National Security Investigations and Prosecutions § 5:4

National Security Investigations and Prosecutions
Database updated June 2013
David S. Kris
J. Douglas Wilson
Part II. NSI Techniques
Chapter 5. The **Foreign Intelligence Surveillance Court** and the Court of Review

Correlation Table

§ 5:4. The **Foreign Intelligence Surveillance Court**—The FISC's review of applications

West's Key Number Digest
West's Key Number Digest, War and National Emergency 32
A.L.R. Library
Validity, Construction, and Application of Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.A. ss 1801 et seq.) Authorizing Electronic Surveillance of Foreign Powers and Their Agents, 190 A.L.R. Fed. 385

The FISC's rules provide that—apart from emergencies—"proposed applications and orders must be submitted no later than seven days before the government seeks to have the matter entertained by the Court," although the "final application," with the Attorney General's approval and other required elements, may be submitted "no later than 10:00 a.m. Eastern Time on the day the government seeks to have the matter entertained by the Court." [1] Changes made in the final application must be specifically identified to the FISC. [2] Applications raising "an issue not previously before the Court—including, but not limited to, novel issues of technology or law," must also be identified. [3] With the FISC's approval, applications and signatures may be submitted electronically. [4]

Applications under FISA are heard by a single FISC judge, and the government may not ask a second judge to consider an application for electronic surveillance or a physical search after one FISC judge has denied it. [5] Instead, if a judge denies such an application, the government's only statutory remedy is to take an appeal to the **Foreign Intelligence Surveillance Court** of Review. [6] In practice, however, the FISA process has not always worked in such a rigid and formal way. For example, in 2002, Judge Lamberth explained how the submission and decision process functioned during his tenure as presiding judge of the FISC:

> I bristle at the suggestion in some quarters that we are rubber stamps for the government, because no applications have been formally denied in recent years. Some have been revised, some have been withdrawn and resubmitted with additional information, and the process is working. It is working, in part, because the [A]ttorney [G]eneral is conscientiously doing his job, and his staff is, as well. [7]

James Baker, then Counsel for Intelligence Policy, echoed these sentiments in an interview conducted for Frontline, the PBS television series:

> I just want to say that the idea that the FISA court is a rubber stamp is to my mind ridiculous, and I think the American people need to know that.
>
> I think folks really don't understand the process. They don't understand the give-and-take … . [W]e have an interactive process with the FISA court. So if they have questions—they don't understand something about the application, they have a concern about the application some way, they don't think the facts are sufficient on a particular point or a particular element of the statute—they'll ask us about

> it, and they'll say, "Well, do you have any more information on this one point?" We'll say: "We don't know, Judge. We'll go back and find out. We'll go back to an FBI field office, let's say, and ask them. They'll say, "Well, actually we do have some additional information." So we'll file a supplemental document, submit that to the court, and then the court might be satisfied, and then the matter is resolved; the application is approved.
>
> So could the court, when it first got the application, just have received it, have the question, decided it was insufficient, denied it or issued some kind of order? I guess they could have in that kind of a scenario, but that's not how the process works. The process is more interactive than that … . [8]

Nonetheless, statistics suggest some variation in approach over time to dealing with FISA applications that the FISC deemed inadequate. The Department of Justice's annual reports in this area provide the relevant statistics. [9]

Year	Number of applications filed [10]	Number withdrawn in whole or in part	Number modified in whole or in part	Number denied in whole or in part
2010	1,511	5	14	0
2009	1,329	8	14	2
2008	2,082	N/A	2	1
2007	2,370	N/A	86	4
2006	2,181	5	73	1
2005	2,074	2	61	0
2004	1,758	3	94	0
2003	1,727	N/A	79	4
2002	1,228	N/A	2 (modifications reversed on appeal)	2 (see adjacent column)

Thus, where the FISC under Judge Lamberth apparently would informally communicate its dissatisfaction with a FISA application, allowing the government to withdraw the application, revise it, and resubmit it without an order of "denial" or "modification" in the record, between 2002 and 2008, the FISC seemed more inclined to enter formal orders. [11] At a conference sponsored by the National Association of Criminal Defense Lawyers on May 3, 2008, however, Judge James Carr, then a member of the FISA Court, stated that as of that date, approximately 15–20% of FISA applications provoke questions from a judge, which may lead to informal withdrawal of the application, and in some cases to resubmission of the application with new information. Beginning in 2008, and since 2009 (when John Bates became Presiding Judge of the FISC), it appears that the number of modifications and denials has declined somewhat.

