UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. UNITED STATES DISTRICT COURT: WHO THE WINNER IS MAY BE A SECRET – PART 3

[Part 1 & Part 2 have been the conventional parts of the Keith case analysis. Now we are going to get into areas that involve less what has happened, and more what is happening and opinion as to how what has happened might have an impact, depending upon the arguments raised to the court. So keeping in mind that on the opinion front, you get what you paid for, let's see where this takes us. To evaluate the impact of the Keith case in a states secrets context, we have to back up and look at the Reynolds case.]

Parameters of the State Secrets Privilege Recognized in the Reynolds' Case

The Reynolds' case, *United States v. Reynolds* took place during World War II. The Government was sued for negligence resulting in the crash of a B-29, killing three civilians. When the families brought a lawsuit for damages, the DOJ sought to block any access to information relating to the crash. After a failed claim that Air Force regulations made the information privileged from disclosure, the Secretary of the Air Force tried a different argument. He filed a document called a "Claim of Privilege" and, while he made the regulations argument again, this time he added another argument and a few carrots to the widows to try to win the court over:

> [The Secretary] then stated that the Government further objected to

> production of the documents “for the reason that the aircraft in question, together with the personnel on board, were engaged in a **highly secret mission of the Air Force**.” An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished “without **seriously hampering national security**, flying safety and the **development of highly technical and secret military equipment**.” The same affidavit **offered to produce the three surviving crew members, without cost, for examination by the plaintiffs**. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a “classified nature.”

(emph. added)

The District Court ruled that the Government would have to show the court *in camera* why national security was at risk if the witnesses were given information on how their husbands died. The DOJ countered that it would make witnesses available to the widows to examine, but it was not going to produce documents. The District Court then ruled that the appropriate response to the obstruction of discovery was to treat the issue of negligence as being decided against the Executive. On appeal, the Circuit Court agreed.

Cut now to the Supreme Court.

The Supreme Court created a privilege (or if you believe in international law ;-) it recognized an exception used in other countries) for the Executive to protect military secrets even in cases where this meant that a litigant would lose their opportunity to pursue a claim against the government. The Court believed that the military testing nature of the information and

the fact that we were currently in a state of war counterbalanced the rights of the litigants, especially since they were being provided with the alternative opportunity of interviewing witnesses.

> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests.

The Court then described the procedures the Executive would need to follow to successfully raise the privilege.

> It is not to be lightly invoked.[18] There must be a formal claim of privilege, lodged by the head of the department which has control over the matter,[19] after actual personal consideration by that officer.[20] The court itself must determine whether the circumstances are appropriate for the claim of privilege,[21] and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[22]

If such a formal claim of privilege (here, a “Reynolds’ Affidavit”) was filed by the government in a civil setting and there was a chance that military secrets would be revealed, the Reynolds Affidavit procedure could be used to not only bar a court from demanding that the government turn over information, but to prevent the court from ruling that allegations against

the government be deemed admitted in light of the failure to provide discovery. Emphasis on the "could" because the court went on to provide a preliminary standard for review for a Reynolds' Affidavit that involved weighing various interests:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.

While the court on the one hand said that "even the most compelling necessity" is outweighed if military secrets are at stake, it still attempted to carve out as an exception cases where the use of the privilege would be "unconscionable," as in a criminal setting:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free.[27] The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms

> to which it has consented.

So the judicial review analysis from *Reynolds* (some of which was *dicta*, as it did not involve a case before the court)was that:

a) there is no privilege unless the Executive properly invokes it;

b) if the privilege is properly invoked, the court weighs necessity to the litigant (or, as I might argue later, to the judicial system) versus need for the privilege;

c) if military secrets in a time of war are involved, no amount of necessity can overcome the privilege (with a possible exception for [unconscionable activity – edited]);

d) if necessity is "dubious" (as in Reynolds, since the widows were being given access to the witnesses) then a mere formal claim of privilege will prevail without further weighing the interests;

e) if the privilege is properly invoked, the court will not determine the non-disclosed facts against the government in civil litigation against it; but

e) if the privilege is properly invoked in a criminal case, then the government is required to release the defendant and drop the prosecution.

