

O Sun God, Savitr!
Thou dazzling fount of life-persuasive light!
Sublimest mystery speeding from afar!
Swift became that burst too potent on the sight!
This radiant type of strength and youth!
Glowing eternally!

He alone shines!
All luminaries get illuminated by His Illumination!
The whole Universe is enlightened by His light!
- Kathopanisad



శ్రీ వేపచేదు విద్యా పీఠము
VEPACHEDU EDUCATIONAL FOUNDATION

మన సంస్కృతి

Mana Sanskriti (Our Culture)

Chief Editor: Dr. Sreenivasarao Vepachedu, Esq.

May the golden-eyed Savitar come hither!
Shining forth he rises from the lap of the dawn!
Praised by singers, my God Savitar!
Stepped forth and never missed his place!
He steps forth the splendor of the sky the wide!
Seeing, far-shining, the shining wanderer!
- Rig Veda, iii. 65

ॐ भूर्भुवः स्वः तत्सवितुर्वरेण्यं भर्गो देवस्य धीमहि धियो यो नः प्रचोदयात्॥

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Issue: 241

డాక్టర్ శ్రీనివాసరావు వేపచేదు/ डॉक्टर श्रीनिवासरावु वेपचेदु / Dr. Sreenivasarao Vepachedu¹, JD, PhD, LLM

THE NEW SURVEILLANCE STANDARD



Historically², American Presidents steadfastly claimed an inherent constitutional authority to conduct warrantless electronic surveillances for non-criminal, national security purposes, grounded in the mandate found in Article II of the Constitution for the Executive to “preserve, protect and defend the Constitution of the United States.” Terrorism has been a tool in the arsenal of imperialist governments which is defined as the use of violent acts through non-governmental organizations against a target national government for the ultimate purpose of compelling the target national government to change its policy by creating fear in the minds of the populace served by the target national government and to achieve a regime change as dictated by the interests of the imperialist government.

In 1972, the Supreme Court decided the case of *United States v. United States District Court* (aka the Keith case)³, in which the Court considered the legality of an Attorney General authorized warrantless electronic surveillance of a US citizen accused of bombing a CIA building. On the basis of the affidavit and surveillance logs (filed in a sealed exhibit), the Government claimed that the surveillances, though warrantless, were lawful as a reasonable exercise of the **presidential power** to protect the national security, like the successive presidents for more than one-quarter of a century have authorized such surveillance without guidance from the Congress or a definitive decision of the Court, so far. This case brought the issue before the Court for the first time, when the Court expressly refused to decide the legality of warrantless surveillances where “foreign powers or their agents” were involved, leaving open the issue of the Executive’s authority to direct such operational activities at those persons or entities. The Court also strongly urged the Congress to provide a judicially-manageable standard applicable to electronic surveillances conducted for national security purposes. The US Congress did not act to protect the US Citizens from the electronic eavesdropping until the Watergate scandal, when the President of the US (POTUS) got involved in wiretapping phones and stealing documents from the office of the Democratic National Committee⁴. In 1978, the US Congress enacted the Foreign Intelligence Surveillance Act (FISA) (50 USC § 1801) as part of the US efforts to counter purported threats to national security, establishing the following:

- non-criminal electronic surveillances within the United States were only permissible for the purpose of collecting foreign intelligence and/or foreign counterintelligence.
- articulated a probable cause standard that had to be met before an electronic surveillance was permissible.

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- the Act established the Foreign Intelligence Surveillance Courts (FISCs), one at the district court level for initial review of surveillance applications, and one at the appellate level should the government appeal a district level denial of an application.
- circumstances under which electronic surveillance could lawfully be conducted in the United States for the purpose of collecting foreign intelligence or foreign counterintelligence: (1) pursuant to an order issued by the FISC; or (2) **in emergency circumstances, pursuant to Attorney General approval, so long as an application is thereafter made to the FISC within 24 hours** (leaving the door open for easy surveillance).
- identified **foreign powers and agents of foreign powers** as the entities and persons that could be targeted for electronic surveillance. The foreign powers include a foreign government; a diplomat, other representative or employee of a foreign government; a faction of a foreign nation that is not substantially composed of US persons; an entity openly acknowledged by a foreign government to be directed and controlled by it; or a group engaged in international terrorism or activities in preparation therefore. The second category of agents of foreign powers includes anyone, **including a US person**, who engages in clandestine intelligence gathering activities for a foreign power which activities constitute a violation of US criminal statutes, sabotage or international terrorism, or activities in preparation therefore, on behalf of a foreign power. A US person is a **citizen or legal alien resident of the US, incorporated or unincorporated associations of citizens or legal alien residents of the US, or a US corporation**.

In 1995, the US Congress has enhanced the ability of counter terrorism agents to use FISA in the effort to discover and thereby thwart acts of terrorism aimed at the US by including physical searches as well as electronic surveillance. The new physical search provisions also recognized the POTUS's authority to acquire foreign intelligence without a court order. Acting through the Attorney General, the POTUS may authorize for periods up to one year the search of any premises if the Attorney General certifies to the FISC that the premises or property to be searched is being used or controlled exclusively by a foreign power, and that there is no substantial likelihood that the search will involve the premises, information, material, or property of a US person.

