TECHNICAL FIXES IN HJC BILL SUGGEST SCOTUS MAY HAVE REVIEWED A (2015 ?) FISA APPLICATION

HJC has released a new version of the bill they're cynically calling USA Liberty. The most significant change in the bill is that it makes the warrant requirement for criminal backdoor queries that will never be used an actual probable cause warrant, with the judge having discretion to reject the warrant.

But that'll never be used. If a warrant requirement falls in the woods but no one ever uses it does it make a sound?

I'm more interested in a series of changes that were introduced as technical amendments that make seemingly notable changes to the way the FISC and FISCR work.

The changes are:

In 50 USC 1803 and 50 USC 1822 eliminating the requirement that the FISA Court of Review *immediately* explain its reason for denying an application before sending it to the Supreme Court.

> The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall ~~immediately~~ provide for the record a written statement of each reason for its

> decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

Letting the FISA Court of Review, in addition to the FISC, ensure compliance with orders.

> Nothing in this chapter shall be construed to reduce or contravene the inherent authority of ~~the court established under subsection (a)~~ [a court established under this section] to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court.

In 50 USC 1805 (traditional FISA), 50 USC 1842(d) and 50 USC 1843(e) (pen registers), and 50 USC 1861(c) (215 orders) stating that a denial of a FISC order under 50 USC 1804 may be reviewed under 50 USC 1803 (that is, by FISCR).

Now, I suppose these (especially the language permitting FISCR reviews) count as technical fixes, ensuring that the review process, which we know has been used on at least three occasions, actually works.

But the only reason anyone would notice these technical fixes — especially how something moves from FISCR to SCOTUS — is if some request had been denied (or modified, given the language permitting the FISCR to ensure compliance with an order) at both the FISA court and the FISA Court of Review, or if FISCR tried (and got challenged) to enforce minimization procedures imposed at that level.

There's one other reason to think there must have been a significant denial: The report, in the 2015 FISC report, that an amicus curiae had been appointed four times.

> During the reporting period, on four occasions individuals were appointed to

> serve as amicus curiae under 50 U.S.C. § 1803(i). The names of the three individuals appointed to serve as amicus curiae are as follows: Preston Burton, Kenneth T. Cuccinelli II (with Freedom Works), and Amy Jeffress. All four appointments in 2015 were made pursuant to § 1803(i)(2)(B). Five findings were made that an amicus curiae appointment was not appropriate under 50 U.S.C. § 1803(i)(2)(A) (however, in three of those five instances, the court appointed an amicus curiae under 50 U.S.C. § 1803(i)(2)(B) in the same matter).

We know of three of those in 2015: Ken Cuccinelli serving as amicus for FreedomWorks' challenge to the restarted dragnet in June 2015, Preston Burton serving as amicus for the determination of what to do with existing Section 215 data, and Amy Jeffress for the review of the Section 702 certifications in 2015. (We also know of the consultation with Mark Zwillinger in 2016 and Rosemary Collyer's refusal to abide by USA Freedom Act's intent on amici on this year's reauthorization.) I'm not aware of another, fourth consultation that has been made public, but according to this there was one more. I say Jeffress was almost certainly the amicus used in that case because she was one of the people chosen to be a formal amicus in November 2015, meaning she would have been called on twice. If it was Jeffress, then it likely happened in the last months of the year.

Obviously, we have no idea what this hidden consultation is. The scan of all of Yahoo's email accounts was in 2015, but it has always been reported as "spring" and weeks before Alex Stamos left Yahoo, so that seems sure to have happened before June 8 and therefore without a post-USA Freedom Act amicus. Moreover, it seems very likely that this fourth amicus consultation involved a denial, because the government is

supposed to release any significant decision. So I'm guessing that Jeffress proved persuasive in one case we don't get to know about.

Update: In this bill I briefly called the bill USS Liberty but thought better of doing so.