

**Nomination of Jane Nitze to the
Privacy and Civil Liberties Oversight Board
Questions for the Record
May 30, 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.

If confirmed, what are your priorities for the future activities of the board? What specific issues would you direct the board to consider?

If confirmed as a member of PCLOB, I would work with fellow Board members to develop the Board's agenda. Topics that I believe could warrant the Board's attention include: procedures that govern the intelligence community's use of open-source information and information in commercial databases; procedures governing information-sharing arrangements between government agencies; and minimization procedures related to U.S. person data.

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 suggest the Board do to better inform public's understanding of U.S. person queries under Section 702?

I believe the Board should continue its oversight of the Section 702 program, including U.S. person queries of the Section 702 database. Recent legislation reauthorizing Section 702 enacted certain changes with respect to these queries, including a requirement that the Attorney General "adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States for information collected," as well as a requirement regarding FBI access of the results of certain queries. As part of its ongoing oversight of the Section 702 program, the Board could examine the impact of these changes, and could issue a public report to the greatest extent consistent with the demands of national security and the protection of classified information.

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

In its 2016 Recommendations Assessment Report, PCLOB noted that the NSA has "advised that it remains committed to developing measures that will . . . 'provide insight about the extent to which the NSA acquires and utilizes' communications involving U.S. persons and people located in the United States under the Section 702 program," and that the agency "seeks to work with Board staff to develop such measures." If confirmed to the Board, I would work with

fellow Board members to continue the Board's important oversight work on this matter and, if appropriate, to provide a public report to the greatest extent that is consistent with the demands of national security and the protection of classified information.

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

The PCLOB's 2016 Recommendations Assessment Report notes that the FBI has revised its minimization procedures, which was responsive to Recommendation 2 of the Board's report on the Section 702 program. As part of the Board's ongoing oversight of the Section 702 program, the Board could lend its assistance to the FBI to help formulate its calculations.

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).

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?

If the NSA resumed "abouts" collection after the requisite FISC approval and completion of the congressional review procedures, I believe that the collection could be an appropriate subject of Board oversight. If appropriate, the Board could provide a public report to the greatest extent that is consistent with the demands of national security and the protection of classified information.

4. According to your Senate Judiciary Questionnaire, since October 2017 you have served as an "Independent Contractor" to Justice Neil Gorsuch on the United States Supreme Court.

a. Please describe your role and job responsibilities as an "Independent Contractor" to Justice Gorsuch.

I assist Justice Gorsuch on research and writing projects unrelated to his official duties.

b. Do you receive compensation for your work as an "Independent Contractor" to Justice Gorsuch? If so, by whom are you paid?

Yes. I am paid by Justice Gorsuch in his personal capacity out of his personal

funds.

- c. Does Justice Gorsuch employ any other individual for similar work as Independent Contractor?**

Not to my knowledge.

5. In January 2017, you appeared in an advertisement by the Judicial Crisis Network in support of then-Judge Gorsuch's nomination to the United States Supreme Court.

- a. When did you first become involved with the Judicial Crisis Network's (JCN) efforts to support Justice Gorsuch's Supreme Court nomination, including the taping of this advertisement? Did you initially approach JCN or were you contacted by the organization?**

I was contacted by a former clerk to then-Judge Gorsuch who asked if I would sit down for an interview for an advertisement of former clerks in support of then-Judge Gorsuch. Along with a number of other former clerks, I agreed to do so.

- b. Were you paid by JCN or any other entity or individual for appearing in the advertisement?**

No.

- c. What was your understanding of why JCN wanted to feature you in an advertisement for Justice Gorsuch's nomination?**

I know that a number of other former clerks of then-Judge Gorsuch were also interviewed for an advertisement featuring clerks. I do not know why I was featured.

The advertisement, in which you spoke, described you as a "Former Obama Administration Attorney."

- d. Were you aware that you would be described in the advertisement as a "Former Obama Administration Attorney"?**

No.

