

Restoring the Balance Between Privacy and Security

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Twelve years after 9/11, One World Trade Center recently became the tallest building in America. Its construction, while not without controversy, is the product of open discussion, criticism and compromise among architects, security personnel, engineers, political leaders, 9/11 families and citizens. In the same time, another edifice has arisen from 9/11's ashes, a looming, largely unaccountable national security state -- an amalgam of laws, policies and secret programs mostly developed behind closed doors with little democratic debate or the checks and balances that our constitution demands. Rather than a soaring tower to our free society, it is a windowless concrete slab, a monument to secrecy, diminished democracy, and lost Fourth Amendment rights.

The balance between security and liberty appears [all but lost](#) [3].

It wasn't supposed to be this way. In 2004, Congress created the [Privacy and Civil Liberties Oversight Board \(PCLOB\)](#) [4] on the express recommendation of the 9/11 Commission, with strong backing from the civil liberties community. In 2007, it made the Board independent and more powerful. The PCLOB was tasked with bringing the voice of privacy and civil liberties to the discussion of new security measures as efforts to protect the nation were considered.

However, the Board has traveled a long and tortuous path to realization. Congressional politics, White House interference (Bush), and foot dragging (Obama) delayed the Board. Nominations were slowed and confirmations fell prey to partisanship. Now, finally, all members of the Board are confirmed and ready to work. (Full disclosure: CDT Vice President for Policy James X. Dempsey sits on the PCLOB.) Yesterday, it held a [public workshop](#) [5] on the recently revealed NSA surveillance programs. For those of us who have spent nearly a decade advocating just for the creation of this board, it was an historic moment: freedom finally had a seat at the table where post-9/11 security architecture is made.

Whether the Board has the will or the power to rein in the surveillance abuses that have roiled the world in the past month remains to be seen. It may be too late to achieve full "privacy by design." The "concrete" around the national security state has had close to 12 years to harden. But a "[Church Committee](#) [6]-like" public report on these surveillance programs by this highly expert group would bring much needed transparency to the debate. Hopefully a set of recommendations to tighten standards for collection and use of information, impose limitations on secrecy, and reform the law to safeguard rights will follow.

Yesterday's workshop offered both eloquent defenses and critiques of key surveillance programs and a range of compelling recommendations. CDT and other civil liberties groups [urged PCLOB](#) [7] to find unlawful the NSA's bulk collection of records of phone calls to, from and within the United States, and to make recommendations calculated to end that program.

There were also calls for Congress and the Administration to bring greater transparency and more rigorous safeguards to restrict the warrantless collection of communications content and to put an end to any prospective surveillance under the so-called business records law. PCLOB members suggested that the government should report back to the Foreign Intelligence Surveillance Court (FISC) on the information the government collects with FISC approval.

Perhaps most interesting was the proposed change in the FISC raised by a surprising voice, former federal judge James Robertson, who sat on the FISC for three years. He defended the integrity of the FISC but argued that changes in the FISA law to permit broad programmatic warrants had eroded the judicial function. He argued for the need for an authoritative adversarial voice before the secretive FISC that oversees the NSA's surveillance programs to ensure that the Court considered all relevant

perspectives. Robertson explained, "Anyone who has been a judge will tell you a judge needs to hear both sides of a case." With the FISA court now approving entire surveillance programs as opposed to just surveillance warrants pertaining to an individual, the need for this adversarial role is even more pressing.

Reflecting on the 9/11 Commission's recommendation to stand up a Privacy and Civil Liberties Oversight Board, Co-Chairman Thomas H. Kean [said](#) [8], "We thought everything with a national security label on it was going to pass, so we felt very strongly that there had to be some voice for civil liberties in the debate."

Kean was right then, and his concerns are even truer today. With the full launch of the PCLOB, we now have an opportunity to begin to take first steps to restore the balance between security and privacy. The task is formidable but at least for now, I choose to be optimistic.

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