A BETTER EXAMPLE OF ARTICLE III FISA OVERSIGHT: REAZ QADIR KHAN

As debate over reauthorization of Section 702 heats up, both those in favor of reform and those asking for straight reauthorization are making their cases. As part of that, I wrote a summary of the most persistent NSA (and FBI) violations of FISA for Demand Progress, called "Institutional Lack of Candor." I did a piece for Motherboard based off the report, which also looks at how Rosermary Collyer did not use the leverage of FISA's exclusivity clause to force NSA to purge improperly accessed data this year.

Meanwhile, NSA's General Counsel, Glenn Gerstell, just did a speech at University of Texas laying out what he claimed is the judicial oversight over Section 702. There's one line I find particularly interesting:

> Among other things, Section 702 also enables collection of information on foreign weapons proliferators and informs our cybersecurity efforts.

Here, Gerstell appears to be laying out the three known certificates (counterterrorism, counterproliferation, and foreign government). But I wonder whether the "among other things" points to a new certificate, or to the more amorphous uses of the foreign government cert.

As for Gerstell's argument that there's sufficient judicial oversight, I find it laughable in several key points.

For example, here's how Gerstell describes the amicus provision included with USA Freedom Act.

> The FISC is entitled to call upon the assistance of amici when evaluating a novel or significant interpretation of

> the law or when it requires outside technical expertise. This amicus provision, which was added to FISA as part of the USA FREEDOM Act amendments in 2015, enables the court to draw upon additional expertise and outside perspectives when evaluating a proposed surveillance activity, thus ensuring that the FISC's oversight remains both robust and knowledgeable. The court has designated a pool of experts in national security to serve as amicus curiae at the court's request. Amici are specifically instructed to provide to the court "legal arguments that advance the protection of individual privacy and civil liberties," "information related to intelligence collection or communications technology," or any other legal arguments relevant to the issue before the court.
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> The FISC's amicus provisions are more than a mere statutory wink and nod to strong judicial oversight. The court has in fact called upon its amici to assist in evaluating Section 702 activities. In 2015, the FISC appointed an amicus to analyze what the court felt were two novel or significant interpretations of law that arose as part of its review of the government's annual application for 702 certifications. The first issue involved whether queries of 702 collection that are designed to return information concerning U.S. persons are consistent with statutory and constitutional requirements. The second question involved whether there were any statutory or constitutional concerns about preserving information collected under Section 702 for litigation purposes that would otherwise be subject to destruction under the government's minimization procedures. On both issues, the FISC carefully considered the views of the amicus, ultimately concluding

> that both of the proposed procedures were reasonably tailored to protect the privacy of U.S. persons and thus permissible under both the FISA statute and the constitution. [my emphasis]

Gerstell speaks of the amicus provision as newly permitting — "entitled," "enabled" — the FISC to consult with others. Yet the FISC *always* had the ability to call amici (in fact it did ask for outside help in the In Re Sealed Case provision and in a few issues in the wake of the Snowden leaks). What was new with the USAF amicus is an affirmative requirement to either use an amicus *or* explain why it chose not to in any matters that present a "novel or significant interpretation of the law."

> Authorization.—A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other statutory requirement that the court act expeditiously or within a stated time—
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> (A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; and
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> (B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.

It's true that USAF permits the FISC to decide what counts as new, but in those cases, the law

does require one or another action, not simply permit it.

Which is why it's so funny that Gerstell harps on the inclusion of Amy Jeffress in the 2015 recertification process. Note his silence on the 2016 process, which addressed an issue that (as both my reports above make clear) is far more problematic than the ones Jeffress weighed in on? Collyer simply blew off the USAF requirement, and didn't get the technical help she apparently badly needed. As I noted, she sort of threw up her hands and claimed there were simply no people with the technical expertise and clearance available to help.

I suspect the Intelligence Community — and possibly even the law enforcement community — will live to regret Collyer's obstinance about asking for help, if for no other reason than we're likely to see legal challenges because of the way she authorized back door searches on content she knows to include domestic communications.

Gerstell then goes on to hail Mohamed Mohamud's challenge to 702 as an example of worthwhile Title III court oversight of the program.

> In certain circumstances, challenges to surveillance programs can be brought in other federal courts across the country. One recent court case is particularly illustrative of the review of Section 702 outside of the FISC, and here is how it commenced:
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> A few years ago, a young man named Mohamed Mohamud was studying engineering at Oregon State University. He had emigrated to the U.S. from Somalia with his family when he was only three, and he later became a naturalized U.S. citizen. He grew up around Portland, Oregon, enjoying many typical American pursuits like music and the Los Angeles Lakers. In 2008, however, he was involved in an incident at Heathrow

