

**Nomination of Adam Klein to the
Privacy and Civil Liberties Oversight Board**

**Questions for the Record
Submitted January 31, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

1. The Privacy and Civil Liberties Oversight Board's (PCLOB) reports on Section 702 of the Foreign Intelligence Surveillance Act (FISA) and Section 215 of the PATRIOT Act remain the most comprehensive and informative reports on these two programs available in the public record.
 - a. **If confirmed, what are your priorities for the future activities of the board? What specific issues would you direct the board to consider?**

The Board has been without a Chairman since mid-2016 and without a quorum since early 2017. Because of these vacancies, the Board has been unable to hire staff for almost two years and unable to initiate or conclude projects for more than a year. If confirmed, an immediate priority would be to ensure that the Board is appropriately staffed and equipped to carry out its mission. That would include hiring staff to fill vacancies that have arisen since former Chairman David Medine's departure in 2016 and reviewing the Board's policies and practices on information security, human resources, and other key management functions.

If confirmed, I would also ensure that the Board is carrying out those substantive responsibilities that can continue in the absence of a quorum. The Board's statute requires it to "receive and review reports from privacy officers and civil liberties officers" on an ongoing basis, and the Board has a consultative role under Executive Order 13636. Board staff also continue to work on a number of projects approved by the Board before it lost its quorum in 2017. In addition, if confirmed, I would be available to provide advice in my individual official capacity.

Once a quorum of the Board is in place, the first priorities would be to bring the Board's existing oversight projects to an appropriate conclusion, including public reports to the extent consistent with the protection of classified information, and to resume issuing the semi-annual reports required by the Board's statute.

Initiating new oversight and advice projects would require the approval of the Board once it regains a quorum. Appropriate subjects for Board oversight could include the status of past Board recommendations that were not fully implemented at the time of the Board's last public Recommendations Assessment Report; Section 702, including the implementation of changes made by the recent reauthorization; and other programs within the Board's jurisdiction that result in the collection of large amounts of data about U.S. persons, or that otherwise affect privacy and civil liberties. It would also be a priority for the Board to consult with stakeholders inside and outside of government, including its congressional oversight committees, as it develops its agenda.

2. One of the most contentious issues in the recent debate over reauthorization of Section 702 of FISA was the issue of U.S. person queries.

a. If confirmed, what would you direct the Board to do to better inform public's understanding of U.S. person queries under Section 702?

In 2014, the Board's report on Section 702 examined this issue in detail and made two recommendations to enhance protection of privacy and civil liberties with respect to U.S.-person queries. In its February 2016 Recommendations Assessment Report, the Board found that those recommendations were "being implemented" and "substantially implemented," respectively. However, because the Board lost a quorum in early 2017, it has not provided a public update on whether these recommendations have been fully implemented.

Given the importance of this issue and the Board's past work on it, encouraging responsible transparency about U.S.-person queries of data collected under Section 702 would remain an appropriate and important subject for continued Board oversight.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

b. If confirmed, would you direct the Board to help determine the total number of U.S. persons' information collected under 702?

In the past, I have written that public discussion about Section 702 would "be better informed if Congress and the public had some idea of how much U.S.-person data is collected."

Encouraging responsible statistical transparency about the effects of programs within the Board's jurisdiction on U.S. persons' privacy, including Section 702, has been, and should remain, an important element of the Board's work.

Given this issue's importance, the Board's past work on it, and NSA's expression of interest, described in the Board's February 2016 Recommendations Assessment Report, in "work[ing] with Board staff to develop ... measures" for U.S.-person communications collected under Section 702, this would be an appropriate and important subject for continued Board oversight.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

c. If confirmed, would you direct the Board to help determine the number of U.S. person queries annually conducted by the FBI?

In light of the privacy concerns surrounding U.S.-person queries, I testified before this Committee last year that "enhanced transparency and oversight of these queries" would be warranted. Given the importance of this issue and the Board's past work on it, encouraging responsible transparency about U.S.-person queries of data collected under Section 702 would remain an appropriate and important subject for continued Board oversight. The Inspector General report recently mandated by Congress should provide additional information about potential approaches and identify "any impediments, including operational, technical, or policy

impediments” to a count of the number of such queries the FBI conducts each year.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

3. In 2016, the Foreign Intelligence Surveillance Court (FISC) rejected the National Security Agency’s Section 702 certification because of reported compliance problems associated with collection of communications that were not to or from a target. Specifically, the court stated that “without further information about these compliance problems and the government’s remedial efforts, the Court is not in a position to assess whether the proposed minimization procedures accompanying the 2016 Certifications comply with statutory standards and are consistent with the requirements of the Fourth Amendment” (FISC’s Order Extending the 2016 Certification dated October 26, 2016, at 2).

