WHAT HAPPENED TO THAT THIRD BRANCH OVERSIGHT?

Judge Colleen Kollar-Kotelly is pissed.

After spending 2002 to 2006 as Chief Judge of the FISA Court struggling to keep parts of the American legal system walled off from a rogue surveillance program, she read the classified account the NSA's Inspector General wrote of her efforts. And while that report does say Kollar-Kotelly was the only one who managed to sneak a peek at a Presidential Authorization authorizing the illegal program, she doesn't believe it reflects the several efforts she made to reel in the program.

> "In my view, that draft report contains major omissions, and some inaccuracies, regarding the actions I took as Presiding Judge of the FISC and my interactions with Executive Branch officials," Kollar-Kotelly said in a statement to The Post.
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> [snip]
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> Kollar-Kotelly disputed the NSA report's suggestion of a fairly high level of coordination between the court and the NSA and Justice in 2004 to re-create certain authorities under the Foreign Intelligence Surveillance Act, the 1978 law that created the court in response to abuses of domestic surveillance in the 1960s and 1970s.
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> "That is incorrect," she said. "I participated in a process of adjudication, not 'coordination' with the executive branch. The discussions I had with executive branch officials were in most respects typical of how I and other district court judges entertain applications for criminal wiretaps under

> Title III, where issues are discussed ex parte."

The WaPo story reporting on her objections makes no mention of the role one FISC law clerk — who got briefed into the program before any of the other FISC judges — played in this process, something I'm pretty curious about.

It does, however, recall two incidents where Kollar-Kotelly took measures to crack down on the illegal program, which Carol Leonnig reported back in 2006.

> Both [Kollar-Kotelly and her predecessor Royce Lamberth] expressed concern to senior officials that the president's program, if ever made public and challenged in court, ran a significant risk of being declared unconstitutional, according to sources familiar with their actions. Yet the judges believed they did not have the authority to rule on the president's power to order the eavesdropping, government sources said, and focused instead on protecting the integrity of the FISA process.
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> [snip]
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> In 2004, [DOJ Office of Intelligence Policy and Review Counsel James] Baker warned Kollar-Kotelly he had a problem with [a "federal screening system that the judges had insisted upon to shield the court from tainted information"]. He had concluded that the NSA was not providing him with a complete and updated list of the people it had monitored, so Justice could not definitively know — and could not alert the court — if it was seeking FISA warrants for people already spied on, government officials said.
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> Kollar-Kotelly complained to then-Attorney General John D. Ashcroft, and her concerns led to a temporary

> suspension of the program. The judge required that high-level Justice officials certify the information was complete — or face possible perjury charges.
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> In 2005, Baker learned that at least one government application for a FISA warrant probably contained NSA information that was not made clear to the judges, the government officials said. Some administration officials explained to Kollar-Kotelly that a low-level Defense Department employee unfamiliar with court disclosure procedures had made a mistake.

Though the NSA IG Report mentions violations that occurred before 2003, it makes no mention of these violations.

What good is an IG Report that gives no idea of how often and persistent violations are?

That said, today's WaPo story provides this as the solution to our distorted view of the FISA Court's role in rubber-stamping this massive dragnet.

> A former senior Justice Department official, who spoke on the condition of anonymity because of the subject's sensitivity, said he believes the government should consider releasing declassified summaries of relevant opinions.
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> "I think it would help" quell the "furor" raised by the recent disclosures, he said. "In this current environment, you may have to lean forward a little more in declassifying stuff than you otherwise would. You might be able to prepare reasonable summaries that would be helpful to the American people."

Back in 2006, Leonnig noted that the judges didn't believe they had the authority to intervene to stop the dragnet. So what good does a ruling — even two as broad and stunning as the ones that used Pen Registers and Business Records to collect the contact records of all Americans — do to depict the role the Court is in?

The Administration keeps pointing to this narrowly authorized court as real court review. But that's not what it is. And until we have a better sense of how that manifested in the past (and continues to — I'll bet you a quarter that they've moved the Internet data mining to some area outside of court purview), we're not going to understand how to provide real oversight to this dragnet.

We'd be far better off having the FISC provide its own history of these surveillance programs.