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Privacy and Civil Liberties Oversight Board: Congressional Refinements

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Abstract. Among the recommendations made by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in its final report was the creation of a board within the executive branch to oversee adherence to guidelines on, and the commitment to defend, civil liberties by the federal government. This CRS report examines the realization of this recommendation with the creation of the Privacy and Civil Liberties Oversight Board (PCLOB), and current efforts to refine the mandate and the mission of the board (H.R. 1, S. 4).

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CRS Report for Congress

Privacy and Civil Liberties Oversight Board: Congressional Refinements

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Summary

Among the recommendations made by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in its final report was the creation of a board within the executive branch to oversee adherence to guidelines on, and the commitment to defend, civil liberties by the federal government. This CRS report examines the realization of this recommendation with the creation of the Privacy and Civil Liberties Oversight Board (PCLOB), and current efforts to refine the mandate and the mission of the board (H.R. 1, S. 4), and will be updated as events warrant.

The final report of the 9/11 Commission 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

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.

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

Legislative Implementation

Among the initial bills offered to implement the recommendations of the 9/11 Commission was one introduced on September 7, 2004, by Senator John McCain (S. 2774), which would have established a five-member Privacy and Civil Liberties Oversight Board (PCLOB) within the Executive Office of the President (EOP).⁴ While board members would have been appointed by the President with Senate confirmation, their term of office was not specified, suggesting that they would have served at the pleasure of the President. Among the functions specified for the board were (1) the provision of advice and counsel to the President and the executive departments and agencies, both on policy development and implementation related to the protection of the nation from terrorism, and to ensure that privacy and civil liberties were appropriately considered in the development and implementation of terrorism policy; (2) continual review of such policy and its implementation to ensure that privacy and civil liberties were protected; (3) receipt and review of reports from privacy and civil liberties officers prescribed elsewhere in the legislation; and (4) periodic submission, not less than semiannually, of reports to Congress and the President. No further action was taken on this proposal during the 108th Congress.

A somewhat similar bill to implement the recommendations of the 9/11 Commission was offered by Representative Nancy Pelosi (H.R. 5024) on September 8, 2004. This proposal directed the President to determine guidelines for acquiring, accessing, using, and sharing information about individuals among federal, state, and local governments, as well as the private sector. It also would have established “within the executive branch a board to oversee adherence to” the President’s afore-mandated guidelines and “the commitment the Government makes to defend civil liberties.” The bill was referred to 11 House committees, but no further action was taken on it during the 108th Congress.

Selected to lead the Senate effort to implement the recommendations of the 9/11 Commission, Senator Susan Collins, the chair of the Committee on Governmental Affairs, and Senator Joseph Lieberman, the ranking minority member on the panel, initially discussed the general terms of their reform bill at a September 15, 2004, press conference. One of its components would have been a civil liberties oversight board.⁵ The draft text of the legislation was made public on September 20, 2004. The Committee on Governmental Affairs began a markup of the Collins proposal on September 21, and completed action the following day when the committee ordered the amended measure favorably reported as an original bill. Introduced by Senator Collins as an original bill on

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 See *Congressional Record*, daily edition, vol. 150, September 8, 2004, pp. S8869-S8915.

⁵ Philip Shenon, “Intelligence Proposals Gain in Congress,” *New York Times*, September 16, 2004, p. A15.

September 23, the legislation (S. 2840) was also introduced a second time that day, with Senator Lieberman as a cosponsor (S. 2845).⁶ At the end of the day, a unanimous-consent agreement was reached providing that, on September 27, the Senate would begin consideration of the latter bill (S. 2845). A bill very similar to the Senate vehicle was introduced in the House on September 24 by Representative Christopher Shays with bipartisan support (H.R. 5150), but no further action was taken on this measure during the 108th Congress.

As the Senate began consideration of S. 2845 on September 27, the legislation, among other provisions, mandated the establishment of a PCLOB within the 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.