- e. This description suggested that you were an appointee of the Obama Administration. Were you in fact a political appointee in the Obama Administration? If so, please indicate which position you held. If not, were you concerned that the advertisement's description of your role in the Obama Administration was misleading? If so, please explain. If not, why not?**

On the conclusion of my clerkship with Justice Sotomayor, I joined the Office of Legal Counsel in the Department of Justice as a career attorney and served in that position from the fall of 2012 to the summer of 2016. I was not a political appointee. It is accurate that I formerly served as an attorney during the administration of President Obama. In addition, and as stated on its website, the Office of Legal Counsel is charged with “provid[ing] legal advice to the President and all executive branch agencies” and so “serv[es] as, in effect, outside counsel for the other agencies of the Executive Branch.”

I have served as a law clerk to Justices appointed by Presidents of two different parties, and have worked closely with Republicans and Democrats in the course of my career. I was happy to support the judge for whom I clerked on the circuit court in the Supreme Court confirmation process, and to state my view that he would be fair and impartial to all parties that came before him.

Senator Dick Durbin
Written Questions for Britt Grant, Patrick Wyrick and Jane Nitze
May 30, 2018

For questions with subparts, please answer each subpart separately.

Questions for Jane Nitze

1. You say in your questionnaire that you currently work as an “independent contractor” for Justice Neil Gorsuch and that you have done so since October 2017.

- a. **What work have you performed in your capacity as an independent contractor for Justice Gorsuch? Please describe this work with specificity.**

I assist Justice Gorsuch on research and writing projects unrelated to his official duties.

- b. **How many hours per week do you work as an independent contractor for Justice Gorsuch?**

I may work anywhere from 0 to approximately 30 hours in any given week.

- c. **Have you been paid for your work as an independent contractor for Justice Gorsuch? If so, who pays you?**

Yes. I am paid by Justice Gorsuch in his personal capacity out of his personal funds.

- d. **How much have you been paid for your work as an independent contractor for Justice Gorsuch?**

To date, I have been paid \$10,000.

- e. **How did you come to work as an independent contractor for Justice Gorsuch?**

Justice Gorsuch asked me to assist him on research and writing projects unrelated to his official duties.

- f. **Who approved your arrangement to work as an independent contractor for Justice Gorsuch?**

The agreement was made between Justice Gorsuch and myself. I listed this agreement in my ethics materials, which were reviewed and approved by the Office of Government Ethics and the PCLOB’s Designated Agency Ethics Official prior to submission to the Committee.

- g. **If confirmed as a member of PCLOB, do you intend to continue working as an independent contractor for Justice Gorsuch?**

No.

2. You also say in your questionnaire that since October 2017 you have worked as a National Security Fellow at the National Security Institute at the Antonin Scalia School of Law at George Mason University.

- a. **What work do you perform in your capacity as a National Security Fellow? Please describe this work with specificity.**

The bipartisan National Security Institute (NSI) offers Fellows the opportunity to work on academic and policy matters in national security, including working on policy papers, attending lectures, events, and conferences, and speaking on panels. Fellows also have access to resources at George Mason, including the library and research services, and are eligible to work with student research assistants and to be considered for adjunct teaching opportunities. They also have the opportunity to interact with other Fellows and academic faculty.

Because of other work and personal commitments, I have not yet taken advantage of many of the opportunities that the Fellowship offers. To date, I have reviewed the work of other Fellows and the materials, including papers, commentary, and media appearances, circulated by the NSI and its faculty and Fellows. I have not yet published any work with the NSI or taught any classes.

- b. **How many hours per week do you work as a National Security Fellow?**

See response to 2(a).

- c. **Are you paid for your work as a National Security Fellow?**

No.

- d. **If so, how much are you paid for your work as a National Security Fellow?**

See response 2(c); I am not paid for my work.

- e. **How did you come to work as a National Security Fellow?**

I was invited to become a Fellow by the NSI.

- f. **Are you aware of the sources of funding for the National Security Institute? If so, please list all sources of funding of which you are aware.**

No.

