

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
November 8, 2005

Statement Of Senator Patrick Leahy, Ranking Member
Senate Judiciary Committee
Hearing on "Executive Nominations"
To The Privacy And Civil Liberties Oversight Board
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Mr. Chairman, today we consider nominees to fill the important posts of Chair and Vice Chair of the Privacy and Civil Liberties Oversight Board. Filling these positions is long overdue. On December 14, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004. Section 1061 of this Act implemented a 9/11 Commission recommendation to establish an independent board within the Executive Office of the President to fill a clear void in government structure for protecting our liberties.

Creating the Board was no easy feat. First, the Administration tried to defuse the 9/11 Commission's recommendation for a Privacy Board by pointing to previous purported efforts to protect privacy and civil liberties. Against the backdrop of secretive data mining efforts and resistance to Congressional oversight of Executive Branch use of invasive powers, this was not persuasive. The Administration then tried to circumvent a congressionally authorized, independent board by issuing an Executive Order establishing an anemic alternative. That entity was not independent, had no authority to access information, had little accountability and was comprised solely of Administration officials from the law enforcement and intelligence communities -- the very communities in need of oversight. It was the proverbial case of the fox guarding the henhouse. But many of us in Congress were committed to creating an effective Board in keeping with the 9/11 Commission's recommendations.

But that was almost a year ago, and the delay in filling these positions has concerned me. Earlier this year on May 11, I joined Senators Durbin, Collins and Lieberman in writing to the President urging him to nominate Board members as soon as possible. We also expressed concern about the inadequate funding in the White House Budget proposal, which would only have provided an underwhelming and insufficient \$750,000 for its operations. Fortunately, the Transportation, Treasury and HUD Appropriations Subcommittee, on which I serve, has raised the amount to \$1.5 million to ensure a better start for the Board, although more resources will undoubtedly be needed for the Board to properly do its work as Congress envisioned. Regrettably, as the Washington Post recently reported, the delays and insufficient funds suggest that perhaps the Administration is simply going through the motions, rather than following through on a meaningful commitment to the Privacy Board and its role and responsibilities.

This Board is too important for us to simply go through the motions. Prior to the Board, there was no office within the government to oversee the collective impact of government actions and powers on our liberties. This is a critical blind spot. We have increased and consolidated the authority of an already-powerful government in an effort to address the realities of terrorism and modern warfare. Soon we will be conferencing on the renewed Patriot Act to solidify the government's powers further. As Lee Hamilton, Vice Chairman of the 9/11 Commission, noted in a Judiciary Committee hearing on August 19, 2004, these developments represent "an astounding intrusion in the lives of ordinary Americans that is routine today in government."

It is regrettable that only two of the Board's positions - the Chairman and Vice Chairman - are Senate-confirmed, minimizing Congress's opportunities to ensure Board members' suitability for this important work. I am also somewhat concerned that one of our nominees' expertise appears to be in environmental and energy law, rather than in privacy law.

It is important that any nominee we confirm for this Board have the ability to think critically and independently about the policies we implement as a Nation and about how they affect our fundamental rights. It is expected that Board members will participate in the policymaking process, review technology choices and options, peer into various agencies and assess actions, review classified materials and investigate concerns. Board members must have the versatility to work closely with government officials, but at the same time be sufficiently independent to push for the full story and assess those government policies without fear, favor or compromise. Board members will also need to choose capable investigative staff to assist them in carrying out these duties.

It is also very important that Board members have a good understanding of technology and how those tools can help protect our nation, as well as how inappropriate use or lack of foresight and planning can undermine the very values and freedoms these tools are supposed to secure. We are in an era in which advanced technologies have opened up new possibilities that even a few years ago seemed out of reach. We now face the prospect of tracking devices like RFID chips integrated in identification documents. For example, the new U.S. passports will include those chips to store sensitive personal data and reserve space for biometrics like fingerprints and iris scans. Other advances include the rapid collection, sharing and analyzing of large amounts of data previously unavailable without great effort, if at all. These powerful tools have enhanced our law enforcement and homeland security efforts, as well as made our lives more convenient and enjoyable. But they also pose significant challenges to our liberties and to our privacy.

In executing their responsibilities, I would caution the nominees, if they are confirmed, to keep in mind the guidance of the 9/11 Commission: 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, there must be adequate guidelines and oversight to properly confine its use."

Security and liberty are always in tension in a free society, and that is readily apparent today. It is our vigilant duty to work hard at striking the right balance, since the success of one is essential to the other. As the 9-11 Commission noted, "[t]his balancing is no easy task, but we must constantly strive to keep it right."

I look forward to hearing from our two nominees about their experience and plans to meet these important responsibilities.

I ask unanimous consent that the May 11, 2005, letter to the President about the Privacy and Civil Liberties Board and the August 8, 2005, Washington Post article, "Civil Liberties Panel Is Off to a Sluggish Start," be included in the record.