Senate Judiciary Committee Hearing
"Strengthening Privacy Rights and National Security:
Oversight of FISA Surveillance Programs"
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Having been asked to appear here following the publication in the *New York Times* on July 23, 2013, of an op-ed article suggesting an amendment to the Foreign Intelligence Act, I do so with the caveat that whatever I say – or have written – on the subject of the op-ed expresses my views alone. I do not mean to bypass the normal process by which the Judiciary proposes legislation. I speak for myself and no one else.

The proposal I made in the op-ed piece is whether it would be worthwhile for the judges of the Foreign Intelligence Surveillance, when a government FISA application raises a new or novel issue of constitutional or statutory interpretation, to have discretion to designate a previously security-cleared attorney to challenge the government's request.

Such appointment would not be frequent, and would not occur in the routine kind of cases making up the day in, day out docket of the Foreign Intelligence Surveillance Court (FISC). Rarely does a FISA application present any challenging issues under the statute. The probable cause standard is much lower than for a conventional search warrant. Once the government meets that standard, judges must issue the FISA order.

Once in a very great while, however, a FISA application raises a novel, substantial, and very difficult issue of law. In such circumstances, the FISC judge (or judges, sitting en banc) may desire to hear not just the government's views in support of the request, but reasons from an independent attorney as to why the court should not issue the order in whole or part.

This process would give the court the benefit of the give and take that is the hallmark of the adversarial process.

In addition, review by the Foreign Intelligence Court of Review would occur, as it does not now, where the government had prevailed before the FISC. Today, only the government, as the only party before the FISC, is in a position to appeal, which it is not likely to do where the FISC has granted its request.

Where such review were available and pursued, public concern about the decisions of the FISC should moderate. This would be so, whether or not the opinion of the Court of Review became public.

If implemented, my recommendation about appointment of counsel would also make possible ultimate review by the Supreme Court.

I can foresee at least one objection to what I propose. Namely, no one besides the government appears when the government seeks an ordinary search warrant in a conventional criminal investigation. But the subject of a conventional Fourth Amendment search warrant knows of its execution, can challenge its lawfulness if indicted, and can, even if not indicted, seek to recover seized property or possibly sue for damages.

In contrast, except in very, very rare instances, suppression or other means of challenging the lawfulness of a FISA order is simply not available to the subject of a FISA order. Even on the infrequent occasion when a FISA target becomes charged in a criminal case, he will, as a result of the procedures mandated in the Classified Information Procedures Act almost never have the opportunity to challenge the FISA order.

Thus, although all conventional search warrants issue *ex parte*, their execution informs the subject of the warrant's issuance. Once the subject knows of the warrant, the law gives that subject several ways in which to challenge the lawfulness of the warrant and search. This is not so with a FISA order.

Another concern would arise where the FISC must, due to emergency circumstances, act immediately. The FISA already authorizes the government to act without a FISA order in emergency circumstances. In such cases, it must still seek *post hoc* FISC approval for the surveillance. In such circumstances, the FISC judge could designate counsel at that stage. In any event, new constitutional issues probably would not arise in emergency circumstances.

My recommendation, while offering some substantial potential benefits to the court's processes and public generally, is very modest. It would not affect the court's day to day operations. It would remain for an individual judge to determine whether to invoke this option on the infrequent occasion that the judge concluded doing so would be useful.

Finally, I emphasize again that these comments, and anything that I may say in response to the Committee's questions, express my views alone, not those of the Federal Judiciary, any other judge, or any one else. While I think what I ask the Committee to consider is worthwhile, only time can tell whether others do as well.

Thank you for this opportunity to submit these Remarks and the attached copy of the op-ed piece which is the occasion for my being here.

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