

## CHIEF JUSTICE REHNQUIST'S APPOINTMENTS TO THE FISA COURT: AN EMPIRICAL PERSPECTIVE

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### INTRODUCTION

William H. Rehnquist's death in the summer of 2005 ended his long tenure as Chief Justice, and has already spurred a significant quantity of scholarship assessing his influence on the Supreme Court and the broader contours of American law.<sup>1</sup> Not surprisingly, this work has focused primarily on Chief Justice Rehnquist's role within the Supreme Court's adjudicative function. In that sphere his imprint on the Court's decisions was crucial but hardly absolute; his views were always tempered by the need to forge majorities, and were occasionally insufficiently forceful to prevent holdings that contradicted them.

This Paper assesses a different part of Chief Justice Rehnquist's legacy. Among the Chief Justice's significant statutory and customary powers

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<sup>1</sup> For a small fraction of the retrospective scholarship that followed William Rehnquist's death in the summer of 2005, see, for example, Symposium, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1661 (2006); In Memoriam, *William H. Rehnquist*, 106 COLUM. L. REV. 487, 487-502 (2006); Symposium, *Just Right?: Assessing the Rehnquist Court's Parting Words on Criminal Justice*, 94 GEO. L.J. 1319, 1319-1634 (2006).

over the federal judiciary is the authority to select, from among hundreds of judges who sit on lower federal courts, the particular jurists who will staff various special tribunals. Situated outside the Court's collective decision making practice, this power is one much more open to the exercise of the Chief Justice's individual discretion. One of the courts for which he chose the members is the Foreign Intelligence Surveillance Act Court ("FISA Court"),<sup>2</sup> the body that hears secret government surveillance requests in connection with national security cases. Chief Justice William Rehnquist made twenty-five such appointments to the FISA Court from a pool comprised of all sitting federal district judges in the United States.

The FISA Court's role in mediating privacy rights and national security interests in the war on terror is important and well-known. Like his jurisprudential influence, Chief Justice Rehnquist's legacy in this area reverberates beyond his death, as many of the judges he installed on the FISA Court will rule on government surveillance requests for years to come.<sup>3</sup> The FISA Court judges chosen by Rehnquist and his successor John Roberts may become even more influential in the next few years as Congress contemplates expanding the Court's jurisdiction. This project examines the choices he made using several criteria, and concludes that the Rehnquist FISA judges were a conservative cohort inclined to favor the government on Fourth Amendment issues during their normal judicial work. However, the FISA Court judges he appointed display some diversity in their background characteristics, and their overall conservatism was not out of step with the views held by the majority of judges who populated the inferior federal bench during the decades in which he made his selections. A more hegemonic pattern is suggested by Rehnquist's less numerous choices for the FISA appellate panel, which hears the rare government appeal from an adverse FISA Court ruling. The six appellate judges Rehnquist tapped for that panel appear to be more uniformly conservative in their judicial philosophy.

In addition to filling a gap in the assessment of William Rehnquist's judicial career, this Paper is an effort to explore judicial discretion outside of the adjudicative context in which it is normally studied. A basic assumption of much scholarship on law and courts is that both Article III judges and the Presidents and Senators who select them seek to advance particular judicial policy goals through their official actions.<sup>4</sup> To be sure, both judges

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<sup>2</sup> See 50 U.S.C. § 1803(a), (b), (d) (2000) (giving the Chief Justice the power to designate eleven federal district court judges to serve in seven year terms on the Foreign Intelligence Surveillance Court, which reviews and decides government applications for electronic surveillance, and three circuit judges to sit on an appellate panel).

<sup>3</sup> FISA judges typically sit for seven year terms. See 50 U.S.C. § 1803(d).

<sup>4</sup> See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) (articulating a theory of "partisan entrenchment" whereby winning political parties seek to "stock the federal judiciary" with ideologically congruent judges who will serve for many years as "temporally extended representatives of [those] particular parties").

and politicians are often constrained by a host of external factors—such as institutional setting, the interests of other actors, and customary norms of official behavior—that preclude single-minded preference maximization in either appointments or adjudication. Nevertheless, the general assumption is that within these constraints both kinds of officials seek results as close to their preferred policy outcomes as possible.