[In 2000, information relating to the Reynolds case was declassified, revealing that the crash resulted from a fire that started in the engine. Attempts were made to have the Supreme Court reopen the case by filing a writ of coram nobis (fraud on the court) but this was denied with no opinion. Plaintiffs then refiled in the lower courts, seeking to set aside the 50 year old settlement, but the Third Circuit decided that it did not believe that there had been a fraud on the court and that it might have been necessary to keep information about the workings of the B-29 secret or to keep details of the craft's mission secret]

Reynolds at Work in the Keith Case.

In the Keith case, Attorney General Mitchell filed an affidavit that met the Reynolds' requirements. As the head of the Department of Justice, who had control over the warrantless surveillance program and who had given personal consideration to and authorized the surveillance, Mitchell filed a formal claim that the information from the surveillance could not be released to a criminal defendant because of national security interests, despite *Alderman* (which had not involved a formal invocation of the privilege) and despite the *Reynolds dicta* that criminal cases involving a claim of national security privilege would be required to be dismissed.

Mitchell's claims went well beyond what the *Reynolds dicta* had contemplated and asked that the court look beyond "legality" of surveillance in a criminal setting and instead elevate national security above the Fourth Amendment in the area of "intelligence" surveillance. This is where the Keith case and how the Supreme Court handled that case offers insight into the states secrets privilege. Mitchell and the DOJ were claiming that the Executive's "national security" function was so separate and severable from its law enforcement function that when it said it was acting for national security purposes, its actions were not reviewable by the judiciary and law enforcement cases could not be impeded based upon the acts of the Executive in pursuing its "national security" function.

Justice White and the "on the statute" Argument.

I think here the most interesting place to start is the separate concurrence of Justice White. Justice White wanted to handle the *Keith* case, not on Fourth Amendment grounds, but rather as a case of conflict between the Reynolds' Affidavit Mitchell had given, and the requirements of the Congressional statute. Trevor Morrison, in an article found at the Columbia Public Law and Legal Theory Working Papers site, The Story of

(*United States v. United States District Court (Keith)*: The Surveillance Power expands on the context of the *Keith* case. In this draft (beginning on page 22), Morrison describes Supreme Court bargaining involving the *Keith* case opinions. In part, he discloses that Justice White's position originally had support from Justices Burger and Blackmun as well.

Justice White's "on the statute" argument was that, because of the fairly recent Congressional statute governing wiretaps, which spelled out what was required to be exempt from the statute, an affidavit invoking "national security" was not enough to sustain privilege. Rather, the Attorney General was required, because of the statute, to affirm within his affidavit the specific exemption provided by Congress and that the Executive's actions fell within that exemption.

Morrison notes in his discussions that the Justice White approach could have reduced the *Keith* case to being about drafting rather than about the underlying issue of warrantless surveillance, and would have been followed quickly by a new affidavit from the Attorney General.

> A statutory holding would simply tell future Attorneys General that their affidavits must more closely track the language in Title III's disclaimer provision. It would amount to little more than a lesson in affidavit drafting.

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I believe, though, that Morrison sells the drafting requirements a bit short with that analysis. In *Reynolds*, neither Congress nor the Constitution had spoken as to the government actions (military test flights) at issue. By contrast, in the Keith case, both Congress and the Constitution had spoken, at least in some fashion, to the government actions (seizing and

searching private communications) at issue. In the *Keith* case, the Court was looking at a comprehensive statutory scheme that provided some exemptions for Executive "security" actions, but only limited exemptions.

White argued was that the first analysis should be whether the Attorney General affirme compliance with the statute.

Congress had established two branches of Executive action that it said was exempt from the statutory wiretap requirements. The first branch involved possible or potential hostile acts by foreign powers, collecting foreign intelligence essential to the national security or protecting national security information against foreign intelligence. The second branch involved overthrow of government and dangers to the structure and existence of government. The affidavit provided in the *Keith* case failed to specifically claim that the Executive's warrantless surveillance of Plamdon, and hence its national security claim, fell under either branch of exemption.

