Letter Outlines Extensive Collaboration Between FISA Court and DOJ

by Greg Nojeim [1]
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On July 29, the judge who presides over the FISA Court sent a letter [2] to Judiciary Committee Chairman Senator Patrick Leahy (D-VT) that outlines significant interaction – if not collaboration - between the clerks for FISA Court judges who rule on FISA surveillance applications and the lawyers for the Department of Justice who file those applications. The back-and-forth occurs before the government even files an application for a FISA order with the FISA Court duty judge.

As outlined in the letter, the process works like this: DOJ sends a draft of the application for FISA surveillance to a clerk at the FISA Court; the FISA Court's clerk sends back comments; DOJ sends another draft or a final application for a surveillance order; the FISA Court clerk prepares a bench memo on the application; and the FISA Court judge on duty decides whether to authorize the surveillance based on the application, bench memo and the government's unopposed presentation at any hearing the judge may convene. As part of this process, FISA Court clerks and DOJ lawyers have conversations daily about FISA surveillance applications, and they get together for meetings approximately weekly depending on the caseload, according to Judge Walton's letter.

This degree of interaction/collaboration is troubling. One would hope that the process would be more arm's length between the two sides: The government applies for an order, the FISA Court judge on duty approves it if it meets the statutory requirements, and, if it does not, the FISA Court judge either sends it back with an explanation about why it comes up short or turns it down. Instead, the process actually employed suggests that the FISA Court and the DOJ work together toward an approved surveillance order.

At footnote 2 in the letter, Judge Walton suggests that the same process occurs in wiretap applications in the criminal context. But, it is difficult to understand how that could come about. Assistant U.S. Attorneys who seek wiretap orders must send them to Main Justice for revision, then final approval, before they are filed with a court. If the court asked for changes in the wiretap application, there would have to be another round of approvals at Main Justice. DOJ lawyers are very busy. Nobody who is busy wants to re-approve something on which they already signed-off. More likely, in the typical case, DOJ sends a criminal wiretap application to the court when it is finished, not when in draft form.

At any rate, in the criminal context, a specific person is wiretapped to obtain evidence about a specific crime, and whether that evidence was obtained lawfully and constitutionally is tested in a fully adversarial proceeding when that person is charged with the crime. There is no such after-the-fact check on FISA surveillance. Any adversarial testing of that surveillance has to occur up front, when the FISA Court is deciding whether to authorize it.

What would happen if the FISA Court process was made adversarial, as former FISA Court Judge Robertson suggested [3] at the July 9 Privacy and Civil Liberties Oversight Board workshop? A special advocate with full access to the evidence supporting the FISA surveillance application would argue in the appropriate case against FISA Court approval when the special advocate thought the surveillance was unconstitutional or illegal. FISA Court clerks, knowing the possibility of such an adversarial process with respect to an application, might see the wisdom of a more arm's length relationship with one party to the process.

The seeming level of collaboration between the FISA Court and DOJ shows the need for reforms to make FISA court proceedings more adversarial. Unfortunately, if the process described in the letter is accurate, privacy and civil liberties could be given insufficient consideration in the application process. It's time to change this and finally have a voice for privacy and civil liberties at the FISA Court.

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