- g. **Was the National Security Institute aware when you began work for them in October 2017 that you were also working as an independent contractor for Justice Gorsuch?**

I was asked to become a Fellow prior to my engagement as an independent contractor for Justice Gorsuch.

- h. **Were all parties who approved your arrangement to work as an independent contractor for Justice Gorsuch made aware that you were simultaneously serving as a National Security Fellow?**

Yes.

- i. **Do you have a procedure in place to ensure that your work as a National Security Fellow does not create a conflict of interest with your work as an independent contractor for Justice Gorsuch? If so, please discuss this procedure with specificity.**

I ensure that nothing I do as a Fellow creates a conflict of interest with my work for Justice Gorsuch. As noted in response 2(a), to date, I have reviewed the work of other Fellows and the materials, including papers, commentary, and media appearances, circulated by the NSI and its faculty and Fellows.

3. 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.”

- a. **Please describe your experience defending civil liberties or privacy.**

My interest in issues related to the Board’s mission is longstanding. Both of my parents grew up in, and eventually fled from, a communist country behind the iron curtain, and I myself grew up with their stories of what it was like to live under a regime of mass surveillance that was often abused for political ends.

Since graduating from law school, I have served in both the judicial and executive branches. In the judicial branch, I served as a law clerk to Justice Sotomayor and Justice Gorsuch on the U.S. Supreme Court, and to then-Judge Gorsuch on the U.S. Court of Appeals for the Tenth Circuit. In those capacities, I participated in numerous cases and issues concerning constitutional and statutory provisions that relate to privacy and civil liberties, including, for example, the First Amendment, Fourth Amendment, the Equal Protection Clause, and the Privacy Act of 1974. I also served for nearly four years as an attorney in the Office of Legal Counsel in the Department of Justice. In that role, I worked in depth on national security questions. Upon leaving that office, I became a Fellow at Harvard Law School, where my research interests centered on national security and the Fourth Amendment. Finally, as an associate at Kellogg, Hasen, Todd, Figel & Federick, I assisted in the pro bono representation of Mr. Murtaza Ali, a Muslim inmate incarcerated in state prison. Mr. Ali alleged that prison officials beat him after calling him an epithet related to the attacks on September 11. The district court had dismissed his case, and we successfully secured a reversal for Mr. Ali by the circuit court.

- b. **Please list any courses you have taught on civil liberties and privacy issues.**

- c. **Please list the public statements or speeches you have given concerning civil liberties and privacy issues.**

Responses (b)-(c). I have not taught courses on privacy and civil liberties or provided public statements on the subject; as described in response to question 3(a), my work on these issues largely took place while I served in the government, with the exception of my pro bono work on behalf of Mr. Ali and my Fellowship at Harvard Law School.

4. During the 2012 reauthorization of Section 702, I joined with colleagues, including Senator Lee, in offering bipartisan amendments that would have prohibited “backdoor” warrantless surveillance of Americans and increased transparency and oversight of the Section 702 process. This year, Congress passed a Section 702 reauthorization bill that omitted many important privacy provisions. For example, it did not end backdoor warrantless searches. However, it did give discretion to the

Attorney General, in consultation with the Director of National Intelligence, to adopt procedures by which agencies will be able to query data collected under Section 702.

a. Do you believe these procedures should be unclassified and released to the public?

I generally support transparency with respect to government surveillance activities that implicate U.S. persons to the greatest extent that is consistent with the demands of national security and the protection of classified information. I believe transparency measures enhance the rigor of the public's understanding and debate concerning the government's activities and promote the public's trust in the intelligence community. In order to determine whether such procedures should be declassified and released publicly, I would have to review the procedures, which I have not yet had the opportunity to do. If confirmed as a member of PCLOB and this question came before the Board, I would approach it with the principles described above in mind.

b. Do you believe such querying procedures should apply to law enforcement queries as well as queries for foreign intelligence purposes?

The law provides that the Attorney General "shall adopt querying procedures . . . for information collected" pursuant to the section 702 program. I read that language to require procedures both for law enforcement queries and for queries for foreign intelligence purposes.

c. Do you believe these procedures should require that queries be maintained in a record and subject to regular audits?

