FORMER PRESIDING JUDGE, JOHN BATES, MAKES COMPELLING CASE TO ELIMINATE FISA COURT

As you read John Bates' "comments" about the NSA Review Group's recommendations, it's worth keeping two things in mind about him:

- He has a history of dismissing legally important cases out of caution — arguably excess caution — over getting involved in matters reserved for the political branches, a caution he did not exercise here.
- In August 2011, after Bates asked NSA to tell him how many entirely domestic communications were being caught via upstream collection (and after Bates had told NSA domestic collection of US person data was only illegal if they acknowledged it), they did not provide the number. And he didn't make them. He did however, in the same exchange, rubber stamp NSA's authority to conduct back door searches into US person communications.

In other words, Bates has long been overly solicitous of Executive power, and contrary to some claims, his work on the FISC actually reinforces, rather than refutes, claims that the Court is a rubber stamp.

Perhaps it's not surprising, then, that his comments actually make a fairly compelling — albeit unintentional — case for eliminating the FISC (at least for all its expanded uses since 2001) altogether.

Don't get me wrong. I'm sympathetic to some of Bates' stated concerns. The concerns about workload (which Bates raises in his first and second bullets, but relegates to his last paragraphs) are real, and have been recognized by a number of people in the FISC debate. Bates points to some real constitutional issues in constructing an advocate for the court (which, again, have been pointed out, with potential solutions, by others).

But ultimately Bates' comments (which may also reflect the concerns of Chief Justice John Roberts, whose authority he invokes in commenting on FISC matters) object to anything that might make FISC more of a … court.

Consider his argument against a Special Advocate. He worries a special advocate would harm what he (the same guy who couldn't get the government to divulge how many Americans are getting swept up in domestic upstream collection) claims is candor.

> Perhaps most troubling, however, is our concern that providing an institutional opponent to FISA applications would alter the process in other ways that would be detrimnetal to the FISC's timely receipt of full and accurate information. As noted above, the current process benefits from the government's taking on — and generally abiding by — a heightened duty of candor to the Court. Providing for an adversarial process in run-of-the-mill, fact-driven cases may

> erode this norm of governmental behavior, thereby impeding the Court's receipt of relevant facts. (As noted above, the advocate would rarely, if ever, serve as a separate source of factual information.) Instead, intelligence agencies may become reluctant to voluntarily provide to the Court highly sensitive information, or information detrimental to a case, because doing so would also disclose that information to a permanent bureaucratic adversary.

Even setting aside the number of times I've been able to find factual problems with claims made in the few FISC filings so far released (suggesting advocates could provide factual and technical details the government doesn't want to), this is a tacit admission that the FISC is not considered a bureaucratic adversary by the government.

This is particularly troubling given that, as Bates portrays the process, the "FISC may request or receive information from the applicant informally through the legal staff" (which according to Judge Walton's portrayal of the process, means via the phone). The only paper trail of the process, then, are (again relying in part on Walton) the written analysis of the FISC's staff attorneys. Which would mean an advocate would require "broad access" to these "draft decisions and memoranda from legal staff," would would violate "ethical canons and separation-of-powers principles," in turn "infring[ing] on the independence of the judges' decisionmaking."

One reason Bates objects to a Special Advocate, then, is that the Government would have to write all its requests down, which might affect their candor.

If that isn't already troubling, Bates' observation that "even relatively routine national security investigations involve

changing facts" raises additional concerns. Bates describes FISC judges making decisions on a sometimes undocumented set of moving facts, facts which the targets of such surveillance have never been permitted to see, much less challenge, in court.

Then there's Bates' stated worries about the problems an advocate would present for the FISA Court of Review (and again, some of this may reflect John Roberts' concern, as SCOTUS is the ultimate court of appeal). Some of this, again, reflects resource concerns. But even those resource concerns — such as the possibility the FISCR would have "to hire its own staff" reveals that the FISCR relies on the same staffers who drive FISC decisions in the first place. It is not, as it turns out, an independent court of its own.

