WHY IS CONGRESS UNDERCUTTING PCLOB?

As I noted last month, the Omnibus budget bill undercut the Privacy and Civil Liberties Oversight Board in two ways.

First, it affirmatively limited PCLOB's ability to review covert actions. That effort dates to June, when Republicans responded to PCLOB Chair David Medine's public op-ed about drone oversight by ensuring PCLOB couldn't review the drone or any other covert program.

More immediately troublesome, last minute changes to OmniCISA eliminated a PCLOB review of the implementation of that new domestic cyber surveillance program, even though some form of that review had been included in all three bills that passed Congress. That measure may have always been planned, but given that it wasn't in any underlying version of the bill, more likely dates to something that happened after CISA passed the Senate in October.

PCLOB just released its semi-annual report to Congress, which I wanted to consider in light of Congress' efforts to rein in what already was a pretty tightly constrained mandate.

The report reveals several interesting details.

First, while the plan laid out in April had been to review one CIA and one NSA EO 12333 program, what happened instead is that PCLOB completed a review on *two* CIA EO 12333 programs, and in October turned towards one NSA EO 12333 program (the reporting period for this report extended from April 1 to September 30).

> In July, the Board voted to approve two in-depth examinations of CIA activities conducted under E.O. 12333. Board staff has subsequently attended briefings and demonstrations, as well as obtained relevant documents, related to the examinations.

> The Board also received a series of briefings from the NSA on its E.O. 12333 activities. Board staff held follow-up sessions with NSA personnel on the topics covered and on the agency's E.O. 12333 implementing procedures. Just after the conclusion of the Reporting Period, the Board voted to approve one in-depth examination of an NSA activity conducted under E.O. 12333. Board staff are currently engaging with NSA staff to gather additional information and documents in support of this examination.

That's interesting for two reasons. First, it means there are two EO 12333 programs that have a significant impact on US persons, which is pretty alarming since CIA is not supposed to focus on Americans. It also means that the PCLOB could have conducted this study *on covert operations* between the time Congress first moved to prohibit it and the time that bill was signed into law. There's no evidence that's what happened, but the status report, while noting it had been prohibited from accessing information on covert actions, didn't seem all that concerned about it.

> Section 305 is a narrow exception to the Board's statutory right of access to information limited to a specific category of matters, covert actions.

Certainly, it seems like PCLOB got cooperation from CIA, which would have been unlikely if CIA knew it could stall any review until the Intelligence Authorization passed.

But unless PCLOB was excessively critical of CIA's EO 12333 programs, that's probably not why Congress eliminated its oversight role in OmniCISA.

Mind you, it's possible it was. Around the time the CIA review should have been wrapping up

though also in response to the San Bernardino attack, PCLOB commissioner Rachel Brand (who was the lone opponent to review of EO 12333 programs in any case) wrote an op-ed suggesting public criticism and increased restrictions on intelligence agencies risked making the intelligence bureaucracy less effective (than it already is, I would add but she didn't).

> In response to the public outcry following the leaks, Congress enacted several provisions restricting intelligence programs. The president unilaterally imposed several more restrictions. Many of these may protect privacy. Some of them, if considered in isolation, might not seem a major imposition on intelligence gathering. But in fact none of them operate in isolation. Layering all of these restrictions on top of the myriad existing rules will at some point create an encrusted intelligence bureaucracy that is too slow, too cautious, and less effective. Some would say we have already reached that point. There is a fine line between enacting beneficial reforms and subjecting our intelligence agencies to death by a thousand cuts.

Still, that should have been separate from efforts focusing on cybersecurity.

There was, however, one thing PCLOB did this year that might more directly have led to Congress' elimination of what would have been a legislatively mandated role in cybersecurity related privacy: its actions under EO 13636, which one of the EOs that set up a framework that OmniCISA partly fulfills. Under the EO, DHS and other departments working on information sharing to protect critical infrastructure were required to produce a yearly report on how such shared affected privacy and civil liberties.

> The Chief Privacy Officer and the Officer for Civil Rights and Civil

> Liberties of the Department of Homeland Security (DHS) shall assess the privacy and civil liberties risks of the functions and programs undertaken by DHS as called for in this order and shall recommend to the Secretary ways to minimize or mitigate such risks, in a publicly available report, to be released within 1 year of the date of this order. Senior agency privacy and civil liberties officials for other agencies engaged in activities under this order shall conduct assessments of their agency activities and provide those assessments to DHS for consideration and inclusion in the report. The report shall be reviewed on an annual basis and revised as necessary. The report may contain a classified annex if necessary. Assessments shall include evaluation of activities against the Fair Information Practice Principles and other applicable privacy and civil liberties policies, principles, and frameworks. Agencies shall consider the assessments and recommendations of the report in implementing privacy and civil liberties protections for agency activities.

As PCLOB described in its report, “toward the end of the reporting period” (that is, around September), it was involved in interagency meetings discussing privacy.

> The Board’s principal work on cybersecurity has centered on its role under E.O. 13636. The Order directs DHS to consult with the Board in developing a report assessing the privacy and civil liberties implications of cybersecurity information sharing and recommending ways to mitigate threats to privacy and civil liberties. At the beginning of the Reporting Period, DHS issued its second E.O. 13636 report. In response to the

> report, the Board wrote a letter to DHS commending DHS and the other reporting agencies for their early engagement, standardized report format, and improved reporting. Toward the end of the Reporting Period, the Board commenced its participation in its third annual consultation with DHS and other agencies reporting under the Order regarding privacy and civil liberties policies and practices through interagency meetings.

That would have come in the wake of the problems DHS identified, in a letter to Al Franken, with the current (and now codified into law) plan for information sharing under OmniCISA.

Since that time, Congress has moved first to let other agencies veto DHS' privacy scrubs under OmniCISA and, in final execution, provided a way to create an entire bypass of DHS in the final bill before even allowing DHS as much time as it said it needed to set up the new sharing portal.

That is, it seems that the move to take PCLOB out of cybersecurity oversight accompanied increasingly urgent moves to take DHS out of privacy protection.

All this is just tea leaf reading, of course. But it sure seems that, in addition to the effort to ensure that PCLOB didn't look too closely at CIA's efforts to spy on – or drone kill – Americans, Congress has also decided to thwart PCLOB *and* DHS' efforts to put some limits on how much cybersecurity efforts impinge on US person privacy.