The ways in which judges and politicians advance their preferences necessarily differ: the Constitution's separation of functions, along with two centuries of institutional practice, has allocated different roles to the two groups. Politicians appoint, making important threshold choices about which persons will occupy lifetime judicial posts. And judges judge, manifesting preferences via the ongoing exercise of adjudicative authority that is constrained to varying degrees by textual commands, norms of *stare decisis* and reason-giving, the potential for review by higher courts, and by the dynamics of the collective decision-making process on a multimember court.

This clear separation of functions is muddled by Congress' occasional use of the unusual appointment device studied here. The unitary appointment authority that the Chief Justice holds for the FISA Court and other tribunals<sup>5</sup> carries with it unusual latitude to shape outcomes by matching particular kinds of judges with particular tribunals. There are a number of theoretical objections to Congress's continued use of this selection mechanism.<sup>6</sup> One is that, given the attitudinal heterogeneity of the lower federal judiciary, the Chief Justice might use the appointment power to advance particular policy ends through the selection of an ideologically uniform group of lower court judges. Moreover, the Chief Justice's power to select special court judges is quite different in kind than the authority that he and

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<sup>5</sup> The Chief Justice is authorized to select the judges that comprise several important federal tribunals, including: the FISA Court, *see* 50 U.S.C. § 1803(a), (b), (d); the FISA Court of Review; the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407(d) (2000) (giving the Chief Justice the power to designate five to seven district or circuit court judges to serve on the Judicial Panel on Multidistrict Litigation); the Alien Terrorist Removal Court, *see* 8 U.S.C. § 1532(a) (2000) (giving the Chief Justice the power to designate five federal district court judges to serve in five year terms on the Alien Terrorist Removal Court, which hears all alien removal proceedings); and, until recently, the Special Division of the D.C. Circuit, *see* 28 U.S.C. § 49(a), (d) (1994) (establishing a special "division" of the District of Columbia Circuit, comprised of three judges designated by the Chief Justice "for the purpose of appointing independent counsels"), whose authority to select and empower independent counsels figured prominently in Kenneth Starr's investigation of President Clinton, *see, e.g.,* Steve Daley, *Choice of Starr Has Partisan Smell*, CHI. TRIB., Aug. 14, 1994, at 4 (debating the selection of Kenneth Starr due to Starr's Republican affiliation); Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37 (urging Starr to quit his new position as Whitewater Independent Counsel); *see also* Erwin Chemerinsky, *Learning the Wrong Lessons From History: Why There Must be an Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1, 10 (2000) (describing the Starr-Sentelle appointments and noting the "great danger" that "a conservative Chief Justice . . . is perceived as likely to select conservative judges").

<sup>6</sup> For more detailed treatment of the history of this appointment device and my objections to it, *see* Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551 (2006).

other Article III judges exercise when deciding cases. The Chief Justice's discretion to pick judges for these tribunals is unconstrained by norms that otherwise operate to constrain judicial discretion, such as being required to state reasons for his choices, or to work toward a decision collectively with the other judges on a multimember court.<sup>7</sup>

This Paper undertakes a systematic study of Chief Justice Rehnquist's appointment choices for the FISA Court, giving particular attention to the question of whether the appointment power was used as a means to maximize his individual ideological preferences. I have chosen to focus on the FISA Court appointments for reasons of both current relevance and methodological opportunity. The FISA Court's importance has grown substantially in light of the post-9/11 "war on terror," as the executive branch has, through it, sought and received increasing numbers of surveillance authorizations. But as the vigor of the counterterrorism response increases, so too does the need for independent review of executive branch action.<sup>8</sup> The FISA judges supervise one key intersection between the potentially conflicting values of national security and civil liberties, and the manner in which the judges mediate this boundary has important implications for other debates related to counterterrorism policy.

The similarity between the balancing of enforcement interests and privacy interests that is critical to FISA Court judging, and the balancing central to ordinary Fourth Amendment jurisprudence, provides a methodological opportunity for assessing Chief Justice Rehnquist's appointment choices. The statutory standard that FISA requires for surveillance authorizations is not precisely the same as the normal Fourth Amendment warrant standard.<sup>9</sup> But the balancing of national security concerns against civil liberties that FISA judging entails is sufficiently analogous to "regular" Fourth Amendment judging to justify screening the FISA judges' pre-appointment Fourth Amendment jurisprudence for clues about their ideological leanings. So, as described in detail below, one facet of this study entailed the review and coding of hundreds of available Fourth Amendment rulings to assess, both individually and collectively, the revealed attitudes of the judges whom Chief Justice Rehnquist appointed to the FISA Court. For those twenty-five judges I also assessed two more

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<sup>7</sup> For a deeper exploration of the normative incongruity of the Chief's special authority in this area, see Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, *supra* note 6, at 1554–67.