I believe it would assist in oversight of the section 702 program if an appropriate set of queries were maintained and subjected to regular auditing. I note that the Inspector General of the Department of Justice is required by law to assess "[t]he practice of the Federal Bureau of Investigation with respect to retaining records of queries conducted under such section 702 for auditing purposes."

5. The recently-passed 702 reauthorization bill also did not bar "about" collection. That term refers to the controversial process of searching through internet traffic to collect not only communications "to" or "from" an intelligence target but also those that simply *mention an identifier* used by a target. This search method sweeps up too many innocent persons' communications.

In 2017, NSA announced it would stop conducting "about" collection, as a result of a result of "inadvertent compliance incidents," or violations of court-imposed restrictions. The new 702 reauthorization law requires the Attorney General and Director of National Intelligence to provide notice to Congress if it intends to restart "about" collection.

What is your view of the PCLOB's oversight role if the intelligence community resumes "about" collection?

If the NSA resumed "abouts" collection after the requisite FISC approval and completion of the congressional review procedures, I believe that the collection could be an appropriate subject of Board oversight.

6. The intelligence community has refused 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.

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

Yes.

7. If confirmed as a member of the PCLOB, you will have influence on the Board's agenda and pursuit of new areas of inquiry.

In your view, what are the three most pressing programs or issues, outside of Section 702, that need independent, outside review?

If confirmed as a member of PCLOB, I would work with fellow Board members to develop the Board's agenda. Topics that I believe could warrant the Board's attention include: procedures that govern the intelligence community's use of open-source information and information in commercial databases; procedures governing information-sharing arrangements between government agencies; and minimization procedures related to U.S. person data.

8. 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 authorizing statute requires that it "continually review" programs within its jurisdiction to determine whether they are "consistent with governing laws." As a result, for programs within its jurisdiction, the Board is authorized to undertake its own legal review, even in those cases in which courts have already ruled the programs are lawful. The Board also may evaluate programs within its jurisdiction from a policy standpoint.

9. 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.

- a. **Do you agree that it is wrong for the President to demand personal loyalty from the FBI Director or the Attorney General?**

I believe that government officials' only loyalty is to the Constitution and the law, and that the administration of justice should proceed free of political pressure and consistent with the rule of law.

- b. **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, can you commit that you will let this Committee know right away?**

If confirmed as a member of the Board and I become aware of any abuse of authorities that falls within Board's jurisdiction, I commit to working with fellow members to ensure that all appropriate action is taken within the Board's statutory authority, including reporting to the Board's congressional oversight committees.

10. Independence of the PCLOB Board from the Executive Branch is also essential in order for it to perform its oversight functions. **If you become aware that the Executive Branch engages in illegal or improper activity, will you notify this Committee right away?**

As previously stated, I believe government officials' loyalty is to the Constitution and the law, and if I become aware of any abuse of authorities that falls within the Board's jurisdiction, I commit to working with fellow Board Members to ensure that all appropriate action is taken within the Board's authority, including reporting to the Board's congressional oversight committees.

11. You say in your questionnaire that during your work as an attorney in the Office of Legal Counsel, you "specialized in...the Emoluments Clause." **Please state your understanding of the original public meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, which provides that:**

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

Based on my work in the Office of Legal Counsel, I understand the Emoluments Clause as "intended to 'preserv[e] foreign Ministers & other officers of the U.S. independent of external influence' by foreign governments." *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development*, Op. O.L.C. at 2 (Oct 6. 2010) (quoting 2 The Records of the Federal Convention of 1787, at 389 (Max Farrand ed., rev. ed. 1966) (notes of James Madison)).

**Questions for
the Record
Senator Mazie
K. Hirono Jane
Emma Nitze,
PCLOB**

1. Chief Justice John Roberts has recognized that “the judicial branch is not immune” from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline or entered into a settlement related to this kind of conduct?

No.