- a. **If confirmed, what could the Board do to better inform the public and the Congress on the compliance problems associated with, and the intelligence value of, NSA collections that are not to or from a target?**

In response to a serious compliance problem reported to the Foreign Intelligence Surveillance Court in late 2016, and after unsuccessful attempts to remedy that problem, NSA announced in April 2017 that it would cease “abouts” collection. Resuming this practice would require FISC approval, followed by a congressional review procedure recently mandated by Congress.

In the past, the Board’s work has enhanced public understanding of the implications of this type of collection for Americans’ privacy and civil liberties. If NSA seeks to resume such collection, and if both the FISC and Congress approve, the attendant privacy and civil liberties concerns would be an appropriate and important subject for the Board’s continued oversight.

Senator Dick Durbin
Written Questions for Michael Brennan, Daniel Domenico and Adam Klein
January 31, 2018

For questions with subparts, please answer each subpart separately.

Questions for Adam Klein

1. The statutory authorization for the PCLOB provides that 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, and without regard to political affiliation.” **Can you describe your litigation experience in the areas of privacy and civil liberties?**

After graduating from law school, I served as a law clerk at the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court. I then practiced law for two years as an appellate litigator at WilmerHale. During my service in the judicial system, and as a practicing lawyer, I participated in many cases involving constitutional provisions and individual rights.

My interest in, and support for, the Privacy and Civil Liberties Oversight Board derives from my longstanding work on issues related to the Board’s mission. My experience with issues related to the Board dates to 2004, when I served on the staff of the 9/11 Public Discourse Project, a nonprofit organization created by the members of the 9/11 Commission to advise Congress and the Executive Branch on the implementation of the Commission’s 41 recommendations. One of those recommendations was that “there should be a board within the executive branch to oversee adherence to . . . the commitment the government makes to defend our civil liberties.” That recommendation gave rise to the Privacy and Civil Liberties Oversight Board. Many of the other recommendations related to counterterrorism policy, the structure of the intelligence community, and other issues relevant to the Board’s work.

Most recently, my research and writing as a Senior Fellow at the Center for a New American Security have focused on issues directly related to the Board’s statutory mission: ensuring that actions taken to protect the nation from terrorism are balanced with the need to protect privacy and civil liberties. Among other relevant publications, a bipartisan report I issued with two colleagues in December 2016 included 61 recommendations to enhance privacy and civil liberties, protect diplomatic equities, and preserve U.S. technological leadership, while ensuring that the government retains robust capabilities for counterterrorism and other foreign intelligence priorities. Last year, in testimony before this Committee on Section 702 of the Foreign Intelligence Surveillance Act, I offered numerous recommendations designed to enhance privacy, transparency, and oversight.

2. I am troubled by the intelligence community’s recent refusal to provide any estimate of how many U.S. persons’ communications are collected under Section 702. This was an abrupt

change of position after previous assurances that efforts were being made toward reporting this estimate.

If confirmed, will you commit to require full implementation of Recommendation 9 from the PCLOB's 2015 report on Section 702, recommending public disclosure of the collection and use of U.S.-person information under Section 702?

In the past, I have written that public discussion about Section 702 would “be better informed if Congress and the public had some idea of how much U.S.-person data is collected,” and have encouraged implementation of Recommendation 9. Given this issue’s importance, the Board’s past work on it, and NSA’s expression of interest, described in the Board’s February 2016 Recommendations Assessment Report, in “work[ing] with Board staff to develop ... measures” for U.S.-person communications collected under 702, this would be an appropriate and important subject for continued Board oversight.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

3. The government has a constitutional and statutory obligation to notify criminal defendants when it uses evidence “obtained or derived from” Section 702 surveillance. Despite repeated requests, the Department of Justice has refused to disclose its policies for determining when information is considered “derived from” Section 702 data. You have suggested the Justice Department should provide greater detail about which “serious crimes” it would use Section 702 information to prosecute, and about how it determines whether evidence introduced in a criminal proceeding is “derived from” Section 702 data.

a. If confirmed, will you commit to requiring the Justice Department to disclose its policies on “serious crimes” it uses Section 702 data to prosecute?

