## FISA court advocate helpful, but no replacement for ending mass surveillance

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November 1, 2013 Originally appeared as <u>FISA court advocate helpful</u>, <u>but no replacement for ending mass surveillance</u> [2] in Yahoo! News

Originally published on Yahoo! News [2].

Revelations regarding the scope of NSA surveillance suggest a failure of oversight mechanisms designed to prevent improper surveillance. Members of Congress have introduced legislation to remedy that failure in part by creating an office that would advocate for privacy in proceedings before the Foreign Intelligence Surveillance Act (FISA) Court. This is would be a positive development, but by no means would it ensure privacy protections for innocent citizens.

The FISA Court was designed to provide independent oversight and prevent improper invasions of privacy, just as the warrant requirement for police searches does, while at the same time meeting the needs of expediency and secrecy that are unique to foreign intelligence investigations. However, the Court's activity in recent years has raised concerns. The Electronic Privacy Information Center compiled a report [3] concluding that the FISA Court rejected only two of 8,591 FISA applications it received between 2008 and 2012. This has lead some commentators such as Glenn Greenwald [4] and Ezra Klein [5] to say that it provides ineffective oversight and acts as a mere "rubber stamp" for surveillance.

The FISA Court has fought back, stating in a <u>letter</u> [6] to Senator Charles Grassley (R-lowa) that substantive changes were made to 24.4 percent of government requests between July and September of this years as a result of FISA Court review, however the specific nature of these changes and the orders they affected was not disclosed.

Whatever the truth, several factors erode trust in the FISA Court, the foremost being that it operates secretly and issues important decisions in a one-sided process in which only the government is represented. This inhibits the Court from giving adequate consideration to arguments against surveillance, and leaves the government free to make flawed or unsubstantiated assertions without fear of rebuttal.

One-sided FISA Court proceedings has led to the development of <u>an unnatural collaborative</u> <u>relationship</u> [7] between clerks of the court and the Department of Justice lawyers who submit surveillance applications to the FISA Court.

In response to this problem, Senator Richard Blumenthal (D-CT) introduced legislation, <u>S.1467</u> [8], to create an independent Special Advocate within the Executive Branch who would "vigorously [advocate] before the FISA Court or the FISA Court of Review ... in support of legal interpretations that minimize the scope of surveillance and the extent of data collection and retention."

The Special Advocate would review every application to the FISA Court, and could ask to participate in any FISA Court proceeding, although the FISA Court has the authority to deny such requests. The Special Advocate could also request that outside parties be granted the ability to file amicus curiae briefs with the Court, or participate in oral arguments. The Special Advocate could also appeal FISA Court decisions – including requests to participate and substantive decisions regarding surveillance applications – to the FISA Court of Review and the Supreme Court. Finally, the Special Advocate could petition for public disclosure of decisions and other relevant documents held by the FISA Court.

Picking up on this idea, Senator Ron Wyden (D-OR) included a "Constitutional Advocate" in his FISA reform bill, the Intelligence Oversight and Surveillance Reform Act (S. 1551 [9]) and Senator Patrick Leahy (D-VT) and Representative James Sensenbrenner (R-WI) included a similar provision in their USA Freedom Act, which was introduced on October 29.

Several improvements could strengthen the "Special Advocate" legislation. First, advocating protection of privacy and civil liberties should be added to the duties of the Office of the Special Advocate. While the current charge to advocate for minimizing the scope of data collection is helpful, sometimes consideration of broader civil liberties interests is appropriate. In addition, the Privacy and Civil Liberties Oversight Board should choose the Special Advocate, rather than selecting a slate of candidates from which the Chief Judge of the FISA Court would choose, as is suggested in the Blumenthal bill. Finally, the Special Advocate, not the FISA Court, should decide in which cases the Special advocate would have a voice. Otherwise, he or she could be barred from participating in most proceedings.

Inserting a Special Advocate in FISA Court proceedings – particularly one charged with making those proceedings more transparent – would go some distance toward restoring trust in intelligence surveillance. But, it is no substitute for clearer, more restrictive rules about the information that can be collected for intelligence purposes, particularly when that information pertains to Americans. In other words, having a Special Advocate is no panacea; it is far more important that Congress act to end the bulk collection of metadata about communications.

-- Read the full text of as <u>FISA court advocate helpful</u>, <u>but no replacement for ending mass surveillance</u> [2] in Yahoo! News

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