

HOW TO PROVE INTENTIONALITY OF DOMESTIC SURVEILLANCE?

Given Russell Tice's recent confirmations of many of our suspicions about Bush's warrantless wiretapping programs, I wanted to point a footnote from the recently declassified FISCR ruling. In a paragraph addressing the incidental collection of Americans' communications and dismissing the possibility (based on BushCo's assurances) that the Bush Administration kept a database of incidentally collected information from non-targeted US person, this footnote appears.

The petitioner has not charged that the Executive Branch is surveilling overseas persons in order intentionally to surveil persons in the United States. Because the issue is not before us, we do not pass on the legitimacy vel non of such a practice. (26)

I find the footnote interesting for a couple of reasons. It suggests that the collection—whether intentionally or not—is sweeping up communications from US persons (even while the ruling elsewhere suggests that there is much more leeway for targeting US persons in this than claimed). That is, it seems to admit the possibility that there might be a suit arguing that the wiretap programs intentionally target Americans, in which case the foreign intelligence exception it describes may be limited.

But at the same time, it suggests how high the bar to prove that this entire program is just an attempt to evade the Fourth Amendment and wiretap Americans. Jeebus. If it accepts the Bush Administration's assurances that there is

no incidental database (which reads like a highly-parsed statement anyway), then how would we ever prove we were intentionally tapped?