

WHAT HAPPENED TO THE FISC APPEAL?

Both the WaPo and the NYT have stories today explaining how the crisis in the warrantless wiretap program got so bad that Congress got punked into passing a shitty bill. The story is simple, on its face. The FISC rejected a government subpoena in March, another in May, and those two rulings resulted in the government losing the ability to wiretap a great deal of foreign communication. Voila! The President gets to tell Congress it can't take vacation.

But something's missing from this process: the appeals process.

Like most legal decisions, FISA allows for a review process. If the FISC rejects a subpoena, the government can appeal that decision to the Foreign Intelligence Surveillance Review Court (FISRC). And if they uphold the rejection, the government can appeal to SCOTUS. Here's how it works:

If [FISC] judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason of his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b) of this section.

[snip]

If [FISCR] determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to

review such decision.

But we get no details of such an appeal in today's stories. So what happened? Did the Administration appeal these rejections on up to Roberts and Scalia and Alito? And if so, did a very conservative SCOTUS rule that the Administration was—and has been—violating the law? Or did they choose not to appeal, and instead create the kind of crisis that results in shitty legislation?

In either case, they seem to have gamed the process of court review, for the future. Here's how the amendment describes the review process if the courts decide the Administration hasn't provided adequate safeguards for American citizens' privacy:

Any acquisitions affected by the order issued under subsection (c) of this section may continue during the pendency of any appeal, the period during which a petition for writ of certiorari may be pending, and any review by the Supreme Court of the United States.™™.

That is, if, in the future a court tells the Administration they're not fulfilling the intent of the law, the Administration gets to keep up what they've been doing until Roberts and Scalia tell them to stop.