

IF FISC CONSULTS TECHNICAL EXPERTS AND NOBODY SEES IT, DOES IT REALLY HAPPEN?

Back in January, PCLOB released a progress report on the reports it released, describing whether the government has taken up its recommendations. There's a detail in it I've been meaning to call attention to:

Recommendation 5: Take Full Advantage of Existing Opportunities for Outside Legal and Technical Input in FISC Matters

[snip]

The FISC should take full advantage of existing authorities to obtain technical assistance and expand opportunities for legal input from outside parties.

[snip]

Discussion of Status: As noted in the Board's report, prior to the issuance of the Board's recommendation the FISC had on one occasion accepted an amicus brief from an outside party (relating to the legality of a publicly known FISA surveillance program), and the PCLOB is aware of specific instances in classified matters in which the FISC has since taken action consistent with this recommendation.

It was always clear (as the amicus permitted under *In re Sealed Case* showed) that FISC could ask for help. Apparently, having been called out for never seeking out opinions outside of the government (which repeatedly got caught being less than forthcoming), FISC has now sought help.

It might be additional legal views. It might be technical help. Who knows?

If I had to wildarseguess, I'd imagine FISC has considered what to do about location tracking programs in light of various circuit decisions over the last year. If that's right (and it just a wildarseguess), it might be technical assistance.

But given the kind of people – like Michael Hayden – pitched as technical experts in DC, what good does that do? Unless the community can vet the technical expertise the FISC calls on for help, it doesn't add to the Court's legitimacy. Nor does it help FISC ensure it's really getting what it needs when it seeks outside advice.