<sup>8</sup> The Supreme Court recently reiterated that a war on terror is not a "blank check" to violate constitutional protections. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (emphasizing due process rights of citizens detained in the war on terror and declaring that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"); see also *Rasul v. Bush*, 542 U.S. 466, 473–85 (2004) (holding that United States courts have jurisdiction to consider the legality of detention of foreign nationals captured abroad and held at Guantanamo Bay).

<sup>9</sup> For a more specific discussion of the FISA standards, see *infra* notes 12–17 and accompanying text.

general proxies for judicial ideology: the party of appointing president, a simplistic binary measure of a nominee's ideology; and a more nuanced ideology measure derived from the ideological preferences of the Senators who were important in the judges' original nominations. I also collected a variety of more specific biographical information, including data on whether the FISA judges had prior military service.

What emerges from this first level of data collection and analysis is a picture of twenty-five Rehnquist-selected judges who are primarily Republican appointees, who skew in a conservative direction based on the nominate-score analysis, who ruled in the government's favor in a large majority of the Fourth Amendment questions presented to them, and who are predominately military veterans.<sup>10</sup> This is an interesting collective portrait, and might explain the FISA Court's unusually high pro-government ruling rate. Yet, it lacks context. A more meaningful assessment of Chief Justice Rehnquist's appointment choices must establish a comparative baseline against which to measure his selections.

Accordingly, in the second phase of this project, I selected a random set of judges from the same pool from which the Chief Justice picked his FISA Court judges, and then collected a data set parallel to that detailed above for the FISA judges, for the random group. The initial comparison suggests that Chief Justice Rehnquist's FISA Court selections *do not* differ significantly, on the relevant ideology measures, from the random group. In other words, the Rehnquist FISA Court judges may be conservative both in general, and on Fourth Amendment issues in particular, but this conservatism appears to reflect the baseline of the federal judiciary rather than an unrepresentative cohort chosen by the Chief Justice.

#### I. BACKGROUND ON THE FISA COURT AND THE CHIEF JUSTICE'S APPOINTMENT POWERS

Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA)<sup>11</sup> during an earlier era of public debate over the proper balance between national security enforcement (then related to the Cold War) and civil liberties protection.<sup>12</sup> The FISA contains a substantive standard for surveillance authorization that is analogous to, although dramatically less stringent than, the basic Fourth Amendment warrant standard.<sup>13</sup> For an authorization

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<sup>10</sup> The full list of the FISA Court judges is contained in the Appendix, below.

<sup>11</sup> Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1811, 18 U.S.C. §§ 2511, 2518–2519 (2000)).

<sup>12</sup> STAFF OF SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., REPORT ON COVERT ACTION IN CHILE 1963–1973 (Comm. Print 1975), available at <http://www.foia.state.gov/reports/churchreport.asp> (last visited Sept. 20, 2006).

<sup>13</sup> The Ninth Circuit found that FISA creates a lower standard of probable cause, but justified such a lenient government burden because the surveillance was for security rather than law enforcement purposes. See *United States v. Cavanagh*, 807 F.2d 787, 790–91 (9th Cir. 1987) (Kennedy, J.). The Second

warrant to issue under FISA, the government must show that “there is probable cause to believe” that “the target of the electronic surveillance is a foreign power or an agent of a foreign power” and that “each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.”<sup>14</sup> The ordinary Fourth Amendment standard, by contrast, requires that warrants issue only on a showing of probable cause to believe that an actual crime has been committed and that evidence of the crime will be found in the place to be searched.<sup>15</sup> Unlike the strictures that the Fourth Amendment and the federal wiretapping statute impose on ordinary law enforcement surveillance, FISA’s “probable cause” standard does not require any additional showing of likelihood of criminal activity—probability of acting on behalf of a foreign power is sufficient.<sup>16</sup> FISA also requires the government to demonstrate that it is following appropriate procedures, a requirement designed to minimize any collateral threats to the civil liberties of persons in the United States.<sup>17</sup>