In 1998, the US Congress further amended FISA to permit the installation and use of pen register and trap and trace devices in the investigation of international terrorism and clandestine intelligence activities. Naturally, the constitutionality of FISA was challenged under the Fourth and Fifth Amendments in several cases in which information acquired through a FISA electronic surveillance was used in a subsequent criminal prosecution. The courts rebuffed those challenges, however, because the government was able to demonstrate that, throughout the FISA surveillances, the purpose thereof had been to secure foreign intelligence

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information rather than being primarily oriented towards assisting a criminal investigation or prosecution. The Department of Justice (DOJ) and the intelligence community perfected the use of the executive power of the POTUS, “in support of the primary purpose of securing foreign intelligence information foreclosing the perception of use in assisting a criminal investigation or to circumvent the more strenuous requirements imposed by federal criminal law.”

This executive power of the POTUS was further consolidated in light of 11 September 2001 attack of the US by Saudi Nationals who hijacked 4 commercial airplanes in a coordinated strike at the economic and political capitals of the US⁵. Within one month, by October 2001, the US Congress enacted the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or the USA PATRIOT Act consisting of ten separate Titles and 156 sections, and which effected modifications of numerous existing federal statutes and rules.

After all these changes to the original 1978 FISA, the standard for electronic surveillance for foreign intelligence purposes has become lower for national security and the government’s interest in protecting the country than the standard for electronic surveillance in criminal prosecutions under Fourth Amendment rights. Under this new lower standard (probably lower than old 1972 standard), the FBI does a threat assessment to determine whether a suspect might be working with foreign intelligence; gathers initial material for a warrant from human sources, physical surveillance, and bank transactions including information obtained by dumpster diving; submits an affidavit and application for a warrant stating the grounds for the FISA warrant (articulating a cause that meets the probable cause standard required for a permissible electronic surveillance) which goes through the FBI through chain of command reaching the proper authority at the FBI Headquarters and ultimately to the Justice Department; DOJ verifies the accuracy of every fact stated in the application through the Woods procedure, sends it to the FISC which reviews the application in secret and approves the warrant; the FBI surveils electronically the targeted American citizen. So far, the FISC has approved over 25,000 (99 %) FISA applications since its inception⁶.



Fast forward to 2018, now there is a memo to be released about alleged abuses by the POTUS in obtaining FISA warrants and surveillance abilities granted by the FISC⁷. What does this mean to an average American? If the POTUS has abused the process in one case, what about the remaining 25,000 FISA warrants approved by the FISC for the POTUS? Have we made a circle and end up in 1972 situation when the POTUS has abused the process, again? Is the justice blind or does she blink⁸ when she sees the elected officials?

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NOTES AND REFERENCES⁹

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² Foreign Intelligence Surveillance Act (FISA): An Overview:

https://www.fleetc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf

Protecting US Person Identities in Disseminations under the Foreign Intelligence Surveillance Act <https://www.dni.gov/files/documents/icotr/CLPT-USP-Dissemination-Paper---FINAL-clean-11.17.17.pdf>

³ *United States v. United States District Court*

<https://www.law.cornell.edu/supremecourt/text/407/297>

⁴ WATERGATE SCANDAL <https://www.history.com/topics/watergate>

⁵ A review of the FBI's handling of Intelligence information related to the September 11 attacks, US Department of Justice, November 2004.

⁶ REPUBLICAN 'RELEASE THE MEMO' CONSPIRACY IGNORES HOW DIFFICULT IT IS TO GET A FISA WARRANT <http://www.newsweek.com/how-get-fisa-warrant-797323?ypttr=yahoo>

⁷ Trump expected to approve release of GOP memo alleging surveillance abuses by FBI

http://www.chicagotribune.com/news/nationworld/politics/ct-trump-memo-20180201-story_amp.html

⁸ The Justice Department appears to have blinked, backing away from an earlier threat to take Maricopa County Sheriff Joe Arpaio, over alleged violations of the civil rights of Hispanics, to

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federal court immediately. <http://www.wnd.com/2012/01/justice-department-blinks-in-battle-against-sheriff-joe/>

In A Standoff With Montana Officials, The Justice Department Blinks

<https://www.npr.org/sections/thetwo-way/2014/06/10/320762940/in-a-standoff-with-montana-officials-the-justice-dept-blinks>

⁹ In addition to the primary sources cited above, additional references include:

New York Times, Washington Post, Mercury News, Bayarea.com, Deccan Chronicle, the Hindu, Hindustan Times, Times of India, AP, Reuters, AFP, The Guardian, Pravda, Spiegel, Connexion, etc.

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“Where the mind is without fear and the head is held high, Where knowledge is free, Where the world has not been broken up into fragments, By narrow domestic walls.” -- Rabindranath Tagore (1861-1941), *Gitanjali*, 1912.

One World One Family
AUM! SWASTI!

Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mrityorma Amritamgamaya, Om Shantih, Shantih, Shantih! (Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to immortality, and peace!)
SWASTI! AUM!

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