In the House, the vehicle for implementing the recommendations of the 9/11 Commission was introduced by Speaker Dennis Hastert on September 24 (H.R. 10). The bill drew upon a September 16 draft proposal for strengthening federal intelligence capabilities that the President had submitted to Congress, with additional input from committee chairs who had held hearings on the findings and recommendations of the 9/11 Commission during August and the early weeks of September. As a result, the bill contained various provisions not found in the counterpart Senate bill (S. 2845). The House bill was referred to 12 committees, five of which — Armed Services, Financial Services, Government Reform, Intelligence, and Judiciary — conducted markups and ordered the resulting versions of the legislation reported on September 29.

As introduced, H.R. 10 mandated a Civil Liberties Protection Officer — to be appointed by a new National Intelligence Director (NID) — within the office of the NID to serve as a civil liberties and privacy overseer of the intelligence community, but no provision was made 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 counterpart 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 7.⁷ The board, constituted as an EOP agency, would have been included in the House bill pursuant to an amendment substituting the text of the Senate counterpart bill, as introduced (S. 2845), and the earlier McCain bill, as introduced (S. 2774),⁸ but this amendment was defeated on a 203-213 vote.⁹ The version of the House bill adopted on a 282-134 vote on October 8 made no provision for a civil liberties oversight board.

⁶ See *Congressional Record*, daily edition, vol. 150, September 23, 2004, pp. S9615-S9638.

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

⁸ For the text of the amendment, see U.S. Congress, House Committee on Rules, *Providing for Consideration of H.R. 10, 9/11 Recommendations Implementation Act*, H.Rept. 108-751, report to accompany H.Res. 827, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 5-152; *Congressional Record*, daily edition, vol. 150, October 7, 2004, pp. 8792-H8833.

⁹ *Congressional Record*, daily edition, vol. 150, October 7, 2004, p. H8850.

The conference committee version of the intelligence reform legislation retained the mandate for a PCLOB.¹⁰ Located within the EOP, the board would have consisted 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 have been subject to Senate approval. While the board would have had most of the review and advice responsibilities contained in the Senate-adopted version of the legislation, it would not have had 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. Also, the eight privacy and civil liberties officers that the Senate-adopted version of the legislation would have established within specified departments and agencies were addressed in a sense of Congress provision stating “that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.” On December 7, the House, on a 336-75 vote, agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote, clearing the intelligence reform legislation for the President’s signature. On December 17, President George W. Bush signed the legislation into law.¹¹

The sense of Congress recommendation in the legislation for privacy officers within agencies of the intelligence community was unexpectedly transformed by the Senate Committee on Appropriations when reporting the Transportation, Treasury, and General Government Appropriations Bill, 2005. The bill included a provision that “directs each agency to acquire a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy.” These officials appeared to be very similar to the privacy officers prescribed in the intelligence reform bill as introduced by Senator Collins. Initially, however, this requirement seemed to apply only to agencies funded by the bill. Such continued to be the case when the legislation was included in the Consolidated Appropriations Act, 2005 (H.R. 4818).¹² Within Division H, Section 522 stated: “Each agency shall have a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy,” and specified nine particular activities to be undertaken by such officers. The section prescribed privacy and data protection policies and procedures to be established, reviews to be undertaken, and related reports to be made. Located in Title V of the division, the requirements of the section appeared to be applicable only to agencies directly funded by the division. Furthermore, it did not appear that the section created new positions, but instead prescribed privacy officer responsibilities to be assigned to an appropriate individual in an existing position.¹³ The President, however, declined to implement the section.¹⁴

A February 11, 2005, memorandum to the heads of the executive departments and agencies from OMB Deputy Director for Management Clay Johnson III asked recipients “to identify to OMB the senior official who has the overall agency-wide responsibility for

¹⁰ 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).

¹¹ P.L. 108-458; 118 Stat. 3638.

¹² P.L. 108-447; 118 Stat. 2809.

