RICHARD POSNER PREPARES TO OVERRULE THE INTENT OF CONGRESS, AND OTHER FISA IN COURT STORIES

While the focus on NSA related issues will be on Washington DC today, with activist events, a debate at Brookings, and a Senate Intelligence Committee hearing, yesterday it was in several courtrooms.

In Chicago ~~DC~~, Richard Posner reportedly seemed intent on finding a way to overturn Sharon Johnson Coleman's order that Adel Daoud's lawyers should be able to review the FISA materials leading to the investigation into him. It seems Posner is not all that interested in Congress' intent that, in some cases, defendants would be able to review FISA warrants.

While she also reportedly seemed inclined to overturn Coleman's decision, Ilana Diamond Rovner at least recognized the clear intend of Congress to permit reviews in some circumstances.

> Another of the appeals court panelists, Judge Ilana Diamond Rovner, added that Coleman appeared to have "discarded" applicable FISA law and come up with her own justification for opening the records.
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> Rovner noted in a question for Ridgway that when Congress enacted the FISA law in the 1970s, it could have clearly indicated defense attorneys should never get access to the records. But it didn't do that, she said.
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> "Can you give me any scenario where disclosure (to the defense) would be necessary?" Rovner asked.

> "It would be a rare circumstance," Ridgway, the assistant U.S. attorney, responded.

As I noted, the Defense made a very good argument that Congress intended review in such cases as this one.

Perhaps most stunning, however, is the way everyone but a big team of government prosecutors got booted from the court room.

> As the arguments concluded, Judge Richard Posner announced the public portion of the proceedings had concluded and ordered the stately courtroom cleared so the three-judge panel could hold a "secret hearing." Daoud's attorney, Thomas Anthony Durkin, rose to object, but Posner did not acknowledge him. Deputy U.S. marshals then ordered everyone out — including Durkin, his co-counsel and reporters.
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> Only those with the proper security clearance — including U.S. Attorney Zachary Fardon, his first assistant, Gary Shapiro, and about a dozen FBI and U.S. Department of Justice officials — were allowed back in the courtroom before it was locked for the secret session.
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> Durkin, a veteran Chicago lawyer, said outside the courtroom he was not notified in advance that there would be a secret hearing and called the move unprecedented.
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> "Not only do I not get to be there, but I didn't even get to object," Durkin said. "I had to object over the fact that I couldn't even make an objection."

I suspect Posner used the period to conduct his own review of the FISA materials, substituting his judgment for Coleman's, so as to uphold

DOJ's flawless record of never having their FISA worked checked.

But don't worry: NSA defenders will point to this and claim has been thoroughly vetted.

Meanwhile, in Oregon, where Mohamed Osman Mohamud is challenging what increasingly looks like his discovery off a back door search, the government appears to have argued that there is a foreign intelligence exception to the Fourth Amendment.

> Assistant U.S. Attorney Ethan Knight countered that the government has court-approved procedures in place that were followed with respect to Mohamud's case. Warrants are not required under an exception for foreign intelligence, he argued.
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> "The reality is when you peel back the layers of hyperbole, what would be unprecedented is if this court were to grant the defendant's motion," Knight said.
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> He also pushed back against a wider examination of the program, saying that it was "not the time or place or even arguably the branch of government" for the broader debate.

Granted, this is not much more extreme than the argument the government made in its filings (as summarized by ACLU's Jameel Jaffer), that Americans may have no privacy interest in international communications.

> In support of the law, the government contends that Americans who make phone calls or sends emails to people abroad have a diminished expectation of privacy because the people with whom they are communicating – non-Americans abroad, that is – are not protected by the Constitution.
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> The government also argues that

> Americans' privacy rights are further diminished in this context because the NSA has a "paramount" interest in examining information that crosses international borders.
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> And, apparently contemplating a kind of race to the bottom in global privacy rights, the government even argues that Americans can't reasonably expect that their international communications will be private from the NSA when the intelligence services of so many other countries — the government doesn't name them — might be monitoring those communications, too.
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> The government's argument is not simply that the NSA has broad authority to monitor Americans' international communications. The US government is arguing that the NSA's authority is *unlimited* in this respect. If the government is right, nothing in the Constitution bars the NSA from monitoring a phone call between a journalist in New York City and his source in London. For that matter, nothing bars the NSA from monitoring every call and email between Americans in the United States and their non-American friends, relatives, and colleagues overseas.

The legal record on this is specific. While FISC found there was a warrant exception for "foreign" communications in Yahoo's challenge of the Protect America Act, the FISA Court of Review's decision was more narrow, finding only that there was a special need for the information before it, and also finding there were adequate protections for Americans (protections the government has been abrogating since the start of these warrantless programs). So while I will have to check the record, it appears that the line attorneys are going beyond what the appellate record (such as the FISCR

decision can be called an appellate record) holds.