To enforce this specialized probable cause standard, FISA created a new federal district court of limited but exclusive jurisdiction. In 2002, Congress expanded the FISA Court from seven to eleven district judges, all of whom serve staggered, non-renewable terms of no more than seven years.<sup>18</sup> Service on the FISA Court is a part-time position. The judges rotate through the court periodically and maintain regular district court caseloads in their home courts. The Chief Justice is empowered to select the FISA Court judges from among all existing federal district court judges, including senior judges.<sup>19</sup> In accordance with its role in sensitive national security matters, FISA Court hearings are cloaked in specialized procedure: hearings are *ex parte*, with only Department of Justice attorneys appearing before the judge on duty; they are housed in a special secure chamber within the Department of Justice; and the transcripts are unavailable to the public.<sup>20</sup> If the FISA Court denies a warrant application, the government can appeal to a special FISA Court of Review that is comprised of three

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Circuit also upheld FISA’s constitutionality. See *United States v. Duggan*, 743 F.2d 59, 71–76 (2d Cir. 1984).

<sup>14</sup> 50 U.S.C. § 1805 (2000).

<sup>15</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 355 (1985) (Brennan, J., dissenting).

<sup>16</sup> For a comparison of the warrant requirements of FISA with those of the ordinary federal wiretapping statute (Title III), see *In re Sealed Case*, 310 F.3d 717, 737–42 (Foreign Int. Sur. Ct. Rev. 2002).

<sup>17</sup> See *id.*

<sup>18</sup> See Pub. L. No. 107-56, § 208 (2001) (amended and codified at 50 U.S.C. § 1803(a), (d) (2000)).

<sup>19</sup> 50 U.S.C. § 1803(a).

<sup>20</sup> See 50 U.S.C. § 1803(a), (c) (2000) (discussing security measures for the proceedings); see also Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 812 (stating that “[t]he government presents applications for warrants to the FISC judges in *in camera*, *ex parte* proceedings conducted under physical security measures designed to protect sensitive national security information”).

federal circuit judges. The judges on this specialized appeals court are also selected by the Chief Justice.<sup>21</sup>

Although facts about individual FISA warrant authorizations are not public, the Department of Justice does issue annual reports summarizing and aggregating its FISA Court activities. What emerges from this data is a government success rate unparalleled in any other American court. In the first twenty years of the Court's existence—from 1978 to 1999—the FISA Court granted almost 12,000 surveillance warrants and denied *none*.<sup>22</sup> Only once in recent years has the Court ruled against the government on a FISA warrant request, and even that denial was swiftly reversed on the merits by the FISA Court of Review.<sup>23</sup> Because only the government can appeal an adverse decision below, this was the first time the Court of Review had ever convened. This lopsided decisional history, coupled with the secret and unreported nature of most of the FISA Court's work, precludes individualized analysis of the FISA Court judges based on their decisions on *that* court. But the dramatic skew also raises one of this study's research questions: Is it possible to discern a similar (if less dramatic) pro-government bias in the Fourth Amendment questions the FISA judges resolved on their home courts prior to appointment? If so, this observable skew could have provided the Chief Justice with a window into their ideological preferences, allowing him to make FISA Court appointment selections on that basis.

## II. METHODOLOGICAL CHOICES

### A. General Motivation, Choices, and Challenges

Many objections to the Chief Justice's appointment power apply regardless of whether there is evidence of strategic appointment behavior by a particular Chief Justice for a particular court. But the critiques could gain greater traction to the extent there were hard evidence of policy-motivated appointment behavior. Over seventeen years, William Rehnquist appointed twenty-five federal district judges to serve fixed terms on the FISA Court. This project aims to assess whether there is evidence that Rehnquist chose judges who are (or appear to be) ideologically inclined to support the government's requests for FISA surveillance warrants. Chief Justice Rehnquist was perceived to be a conservative (pro-government) jurist when he ad-

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<sup>21</sup> See 50 U.S.C. § 1803(b).

<sup>22</sup> See Lawrence D. Sloan, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1496 (2001) (no denials in 11,883 surveillance warrant requests); see also Cinquegrana, *supra* note 20, at 815 (“[I]n over four thousand matters involving electronic surveillance [as of 1987] using various techniques directed at various types of targets in various circumstances, the [FISA Court] saw fit to deny no government request.”).

<sup>23</sup> See *In re Sealed Case*, 310 F.3d 717, 735 (Foreign Int. Sur. Ct. Rev. 2002) (holding that surveillance of an agent does not violate the Fourth Amendment as long as foreign intelligence is the significant purpose of that surveillance).

dressed Fourth Amendment issues that came before the Supreme Court.<sup>24</sup> My hypothesis was thus that, to the extent his appointments evidenced any meaningful attitudinal skew, it would be in favor of judges likely to support government authority to conduct surveillance.