¹³ *Congressional Record*, daily edition, vol. 150, November 19, 2004, pp. H10358-H10359.

¹⁴ See *Weekly Compilation of Presidential Documents*, vol. 40, December 13, 2004, p. 2925.

information privacy issues.” Expressing the administration’s commitment “to protecting the information privacy rights of Americans and to ensuring Departments and agencies continue to have effective information privacy management programs in place to carry out this important responsibility,” it noted that a Chief Information Officer or “another senior official (at the Assistant Secretary or equivalent level) with agency-wide responsibility for information privacy issues” could be named.¹⁵

Legislative Refinements

No nominations to membership positions on the PCLOB were made in the early weeks of the 109th Congress, and the President’s initial FY2006 budget documents contained no request for funds for the panel, although a later justification document requested \$750,000.¹⁶ 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 that “the hope is to move quickly” on the appointment of board members.¹⁷ On June 10, the White House announced that President Bush would nominate Carol Dinkins to be chair and Alan Charles Raul 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. Eventually, Dinkins and Rauls were confirmed by the Senate on February 17, 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

Efforts to refine the mandate and mission of the board began with the March 15, 2005, introduction of H.R. 1310 by Representative Carolyn B. Maloney for herself and 23 bipartisan cosponsors. The legislation would have reconstituted the 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.¹⁹

¹⁵ U.S. Office of Management and Budget, “Designation of Senior Agency Officials for Privacy,” Memorandum for Heads of Executive Departments and Agencies from Clay Johnson III, Deputy Director for Management (Washington: February 11, 2005).

¹⁶ U.S. Office of Management and Budget, *Executive Office of the President: Fiscal Year 2006 Congressional Budget Submission* (Washington: n.d.), p. 111.

¹⁷ Eric Lichtblau, “Senators Say Bush Lags on Creating Terror Panel,” *New York Times*, May 15, 2005, p. 25.

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

¹⁹ See *Congressional Record*, daily edition, vol. 151, March 16, 2005, p. E456.

During House consideration of the Transportation, Treasury appropriation bill (H.R. 3058) on June 29, 2005, Representative Maloney offered an amendment, which was agreed to, increasing the funding for the PCLOB \$750,000 to \$1.5 million. This provision remained in the bill when it was approved by the House the following day. In late July, Senate appropriators recommended \$1.5 million for the board.²⁰ This amount was provided to the board in the version of the appropriations bill signed into law by the President on November 30, 2005.²¹

Shortly thereafter, on December 5, 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.”²² As noted above, the leaders of the board were subsequently confirmed on February 17, 2006, and the board held its initial meeting on March 14, 2006.

Early in the 110th Congress, legislation (H.R. 1; S. 4) was introduced to implement unfinished recommendations of the 9/11 Commission. The House approved its bill on January 9, 2007, on a 299-128 vote. The Senate counterpart bill was referred to the Committee on Homeland Security and Governmental Affairs, which reported it on February 22. After considerable debate and amendment, the legislation was approved by the Senate on a 60-38 vote on March 13. Conferees on the legislation filed their report on July 25. The Senate adopted the report the following day on a 85-8 vote; the House concurred on July 27 on a 371-40 vote. The legislation, signed into law on August 3, reconstitutes the board as an independent agency with modified analysis, review, and advisory responsibilities; requires Senate confirmation of all members of the PCLOB; sets qualifications and terms for nominees to be board members; authorizes the Attorney General to exercise subpoena power on behalf of the board; requires the designation of Privacy and Civil Liberties Officers; and enhances the authorities of the DHS Privacy Officer.²³

²⁰ U.S. Congress, Senate Committee on Appropriations, *Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies Appropriations Bill, 2006*, report to accompany H.R. 3058, 109th Cong., 1st sess., S.Rept. 109-109 (Washington: GPO, 2005), p. 201 (preprint).

²¹ 119 Stat. 2396.

²² 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>].

²³ P.L. 110-53; 121 Stat. 266.