

A GOOD IDEA THAT MAY BACKFIRE: FISCR FAST TRACK

I've written several posts about Leahy's USA Freedom already. To recap:

- The bill is definitely an improvement off of USA Freedom, though it retains "connection" chaining language I'm seriously concerned about
- The bill permits the government to collect "bulky" collections in at least two ways: the use of IP addresses and non-individual persons (aka corporations)
- The bill inexplicably exempts the FBI from reporting requirements on back door searches

My last new concern about the bill pertains to a measure that means well, but might backfire.

The bill includes language designed to provide for appeals of significant issues, first to the FISA Court of Review, and then to SCOTUS.

(j) REVIEW OF FISA COURT DECISIONS.—After issuing an order, a court established under subsection (a) shall certify for review to the court established under subsection (b) any question of law that the court determines warrants such review because of a need for uniformity or because consideration by the court established

under subsection (b) would serve the interests of justice. Upon certification of a question of law under this paragraph, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(k) REVIEW OF FISA COURT OF REVIEW DECISIONS.—

(1) CERTIFICATION.—For any decision issued by the court of review established under subsection (b) approving, in whole or in part, an application by the Government under this Act, such court may certify at any time, including after a decision, a question of law to be reviewed by the Supreme Court of the United States.

(2) SPECIAL ADVOCATE BRIEFING.—Upon certification of an application under paragraph (1), the court of review established under subsection (b) may designate a special advocate to provide briefing as prescribed by the Supreme Court.

(3) REVIEW.—The Supreme Court may review any question of law certified under paragraph (1) by the court of review established under subsection (b) in the same manner as the Supreme Court reviews questions certified under section 1254(2) of title 28, United States Code.

That is, it provides a way for FISC to ask FISCR to review their work, and for FISCR to ask SCOTUS to review their work.

To some degree, the more eyes that look at these novel decisions, the better.

But neither the FISCR review nor the SCOTUS review requires even the Special Advocate. While FISCR has, in the past, permitted *amici*, they

(and Yahoo, in the case where Yahoo appealed FISC's 2007 recision on Protect America Act) were shooting in the dark. the new advocate, such as it exists, would be able to argue before FISC if the court wanted it.

So to a significant extent that would result in the same people (the government and the Court's permanent staff, on one side, and the unproven advocate on the other) arguing the same issue over and over. with the courts themselves choosing to have their own decisions certified by the higher courts.

With the potential result that you'd have appellate decisions or even a SCOTUS instruction without ever giving a real adversary a shot at the issue. If FISC responded to the phone dragnet question before the way they have since Snowden leaked details of it, they would have gotten it certified to confirm their authority.

One addition to Leahy's bill could exacerbate that. His bill requires the FISC to consult with PCLOB on appointees as Advocates. With today's PCLOB, that'd be a good thing. But if Republicans win back the Senate – especially if Mitch McConnell retains his seat – you'd see another PCLOB member the likes of Elisabeth Collins Cook and Rachel Brand. Both are really smart. But both were architects of the surveillance regime while serving as DOJ Policy AAGs. Add a third of that ilk, and PCLOB could load up the Advocates corp with people like Steven Bradbury.

Moreover, for the foreseeable future, Justice John Roberts will be handpicking these judges, which doesn't give me a lot of confidence.

I just think the Advocate system is unproven right now. It may work out, it may be gamed to reinforce the dysfunction of the court. And the record of the FISC – especially Laurence Silberman's efforts to rule FISA illegal in 2002 – give me no confidence this kind of self-appeal would do anything but sanction bad decisions.

Mind you, the Leahy bill also permits the

government to go on denying aggrieved people of review of Section 215 collection, so it's not clearly anyone else will get standing to challenge this program in particular.

But it seems like the FISC system is so dysfunctional, there's no reason to pre-empt the possibility of real adversarial court function.

Update: Orin Kerr thinks this is unconstitutional.