THE FISC PURPORTEDLY CONTINUES TO HAVE PROBLEMS WITH "RELEVANT" AND "ALL"

Amid posts bewailing Rand Paul because the Senator's substantial discussions of the problems with EO 12333 and Section 702 spying aren't the substantial discussions he wants (I'll return to these once more pressing matters have passed), Steve Vladeck has returned to the USA F-ReDux topic on which he doesn't keep contradicting himself: the amicus.

As he notes (and I noted here), Mitch McConnell is (as we speak) attempting to water down the already flimsy FISC amicus via amendment. And Vladeck — as he has before — exposed the false claims that the objections to the amicus comes from the judiciary, this time as represented in the letter from Director of the Administrative Offices of US Courts James Duff.

> Why is such a radical amendment to a provision in the House bill that was negotiated *very* carefully so necessary? According to the memo, "Amendment 1451 is responsive to the judiciary's continual opposition to the amicus structure of the USA Freedom Act," as manifested in "a letter to Congress from the director of the Administrative Office of the U.S. Courts."
>
> [snip]
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> I don't mean to belabor the point. If anything, as I suggested yesterday, section 401 of the House-passed USA FREEDOM Act is a terribly weak version of what should have been a very good (and unobjectionable) idea—allowing a security-cleared outside lawyer to participate in the tiny percentage of cases before the FISC that involve

> applications for anything *besides* individualized warrants (you know, the cases in which adversarial participation is *already authorized)*.Part of *why* section 401 is so weak is because members of Congress have consistently allowed themselves to be snookered by (or have found it convenient to hide behind) the objections of the "judiciary."
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> On the merits, though, these objections are patently unavailing. And they certainly aren't the objections of the "judiciary."

I've also tracked how others, like James Clapper, have been using these purported judiciary concerns to undercut the "advocate" that President Obama used to pretend to want.

What's particularly interesting, however, is one of the recurrent problems the "judges" seem to keep having. Duff emphasizes that one problem with amici is the Executive would lie to the FISC if telling the truth might risk revealing useful information to an amici. And as one part of that, he focuses on USA F-ReDux's intent to get

> Designated amici are required to have access to "all relevant" legal precedent, as well as certain other materials "the court determines are relevant.
>
> [snip]
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> We are concerned that a lack of parallel construction in proposed clause (6)(A)(i) (apparently differentiating between access to legal precedent as opposed to access to other materials) could lead to confusion in its application.

This is what Clapper seemed to be going after

last September.

> 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.
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> > (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;
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> 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.

But the really interesting thing — the reason McConnell's as-we-speak attempt to gut the amicus further — is that the House already fixed some of this. In a manager's amendment presented as technical clarifications (but which, on this issue, were not), Bob Goodlatte rewrote this passage:

> (i) shall have access to *all* relevant legal precedent, and *any* application, certification, petition, motion, or such other materials that the court

> determines are relevant to the duties of the amicus curiae;

To read like this, to directly address one of Huff's stated concerns:

> (i) shall have access to *any* relevant legal precedent, and application, certification, petition, motion, or such other materials that the court determines are relevant to the duties of the amicus curiae;

That is, Goodlatte already gave the court complete discretion over what the amicus could access, up to and including underlying legal precedents.

Of course, all that assumes the courts will get all the information they need, which they have a long history of not doing.

Here's the real takeaway though. The President likes to claim he supports this reform. But he has already made it clear he didn't really want an advocate at the FISC, but would instead like the FISC to remain a rubber stamp.