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Peter Margulies

Roger Williams University School of Law

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FISC Query Preapproval: Intelligence Burden or Bump in the Road?

By Peter Margulies Saturday, January 18, 2014, 5:00 PM

Privacy Paradox: Rethinking Solitude

Never was the phrase “the devil’s in the details” more apt than in describing President Obama’s instruction, yesterday, that the government query its bulk collection metadata only “after a judicial finding, or in a true emergency.” Preapproval ratcheted up burdens at the NSA in 2009, when FISC Judge Reggie Walton imposed a preapproval requirement after learning that the NSA had been querying metadata using identifiers without a “reasonable and articulable suspicion” (RAS) link to terrorist groups. But the impact of preapproval is actually only the second question to be asked about the President’s proposed RAS regime; the first question (as Ben noted at a fine Brookings event yesterday) is whether the FISC has the authority to preapprove specific identifiers. This post addresses both questions, starting with the issue of the FISC’s power.

While the President “directed the Attorney General to work with” the FISC on this issue, it’s far from clear that the FISC will play ball. After all, the FISC has repeatedly approved the government’s statutory authority under section 215 of the Patriot Act to query metadata using RAS-approved identifiers determined by the NSA itself. Having read section 215 in this fashion, the FISC may hold that any modification requires congressional action. That could take time, given the current divide in Congress on the metadata program. (The FISC could also hold that preapproval of identifiers and/or the participation of a “public advocate” would violate the Constitution’s Article III requirement that federal courts only decide “case or controversies.” The FISC’s Judge John Bates mentioned this concern about a public advocate in his letter to the Senate Intelligence Committee this week. That said, the similarity of judicial preapproval to traditional warrants might well ease that concern.)

The FISC’s case law on preapproval reinforces this scenario. Even though the FISC ordered temporary preapproval in March 2009, it did so only as a remedy for problems in implementation of its earlier orders. The FISC authorized a return to NSA RAS-approved identifiers in late 2009, after concluding that the NSA had addressed the problems. Rather than bow to a presidential request to reinstitute preapproval, the FISC could hold that preapproval was a matter for the FISC’s own remedial discretion, which Congress (but not the President) can modify. Any other result, as Orin Kerr suggests and Wells agrees, would be a violation of separation of powers---an ironic outcome for a step designed to alleviate concerns about executive branch overreaching!

Of course, this is not the only possible result on the issue of the FISC’s authority. The court could also apply a *Chevron*-like analysis to the President’s proposed approach, and defer to it as a permissible reading of Section 215. To support this holding, the court could find that the language of section 215 was ambiguous, so far as concerns the scope of the FISC’s role in approving database queries. It could then find that the President had reasonably construed the statute’s text, which requires the FISC to determine that information sought by the government is “relevant to an investigation” of terrorism or clandestine foreign intelligence activities. Since the FISC’s precedents deem querying with RAS-approved identifiers to be integral to compliance with the statutory relevance standard, then judicial preapproval would arguably be consistent with the statute.

However, this argument also has problems. First, courts often decline *Chevron* deference when the executive’s position is inconsistent; and courts in any case generally reserve the doctrine for application to administrative law situations, where there has been a clear congressional delegation of lawmaking power to an agency. Here, the executive has for years taken the position that judicial preapproval was not required. Is the debate triggered by the Snowden revelations a sufficient reason for a shift? The FISC would have to answer this question in the affirmative. Second, the FISC may take the view outlined by Judge Bates in his letter, asserting that judicial preapproval and other changes to the metadata program would adversely affect judicial efficiency. That might be enough for the FISC to find that the President’s RAS arrangement amounts to an unreasonable reading of section 215---one unworthy of deference.

If the Attorney General can “work with the FISC” to ease these concerns, the government and the court will have to decide how to implement the President’s idea without causing dangerous gaps in the government’s gathering of information about terrorism. Terrorists will not go on vacation while the FISC considers government preapproval requests. To seal such gaps, the government may ask the FISC for provisional approval of all RAS identifiers now in use at the NSA. The FISC could grant such approval pending fuller review of the identifiers. The FISC could also accord substantial deference to the NSA’s determinations, based on the NSA’s long expertise in this area. Moreover, in construing what constitutes a “true emergency” under the President’s approach, the FISC could borrow language from the section 702 overseas surveillance program. Section 702 allows the Attorney General and Director of National Intelligence to determine prior to FISC approval that a given course of surveillance is appropriate because without immediate action, “intelligence important to the national security of the United States may be lost or not timely acquired.”

This approach would allow queries to proceed without dangerous gaps, while enhancing accountability per the President's intention. But the FISC could decide that, even if this approach is sound as a policy matter, the court lacks the power to order it. That would toss the issue back into Congress's lap. One thing is sure: the FISC will not be a rubber stamp. Judge Walton demonstrated that clearly in March, 2009, and (despite the sometimes strident claims of metadata critics) the FISC's role remains robust today. The Attorney General's efforts to "work with the FISC" on implementing the President's would-be RAS mechanism may well become the latest evidence of the FISC's independence.

Topics: FISA: 215 Collection, Internet Metadata Collection, FISA: Reform, FISA, FISA: 702 Collection

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).