A COMPARATIVE ANALYSIS OF JUDICIAL INTERPRETATION OF THE PHRASES "ELECTRONIC SURVEILLANCE" AND "GOOD MORAL CHARACTER"

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The issue I examine in this chapter is whether the average citizen and the Judiciary can define the phrase "Good Moral Character" or "Electronic Surveillance." The conclusion I reach is that to the average citizen the phrase "Good Moral Character" is impossible to define, but the phrase "Electronic Surveillance" is easy to define. In contrast, to the Judiciary, the exact opposite is true. To the Judiciary, the phrase "Good Moral Character" is easy to define and the phrase "Electronic Surveillance" is almost impossible to define.

The result of this disparity between the Judicial ability to interpret words and the citizens ability to interpret words is a mandated conclusion that the Judiciary is not functioning in a cognitively rational manner properly aligned with the general public's interest. Instead, the Judiciary is functioning to further the interests of the government and itself at the expense of the general public.

I compare in this essay two important cases decided by the Sixth Circuit Federal Court of Appeals within 14 months of each other. The two cases considered conjunctively exemplify a selective application of logical principles that can only be construed as being in furtherance of judicial self-interest.

In ACLU v National Security Agency, Case #06-2095 (2007) the Sixth Circuit addressed the interception of telephone and e-mail communications without any judicial warrant by the National Security Agency (NSA). One aspect of the Court's opinion addressed a critical provision of the Foreign Intelligence Surveillance Act (FISA), which requires judicial warrants for governmental interception of communications occurring by means of "Electronic Surveillance." The Sixth Circuit's opinion, ruling against the ACLU and in favor of the government's interception without a judicial warrant states (emphasis added):

> "Next, the interception must occur by "electronic surveillance." **According to the plaintiffs, the government's admission that it intercepts telephone and email communications - which involve electronic media** and are generally considered, in common parlance, forms of electronic communications - **is tantamount to admitting that the NSA engaged in "electronic surveillance"** for purposes of FISA. **This argument fails upon recognition that "electronic surveillance" has a very**

> **particular, detailed meaning** under FISA - a legal definition that requires careful consideration of numerous factors. . . **The plaintiffs have not shown**, and cannot show, that the **NSA's surveillance activities include** the sort of conduct that would satisfy FISA's definition of **"electronic surveillance".** . . ." [220]

The above passage asserts that the government admitted it intercepts telephone and e-mail communications involving "electronic media." This is because it is irrefutable telephone and e-mail communications involve electronic media. Notwithstanding, the Court holds this type of interception is not necessarily "electronic surveillance." The problem is that if the question were presented to all of roughly 250 million adult Americans, virtually every single one would conclude that if you intercept a telephone call or an e-mail communication it constitutes "electronic surveillance.

However, the Sixth Circuit seeking in desperation to find some way to justify the government's position, adopts an exceptionally constricted view towards interpretation of the phrase "electronic surveillance." It does this even though by doing so, its interpretation does not conform to society's commonly understood perception of the meaning of words. This results in the Court essentially isolating itself from accepted moral norms of society. Alternatively stated, the Court is in its "own world" so to speak.

In contrast to the sophistical reasoning used to escape the commonly understood meaning of the phrase "electronic surveillance," the Sixth Circuit adopted an entirely different approach when interpreting the phrase "Good Moral Character" in the case of <u>Frank Lawrence v Michigan Board of Law Examiners</u>, Case No. 05-1082 (2006). The <u>Lawrence</u> case was decided a mere 14 months prior to the NSA decision, but the method used to define words was precisely opposite to that used in the NSA decision. In the <u>Lawrence</u> case, the Bar Applicant launched a facial challenge to Michigan State Bar admission rules. This included an allegation that the "Good Moral Character" standard gave unbridled discretion to State Bar decision-makers. The Sixth Circuit indicated that under Michigan law the phrase "Good Moral Character" was defined as follows (emphasis added):

> ". . . the propensity on the part of the person to serve the public in the licensed area in a **fair, honest, and open** manner." [221]

The Court then held as follows (emphasis added):

> "The defendants also do not have "unbridled discretion" in deciding whether to admit or to reject bar applicants because **the Michigan statute provides sufficient guidance** to determine which applicants have "good moral character." [222]

Once again, I turn the matter over to roughly 250 million American citizens. In contrast to the NSA case, where the overwhelming majority of Americans would conclude without hesitation that the interception of telephone and e-mail communications involving "electronic media" constitutes "electronic surveillance," you would indisputably get a wide array of opinions from the general public as to what constitutes "fair." Everyone has a different opinion as to what is "fair." Similarly, you would get vastly different opinions as to what constitutes being "honest" or "open." For centuries, great philosophers have wrestled interminably trying to define these terms. Yet, all of the sudden when it comes to the State Bar, the same Sixth Circuit that couldn't figure out the meaning of the phrase "electronic surveillance," concludes without hesitation that the terms "fair, honest, and open" are definitively clear.

In the Lawrence case, the Sixth Circuit isolated itself from well-accepted moral norms of society, just like it did in the NSA case. Those well-accepted moral norms recognize that determining what is honest, fair and open is an exceptionally difficult thing to do. Interestingly, since the crux of the NSA case was that the government was "surreptitiously" eavesdropping "without judicial warrants," it would be fair to conclude they did so "unfairly," "dishonestly," and not "openly."

Thus, if we apply the methodology used by the Court in Lawrence to the NSA case, the only rational conclusion that can be reached is that the government lacked "Good Moral Character" by surreptitiously eavesdropping without warrants. Alternatively, the rule to be gleaned from the conjunction of these two cases in the Sixth Circuit's view is that to be "fair" means to engage in noncompliance with properly enacted Congressional law (FISA). In turn, to be "honest and open" means the government's failure to comply with Congressionally enacted law must be accomplished "surreptitiously and secretly."

It's like BizarroWorld.