2. **Since no changes were made to the law during this latest reauthorization, what will you do, if confirmed as Chairman, to strengthen the public trust that civil rights and liberties are being protected in the face of so much intelligence collection?**

If confirmed as a member of the Board, I believe that PLOCB should continue its important oversight work on the section 702 program, and, if appropriate, should release a public report regarding that work to the greatest extent that is consistent with the demands of national security and the protection of classified information. Specific areas that may be appropriate for Board oversight include: the incidental collection of U.S. person information under the program; U.S. person queries of the section 702 database; and minimization procedures concerning U.S. persons. More generally, I think the government, in consultation with the Board, should continue to assess the effectiveness of the section 702 program and evaluate whether emerging technologies can be deployed to further secure privacy and civil liberties values.

3. **I’d like to know more about your priorities. Do you believe it is important for the PCLOB to conduct oversight of, and release public records on, programs that raise real risks of threats to privacy and civil liberties? Or would you prioritize the PCLOB’s advice function, under which it provides advice behind closed doors as programs developed?**

In my view, one of the Board’s critical functions is engaging the public. The Board’s authorizing statute requires it to make its reports available to the public to the greatest

extent that is consistent with the protection of classified information, as well as to “hold public hearings and otherwise inform the public of its activities,” again consistent with the protection of classified information. If confirmed, I commit to working with other Board members to fulfill these important statutory responsibilities.

4. There is concern that Section 702 surveillance and use of data collected under Section 702 may impact vulnerable communities such as communities of color, immigrant communities, and the Muslim community at significantly higher rates than it affects Caucasian or non-immigrant communities.

- a. **Do you believe that an individual’s race, religion, ethnicity, or nation of origin is a factor that should be weighed into a decision to target someone for foreign intelligence information?**

I believe that it is appropriate for law enforcement and the intelligence community to use its resources in a manner that ensures they will have the greatest impact. It is critical that the government does so, however, in a manner that is consistent with constitutional and statutory protections, including the Equal Protection Clause and anti-discrimination statutes. In addition, the government should also take account, as a policy matter, of actions that it takes that adversely affect individuals or communities of a particular race, religion, ethnicity, or national origin.

- b. **Will you conduct a quantitative study to determine whether surveillance targeting under Section 702 disparately impacts these communities? Such a study should also include a qualitative analysis of whether the intelligence communities’ targeting decisions are based, even in part, on an individual or community’s racial, religious, or ethnic makeup, or on the country where they reside, instead of based wholly on indicators that they possess foreign intelligence information.**

If confirmed as a member of PCLOB, I would work with fellow Board members to develop the Board’s agenda. The extent to which the government’s targeting decisions under section 702 “disparately impacts” communities of a particular race, religion, ethnicity, or national origin could be a subject of Board oversight.

- c. **Will you also conduct a study to determine whether the intelligence community agencies that conduct warrantless US-person queries engage in conduct related to those queries that impacts communities of color, immigrant communities, and Muslim communities more than Caucasian communities?**

As noted in response to question 4(b), if confirmed as a member of PCLOB, I would work with fellow Board members to develop the Board’s agenda. The extent to which U.S. person queries of the section 702 database “impacts communities of color, immigrant communities, and Muslim communities” could

be a subject of Board oversight.

5. The Office of the Director of National Intelligence committed to providing Americans and the Congress with an estimate of the number of Americans whose communications are incidentally collected under Section 702, only to renege on this commitment after the new Administration took over. **Will you commit to reviewing the ODNI's claims about the feasibility of obtaining such an estimate, helping ODNI determine a way to obtain a meaningful estimate, and providing a public report describing your findings.**

In its 2016 Recommendations Assessment Report, PCLOB noted that the NSA has “advised that it remains committed to developing measures that will . . . ‘provide insight about the extent to which the NSA acquires and utilizes’ communications involving U.S. persons and people located in the United States under the Section 702 program,” and that the agency “seeks to work with Board staff to develop such measures.” If confirmed to the Board, I commit to working with fellow Board members to continue the Board’s important and ongoing oversight work on this matter and, if appropriate, to provide a public report to the greatest extent that is consistent with the demands of national security and the protection of classified information.