In testimony before this Committee last year, I emphasized the importance of “public transparency about the downstream use in the criminal-justice system of information derived from Section 702,” including which “serious crimes” the government would use data from Section 702 to prosecute. Given the Board’s past work on Section 702, this would be an appropriate and important subject for continued Board oversight.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

b. Will you commit to require the Justice Department to disclose its policies on determination what evidence is “derived from” Section 702 data?

In testimony before this Committee last year, I emphasized the importance of “increased public transparency about the downstream use in the criminal-justice system of information derived from Section 702,” including the Justice Department’s standard for whether evidence introduced in a criminal proceeding was “derived from” 702 information and thus requires notice to the

defendant. Given the Board's past work on Section 702, this would be an appropriate and important subject for continued Board oversight.

If confirmed and if asked, I would also welcome the opportunity to provide advice on this issue in my individual official capacity.

4. What is your position on the role of the PCLOB in overseeing any reimplementation of the controversial policy of "abouts" collection?

In response to a serious compliance problem reported to the Foreign Intelligence Surveillance Court in late 2016, and after unsuccessful attempts to remedy that problem, NSA announced in April 2017 that it would cease "abouts" collection. Resuming this practice would require FISC approval, followed by a congressional review procedure recently mandated by Congress.

In the past, the Board's work has enhanced public understanding of the implications of this type of collection for Americans' privacy and civil liberties. If NSA seeks to resume such collection, and if both the FISC and Congress approve, the attendant privacy and civil liberties concerns would be an appropriate and important subject for the Board's continued oversight.

5. If confirmed as chairman of the PCLOB, you will have an impact on setting the Board's agenda, and in pursuing new areas of inquiry. What are the three most pressing counterterrorism programs or issues, outside of Section 702, that need an independent, outside review?

Topics that, based on my experience and research in this area, could warrant the Board's attention include: programs within the Board's jurisdiction that result in the collection of substantial amounts of data about U.S. persons; the analytic tools applied to the resulting datasets and what insights they are able to generate about U.S. persons; new technologies that enable government agencies to collect and analyze large amounts of personally identifiable data about the public movements of Americans and people in the United States; and federal agencies' acquisition and analysis of open-source data in programs used to protect against terrorism.

In addition, the Board would consult with stakeholders inside and outside of government, including its congressional oversight committees, as it develops its agenda.

6. The broad role of the PCLOB in oversight and protection of civil liberties and privacy is much different than the role of a court or judge. How should the PCLOB evaluate an intelligence program, if courts have already ruled that the program is legal?

The Board's statute requires the Board to "continually review" programs within its jurisdiction to determine whether they are "consistent with governing laws." Pursuant to this provision, the Board may undertake its own legal analysis of programs within its jurisdiction, where warranted.

The statute also empowers the Board to evaluate, as a policy matter, whether programs within its jurisdiction effectively balance the need to protect the nation from terrorism with privacy and civil liberties. In providing advice and conducting oversight, the Board can and should make

recommendations to optimize that balance, as it did in its reports on Section 702 and on the telephony metadata program formerly operated under Section 215 of the USA PATRIOT Act.

7. The PCLOB's statutory role is to analyze and review actions of the executive branch, ensuring the protection of privacy and civil liberties. The independence of the Justice Department and the FBI from the White House is essential in order to protect civil liberties, not just in counterterrorism programs, but in all programs. **Do you agree that it is wrong for the President to demand personal loyalty from the FBI Director or the Attorney General?**

Law enforcement and the administration of justice should be insulated from political pressure and carried out with strict fidelity to the Constitution and the laws of the United States. Federal officials' highest loyalty should be to the Constitution and the law.

8. **Should you become aware of any efforts by the White House to interfere with the independence of the Justice Department, the FBI or any other government agency, will you commit that you will let this Committee know right away?**

If confirmed, and if the Board discovered any abuse of authorities within the Board's jurisdiction, I would work with my colleagues to take all appropriate action within the Board's statutory powers, including reporting to the Board's congressional oversight committees.

