

ELENA KAGAN ON ILLEGAL WIRETAPPING

From Elena Kagan's first comments about Cheney's illegal wiretapping program yesterday (at 2:10), it sounds almost like she'd vote for rule of law in the al-Haramain case (though the case is probably in the gray area of cases on which she should recuse herself).

DiFi: And we have just had a case. It came—by a District Court Judge in California, as of March 31 of this year, the al-Haramain case, and Senator Specter and I have discussed this. It's my understanding that what the judge did here was find the Terrorist Surveillance Program illegal, and essentially say that the plaintiff was entitled to damages from the government. So I guess the question might be whether that case goes up to the Supreme Court or not. But clearly the judge here dealt with something that was outside of the scope of law—which was the Terrorist Surveillance Program—and made a finding that it was, in fact, illegal.

Kagan: I believe that is what the judge said in that case and that case is still pending of course and might come before the Court. I think that the appropriate analysis to use with respect to that case or many others in this area would be the Youngstown analysis which makes very important what Congress has done. Where Congress authorizes the President, it's one thing, where Congress has said nothing, it's still another, where Congress has specifically barred the activity in question, you've got a much much higher bar for the President to jump over in order to find the action Constitutional.

After all, as DiFi with her historic concern for FISA being the “exclusive means” to conduct wiretapping seems intent to remind Kagan, warrantless wiretapping was specifically barred.

But maybe not. Later in the hearing, Arlen Specter asks Kagan specifically whether she would have granted cert in *ACLU v. NSA*, the 6th Circuit case.

She immediately retreats to the jurisdictional issue—precisely the reason the 6th Circuit overturned *Anna Diggs-Taylor*’s decision in the case.

Specter: I don’t care what’s often a reason. We have a specific case, you’ve had a lot of notice, it’s in concrete. Would you have voted to grant cert?

Kagan: Senator Specter, I can just tell you, there was this jurisdictional issue, now the jurisdictional issue itself was an important one. It was an important one because how is a person going to know whether there is a person that was being surveilled?

Of course, the Bush and Obama Administrations have repeatedly prevented plaintiffs from obtaining the information they needed to prove they were surveilled (or tortured or rendered). Which, if you buy the 6th Circuit decision, then you’re also going to buy a bunch of the other decisions that have allowed the Executive Branch to hide its crimes.

Plus—as *bmaz* will no doubt point out when he stops by—there’s still the possibility that Kagan would argue the AUMF authorized wiretapping that Tom Daschle tells us it pointedly didn’t, which is the argument the Obama Administration still has on its OLC opinion books.