A BETTER REFORM THAN USA FREEDOM: GET RID OF THE FISA COURT

As he did once before, John Bates has written a letter in the guise of raising concerns about the resources of the FISA Court (though in this case, not actually raising any such concerns) to provide his — or someone else's — policy views on Patrick Leahy's version of USA Freedom (see Steve Vladeck's great post arguing that this letter presents solely Bates defending the executive; though I think Vladeck misreads claimed cooperation with the Administration on Leahy's bill for assent to it). But also as his earlier letter did, this does nothing so much as make a compelling case to eliminate the FISC.

While Bates raises legitimate concerns about whether summaries of court opinions are better than redacted versions (he would prefer the most sensitive ones remain secret) and the constitutionality of the appeals process, his chief gripe arises from the increased independence Leahy's bill gives a special advocate.

Bates maintains that by requiring the FISC special advocate to advocate for privacy or civil liberties would not further the interests of privacy or civil liberties.

That's because actually requiring the advocate to advocate for something would put her in an adversarial position vis-a-vis the government. And that, Bates is sure, would lead the government to withhold information from the Court.

> Introducing an adversarial special advocate in FISA proceedings creates the risk that representatives of the Executive Branch — who, as noted, have a heightened duty of candor in ex parte FISA court procedings — would be reluctant to disclose to the courts

> particularly sensitive factual information, or information detrimental to a case, because doing so would also disclose the information to an independent adversary.

Mind you, the public record shows the government already withholds crucial information, such as how many Americans get collected under upstream collection, as well as how the government is actually using back door searches and how prevalent they are, as well as the torture from which some of their evidence introduced at FISC derives, as well as that EFF had a protection order for data that might incorporate the Section 215 program. So the notion that ex parte proceedings currently give the FISC all the information it needs is farcical.

But Bates worries that requiring the government to expose all the information about its plans to an adversary might lead the government to forgo "potentially valuable intelligence-gathering activities under FISA." That's an admission that some of the government's current programs could not have withstood even the classified scrutiny of someone not positioned as a partner in implementing all the possible intelligence gather activities. The FISC has become, Bates makes clear, the government's partner in approving every possible collection program that might be valuable.

And all of this complaint is an admission from Bates that it never intended to provide the advocate, as described under USA Freedumber, all the information she needed to do her job.

Bates had already made that complaint in his last letter. In this one, he adds a new one: that because Leahy's USA Freedom requires the special advocate to be involved in novel cases — and actually defines what novel means — she would be involved in too many.

> Section 401 would seem to apply to a

> potentially large number of cases. The requirement to designate a special advocate would be triggered in the first instance in any matter involving a "novel or significant interpretation of the law." That term is defined expansively to include, among other things, matters involving the "application … of settled law to novel … circumstances." Because nearly every application involves distinct (i.e., "novel") facts and circumstances, Section 401 could be read as applying in a broad swath of cases.

Bates' former colleagues disagree on this point. James Robertson and James Carr have said the vast majority of what FISC judges approve are fairly simple warrants.

Both and his colleagues, however, may be right: that is, it may well be the FISC has now gotten to the point where each application represents an expansion or a new tweak of previous approvals. I would actually be shocked if the expanding number of Section 215 orders — accompanied as they have been by FISC-imposed minimization procedures — don't represent such an expansion.

Given Deputy Attorney General James Coles' confirmation of Zoe Lofgren and Mark Warner's questions about what Section 215 may be used for — including credit card data, URL searches, and location data — this morphing use of 215 now likely provides the government access programmatically to things they previously needed individualized warrants for.

Even with the opinions and applications we've seen — most of which pre-date the significant 2010 expansion of 215-based programs — it becomes clear the FISC judges (or at least those in DC who review the more novel applications) have become a rubber stamp for programs that far surpass the language of the law and likely conflict with other laws. With the vast

expansion of dragnets starting in 2004, the FISC has become a court of reasonableness generally, not reasonableness within the letter of the law as written by Congress. The series of plaintive and laughably weak FISC opinions since the exposure of the Section 215 program underscores this: exposed as having far exceeded the law and intent of the Section 215 program, the FISC was left trying to invent the law post hoc.

Bates has, even more than his earlier letter, made it clear that he, at least, believes the FISC is and should be a partner with the Executive, providing legal cover for novel new surveillance that may not fit the intent of Congress. I'd say, too, that even in the area of individualized warrants, it has presided over the redefinition of things like "agent of foreign power," such that confused Muslim young men become legitimate targets for invasive surveillance that can never be checked in the context of criminal proceedings.

So let's get rid of it!

It may be the case that in 1978 traditional Title III courts couldn't handle the secrecy required by FISC proceedings. But they can and do now, routinely. There's no reason judges throughout the country couldn't be asked to weigh FISC probable cause as they currently weigh criminal probable cause; and having more judges do so might stay closer to the definition of foreign power as intended by Congress, and if it doesn't (which given the rubber stamp of magistrates, might well happen), it would be more likely to be reviewed at the appellate level.

Similarly, the courts have and are proving able to deal with new applications, as their treatment of FBI's request for nationwide warrants to hack makes clear. But they do so in deliberative fashion, actual weighing the language of the law, rather than just secretly approving an application that pretty clearly violates Congress' intent.

Eliminating the FISC wouldn’t fix all the problems of out-of-control surveillance. Requiring notice for EO 12333 collection is another necessary step, as is actual prosecution for violations of surveillance law. But it seems that just eliminating the FISC would be a far better fix for the problems exposed by Snowden’s leaking than USA Freedom would be.