Because this study focuses primarily on federal district judges, it faces the general challenges that confront all attempts to empirically assess the attitudes of that cohort. Several factors combine to make it more difficult to assess the ideology of district judges than those at higher levels of the federal judiciary. First, district judges typically decide cases individually, precluding use of methodological techniques common in analyses of decisions made by multi-member court. Attitudinal research on the Supreme Court has achieved a high level of sophistication in significant part because the Court is a closed set of nine judges, making it susceptible to a variety of linear scaling techniques that can draw upon hundreds of decided cases to model and assess the ideology of the Justices relative to each other.<sup>25</sup> The rotating panel systems of the federal appellate courts frustrate the application of a single linear attitudinal model, but do afford some basis for comparison among different judges with the same case stimuli.<sup>26</sup> No such group-based comparative measures exist for ordinary district court judging.

Second, although more specific analysis and coding of individual district judge ideology is possible, the size of the federal district bench (over 800 judges at this writing) means that there are few resource studies from which to borrow pre-determined ideology scores for district judges generally or for the Rehnquist FISA judges specifically.<sup>27</sup>

Even a careful coding of individual district judges' available decisions may be an imperfect window into judicial attitudes for two additional reasons. First, the institutional placement of district judges at the bottom of the Article III hierarchy means that their decisions are more certain to be reviewed by other judges; their decisions are more likely to reflect percep-

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<sup>24</sup> See, e.g., Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2353–2416 (describing William H. Rehnquist's role in producing a more conservative criminal procedure both before and after he joined the Supreme Court).

<sup>25</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–81*, 78 AM. J. POL. SCI. 891, 892–93 (1984). The rotating panel systems of the federal appellate courts frustrate the application of a single linear attitudinal model, but do afford some basis for comparison among different judges with the same case stimuli, as do instances when appellate judges sit en banc.

<sup>26</sup> For a comprehensive discussion of the methodological challenges and opportunities facing scholars of federal appellate courts, see Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1665–69 (1998).

<sup>27</sup> A notable exception is the prolific work on the federal district judiciary by Robert Carp and C.K. Rowland. See ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996).



tions of prevailing circuit court or Supreme Court precedent, and less likely to reflect their own ideological preferences than are the decisions of higher courts, whose judges have greater attitudinal discretion.<sup>28</sup> This clearly differentiates district court judges from Supreme Court Justices, but also from their circuit court counterparts, whose decisions are unlikely to be reviewed given the Supreme Court's parsimonious use of its discretionary jurisdiction. Second, only a small fraction of district judges' rulings are reduced to writing, and an even smaller fraction are available electronically.<sup>29</sup> For these reasons, any wide-ranging study of district court preferences that relies on written decisions draws on an incomplete set of judicial actions.

Taken together, these limitations complicate the study of district judge behavior in a way that is particularly relevant to this study. Because district judges do not sit together, because their decisions are promulgated unevenly, and because they reside in different circuits with different governing law, it is more difficult to make comparisons between two district judges, or groups of district judges, than it is to compare Supreme Court justices or circuit judges. The precise research question here—whether Chief Justice Rehnquist has appointed certain kinds of district judges to the FISA court—compels just that sort of comparative analysis. A crucial question is not simply whether the Rehnquist appointments are “conservative” in some abstract sense (although they appear to be), but whether his FISA selections are dramatically out of line with the baseline preferences of the district court judiciary.

### *B. Specific Methodological Choices*

The research agenda for this project, then, is a compound one: first, to assess the twenty-five actual Rehnquist choices using a number of different ideology measures; and second, to develop those same measures for a group of randomly-chosen judges to arrive at a comparison point. This subsection first describes the assessment mechanisms, detailing the steps taken to alleviate the difficulties associated with studying district court judges, and then details the methods used to randomly select the control group of judges.

*1. Assessing the FISA Judges.*—Despite the difficulties inherent in performing attitudinal research on district judges, a few readily ascertainable general proxies for judges' likely policy preferences have achieved some currency in the literature. In this study I used two of these established proxies, and a third proxy of my own creation based on the judges' Fourth Amendment rulings. First, like many studies before, this work uses the

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<sup>28</sup> See Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Procedure in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143 (2003).