The increase in modifications through 2007 probably results from one or more of four factors. First, the government's first appeal to the Court of Review in 2002 may have chilled relations between the FISC and the Department of Justice, at least temporarily. [12] There is in any event a certain symmetry between the FISC's first (and only) reversal in the Court of Review in November 2002 and the government's first denials before the FISC in calendar year 2003. Second, in May 2002, Colleen Kollar-Kotelly replaced Royce Lamberth as the FISC's Presiding Judge. [13] Under Judge Lamberth, as noted above, the FISC sometimes informally rejected FISA applications without entering formal orders "denying" or "modifying" them, and allowed the government to make any needed changes and resubmit the applications. This informal approach is not drastically different from the approach that governs traditional search warrant practice in some judicial districts, but Judge Kollar-Kotelly may well have adopted a more formal approach. Third, the increased attention focused on the FISC, and on civil liberties generally after the Court of Review's decision, may have contributed to a more formal approach. Under Judge Kollar-Kotelly's successor, Presiding Judge John Bates, the Court has reduced the number of formal denials and modifications. It is not entirely clear whether the statistical changes reflect substantive as well as stylistic trends—i.e., whether the FISC is doing more than merely formally denying or modifying applications that would have been withdrawn or modified informally in the past. Fourth, the increasing volume of FISA applications—the government filed more than twice as many FISA applications in 2006 as it did in 2001 [14]—and the increased size of the FISC itself after the Patriot Act—from seven to 11 judges—as well as possibly increasing complexity in technology and other areas may have contributed to a more formal approach, in the interest of speed and efficiency if nothing else.

Prior to 2008, the statute did not expressly authorize the FISC judges to sit in panels or as a full court. Nevertheless, on at least one occasion, the FISC sat "en banc" to consider procedures that the Department of Justice promulgated to govern the coordination of criminal and foreign investigations. [15] In reviewing that decision, the Court of Review noted the lack of statutory authorization for an "en banc" sitting of the FISC. [16] Apparently in response to the Court of Review's comment, Congress, in the FISA Amendments Act of 2008, authorized the FISC to hold a hearing or a rehearing en banc on its own initiative or when requested by the government and if "ordered by a majority of the [FISC] judges." The court may hold an en banc sitting when "necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." [17] Congress drew these standards from Fed. R. App. P. 35, which sets forth the same criteria for authorizing an en banc hearing or rehearing by federal courts of appeals. As amended in 2008, FISA also provides that "[a]ny authority granted [by FISA] to a judge of the court established under this subsection may be exercised by the court en banc." [18] Title VIII of the FISC's rules provides procedures for en banc hearings.

Footnotes

1 **Foreign Intelligence Surveillance Court** R. 9(a) and (b).

2 **Foreign Intelligence Surveillance Court** R. 9(e).

3 **Foreign Intelligence Surveillance Court** R. 11(b). Where an application involves "a new surveillance or search technique," the FISC's rules require the government to submit a memorandum explaining the technique, describing the circumstances of its likely use, discussing any resulting legal issues, and describing proposed minimization procedures. **Foreign Intelligence Surveillance Court** R. 11(b). Similarly, the government must file a "written submission" addressing a request "to use an existing surveillance or search technique in a novel context." **Foreign Intelligence Surveillance Court** R. 11(c). A memorandum of law is also required for any "issue of law not previously considered by the Court." **Foreign Intelligence Surveillance Court** R. 11(d).

4 **Foreign Intelligence Surveillance Court** R. 7(d) and (e); see **Foreign Intelligence Surveillance Court** R. 18(d) (allowing electronic signatures on orders).

