

January 23, 2018

Senator Chuck Grassley, Chairman  
Senator Dianne Feinstein, Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6050

## **RE: Nomination of Adam Klein to be Chairman of PCLOB**

Dear Chairman Grassley and Ranking Member Feinstein:

We write to you regarding the upcoming hearing on the nomination of Adam Klein to be Chairman of the Privacy and Civil Liberties Oversight Board (“PCLOB”).<sup>1</sup> The Electronic Privacy Information Center (“EPIC”) respectfully requests that you reconsider this nomination. PCLOB must be able to challenge the intelligence community, therefore Klein’s deference to the intelligence community makes him unsuited for this position.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>2</sup> EPIC has a particular interest in the status of the PCLOB. EPIC testified before the 9-11 Commission to urge the creation of an independent privacy agency after 9-11 to ensure appropriate oversight of the new surveillance powers that would be established by Congress.<sup>3</sup> EPIC also set out several priorities for PCLOB as the agency was shaping its agenda.<sup>4</sup> And EPIC spoke at the first meeting of the PCLOB in 2013.<sup>5</sup>

The PCLOB plays a vital role safeguarding the privacy rights of Americans and ensuring oversight and accountability of the Intelligence community. The PCLOB was established because the 9-11 Commission found that “there is no 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.”<sup>6</sup> The PCLOB has two core responsibilities:

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<sup>1</sup> *Nominations*, 115th Cong. (2018), S. Comm. On Judiciary, (Jan. 24, 2018), <https://www.judiciary.senate.gov/meetings/01/24/2018/nominations>.

<sup>2</sup> See About EPIC, EPIC.org, <https://epic.org/epic/about.html>.

<sup>3</sup> Marc Rotenberg, *Testimony, Security and Liberty: Protecting Privacy, Preventing Terrorism*, National Commission on Terrorist Attacks Upon the United States (Dec. 8, 2003), <https://epic.org/privacy/terrorism/911commtest.pdf>; See also Rotenberg, Marc, *The Sui Generis Privacy Agency: How the United States Institutionalized Privacy Oversight after 9-11* (September 28, 2006). Available at SSRN: <https://ssrn.com/abstract=933690> or <http://dx.doi.org/10.2139/ssrn.933690>

<sup>4</sup> EPIC Statement to PCLOB, *Sunshine Act; Notice of Meeting* (Oct. 23, 2012), <https://epic.org/privacy/1974act/EPIC-PCLOB-Statement-10-12.pdf>.

<sup>5</sup> Marc Rotenberg, *Workshop on Domestic Surveillance Programs Operated Under the USA PATRIOT Act and the Foreign Intelligence Surveillance Act*, Privacy and Civil Liberties Oversight Board (July 9, 2013), <https://epic.org/privacy/oversight/EPIC-PCLOB-Statement.pdf>

<sup>6</sup> See About PCLOB, <https://www.pclob.gov/about/>.

oversight and advice.<sup>7</sup> In its oversight role, PCLOB continually reviews executive branch actions and information disclosure policies. In its advisory role, PCLOB counsels the President and executive branch agencies on the privacy and civil liberties concerns of their proposed policies. PCLOB reports twice a year to the President and Congress, and makes these reports available to the public. These responsibilities are vital checks on the intelligence community.

EPIC is concerned that the current nominee for chair of the PCLOB lacks the ability to provide the oversight and independence required for this role, and is too deferential to the intelligence community, focused more on national security than civil liberties. There are many government entities advancing national security interests, but it is PCLOB's responsibility to protect privacy and civil liberties.

