# READING TEA LEAVES ON WARRANTLESS WIRETAPPING

Sorry I've been distracted all day. And yes, I will try to comment on the surprise news that Steven Kappes will be leaving the CIA next month later this evening.

But in the meantime, I wanted to look at this exchange between Arlen "Scrapple that used to be Haggis" Specter and Eric Holder on the recent al-Haramain verdict.

> SEN. SPECTER: Mr. Attorney General, there will be another opportunity to test the constitutionality of the warrantless wiretaps through the appellate process and, hopefully, to the Supreme Court of the United States. And from the decision made by Chief Judge Walker recently in the San Francisco case, holding that the warrantless wiretaps were unconstitutional, saying that the requirements of the Foreign Intelligence Surveillance Act precluded the warrantless wiretaps, that there had to be probable cause and a warrant.
>
> There was an opportunity to have a review by the Supreme Court of the United States in the case arising out of Detroit which federal court there declared the warrantless wiretaps unconstitutional. The Sixth Circuit cited there was no standing. I thought the dissent was much stronger than the two judges in the majority. Well-known that standing is frequently used as a way of avoiding deciding tough questions, and Supreme Court of the United States denied cert.
>
> So at this point, after a lot of specification, a lot of discussion, we do [not?] know, dispositively, whether

> the president’s power as commander in chief, under Article II, justifies warrantless wiretapping or whether the explicit provisions of Foreign Intelligence Surveillance Act govern.
>
> Would you press to have the case coming out of the San Francisco federal court go to the Supreme Court for a decision there?
>
> ATTY GEN. HOLDER: We have really not decided what we’re going to do at this point with the decision that was made by the judge. The focus there had really been not necessarily as much on the legality of the TSP as the protection of sources and methods. And a determination as to what we are going to do with the adverse ruling that we got from the chief judge – the district court judge, has not been made as yet. We are considering our options.
>
> SEN. SPECTER: What do you think?
>
> ATTY GEN. HOLDER: (Laughs.) Well, I think that I haven’t made up my mind yet. I think that we have to see what the impact will be on this case with regard to a program that I guess ended, I think, 2007, 2006.
>
> My view is that, to the extent that – I can’t get in too many operational things here, but the support of Congress, the authorization from Congress to conduct these kinds of programs is a way in which the executive branch should operate. It is when the executive branch is at its strongest, when we have the firmest foundation, is when we work with members of Congress to set up these kinds of programs, and especially when one looks at, as you point out, you know, the requirements under FISA.
>
> So I think that we will have to consider what our options are and try to

> understand what the ramifications are of the judge's ruling in the Al-Haramain case.

Here's my take (and bmaz will hopefully be along shortly to tell me how naive I'm being, from a wizened Defense Attorney perspective).

First, note Specter's false premise, in which he asserts that:

- Vaughn Walker held that warrantless wiretaps were unconstitutional
- Walker further held that FISA required probable cause and a warrant
- SCOTUS has a chance to test the Constitutionality of the warrantless wiretapping program by reviewing the al-Haramain decision
- Holder could encourage this outcome by appealing the al-Haramain verdict

But I think this misreads Walker's verdict and—more importantly—the grounds on which DOJ might appeal. The thing about Walker's verdict that most pissed off DOJ is that he ruled that FISA trumps state secrets. What he then did was use that ruling to give the government a choice: either hand over a warrant for the wiretapping it did on al-Haramain, or he would judge that al-Haramain had been illegally wiretapped. I'm not a lawyer, but the actual wiretapping part of Walker's decision, it seems to me, is a simple one about the plain text meaning of FISA. He didn't rule on Bush and Yoo's wacky theories of Article II power.

As I said, though, the really dangerous part of Walker's ruling for DOJ was that certain laws might pre-empt what both the Bush and the Obama

Administration would like to claim are unlimited powers to hide things—including crimes—behind State Secrets invocations.

Which is pretty much what Holder said: "The focus there had really been not necessarily as much on the legality of the TSP as the protection of sources and methods." The focus of the ruling—certainly as he reads it—is about State Secrets, not the legality of the warrantless wiretapping program. So, using both the first person plural and the passive, Holder punts and says no decision has been made.

So Specter tries again, and asks what Holder thinks personally. And Holder—the guy who may well get overridden on his Gitmo decision, says, "I haven't made up my mind yet." Does this suggest that Holder—not Rahm Emanuel and Lindsey Graham, and not the lawyers who have been fighting this for four years—will actually get to make the decision himself?

Holder raises, as the first issue, what impact this decision will have on a program that ended in 2007. I've suggested it will have no impact, because if anyone else actually could prove standing in the way al-Haramain had to, we'd know about it.

But then Holder gets cryptic.

> I can't get in too many operational things here, but the support of Congress, the authorization from Congress to conduct these kinds of programs is a way in which the executive branch should operate. It is when the executive branch is at its strongest, when we have the firmest foundation, is when we work with members of Congress to set up these kinds of programs, and especially when one looks at, as you point out, you know, the requirements under FISA.

At first, this statement seemed like a statement effectively saying, "we've got our FISA

Amendments Act, we've achieved the same results with the blessing of Congress, and so therefore the program we've got now is safe in any case." That may be all he's saying.

But I'm wondering if, instead, this is a reflection about whether the modified program would not carry the same risk of court review as the old program had. That is, I'm wondering whether Holder's decision will be premised on whether the decision that FISA trumps State Secrets would be inapplicable to the statute—and the program—as it exists today.

I'm going to have to review the program on that front. But I'm guessing—and it's just a wildarsed guess—that that's what Holder is most concerned about with regards to Vaughn's ruling.