

ARREST JOHN BOEHNER

The government's primary strategy, in responding to the ACLU's request for release of the FISC rulings disallowing parts of the Administration's domestic wiretapping program, is to argue that the ACLU doesn't have standing to ask for the documents. Only an aggrieved person can ask for such rulings, and even then, the aggrieved person cannot see the orders themselves that authorize domestic spying.

But there are two problems with that, it seems. First, the administration simply ignores that opinions are presumptively public, and therefore doesn't address the historic role courts have played in whether they can publish their own orders. Further, the examples the Administration cites for refusing to release the FISC orders are cases in which the FISC approved wiretapping—not where it ruled wiretaps illegal.

Congress, which recognized the necessity for strict secrecy in matters handled by the FISC, specifically provided that the FISC operates under special security measures, and that FISA orders and applications are not to be disclosed absent specific judicial findings. See 50 U.S.C. 5 1803(c) ("application made and orders granted[I] shall be maintained under security measures"); *id.*   1806(f) (FISA orders, applications and related materials may be disclosed by a reviewing court in a criminal case "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance"); FISC R. Pro. 3 (FISC must comply with 9 1803(c), 5 1822(e), and Executive Order 12,958 governing classification of national security information).

The government cites examples where the government's application was **granted**, not, as in

this case, where it was **denied**. There's no question—the order in question was deemed illegal.

The other problem is that, if the materials requested are as classified as the government claims, then John Boehner should be prosecuted for leaking classified information. The government argues that Alberto Gonzales' revelations about the FISC orders were authorized, but it does not say whether Tony Snow's, Mike McConnell's, and John Boehner's revelations were. And it bases its discussion of the limited release solely on that Gonzales reference.