JAMES CLAPPER, BATES-STAMP, AND GUTTING THE FISA ADVOCATE

As I noted the other day, in his letter purportedly "supporting" Patrick Leahy's USA Freedom Act, James Clapper had this to say about the ~~special advocate~~ amicus curiae position laid out by the law.

> We note that, consistent with the President's request, the bill estsablishes a process for the appointment of an amicus curiae to assist the FISA Court and FISA Court of Review in matters that present a novel or significant interpretation of the law. We believe that the appointment of an amicus in selected cases, as appropriate, need not interfere with important aspects of the FISA process, including the process of ex parte consultation between the Court and the government. We are also aware of the concerns that the Administrative Offices of the U.S. Courts expressed in a recent letter, and we look forward to working with you and your colleagues to address these concerns.

Clapper stretches the actual terms of all four provisions of the bill he discusses — he admits he'll use selection terms outside those enumerated by the statute, he discusses collecting "metadata" rather than the much more limited "call detail records" laid out in the bill, and he facetiously claims FBI won't count its back door searches because of technical rather than policy choices.

But I think Clapper's comments about the FISC amicus curiae deserve particular attention, because the letter suggests strongly that Clapper will ignore the law on one of the key

improvements in the bill.

Clapper claims, first of all, that Obama has called for the appointment of an amicus curiae.

That's false.

Obama actually called for fully-independent advocates.

> To ensure that the Court hears a broader range of privacy perspectives, I am calling on Congress to authorize the establishment of a panel of advocates from outside government to provide an independent voice in significant cases before the Foreign Intelligence Surveillance Court.

That may seem like semantics. But in his letter, Clapper signals he will make the amicus curiae something different. First, he emphasized this amicus will not interfere with ex parte communications between the court and the government. That may violate this passage of Leahy's bill, which guarantees the special advocate have access to anything that is "relevant" to her duties.

> (A) IN GENERAL.—If a court established under subsection (a) or (b) designates a special advocate to participate as an amicus curiae in a proceeding, the special advocate—
>
> [snip]
>
> (ii) shall have access to all relevant legal precedent, and any application, certification, petition, motion, or such other materials as are relevant to the duties of the special advocate;

Given that in other parts of 50 USC 1861, "relevant" has come to mean "all," it's pretty amazing that Clapper says the advocate won't have access to all communication between the government and the court.

There are just two bases on which the advocate can be denied access to documents she would need.

> (i) IN GENERAL.—A special advocate, experts appointed to assist a special advocate, or any other amicus or technical expert appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States.
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> (ii) RULE OF CONSTRUCTION.— Nothing in this section shall be construed to require the Government to provide information to a special advocate, other amicus, or technical expert that is privileged from disclosure.

If we could believe that Clapper were operating on good faith, this language would be fairly innocuous. But given that Clapper has made it very explicit he wants to continue to conduct ex parte communication, and given that the Director of National Intelligence has a significant role in both need to know determinations and privilege claims, this language — and Clapper's commitment to retain ex parte communications — is a pretty good indication he plans to deny access based on these two clauses.

And all that's before Clapper says he plans to continue to work with Leahy to address some of John Bates purported concerns.

As a reminder, in Bates' most recent letter, he claimed to be speaking "on behalf of the Judiciary" and used the royal "we" throughout. In response to the letter, Steve Vladeck raised real questions what basis Bates had to use that royal "we."

> Judge Bates's latest missive … raises the question of why Judge Bates believes

> he's entitled to speak "on behalf of the Judiciary"—especially when at least two former FISA judges have expressly *endorsed* reforms far more aggressive than those envisaged by the Senate bill, and when the substance of Judge Bates's objections go principally to burdens on the *Executive Branch*, not the courts.

Then Senior 9th Circuit Chief Judge Alex Kozinski [weighed in](). While he professed not to have studied the matter, he made it quite clear that he

> was not aware of Director Bates's letter before it was sent, nor did [he] receive a copy afterwards.
>
> [snip]
>
> having given the matter little consideration, and having had no opportunity to deliberate with the other members of the Judicial Conference, I have serious doubts about the views expressed by Judge Bates. Insofar as Judge Bates's August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so.

In other words, Bates decided to speak for the Judiciary without consulting them.

And, as Vladeck correctly notes, what he said seemed to represent the views of the Executive, not the Judiciary. I think that conclusion is all the more compelling when you consider the 3 big opinions we know Bates wrote while serving on FISC:

- Around July 2010: After noting that the Executive had violated the PRTT orders from 2004 until 2009 when it

was shut down, including not disclosing that virtually every record collected included unauthorized collection, he reauthorized and expanded the program 11- to 24-fold, expanding both the types of data permitted and the breadth of the collection. Bates did prevent the government from using some of what it had illegally collected in the past, but told them if they didn't know it was illegal they could use it.

- October 3, 2011: The year after he had reauthorized PRTT in spite of the years of violation, the government informed him they had been illegally collecting US person content for 3 years. Bates authorized some of this collection prospectively (though more assertively required them to get rid of the past illegal collection). At the same time, Bates permitted NSA and CIA to conduct back door searches of US person PRISM content.
- February 19, 2013: Bates unilaterally redefined the PATRIOT Act to permit the government to collect on US

> persons solely for their First Amendment activities, so long as the activities of their associates were not protected by the First Amendment.

In short, even though Bates knew better than anyone but perhaps Reggie Walton of the Executive's persistent violations of FISA orders, he repeatedly expanded these programs in dangerous ways even as he found out about new violations.

That's they guy lecturing Leahy on how the FISC needs to work, invoking the royal "we" he hasn't gotten permission to use.

And consider the things Bates asked for in his most recent letter — which, by invocation, Clapper is suggesting he'll demand from Leahy.

- The advocate should not be mandated to speak for privacy and civil liberties.
- The advocate should not be adversarial because that might lead the government to stop sharing information it is required to share.
- The advocate should not be required to be consulted on all novel issues [I wonder now if Bates considers the First Amendment application a novel issue?] because that might take too long.

Basically, Bates says Leahy should replace his language with the House language.

> In our view, the greater flexibility and control that the FISA courts would have

> under the amicus provision in H.R. 3361 make it a better fit for FISA court proceedings than the special advocate provision of S. 2685. As discussed above, the House bill would give the FISA courts substantial flexibility not only in deciding when to appoint an amicus in the first place, but also in tailoring the nature and scope of the assistance provided to the circumstances of a particular matter.

So the guy who Bates-stamped so many dangerous decisions wants FISC to retain the authority to continue doing so.

Again, Clapper is absolutely wrong when he claims this kind of thing — a role the FISC can sharply limit what advice it gets and the DNI can sustain ex parte proceedings by claiming privilege or need to know — is what President Obama endorsed 8 months ago.

Which raises the question: is the President going to tell his DNI to implement his own policy choices? Or is he going to let James Clapper and Bob Litt muddle up a democratic bill again?