> Airport in London during which he believed he was racially profiled by airport security. This incident set Mohamud on a path toward radicalization. He began reading jihadist literature and corresponding with other Al-Qaeda supporters. In 2010, he was arrested and indicted for his involvement in a plot to bomb the Christmas Tree Lighting Ceremony in Portland, which was scheduled to take place the day after Thanksgiving. He was eventually found guilty of attempted use of a weapon of mass destruction.
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> After the verdict but before his sentencing, the government provided Mohamud with a supplemental notice that it had offered into evidence or otherwise used or disclosed during the proceedings information derived from Section 702 collection. After receiving this notice, Mohamud petitioned the court for a new trial, arguing that any 702-derived information should be suppressed because, among other reasons, he claimed that Section 702 violated the Fourth Amendment. The federal district court considered Mohamud's claims before ultimately holding that 702 was constitutional. In so holding, the court found that 702 surveillance does not trigger the Fourth Amendment's warrant requirement because any collection of U.S. person information occurring as a result of constitutionally permissible 702 acquisitions occurs only incidentally and, even if it did trigger the warrant requirement, a foreign intelligence exception applies. The court also found that "the government's compelling interest in protecting national security outweighed the intrusion of Section 702 surveillance on an individual's privacy," so the 702 collection at issue in that case was reasonable under the Fourth Amendment.

> Mohamud appealed the district court's ruling to the Ninth Circuit, where the Circuit Court again looked at the constitutionality of the 702 collection at issue, with particular scrutiny on incidental collection. The Ninth Circuit concluded that the government's surveillance in this case was consistent with constitutional and statutory requirements; even if Mohamud had a Fourth Amendment right to privacy in any incidentally-collected communications, the government's searches were held to be reasonable. [my emphasis]

Look carefully at what Gerstell has argued: he uses a case where DOJ introduced evidence derived from 702, but gave the legally required notice only after the entire trial was over! That is, he's pointing to a case where DOJ broke the law as proof of how well judicial oversight works.

And that's important because DOJ has stopped giving 702 notice again (and has never given notice in a non-terrorism case, even though it surely has used derivative information in those cases as well). Without that notice, no defendant will be able to challenge 702 in the designated manner.

Which is why I would point to a different case for what criminal court oversight of SIGINT should look like: that of Reaz Qadir Khan (whose own case was closely linked to that of Mohamud).

At first, Khan tried to force the judge in his case, Michael Mosman, to recuse because he was serving as a FISA judge at the time. Mosman stayed.

Khan then asked for notice from the government for every piece of evidence obtained by the defense, laying out the possible authorities. Things started getting squirrelly at that point, as I summarized here.

> Last year, I described the effort by the Reaz Qadir Khan's lawyers to make the government list all the surveillance it had used to catch him (which, significantly, would either be targeted off a dead man or go back to the period during with the government used Stellar Wind). In October the government wrote a letter dodging most notice. Earlier this year, Judge Michael Mosman (who happens to also be a FISA judge) deferred the notice issues until late in the CIPA process. Earlier this month, Khan plead guilty to accessory to material support for terrorism after the fact.

What I suspect happened is that Mosman, who knows more about FISA than almost all District judges because he was (and still is) serving on the court, recognized that the government had surveillance that deserved some kind of judicial scrutiny (in this case, it probably involved Stellar Wind collection, but also likely included other authorities). So he agreed to deal with it in CIPA.

And just weeks later, Khan got a plea deal.

That's the way it should work: for a judge to be able to look at surveillance and figure out if something isn't exactly right or, for exotic interpretations of the law that don't pass a smell test, and in those cases provide some means for review. Here, the government appears to have gotten uninterested in subjecting its evidence for review and, as is built into CIPA, ended up making a deal instead.

Of course, that rare exception points to one of the problems with FISC.

Gerstell claims that a court that until the Snowden leaks had no Democratic appointees on it boasts a "diversity of backgrounds."

> Recognizing the importance of judicial accountability for foreign intelligence surveillance under FISA, Congress

> designed a specialized court authorized to operate in secret — the FISC — to encourage rigorous oversight of activities conducted under FISA. Even its structure is deliberately assembled to serve that purpose. FISC judges are selected by the Chief Justice to serve for up to seven years, on staggered terms, which guarantees continuity and subject matter expertise on critical issues. In addition, the FISC is required by statute to be composed of judges drawn from at least seven of the U.S. judicial circuits. This statutory makeup ensures that the FISC includes judges from a diversity of backgrounds and geographic regions, rather than a court that might tend toward unanimity of thought or particular judicial sympathies.

That's poppycock. The judges tend to be conservative. Importantly, the presiding judges are always from the DC district, not even just the DC neighborhood, such as MD or EDVA.

And remarkably, almost none of the judges on the FISC have presided over terrorism cases (Mosman is from OR, which because of a mosque that the FBI has basically lived in since 9/11, has had more than its share of terrorism cases). Which means the men and women sitting in Prettyman overseeing FISA often have little to no experience on how that data might affect an American's right to a fair trial two years down the road.

I, like Gerstell, contest the claim that the FISC is generally a rubber stamp. But I do believe it should include more of the judges who actually oversee the trials that may result, because that experience would vastly improve understanding of the import of the review. At the very least, it should include the judges from EDVA who oversee the cases that go through the CIA-Pentagon District, which also includes a great many of the country's espionage cases.

And most of all, the practice of having one judge, always from DC, review programmatic spying programs by herself should stop. While it is absolutely the case that judges have often shown great diligence, when a judge doesn't show adequate diligence — as I believe Collyer did not this year — it may create problems that will persist for years.

The FISC is not a rubber stamp. But neither is the judicial oversight of 702 the consistently diligent oversight Gerstell claims.