

US appeals court rules defendant has no right to secret surveillance documents

By Gabriel Black
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The US Court of Appeals for the 7th Circuit ruled Monday that a District Court in Chicago was wrong to allow a terrorism defendant's lawyer access to secret Foreign Intelligence Surveillance Act (FISA) court documents relating to his client.

The successful appeal demonstrates the complicity of the American legal system, particularly the higher courts, in the push by the executive branch to dismantle the separation of powers and establish the framework of a police state.

The court order spins pragmatic arguments to obscure and conceal the anticonstitutional role of the FISA court in rubber-stamping the massive illegal spying apparatus of the US government. Hoping to stop future legal challenges, the ruling sharply warns lower courts against questioning the pseudolegal dictates of the FISA court.

The unanimous ruling of the three-judge appellate court was authored by Judge Richard Posner, a particularly right-wing judge appointed by President Ronald Reagan. Judge Posner was joined by Judges Michael Kanne and Ilana Rovner.

Using language fitting of a military order, Judge Posner writes that Judge Sharon Coleman of the US District Court in Chicago "disobeyed" the FISA court law when she ordered that a defendant's lawyer had the constitutional right to examine FISA documents pertaining to his case.

Judge Coleman ruled in January that the defense attorney for Adel Daoud could examine FISA applications and orders. She argued that the only way a successful legal trial could happen is through an adversarial proceeding. In other words, the defendant needed to be able to contest, in court, the legality of the FISA evidence. If he was prevented from doing so, he was being denied access to a *public* trial, as guaranteed

by the Sixth Amendment to the US Constitution.

As Coleman wrote, "An accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding." She continued, "The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment."

Posner and his fellow judges vehemently opposed Coleman's logic. Defending FISA, he wrote that the hidden court system is "an attempt to strike a balance between the interest in full openness of legal proceedings and the interest in national security, which requires a degree of secrecy concerning the government's efforts to protect the nation."

Posner is trying to do away with the guaranteed rights of the Constitution with the cynical weighing of legality and "national security," in which legality and democratic rights must give way to the demands of the state.

Moreover, what is at stake is not "a degree of secrecy," but a massive, historically unprecedented, illegal spying operation that is rubber-stamped by the FISA courts on a daily basis.

There is no real legal oversight for any of this. Out of the tens of thousands of known FISA cases, only a small handful have produced a decision not in favor of executive branch requests.

The government lawyers who filed the appeal outline the authoritarian conceptions that guide their reasoning: "FISA does not call for district courts to estimate the 'potential danger of disclosure,' scrutinizing the executive branch's judgment that disclosure to the defense would harm national security." The judgment of harm to "national security" should simply be accepted, the lawyers argued.

Even Judge Rovner, who agreed with Posner's

decision, noted how unfair the FISA process is. She wrote in a concurring opinion, “Defendants in FISA cases face an obvious and virtually insurmountable obstacle in the requirement that they make a substantial preliminary showing of deliberate or reckless material falsehoods or omissions in the FISA application without having access to the application itself.”

As if to intimidate future dissent, Judge Posner scolds Coleman, suggesting that she has contempt for human life and a poor understanding of the judicial system.

Had he not overturned it, Posner said that Coleman’s decision “would harm the national security of the United States.” According to Posner, Coleman has “incomplete” beliefs regarding the justice system, “the federal judicial system in particular,” he added.

“Terrorism is not a chimera,” Posner continued. Assuming the guilt of the accused, Posner warned, “With luck, Daoud might have achieved his goal of indiscriminately killing hundreds of Americans.”

The hypocrisy here is breathtaking. The accused, Adel Daoud, was led by three undercover FBI agents to purchase a fake bomb, which he allegedly tried to detonate outside of a Chicago bar in 2012.

Three undercover FBI agents contacted him over the course of about a month, exchanging messages regularly. According to Thomas Durkin, Daoud’s attorney, Daoud was confused when they encouraged him to pursue violence. Durkin said that Daoud was taught by local Imams that “violence ran counter to Islamic teachings.”

The FBI, however, was not discouraged. According to Durkin, the agents put Daoud in contact with their own supposed Imams, who repeatedly gave Daoud ideological justifications to carry out the attack.

Enshrining the hypocrisy, the appeal against Coleman’s ruling argued that Daoud could undoubtedly be put under surveillance using FISA because he was an “agent of a foreign power.” Daoud, a US citizen and a teenager, just out of high school, at the time of his alleged crime, was no agent of any foreign power. If he was an agent of anyone it was clearly a domestic power, the FBI.

The successful appeal of Coleman’s decision demonstrates just how far the American legal system has disintegrated. Durkin told the *Washington Post* that he “could not disagree more with Judge Posner.” The adversarial process, he said, “is the foundation of civil

liberties in this country.”

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