB and noted that, while the President had nominated individuals to its leadership positions in June, “the Senate has not confirmed them.” Furthermore, funding for the board was regarded to be “insufficient,” and “no meetings have been held, no staff named, no work plan outlined, no work begun, no office established.”¹⁷

Eventually, Dinkins and Rauls were confirmed by the Senate on February 17, 2006. All board members were sworn in and had their first meeting on March 14, 2006. Davis subsequently resigned from the board on May 14, 2007, because, as he indicated in his letter of resignation, he felt the board members had interpreted their oversight responsibilities too narrowly and that they had not exercised adequate independence when they accepted extensive redlining by Administration officials of the board’s first report to Congress.¹⁸

Reconstitution

As established, the PCLOB, to some, appeared to be a presidential appendage, devoid of the capability to exercise independent judgment and assessment or to provide impartial findings and recommendations. It was located in the EOP, an enclave of agencies immediately serving the President. Only two of its five members were subject to Senate approval, and all five served at the pleasure of the President. Its advice was to be “to the President or to the head of any department or agency of the executive branch.”¹⁹ Although it was to report to Congress at least annually, it was not clear if its members or chair would testify before congressional committees or if the board could otherwise assist Congress. The board’s budget was presented as an account within the funding request for the White House Office (WHO), suggesting that it was a subunit of the WHO (although the board’s chartering legislation placed it in the EOP, making it a coequal agency to the WHO).

That there was dissatisfaction with the status of the PCLOB was evidenced in March 2005, when Representative Carolyn B. Maloney introduced, for herself and 42 bipartisan cosponsors, legislation (H.R. 1310) which would have reconstituted the

¹⁶ Eric Lichtblau, “Senators Say Bush Lags on Creating Terror Panel,” *New York Times*, May 15, 2005, p. 25.

¹⁷ 9/11 Public Discourse Project, *Final Report on 9/11 Commission Recommendations* (Washington: December 5, 2005), p. 3, available at [<http://www.9-11pdp.org>].

¹⁸ John Solomon and Ellen Nakashima, “White House Edits to Privacy Board’s Report Spur Resignation,” *Washington Post*, May 15, 2007, p. A5.

¹⁹ 118 Stat. 3684.

PCLOB as an independent agency within the executive branch, made the appointment of its members subject to Senate confirmation, and limited its partisan composition to not more than three members being from the same political party.²⁰ Almost one year later, a similar bill (H.R. 5000) was introduced by Representative Christopher Shays for himself and 13 bipartisan cosponsors. These bills, each referred to multiple committees, received no further attention during the 109th Congress.

The 110th Congress returned to the status of the PCLOB when legislation was developed to implement the remaining recommendations of the 9/11 Commission. The House bill (H.R. 1), introduced on January 5, 2007, sought to reconstitute the board as an independent agency and subjected its five members to Senate approval and to six-year terms. The Senate counterpart proposal (S. 4) kept the board in the EOP, but also subjected its five members to Senate confirmation and to six-year terms. Ultimately, the House preference for the PCLOB to be reconstituted as an independent agency within the executive branch prevailed. President Bush signed the legislation, the Implementing Recommendations of the 9/11 Commission Act (IR9/11CA), into law on August 3, 2007.²¹

Transition

Title VIII of the IR9/11CA reconstituting the PCLOB set out the following findings which underlie the reestablished board in its new independent status.

(1) In conducting the war on terrorism, the Government may need additional powers and may need to enhance the use of its existing powers.

(2) This shift of power and authority to the Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life and to ensure that the Government uses its powers for the purposes for which the powers were given.

(3) The National Commission on Terrorist Attacks Upon the United States correctly concluded that “The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.”²²

The reconstituted PCLOB was also given two purposes.

(1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and

²⁰ See *Congressional Record*, daily edition, vol. 151, March 16, 2005, p. E456.

²¹ P.L. 110-53; 121 Stat. 266.

²² 121 Stat. 352.

(2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.²³

These purposes, given further elaboration in the restated functions of the board, suggested that it should be concerned with the actions and policy outcomes of both the executive branch and Congress. “The members of the Board,” it was also specified, “shall appear and testify before Congress upon request.”²⁴

In general, Section 801(d) of the title indicated that the amendments contained in Section 801(a) and (b) changing the status, mission, and operations of the PCLOB take effect 180 days after the date of the enactment of the IR9/11CA, which would be January 30, 2008, as the statute was signed into law on August 3, 2007. Section 801(c) of the title contained transition provisions for the board as it shifted from EOP agency status to being an independent agency within the executive branch. It stated that:

- Any individual who is a member of the PCLOB on the date of the enactment of the IR9/11CA may continue to serve on the board until 180 days after the date of the enactment of the act. (There is presently one vacancy on the board due to the resignation of Lanny Davis.)
- The term of any individual who is a member of the PCLOB on the date of the enactment of the IR9/11CA shall terminate 180 days after the date of the enactment of the act.
- The President and the Senate shall take such actions as are necessary for the President, by and with the advice and consent of the Senate, to appoint members to the PCLOB as constituted under the amendments made by Section 801(a), which include provisions for the initial members to serve terms of two, three, four, five, and six years, with the term of each to be designated by the President. Not more than three members of the board shall be members of the same political party, and nominees to be members of the board “shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience.”²⁵

The IR9/11CA authorized appropriations for the PCLOB in specific amounts for FY2008 through FY2011, and for FY2012 “and each subsequent fiscal year” authorized “such sums as may be necessary.”²⁶ The PCLOB was initially funded through the White House Office account in the Transportation, the Treasury, Housing

²³ Ibid.

²⁴ 121 Stat. 353.

²⁵ 121 Stat. 355.

²⁶ 121 Stat. 357.

and Urban Development, the Judiciary, the District of Columbia, the Executive Office of the President, and Independent Agencies Appropriations Act for FY2007. It was then funded through the WHO in the Financial Services and General Government Appropriations Act for FY2008. The Financial Services bill accounts were included in the Consolidated Appropriations Act, 2008, in Division D, where the PCLOB was a separate account among EOP entities in Title II, receiving \$2 million. The President's budget for FY2009 requests \$2 million for the PCLOB.²⁷ As an independent agency, its positioning in an appropriations bill for FY2009 has yet to be determined.

PCLOB Reports

U.S. Privacy and Civil Liberties Oversight Board, *First Annual Report to Congress: March 2006-March 2007* (Washington: April 20, 2007). 42 p.

———. *Second Annual Report to Congress: March 2007-January 2008* (Washington: January 30, 2008). 35 p.

———. *Issue Report: Terrorist Watch List Redress Activities* (Washington: September 10, 2007). 9 p.

These text of these reports as well as prepared testimony, letters, and statements by board members are available at [<http://www.privacyboard.gov>].

²⁷ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009 — Appendix* (Washington: GPO, 2008), p. 1222.