

ROSEMARY COLLYER MOVES TO LOCK DOWN THE FISA COURT

These two filings at the FISA Court – letters from Rosemary Collyer to Republican members of Congress trying to liberate documents related to Carter Page’s FISA application – have generated a good deal of attention. But they’re not all that exciting. All they consist of is Collyer (the worst presiding judge ever, if not the worst FISC judge outright) telling Bob Goodlatte and Devin Nunes that DOJ and FBI have most of the documents they want and she’s not going to budge until she learns what they’ll do.

Thank you for the courtesy of copying me on your February 1, 2018, letter to the Department of Justice and the FBI in which you made requests for information similar to those in your letter to us. Those agencies possess most, if not all, of the responsive materials the Court might possess, and we have previously made clear to the Department, both formally and informally, that we do not object to any decision by the Executive Branch to release any such FISA materials to Congress. I expect that their handling of your requests will inform the Court as to how the Executive Branch perceives its interests and will assist us in our consideration of the full range of issues; therefore we have asked the Department of Justice to keep us informed regarding its response to your February 1 letter.

It’s a punt. And not a very bold one.

The context, though, is interesting. The move comes after three related events:

- After Collyer blew off a

previous FISC precedent in ruling against an ACLU effort to liberate some FISA documents, the FISC apparently revolted, leading the entire court to consider the issue which was narrowly decided for ACLU. FISC then punted that decision up to the FISCR. FISCR named Laura Donahue as amicus on that challenge (both giving the proceeding a patina of process but also ensuring she doesn't give up on the amicus process like John Cline did in December). I hope I'm wrong, but I expect FISCR to rule against ACLU, thereby tamping down any First Amendment right to access decisions of the court.

- NYT's Adam Goldman and Charlie Savage asked for the Carter Page application. This is a serious legal effort, with attentive follow-up. If ACLU loses at FISCR, however, it'll make it very easy for FISC to deny their request.
- Lawfare's Susan Hennessey and Ben Wittes asked for the FISC to release a statement about whether DOJ conducted any misconduct in the Page

application. This is less serious than the NYT effort, both for the utter lack of self-awareness of two people who just four months ago were applauding FISC law-breaking, deeming themselves "true friends" of the court, claiming that FISC telling us it is cool with DOJ's application will restore faith in the process. As if that would be sufficient. Plus, the motion isn't necessary: Reggie Walton has made public statements on his own. If Collyer did so in this case, it would be more credible if she did so on her own than if she did so because a former NSA lawyer and a surveillance booster invited her too.

I don't support the full Page application coming out in this case. But a sharply redacted version would do more to silence the skeptics than anything else.

But by all appearances, Collyer wants the Executive to tell her what to do here, ceding the "inherent authority" Hennessey and Wittes proclaim in their motion.

Collyer's continued subservience to the Executive is, in my opinion, a far graver challenge to FISA Court legitimacy than the Carter Page approvals are. Particularly at this moment, I wish Judge Collyer would act like the independent court most other FISC judges treat it as.