5 50 U.S.C.A. § 1803(a) (electronic surveillance), 1822(c) (physical search). See **Foreign Intelligence Surveillance Court** R. 18(b)(2). The prohibition on a judge hearing a FISA application after another FISC judge has denied it ensures that the government will not engage in judge-shopping among the members of the FISC, submitting the same application repeatedly until one of the 11 judges approves it. See In re Sealed Case, 310 F.3d 717, 721 n.5, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002). The legislative history explains that an appeal to the Court of Review "is intended to be the exclusive means by which the Government can further pursue an application that has been denied by a judge of the [FISC]. If, however, the Government discovers new information on which to base a new application against the same target, it may file a new application" with the FISC. FISA House Intelligence Report at 72. The new application, with new information, would need to discuss the earlier (rejected) application.

6 50 U.S.C.A. §§ 1803(a), 1822(c).

7 Lamberth Speech.

8 Interview with James Baker, Frontline: Spying on the Home Front (available at http://www.pbs.org/wgbh/pages/frontline/homefront/interviews/baker.html) html (last viewed July 13, 2009).

9 See 50 U.S.C.A. § 1807 (annual report requirement). For a discussion of Congressional oversight and reporting with respect to FISA, see §§ 13:1 et seq. For additional discussion of these statistics, see § 13:4. The public reports are available at http://www.justice.gov/nsd/foia/reading_room/foia_readingroom.htm (last visited June 12, 2011).

10 The government changed its reporting in this area beginning with reports concerning calendar year 2009. Prior to that year, it reported the total number of applications for electronic surveillance and/or physical searches, and the number of such applications denied or modified by the FISC. For calendar years 2009 and 2010, however, it reported the total number of applications, as well as the total number that involved requests for electronic surveillance (i.e., applications solely for electronic surveillance, or for electronic surveillance and physical searches, but not applications solely for physical searches), and the number of those applications withdrawn by the government and denied or modified by the FISC. The relevant reporting statute, 50 U.S.C.A. § 1807, requires public reporting of "the total number of applications made for orders and extensions of orders approving electronic surveillance," and "the total number of such orders and extensions either granted, modified, or denied." The numbers of withdrawn applications listed in the

table include applications that were withdrawn even if they were later resubmitted and granted. Where the table lists "N/A" in the column for applications withdrawn, the government's reports do not refer to any withdrawn applications; it may be that there were no withdrawals in those years.

11 There was one prior denial of a sort, when in 1981 the government submitted an application for a physical search but urged the FISC to deny the application on the grounds that, at that time, the FISC had jurisdiction solely over applications for electronic surveillance. See FISA Senate Intelligence Report at 36-37 (1978). The opinion of the FISC is reprinted in S. Rep. No. 97-280 at 16-19 (1981).

12 For a discussion of this appeal, see §§ 10:1 et seq.

13 Judge Kollar-Ketelly's term expired in 2009 and Judge John Bates, a sitting member of the FISC, replaced her. See The **Foreign Intelligence Surveillance Court**—2010 Membership, available at http://www.fas.org/irp/agency/doj/fisa/court2010.html.

14 Compare Letter from John Ashcroft, Attorney General, to Richard B. Cheney, President of the Senate (Apr. 27, 2001) (1005 applications), (available at http://www.fas.org/irp/agency/doj/fisa/2000rept.html), with Letter from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs, to Nancy Pelosi, Speaker, United States House of Representatives (Apr. 27, 2007) (2181 applications), (available at http://www.fas.org/irp/agency/doj/fisa/2006rept.pdf). Since enactment of the FISA Amendments Act of 2008, the numbers of traditional FISA applications have moderated somewhat, as shown in the table in the text. The public reporting does not include matters submitted under the FISA Amendments Act.

15 See In re All Matters Submitted to **Foreign Intelligence Surveillance Court**, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002) (abrogated on other grounds by, In re Sealed Case, 310 F.3d 717, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002)).

16 In re Sealed Case, 310 F.3d 717, 721 n.5, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002).

17 50 U.S.C.A. § 1803(a)(2)(A). The FISA Amendments Act of 2008 also gave the FISC, the Court of Review, and the Supreme Court (or a member of any of those courts) authority to grant a stay of any order issued by the FISC while an en banc rehearing or an appeal is pending. 50 U.S.C.A. § 1803(f)(1).

18 50 U.S.C.A. § 1803(a)(2)(B).

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