

WITH UPCOMING DAVID MEDINE DEPARTURE, WILL PCLOB SLIP BACK INTO MEANINGLESSNESS?

The Chair of the Privacy and Civil Liberties Oversight Board, David Medine, has announced he will resign effective July 1 to work with a development organization “advising on data privacy and consumer protection for lower-income financial consumers.”

The move comes not long after Congress has, in several ways, affirmatively weakened or unexpectedly stopped short of expanding PCLOB’s mandate, by ensuring it could not review any covert programs, and by eliminating a PCLOB oversight role under OmniCISA.

In Medine’s statement, he promised the board would continue to work on their examination of CT activities relating to EO 12333.

I look forward to continuing to work on PCLOB’s current projects until my departure. I am pleased to know that, even after my departure, the Board Members and our dedicated staff remain committed to carrying forward the Board’s critical work, including its ongoing examination of counterterrorism activities under Executive Order 12333.

The EO 12333 approach (and the two CIA programs to examine) was formally approved July 1, a year to the day before Medine’s departure. It was initially scheduled to be done by the end of last year. But in their most recent semi-annual report (released at the end of December), PCLOB noted they were just starting on their public report.

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. Board staff also began work developing the Board's public report on E.O. 12333, described above.

So while Medine promises PCLOB will continue to work on the E.O. 12333 stuff, I do worry that it will stall after his departure. I'm concerned, as well, about the makeup of the board. Board member Jim Dempsey's term officially ended on January 29, though President Obama nominated him for another term on March 17, which means he will serve out 2016 (I believe as a temporary appointment until the end of the congressional term, but am trying to confirm; Update: this stems from PCLOB's statute, but the appointment would extend through the end of the Congressional term), and longer if and when the Senate confirms him. But Medine's departure will leave 2 members (counting Dempsey) who have been firmly committed to conducting this review, Rachel Brand, who has been lukewarm but positive, and Elisabeth Collins Cook who was originally opposed. That is, unless Medine is replaced in timely fashion (and given that this is a multiple year appointment, Republicans would have incentive to stall to get a GOP Chair), the board may be split on its commitment

to investigating these issues.

There are a few other things happening on the E0 12333 front. Most urgently, the Intelligence Community is *as we speak* implementing new procedures for the sharing of E0 12333 with law enforcement agencies. PCLOB was involved in a review of those procedures, and had successfully pressed for more controls on the FBI's back door access to 702 data (which is one reason I find the timing of Medine's departure of particular concern). Two years after PCLOB first outed Treasury as having no E0 12333 implementing guidelines, they still have none.

That is, particularly after Congress' successful attempts at undercutting PCLOB's power, Medine's departure has me seriously worried about whether the Intelligence Committee is willing to undergo any scrutiny of its E0 12333 activities.