JOHN BATES GETS SLAPPED DOWN FOR SPEAKING OUT OF TURN, AGAIN

A few weeks back, I pointed to 9th Circuit Chief Judge Alex Kozinski's criticism of John Bates' presumption to speak for the judiciary in his August 5 letter complaining about some aspects of USA Freedom Act. Kozinski was pretty obviously pissed.

But compared to the op-ed from retired District Court Judge Nancy Gertner — who effectively scolds Bates, as the Administrative staff, speaking out of turn — Kozinski was reserved.

> [W]hatever the merits of Bates' concerns—and other judges have dissented from it—he most assuredly does not speak for the Third Branch.
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> [snip]
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> Bates has been appointed by Chief Justice John Roberts to serve as director of the Administrative Office of the U.S. Courts, the body that administers the federal courts. It was created in 1939 to take the administration of the judiciary out of the Department of Justice. Its principal tasks were data collection and the creation of budgets and, while its duties have grown over the years, they remain administrative (dealing with such things as court reporters, interpreters, judicial pay, maintenance of judicial buildings, staffing etc.).
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> When members of Congress solicit the "judiciary's" opinion they may write to the office's director, but he has no authority to make policy for the federal judiciary. It is the Judicial Conference

> of the United States Courts, to which the AO director is only the "secretary," that has that responsibility.

I'm very supportive of Gertner's defense of judicial independence and her concern about the operation of the FISA Court.

But her critique goes off the rails when she points to DOJ's purported support of USA Freedom Act as a better indication of the Executive's views than Bates' comments.

> Moreover, a great deal of Bates' letter focuses on the Senate proposals' impact on the executive branch and the intelligence community. The Senate bill would burden the executive with more work and even delay the FISA court's proceedings, he suggests. Worse yet, the executive may be reluctant to share information with an independent advocate—a troubling claim.
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> Bates' concerns are belied by the support voiced by the Department of Justice and the president for the Senate proposal. Surely, the executive branch understands its own needs better than does Bates. Surely, the executive branch has confidence in the procedures that the FISA court would have in place for dealing with classified information, just as the courts that have dealt with other national security issues have had.
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> And surely, the executive would abide by what the law requires, notwithstanding Bates' predictions about its "reluctance" to share information with a special advocate.

DOJ's "support" of the bill was expressed when Eric Holder co-signed a letter (which Gertner tellingly doesn't mention, much less link) from James Clapper which, when read with attention, clearly indicated the Executive would interpret

the bill to be fairly permissive on most of the issues on which the Senate bill would otherwise improve on the House one. Holder's "support" of the bill strongly indicates that DOJ, with ODNI, plans to use the classification and privilege "protections" in the bill to refuse to share information with the special advocate.

And that's precisely the part of the letter where Holder and Clapper invoke Bates.

The Executive has only endorsed this bill while at the same time endorsing the Bates letter — and its demand for a impotent "advocate" — Gertner complains about.

But she ignores another important point. In her op-ed, Gertner insists it is Congress' job to determine what the FISC should be.

> But it is the legislature's job to decide whether those resource needs are outweighed by the bill's heightened protections for civil liberties and privacy, particularly given the very troubling disclosures about the FISA Court in recent years.

Yet she seems unaware of the ways the language Congress currently embraces keeps that Court dysfunctional — perhaps even weakens it. In addition to the clauses permitting the Executive to withhold information from the Advocate, the bill would reflect the intent of Congress to give the Attorney General — not the FISC Judges — the key role in protecting the privacy of Americans. With the emergency provisions, the PRTT "privacy procedures," and the minimization procedures for ongoing bulk collection, the bill assigns the Attorney General the dominant role in establishing and — more importantly — ensuring compliance with minimization procedures. On the emergency provisions, the bill definitely weakens existing protections; on the other two, the bill appears to weaken existing protections.

Right now, the FISC, inappropriately, plays a

key role in overseeing the dragnet. Nevertheless, FISC oversight is what has replaced adversarial process and transparency. And USAF weakens that, somewhat.

And as for the Advocate — which I think is an improvement if only in the way that when Advocates start quitting because they can't do their job it might provide cause to make it stronger, as happened with PCLOB — if, as Gertner claims, the President approves that part of it, he can implement it right away, with no legislation.

We know what the Executive prefers, because we know that with a few very limited exceptions, the Executive has chosen to go to rubber stamps like Bates rather than inviting a third view.

The supporters of this bill need to have a really clear sense of both what Congress has laid out — including provisions that weaken FISC oversight — and how the Executive has said it will interpret the bill if it becomes law. If Gertner is any indication, they do not.

Update: Thanks to Saul Tannenbaum and Mike Masnick for alerting me to my dumb Gertner/Gartner typo.