BEN WITTES AND SUSAN HENNESSEY ENDORSE JUDICIAL LAWBREAKING

The surveillance boosters are having a tough time with this year's Section 702 reauthorization. For the first time, enough details about the program are public such that we can have a debate about the authority. In response to substantive discussions of policy, boosters are engaging in ad hominem attacks and, at times, betraying their own ignorance.

Take this piece from Ben Wittes and Susan Hennessey. For the moment, ignore the insults they use against Congress and reformers. The most remarkable passage comes where they attack the HJC reauthorization bill's requirement that, for the yearly 702 reauthorization, the FISA Court appoint an amicus or explain why they didn't think it was necessary.

> Or consider the strange provision that requires that the FISA court must appoint an amicus curiae, or special advocate and expert, in the certification process for Section 702's surveillance programs to make the proceedings more adversarial with respect to the government's position. Previously, the court appointed amici — which were established in the 2015 USA Freedom Act — at its discretion. The court has never indicated any need for a change in practice; indeed, if it wanted to appoint amici in every case it would and could. Currently, FISC judges rely on highly specialized staff attorneys and call on amici when they deem outside counsel useful to their decision-making. This provision usurps judicial discretion and further burdens a heavily strained court that would now need to justify each and every decision to not use the help it didn't ask for.

Let's start with the clear errors in this passage.

Contrary to what these so-called experts (a former NSA lawyer!!) say, the USA Freedom Act did not "establish" the practice of appointing amici at the court's discretion. The FISC *always* had that authority, and in fact appointed amici on a number of occasions before passage of USAF, as early as the 2002 In Re Sealed Case and again in the wake of the Snowden leaks.

What the USAF did was *mandate* that the FISC appoint an amicus curiae for novel or significant interpretations of the law, "unless the court issues a finding that such appointment is not appropriate."

> Authorization.—A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other statutory requirement that the court act expeditiously or within a stated time—
> (A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate;

It troubles me that a former NSA lawyer doesn't know what that word, "shall" means. Or perhaps is writing about matters of law without actually reading the law?

It should be obvious that the yearly authorization of the yearly 702 reauthorization program is a "significant interpretation of law." It authorizes spying on over 100,000 people.

That was especially true this year, because the FISC had to decide what to do in response to

learning NSA had been violating rules imposed back in 2011 to ensure the constitutionality of upstream collection (for several of those years, Hennessey was at NSA). Just as importantly, the FISC had to decide whether to permit back door searches of upstream surveillance that it knew included entirely domestic communications. Such searches had never been permitted before because of the privacy impact on Americans. Yet FISA judge Rosemary Collyer didn't bother consulting with an amicus. Nor did she provide the mandated finding explaining why she didn't need the help.

And trust me, Collyer needed the help: it's clear she got some key technical details (the difference between SCT and MCTs) wrong. Who knows how much else she got wrong? But she figured she was smart enough she could blow off the law requiring an amicus in such situations.

In the wake of such stubbornness from the court, the HJC bill mandates an amicus for the yearly authorization. It is an obvious (and inadequate) response to a clear problem that may have profound consequences for Americans' privacy.

In response to that, Wittes and Hennessey complain that the court — the same court that has just blown off USAF!!! — "never indicated any need" to be obligated to do what USAF requires. They claim that the "provision usurps judicial discretion," suggesting they don't believe the coequal Congress itself may or should exercise discretion. And they suggest the once-yearly requirement would "further burden[] a heavily strained court that would now need to justify each and every decision to not use the help it didn't ask for," as if simply including an amicus review for a program that affects millions is just too difficult for judges who are used to adversarial process on all their non-FISA proceedings.

Here's the craziest thing. These two experts (including an ex-NSA lawyer!!) make clear errors of law. They appear unfamiliar with the last 702 reauthorization. They get the constitutionality of coequal branches wrong.

And having done all that, they complain about "panicky civil libertarians" and "congressional dysfunction," as if boosters who can't get basic facts right are in a position to judge the good faith engagement of others.

This is what passes for responsible oversight among surveillance boosters: responding to judicial obstinance by complaining that asking the poor FISA court to do what Congress mandated they do "usurps judicial discretion."

There is far more in this piece that is erroneous and obnoxious.

But why bother laying that all out? All this piece reveals is that key surveillance boosters are either operating in bad faith or unaware of the law and implementation of the program they bitch at others about.

If this is the best the surveillance boosters can do, then we should impose far more reforms of this bill, because Hennessey has revealed that the lawyers overseeing this program don't know enough about it to make sure it operates safely.