

FISC SUSPECTS JOHN RATCLIFFE OF RELAXING RULES FOR UNMASKING OF FISA MATERIAL

I Con the Record released last year's FISA 702 reauthorization the other day. A number of people have written pieces about it. I think my piece, predicting what would happen with this one, written in September 2020, sums it up nicely. I say that because, as presiding Judge James Boasberg notes in his opinion, the certification process was largely a "status-quo replacement of certifications and procedures approved by the court [on] December 6, 2019."

With regards to the pressing issue reported on by others (which I will return to) – whether FISC will ever fully account for the problems with the way FBI does back door searches, on FISA 702 material, traditional FISA material, and otherwise – because of the way certifications happen, the court is still working through stuff that happened over a year ago.

But a more interesting aspect of the filing deals with one of the more substantive changes in the "status-quo" reauthorization. Because of changes at the National Counterterrorism Center made under Ric Grenell and John Ratcliffe, ODNI had to change the title in the minimization procedures governing NCTC's access to raw 702 data. When NCTC wants to override requirements that data get purged after five years, one of two fairly senior people needs to sign off on it. Before, those people were the Deputy Director for Intelligence and the Deputy Director for Terrorist Identities; now they are the Assistant Director for Intelligence and the Assistant Director for Identity Intelligence. Boasberg found that change was no big deal.

Boasberg was more troubled by a change arising

from the same reorganization that assigns authority to disseminate unmasked information on US persons. Before, that approval had to come from the NCTC Director “or a designee who shall hold a position no lower than Group Chief within the NCTC Directorate of Intelligence.” Now, a “Group Chief” within the Directorate of Identity Intelligence can be delegated that authority. As Boasberg interprets it, this might allow NCTC to expand the universe of people who can authorize the dissemination of unmasked US person data.

This proposed change gives the Court pause. That the change is purportedly necessitated by the transfer of one analytic group to another directorate does not mean that the practical effect of the proposed change would be limited to that group. Presumably there are other groups within the Directorate of Identity Intelligence, and, on its face, this change would allow the NCTC Director to delegate dissemination determinations to chiefs of those other groups, as well as to other, more senior officials within the Directorate of Identity Intelligence, none of whom currently can be delegated such authority.

Mind you, Boasberg approved the change anyway.

To be sure, the Court does not second-guess internal organizational decisions made by the Executive. The Court, moreover, has no objection in principle to the maintenance of the status quo vis-à-vis the group, previously within the Directorate of Intelligence, and now within the Directorate of Identity Intelligence, that is “responsible for identifying and locating members of terrorist networks.” *Id.* But the Court has not been provided enough information about other groups within the Directorate of Identity Intelligence to know whether the extension of delegated

authority to chiefs of those other groups to authorize [redacted] disseminations is equally appropriate. The Court will approve the proposed change, but require the government to report in the future on the exercise of the delegation authority to any group chief or official within the Directorate of Identity Intelligence other than the one specifically discussed in the government's submission.

This is how FISA problems get so bad (as the FBI back door searches did) such that it takes years before FISC learns and catalogs current problems: it requires reporting, not imposes prohibitions, and as a result only learns if there are problems months or years after the fact.

Probably, this change did not result in a relaxation of the rules regarding who could unmask US person identities. Probably, the changes imposed under Grenell and Ratcliffe were just an attempt to root out people they deemed to be disloyal to Donald Trump. Probably, this has resulted in the same fairly strict rules regarding the unmasking of US person identities that were in place before.

But it's fairly ironic that Boasberg suspected that a change made in a certification signed by John Ratcliffe would make it easier for the government to unmask the identities of Americans who had been captured in FISA surveillance – because that's the kind of thing the GOP led a years-long campaign accusing others of.