Justice White's opinion layered a second level of requirements on the national security privilege when there was a Congressional statute on point. The first level was *Reynolds* and applied for military secrets and in the absence of Congressional input. The second test, per Justice White's approach, involves requiring the Executive to affirm compliance with applicable statutes including recitations as to the exemptions that applied if exmptions were relied upon. Under Justice White's approach, where Congressional statutes sspeak to activities the Executive is using to "collect intelligence," then the Executive would be required to comply with both tests.

However, since Justice White's opinion was only a separate concurrence, though, let's look at the impact of the majority opinion on the invocation of states secrets.

The Powell Decision Impact on State Secrets.

Powell and the majority of the court met the Executive branch's warrantless surveillance of Americans with a constitutional, rather than statutory, argument. The focus of the opinion was that (unlike *Reynolds)* the *Keith* case involved a set of government conduct that was specifically covered by the Constitution. The Powell majority argued that even if Congress had authorized the Executive's warrantless surveillance by statute, it would not matter because the Constitution and Fourth Amendment controlled over both Congressional statute and Executive national security claims.

In the case before it, the Court's only remedy for the unconstitutional behavior was to affirm Judge Keith's right to retain the illegal surveillance records and require that they be turned over to the defense, even over a national security interest claim by Mitchell. This aspect of Keith gets lost, but its clear holding was that when a procedurally proper *Reynolds* invocation attempts to apply a state secrets privilege to actions barred by the Constitution, it fails.

But Powell was obviously troubled by the need for the government to at times engage in domestic surveillance for a domestic security need separate from law enforcement. The Powell majority collectively engaged in *dicta* to speculate as to how *Congress (*not the Executive internally) migh address the warrant requirement in a domestic security situation. That *dicta* is worth examining for its impact on states secrets invocations as well.

While the Powell majority dismissed the impact of Congressional acts if they attempted to overcome the requirements of the Fourth Amendment, it did want to encourage Congress to act to authorize domestic surveillance in a way that would be consistent with the Fourth Amendment and the Court's judicial review holding in *Keith*. The warrantless Plamondon surveillance was held clearly unconstitutional, but Powell speculated that wide latitude might

be shown for surveillance involving only "foreign powers" or their agents: "We have not addressed and express no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents." Powell signaled, as had lower courts, that where there was no Congressional effort to address surveillance involving only foreign powers, that kind of surveillance would likely fall within Executive power and outside of the Fourth Amendment.

Powell then went on to discuss more generically *domestic security* intelligence surveillance v. criminal surveillance and provided a speculative list of actions that Congress might attempt to create a situation whereby the Executive could engage in domestic security intelligence surveillance in a manner that would allow that intelligence surveillance to be in compliance with the Fourth Amendment and exempt from *Alderman* production during a criminal trial.

> Congress may wish to consider protective standards for the [domestic security surveillance] which differ from those already prescribed for specified crimes
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> …
>
> It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of [criminal surveillance warrant applications] but should allege other circumstances more appropriate to domestic security cases; that **the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court** (*e. g.*, the District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit); and that the time and reporting requirements need not be so strict as those in [criminal surveillance warrant applications.]

> . . . We do not attempt to detail the precise standards for domestic security warrants … We do hold, however, that **prior judicial approval is required for the type of domestic security surveillance involved in this case** and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe. (emph. added)

The takeaway from the Powell decision is that, even under a claim of national security privilege, the Fourth Amendment required **prior judicial approval** for the Court to hold that such surveillance for domestic security purposes was constitutional. The Court felt Congress might be able to come up with a statutory scheme which could provide for prior judicial approval of domestic security surveillance and that the Court might deem such a judicially authorized seizure and search of communications based on less than criminal probable cause to comply with the Fourth Amendment.

The combined takeaway from the White and Powell opinions is that every member of the Court who considered the case believed the Reynolds invocation of national security interests failed – Justice Powell and the majority because it did not comply with Constitutionally required prior judicial approval; Justice White because the Reynolds affidavit did not clearly state, on its face, compliance with Congressional statutes or exemptions (which he wanted to resolve before looking at the Constitutional argument).

Next up – Congressional efforts with FISA to first rein in, and now reel out, Executive power while avoiding judicial review and options that may still be open .