IN THE MOST COWARDLY POSSIBLE DECISION, NINTH CIRCUIT UPHOLDS GARTENLAUB CONVICTION

The Ninth Circuit just released an *unsigned* opinion in Keith Gartenlaub's case; in a non-precedental opinion, they upheld his conviction.

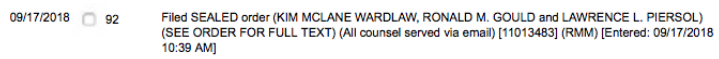
As a reminder, Gartenlaub was an engineer at Boeing. During a period when there were suspected Chinese breaches of Boeing at other locations, an FBI Agent in the LA area decided that there must be someone breaching Boeing at the local facility. He set out to find a suspect and focused on Gartenlaub (apparently) because he had access to relevant files and a Chinese-America wife. It appears that the FBI used back door searches on Section 702 material in their early investigation of Gartenlaub. They also moved back and forth from criminal warrants to FISA warrants. Using a FISA physical search warrant, the FBI searched his home and imaged his hard drives. Searches of those hard drives found no evidence he was a spy for China, as they had claimed; instead, they found child porn that had not been accessed in a decade. The government used that to obtain yet another warrant on Gartenlaub, parallel constructing the child porn for use at trial, all in an attempt to get him to agree to spy on his Chinese relatives. Instead, he went to trial and was found guilty of knowingly possessing child porn.

He appealed his conviction both because the government presented no evidence he had actually accessed this child porn since it had been loaded onto his computer, and because the government used a FISA order to find the porn

that they then used to search him (and also used to legitimize the Tor exception, which permits the NSA to target location-obscured facilities known to be used by Americans, so long as they sift out the non-criminal US person content after the fact).

The Ninth Circuit sat on this decision until Gartenlaub was out of prison

I say this opinion was cowardly for a number of reasons (aside from the court taking nine months to release a thin, unsigned opinion). Part of the cowardice is the timing. The court entered this judgment on September 17, two weeks ago.


09/17/2018 92 Filed SEALED order (KIM MCLANE WARDLAW, RONALD M. GOULD and LAWRENCE L. PIERSOL) (SEE ORDER FOR FULL TEXT) (All counsel served via email) [11013483] (RMM) [Entered: 09/17/2018 10:39 AM]

They just released it today.

Today also happens to be the day that Gartenlaub moved to a halfway house. Perhaps the court hoped by releasing it after he was released from prison, it would moot any further challenge.

Even the Carter Page precedent didn't win Gartenlaub a review of his FISA application

While Gartenlaub challenged the sufficiency of the evidence that he knowingly possessed the child porn (which the Ninth also upheld), the key to this challenge was whether using child porn the government had found using the broader search protocols available under FISA presented a Fourth Amendment challenge, particularly in light of the *US v. Comprehensive Drug Testing* precedent on plain view doctrine in the circuit.

The Ninth avoided dealing with this issue in two ways. First, even though Carter Page has established the precedent that defendants — indeed, the whole world! — can see FISA applications, the court conducted its own review, and found the FBI had presented probable cause that Gartenlaub (or perhaps his wife?) was an agent of China "when the FISA order was issued."

> Based upon our independent review of the classified record evidence, we conclude that the FISA warrant was supported by probable cause. The FISA application and supporting materials demonstrated probable cause to believe that Gartenlaub was an agent of a foreign power when the FISA order was issued.

I'm really curious about that language, "when the order was issued," as the two streams of collection the FBI was using leaves open the possibility that FBI had learned that he wasn't a spy by the time they did the search.

Based on their review of the FISA application the Ninth decided that such a review was not necessary or even useful to determine the legality of the search.

> We have conducted an in camera review of the underlying FISA materials. We conclude that the disclosure of the FISA materials to Gartenlaub was not "necessary to make an accurate determination of the legality of the search." 50 U.S.C. § 1825(g); see also United States v. Ott, 827 F.2d 473, 476–77 (9th Cir. 1987) (finding "no indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of non-foreign intelligence information, or any other factors that would indicate a need for disclosure" (internal quotation

> marks omitted)). In point of fact, disclosure was not necessary even under a less rigorous standard than that proposed by the government.

Of course, given the likelihood that the government used 702 data to obtain this FISA order (and the FBI's use of shoddy public reporting), that's not all that comforting.

The Ninth punts on the Fourth Amendment issue

Having disposed of the sufficiency of the evidence and the probable cause challenges, the Ninth then addressed the key issue that any non-cowardly opinion would have dealt with: whether using a FISA order, instead of a criminal warrant, to get the ability to search more extensively on a person's life constitutes a Fourth Amendment violation (this is particularly important in Gartenlaub's case, because he was suspected of stealing non-videos, so a criminal search wouldn't have had any reason to search for videos). The court admits that this is a really troubling issue.

> The idea that the government can decide that someone is a foreign agent based on secret information; on that basis obtain computers containing "[t]he sum of [that] individual's private life," Riley v. California, 134 S. Ct. 2473, 2489 (2014); and then prosecute that individual for completely unrelated crimes discovered as a result of rummaging through that computer comes perilously close to the exact abuses against which the Fourth Amendment was designed to protect.

But they treat this question as a review for plain error (in part because Gartenlaub's original attorney, who made some other key errors at the District level, didn't raise the

Fourth Amendment issue).

> Plain error review is the appropriate standard because Gartenlaub did not assert the Fourth Amendment argument predicated on alleged misuse of the FISA warrant before the district court.

Note, significant evidence about how the government abused the FISA process to get at the more expansive search authority under FISA became public after Gartenlaub submitted his appeal.

In any case, having deemed this a plain error review rather than a Fourth Amendment one, the court basically said there's no standard set for the use of plain view in national security cases, so the District judge could not have plainly erred.

> No controlling authority dictates the conclusion that the government's Foreign Intelligence Surveillance Act ("FISA") search and subsequent use of FISA-derived materials in a non-national security prosecution violates the Fourth Amendment, such that the district court's failure to follow it was plain error. See United States v. Gonzalez-Aparicio, 663 F.3d 419, 428 (9th Cir. 2011), as amended (Nov. 16, 2011). Our decision in United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010) (en banc), abrogation recognized by Demaree v. Pederson, 887 F.3d 870 (9th Cir. 2018) (per curiam), is inapposite; it did not decide the question presented by this case and, in fact, addressed no national security concerns particular to the FISA context.

This is, in other words, a punt — a punt that admits such unrestricted searches are a problem, but manages to avoid ruling for this case, a

case that itself served as precedent at the FISA court for a whole slew of even more problematic national security searches.