Klein does not appreciate the full extent of the privacy interests at stake in many of the most significant debates about the scope of government surveillance authority. In a recent op-ed, he wrote, "The scale of the potential privacy concern also appears small: In 2016 only one FBI search for information about an American in a non-national-security criminal investigation led the FBI to review messages collected under 702."<sup>8</sup> The search he refers to is only one narrow subset of all U.S. backdoor searches: in which the FBI, without a warrant, queries 702 data seeking evidence of a crime and reviews information about a U.S. person. This does not include searches by other agencies, searches with warrants, or metadata searches. And a related FOIA case by EPIC determined the FBI does not fully report the use of 702 authority as required by law. Not only has Klein understated the privacy concerns about 702 he lacks the judgement necessary to serve in an oversight right.

In the EPIC suit against the Department of Justice, we sought public disclosure of the report of that 702 search.<sup>9</sup> Following the filing of our case, the DOJ released the report to EPIC. By the DOJ's own admission, procedures to ensure accurate reporting of controversial backdoor searches *were not followed*. The National Security Division learned of the query after questioning the FBI. In a footnote, the report obtained by EPIC explains that the FBI had implemented a process in order to fulfill the FISC's order to report these searches, and that this process was not followed. *See* Appendix A.

The DOJ was required to report these controversial queries to the FISC. The Office of the Director of National Intelligence also relied on this information to report statistical data about 702 authorities to the American public.<sup>10</sup> This raises questions about the accuracy of this information and if all such searches have been reported to FISC. This should be of concern to Mr. Klein if he is to head a Board, charged with the independent monitoring of the Intelligence Community

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<sup>7</sup> PCLOB, *History and Mission*, <https://www.pcllob.gov/about/>.

<sup>8</sup> Adam Klein, *Connect the Dots to Stop Terror Plots*, Wall Street Journal (July 26, 2017), <https://www.wsj.com/articles/connect-the-dots-to-stop-terror-plots-1501106621>.

<sup>9</sup> *EPIC v. NSD (Section 702 Query Report)*, <https://epic.org/foia/nsd/702-query-report/>.

<sup>10</sup> Director of National Intelligence, *Statistical Transparency Report Regarding Use of National Security Authorities*, [https://icontherecord.tumblr.com/transparency/odni\\_transparencyreport\\_cy2016](https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016).

***We seek assurances that Klein will investigate whether agencies are accurately disclosing backdoor searches and following proper procedures.***

A full strength, independent PCLOB is critically necessary for oversight of government surveillance programs. Without a quorum, PCLOB is unable to carry out its duties. The PCLOB's legitimacy and ability to perform oversight functions relies on it being bipartisan. PCLOB's board was meant to be split 3-2, with members recommended by both parties. The only current board member, Elisebeth Collins, is a Republican,<sup>11</sup> as is Adam Klein. This is not a problem itself, but EPIC is concerned that the Senate will only appoint members of the majority party to the PCLOB board. PCLOB must be able to provide nonpartisan analysis that can be trusted. Leaving the board understaffed with members of only one party will do little to promote trust or confidence in the activities of the Intelligence Community.

***We seek assurances that future appointments will preserve PCLOB as a bipartisan entity.***

We ask that this letter be entered in the hearing record.

EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg  
Marc Rotenberg  
EPIC President

/s/ Christine Bannan  
Christine Bannan  
EPIC Administrative Law & Policy Fellow

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<sup>11</sup> See PCLOB Board, <https://www.pclob.gov/board/elisebeth-b-collins.html>.

## Appendix A: Excerpted Text, DOJ Report to FISC

<sup>2</sup> ~~(S//NF)~~ As described to the Court in a letter filed [REDACTED] FBI had implemented a process to attempt to identify those queries that are run in FBI systems containing raw Section 702-acquired information after

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[REDACTED] that are designed solely to extract evidence of a crime. As part of this process, FBI sent out guidance to its personnel that if they receive and review the results of queries of raw Section 702-acquired information that is identified as concerning a known or presumed United States person in response to a query that is not designed to find and extract foreign intelligence information, they must notify their Chief Division Counsel and the National Security Law Branch of the query and results to determine if it needs to be reported to NSD and the Court. This process was not followed in this instance. NSD reminded the [REDACTED] personnel of this guidance.

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