9. Independence of the PCLOB Board from the Executive Branch is also essential in order for it to perform its oversight functions. **Outside of discussions concerning filling out your nomination questionnaire, have you had any discussions with any non-career employees of the White House or any of the intelligence or law enforcement agencies concerning your substantive views on issues relating to the PCLOB's work?**

Last year, subject-matter experts on the White House staff asked if I would undergo vetting for this nomination. At no time during that discussion, or afterwards, have I been asked anything that could call into question the Board's statutory independence. If confirmed, I would carry out my duties in a strictly independent manner, as the law requires.

Since 2015, in conducting research as a Senior Fellow at the Center for a New American Security, I have frequently spoken with officials in the intelligence and law enforcement agencies, as well as members of Congress and congressional staff, privacy and civil liberties experts, technologists, state and local law enforcement, and other stakeholders, about issues that fall within the PCLOB's statutory mandate. The results of those consultations and my substantive views on these issues are reflected in the public reports, testimony, and other writings produced during my tenure at CNAS.

10. As you know, Congress structured the PCLOB to ensure an independent and bipartisan Board. Currently, there is only one serving member and she was a Republican nominee. If you were to be confirmed, the Board would have only two members, both Republican nominees. **Do you agree that maintaining the bipartisan nature of the Board is important?**

Yes. Bipartisanship is a fundamental element of the Board's statute and is vital to the Board's credibility and effectiveness. I have substantial experience working in bipartisan institutions and have frequently authored articles and reports with Democratic colleagues. If confirmed, I look forward to welcoming future Democratic colleagues to the Board and working with them in a collegial, bipartisan manner.

11. The Board should not only be bipartisan and independent, it must have diverse members and staff. If confirmed, you will have authority to hire personnel, experts, and consultants to aid the Board in carrying out its functions.

- a. **Will you commit to ensuring that such hires include persons of diverse backgrounds, specifically backgrounds in the privacy, civil liberties, and civil rights communities?**

Yes. If confirmed, I would work to ensure that the Board's staff includes persons of diverse backgrounds and expertise, including expertise in privacy and civil liberties.

- b. **Do you agree that only hiring persons from the Intelligence Community, without hiring persons with privacy and civil liberty backgrounds, is not in line with the PCLOB mission to ensure that privacy and liberty concerns are protected?**

Yes. The Board's staff should include persons with a broad and diverse range of backgrounds, including service in the intelligence community, privacy and civil liberties, counterterrorism, oversight and investigations, and technology.

Questions for the Record for Mr. Adam Klein
Submitted by Senator Richard Blumenthal
January 31, 2018

Last year, you testified before this Committee that the amicus curiae currently empowered to argue before the FISA Court plays a useful role.

1. Do you continue to believe it is valuable to have an outside attorney empowered to argue against the government in FISA Court proceedings?

Yes. The participation of a cleared amicus in FISC matters that are systemically significant or raise novel legal or technical questions, as recommended by the Board and enacted by Congress in the USA FREEDOM Act, strengthens the public credibility and rigor of judicial oversight of surveillance authorities, while preserving the government's ability to flexibly use these authorities once approved by the court.

2. How would you expand or change the role of the amicus?

In testimony before this Committee in July 2017, I recommended requiring the FISC to appoint one of the cleared amici in each review of an annual certification under Section 702:

“Under current law ... whether to appoint an amicus is in the court's discretion.... Congress could strengthen public confidence that 702 is receiving rigorous judicial testing by mandating the appointment of a cleared amicus curiae in every review of annual certifications under Section 702. Guaranteeing that an amicus will be appointed in this narrow, but very important, category of cases would strengthen the public credibility of Section 702's programmatic judicial oversight. Just as importantly, it would not hamper the government's ability to use 702 to nimbly confront security threats.”

That recommendation was based on the public information available to me as a Senior Fellow at the Center for a New American Security. If confirmed, I would maintain an open mind while considering any new information that would be available, while continuing to adhere to the overarching principle that authorities within the Board's jurisdiction must be balanced by robust, credible oversight.

3. If you are confirmed, would you work with me and my colleagues on the Committee to make whatever statutory changes are appropriate to ensure that the FISA Court amici play an appropriate role in proceedings before that court?

Yes. If confirmed, and if the Committee were to seek the Board's views, testimony, or my advice in my individual official capacity, I would welcome the opportunity to provide it.