Which makes the Constitutional concerns raised by the wacky decisions of the FISC, starting with its secret redefinition of "relevance" (without even benefit of independent dictionary definitions), all the more urgent. There is no standing to challenge these issues outside of the courts; with the FISC structure, there is apparently no fully independent court of appeal. And the Chief Justice wants to keep it that way.

Which means part of what Bates is defending is the authority for a bunch of District Court Judges to serve as Appellate Judges for some of the most Constitutionally novel issues raised by national security.

Yet Bates also seems to be defending the Court's ability to remain ignorant about some things the Executive does. He rejects any proposal to serve as an oversight check on the Executive (this is another concern I have some sympathy for). But he does so in a document including this disclosure raised in objection to requiring warrants to conduct back door searches. (Snoopdido noted this passage last night.)

> Decisions about querying Section 702 information are now made within the

> Executive Branch. As a result, the Courts do not know how often the government performs queries of data previously acquired under Section 702 in order to retrieve information about a particular U.S. person. It seems likely to us, however, that the practice would be common for U.S. persons suspected of activities of foreign intelligence interest, e.g., engaging in international terrorism, so that the burden on the FISC of entertaining this new kind of application could be substantial.

Remember: Bates is the guy who first approved NSA and CIA's use of these back door searches (relying in part on the prior 3-year history of FBI's use of them). But he has apparently never gotten enough "candor" from the Executive — either before or after he approved this — to know how and how often the Executive is using these searches!

Then he goes on to explain that the Executive might need to use back door searches to get the content of Americans they can't otherwise target under FISA.

> For a variety of reasons, a U.S. person suspected of such activity may not otherwise be a FISA target. For example, there may be probable cause to believe that a U.S. person is engaged in international terrorism, but intelligence agencies may not have the ability to implement current forms of FISA collection against that person because of the person's location or lack of information about particular facilities.

Granted, what Bates is describing is the use of reverse targeting to get around technical difficulties, not legal ones (though I wonder how he's sure about the legal case if the

government has never made it).

But it is reverse targeting, the use of a back door search to get to the US person content, without a warrant, via collection on another target. This is forbidden by the law. Yet he describes it as one reason why the FISC shouldn't get involved in reviewing warrants for this kind of search, which (as he describes it) violates the law.

Against the background of admitting that the FISC doesn't always require the government to write down its requests and that it doesn't want to approve warrants for activity that by his description violates the statute because the government should be permitted to continue violating the statute, Bates then objects to the recommendations to eliminate bulk collection and provide more review of 215 and NSLs, in part because of the burdens they'd pose for the Court. Most curiously, Bates says that if reforms eliminated NSL gag orders, the government would begin to use Section 215.

> Those changes would like result in the government's decreasing its reliance on NSLs for records subject to such a disclosure requirement and instead bringing to the FISC more applications under Section [215] for production of such records, in order to avoid disclosure of such information to private parties.

If the government could still get bulk Section 215 orders, I agree, they might well use those instead.

But Jim Comey — to the extent he can be believed in comments that were clearly misleading — said he'd end up using grand jury subpoenas instead. So a guy with years of involvement in prosecuting terrorism cases at least claims that he not only could — but would prefer to — use grand jury subpoenas for this information over the FISC.

Which would alleviate the need to routinely eliminate gags, because review in any criminal proceedings would provide the kind of transparency and review necessary for such things (this is a point Peter Swire made in yesterday's hearing).

The reason we need a FISC is because the government — often through inadequate notice to defendants — has succeeded in avoiding the kind of review courts normally bring. But John Bates reveals a number of ways in which the court that is supposed to be providing that review has failed to do so. And Jim Comey, at least, thinks some of this could move back to real courts.

So why not? Why not move this, with all the gags grand jury subpoenas get and the national security experience judges have acquired over the last decade and all the normal constitutionally required review process, back to normal Title III Courts?

I admit it. Bates makes an excellent case for eliminating the FISC case, at least for all the exotic bulk programs the government has been inventing in secret.