# RICHARD POSNER WANTS YOU TO LEARN TO LOVE SECRECY

As you've likely already heard, the 7th Circuit ruled aggressively against Adel Daoud, overturning Judge Sharon Johnson Coleman's ruling that his lawyers could review his FISA warrant. This was utterly predictable, but unfortunate nevertheless.

Steve Vladeck had a really good post on both Judge Ricard Posner's overreach and Judge Ilana Rovner's description of the problem FISA presents for challenging the truthfulness of FISA warrant materials.

Here's how he describes Posner's obnoxious assumption of the District Court job to actually determine whether defense review is necessary.

> But rather than accept—or at least sympathize with—Judge Coleman's efforts to square a circle, Judge Posner derided them by suggesting that the government has a right to keep these materials secret, repeatedly criticizing calls (one is left to wonder from where) for "openness." "Not only is federal judicial procedure not always adversarial," Posner wrote; "it is not always fully public." This is true, but entirely beside the point; Judge Coleman wasn't seeking to *open* the proceedings; she was seeking to provide security-cleared defense counsel (who, just like everyone else, are subject to the Espionage Act) with access to classified information.
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> [snip]
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> But far more troubling than these (gratuitous) rhetorical flourishes is the last part of Judge Posner's opinion,

> which doesn't just conclude that disclosure to Daoud's defense counsel in this case is unnecessary under § 1806(f)—the step the Court of Appeals criticized Judge Coleman for skipping—but then goes on to resolve Daoud's *Franks* motion on the merits. Thus, the majority concluded that "our study of the materials convinces us that the investigation did not violate FISA," even though the district court hadn't even gotten that far.
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> In other words, in a case in which the whole question is how judges should decide whether they need adversarial participation in order to properly resolve a FISA-based *Franks* motion, Judge Posner's answer is, in effect, "don't worry about it; we judges can handle this without any help." With all due respect to one of the brightest and most gifted appellate judges in the country, how does he (or his colleagues) *know* that? Indeed, I thought one of the most significant revelations from the FISA-related disclosures of the past year is that, in fact, judges *won't* always get these issues right without the benefit of adversarial presentation and argument.

What's especially odd about Posner's opinion, however, is his own understanding of the process he himself used to determine this warrant was legal.

Remember that at the original review of this case, Posner and his colleagues had an unannounced secret hearing to review the warrant, attended by a goodly chunk of the US Attorney's office. After that, the Court issued an order requiring even more information from the government.

Asking for additional information is legal. Under FISA a reviewing (District) Judge can

consult “such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized.” But the fact that the Circuit had to go back for even more information, after having seen all the materials Coleman reviewed, suggests the question was not as easy as Posner suggests.

And Posner wants us to believe his assumption of the role of the District Judge is a benefit to Daoud. He does so, first, in his bizarre rant about secrecy, when he emphasizes the times when secrecy benefit defendants. Then he goes further when dismissing Daoud’s lawyers objection to the secret hearing.

> Their objecting to the classified hearing was ironic. The purpose of the hearing was to explore, by questioning the government’s lawyer on the basis of the classified materials, the need for defense access to those materials (which the judges and their cleared staffs had read). In effect this was cross-examination of the government, and could only help the defendant.

Only it wasn’t. It was an opportunity for the government to get a second bite at the ex parte apple, which by itself apparently wasn’t even sufficient to address questions about the application.

As Vladeck laid out, Rovner wrote a concurrence in which she acknowledged the failure of FISA to provide defendants with the ability to challenge the case against them.

But that’s not the direction our judiciary is going. On the contrary, it is embracing more and more secret procedures, all in an effort to hide what the government is really doing in its countereterrorism efforts.