FISA - A CONGRESSIONAL ENACTMENT TO SUPPLEMENT PRESIDENTIAL POWER

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Life and government are characterized by an irony that is often comical, which is as follows. The effect of conduct anyone engages in is often precisely Opposite to the effect intended. As indicated in the previous Chapter, FISA is the Foreign Intelligence Surveillance Act. Enacted for the purpose of limiting Executive power, under President George Bush it had the effect of increasing Executive power. All it took was two simple requisites. First, the President had to violate the law, and then he had to be the beneficiary of the Judiciary's failure to uphold the law.

The matter was first decided quite correctly and bravely by Federal District Court Judge Anna Diggs Taylor. She squarely held President Bush violated the law. The government appealed to the Sixth Circuit Court of Appeals. The Justices cowered out of even deciding the key issue by manipulatively interpreting the doctrine of Standing. As indicated in the previous Chapter, they did so in an indecipherable opinion figuring that nobody would really be able to fully understand what they wrote anyway. On that point, the Sixth Circuit was quite correct.

The matter was then addressed by the Federal Ninth Circuit Court of Appeals, in an opinion published November 16, 2007. The facts of the Ninth Circuit's opinion are quite interesting, and its logic amusing, if not pitiful. In general, the Court presents the matter as follows. Following the terrorist attacks of 9/11/01, President Bush authorized the National Security Agency (NSA) to conduct a warrantless communications surveillance program known as TSP (Terrorist Surveillance Program). After the New York Times revealed the program in 2005, government officials doled out disclosures about the program. One day later President Bush informed the country in a radio address he had authorized the program.

A domestic organization called the Al-Haramain Islamic Foundation instituted suit after the President's uncoerced confession. They claimed they had been subject to warrantless electronic surveillance in 2004 in violation of FISA. However, unlike the case presented to the Sixth Circuit, Al-Haramain was in possession of a "Top Secret" document proving they had been the subject of warrantless surveillance. Thus, Al-Haramain had irrefutably cleared the "Standing" hurdle that was the impediment in the Sixth Circuit case.

Now, a reasonable person would probably ask, "How did the organization obtain possession of such a Top Secret document?" The answer is both easy and

pathetic. They got the "Top Secret" document because the United States government just gave it to them in error in 2004 during the course of proceedings to freeze the organization's assets. Even though the government voluntarily gave the organization the document, it contends in the FISA litigation, that the Court should not consider the document because it is still "Top Secret" and thus covered by the state secrets privilege.

Now, am I missing something here? How can you possibly tell somebody a secret and then contend they don't have a right to know it? It's like going up to your wife and saying, "Honey, I've been screwing around with your best friend, but you can't divorce me for that, because I made a mistake telling you when I was drunk and you're not supposed to know." In a pathetically lame manner, the Ninth Circuit does indeed contrive a contorted, albeit mentally impaired, irrational way to justify the foregoing premise. What the Court does is as follows.

The Court first notes the state secrets privilege is "not to be lightly invoked." It then proceeds to "lightly invoke" the privilege in a manner more lightly than has ever occurred in American history. It agrees with the District Court that the subject of the TSP program is not protected by the state secrets privilege because President Bush publicly acknowledged he authorized the program. The Court further notes that subsequent to Bush's disclosure, government officials made one voluntary disclosure after another about the TSP. So it concludes the TSP program itself is not subject to the state secrets privilege.

That however, does not resolve the question as to whether the so-called "Top Secret" document the organization was given by the government is covered by the state secrets privilege. The Ninth Circuit opinion states:

> "This case presents a most unusual posture because Al-Haramain has seen the Sealed Document. . . . The district court held, however, that "**because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs knew they were, this information remains secret**. . . . The district court also concluded that **the government did not waive its privilege by inadvertent disclosure of the Sealed Document**." [218]

The Court then states:

> ". . . Al-Haramain is privy to knowledge that the government fully intended to maintain as a national security secret. . . . We reviewed the Sealed Document . . . . Having reviewed it in camera, we conclude that the Sealed Document is protected by the state secrets privilege." [219]

The essence of the Court's opinion is that the "Top Secret" document obtained by Al-Haramain, which proves they were subjected to warrantless surveillance can not be used by the organization, because the governmental disclosure was made by mistake. Stated simply, the Court concludes that since the government intended to keep the document secret, even though it revealed the secret in error, the state secrets privilege still applies. The result is that Al-Haramain cannot use the document they were given to prove they have Standing, and as a result they lack Standing.

The Court's opinion is stupidity at its "best" ("worst"). Two facts are irrefutable upon rational consideration of the cognitively deficient logic used in the opinions of the Sixth and Ninth Circuits, compared to the logically sound opinion of Federal Judge Anna Diggs Taylor. First, President Bush positively violated FISA. Second, neither the Sixth or Ninth Circuit had the courage to directly decide the issue. Instead, they both relied on ridiculously contrived reasoning pertaining to the issue of Standing. The reason they lacked the courage to decide the main issue is they knew if they did, they would have to rule that the President violated the law. Federal District Court Judge Taylor was willing to uphold the law. In contrast, the Appellate Justices of the Sixth and Ninth Circuits were too handicapped by their own personal fears to fulfill their judicial duties.

Lastly, I note the following. The issue of terrorism is undoubtedly one of serious national concern. The exigency of an emergency situation that could impact upon the entire nation may in fact justify warrantless surveillance in isolated instances. If so, what should have occurred is as follows. Bush should have gone to Congress asking for repeal or amendment of FISA to the extent necessary for fulfilling the nation's defense needs. He should have done this before violating the law, not after. Alternatively, the government could have challenged the constitutionality of FISA on the ground it infringed upon rightful Presidential power.

But, for Bush to simply say, "to hell with FISA, I'm doing what I want" and then blatantly violate the statute was commission of an Illegal act by the President. The failure of the Sixth and Ninth Circuit Court of Appeals Justices to fulfill their sworn duty to uphold the law, by evading the rendering of a decision on the key issue was an act of Contempt for the law on their part. That sends a disturbing message to the public. If the President can violate the law, and if Appellate Justices are contemptuous towards congressionally enacted statutes, the general public can reasonably be expected to have a diminished degree of respect for the written law.

As the saying goes, if you want a secret kept, then keep it. The notion of "I didn't really mean to tell you my secret, so it should still be treated as a secret" is a buffoonish mockery of reason.

Perhaps FISA really stands for "Federal Insulation from Statutes for the Administration."