<sup>29</sup> On the low publication rate of district court opinions in a different area of the law, see Peter Seigelman and John J. Donohue, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW AND SOC'Y REV. 1133 (1990).

party of the appointing President as a crude proxy for the ideology of the FISA judges and the random group. The overly simplistic nature of this binary variable is illustrated anecdotally by the judicial careers of Justices John Paul Stevens and Harry Blackmun (Republican appointees but liberal jurists) and Byron White (Democrat appointee but relatively conservative jurist). Nonetheless, the party of the appointing President remains a widely recognized metric for assessing a court's ideological composition, and over a sufficient number of judges, studies show that the appointing President's party generally correlates with subsequent judicial behavior.<sup>30</sup>

A few judicial scholars have begun using a second easy-to-obtain ideology proxy that is more nuanced, and thus may correlate even more closely with judges' subsequent behavior. This new assessment technique builds on advances in measuring the ideology of members of Congress made by scholars of that institution, most notably Keith Poole and Howard Rosenthal. These scholars have developed sophisticated ideology measures for all members of Congress dating back many decades.<sup>31</sup> Under this method of assessing Congressional ideology, scholars have coded every recorded vote on a linear liberal-conservative scale. The "coded" votes are then used to generate overall ideology scores for each member of Congress. These ideology scores, called "nominate scores," are expressed as a number between 1, the most conservative nominate score, and -1, the most liberal score. Nominate scores close to zero indicate a relatively moderate voting record.

With these Congressional scores well-established in the political science literature, some scholars of the judiciary have used the measurement as a rough proxy for the ideology of federal judges. By matching each federal judge with the numerical scores of his or her likely Senatorial sponsors, these scholars recognize the crucial role home-state Senators play in the judicial selection process. Senators—particularly those of the President's party—have traditionally had significant influence in the selection and approval of nominees to the federal district courts in their home states.<sup>32</sup> Thus, a particular Senator's score—or the mean of two Senators' scores, where both of a state's Senators belong to the President's party—can be assigned to the judges in whose nominations she participated. This scoring

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<sup>30</sup> For a comprehensive collection of eighty-four studies measuring party and judicial ideology, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (concluding that "[c]umulating and synthesizing empirical findings . . . confirm conventional wisdom that party is a dependable measure of ideology in modern American courts" and that "Democratic judges indeed are more liberal on the bench than Republican counterparts").

<sup>31</sup> See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997); Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998). Poole and Rosenthal provide a full list of their scores for current and past Presidents and members of Congress on a website: <http://voteview.com> (last visited Sept. 17, 2006).

<sup>32</sup> See Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001); David Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 493-94 (2005).

technique has the potential to better capture the nuance of intra-party ideological variation than a crude focus on the appointing President alone. For instance, a Maine district judge nominated by President Bush but sponsored by Olympia Snowe (a moderate Republican with a nominate score of 0.059), would receive a very different score than a Mississippi judge who was put forward by Trent Lott (a more conservative Republican with a nominate score of 0.492).<sup>33</sup>

Applying a version of this method in comparison with other ideology proxies, Michael Giles, Virginia Hettinger and Todd Peppers found that when one or more of a nominee's home-state Senators was of the President's party, the President's own ideology did not accurately predict the behavior of the judges he appointed.<sup>34</sup> The hypothesis that these authors employed, and that I adopt here, is that the Senatorial nominate scores may more accurately reflect the judicial nominee's ideology than a blunt focus on the President alone, even though the Senators and nominated judges are not precisely congruent.<sup>35</sup> In coding the nominate scores for both the FISA Court judges and the random control group, I used the specific methods used by Giles, Hettinger and Peppers. Where two home state Senators of the President's party were serving at the time of appointment, judges were assigned the mean of the two; where only one Senator was of the President's party, I used that Senator's score only; and where neither home state Senator was of the President's party, I used the nominate score of the President alone.

Although nominate scoring provides a more nuanced variable than a binary party-based measure, both are general proxies that predict judicial behavior imperfectly, without regard to particular judicial views on specific doctrinal subject areas. Because the FISA Court's jurisdictional scope is quite narrow—limited to approval or disapproval of national security surveillance requests—I sought a measure of the FISA judges' attitudinal preferences that was a more precise substantive fit with their role on that court.<sup>36</sup> Since FISA calls for the judges to apply a balancing test that is related to ordinary Fourth Amendment probable cause standards,<sup>37</sup> judges' decisions in the latter class of cases can provide a predictive proxy for judicial behavior once on the FISA Court. Relatedly, the Chief Justice himself might re-

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<sup>33</sup> The nominate scores used here were the DW-nominate scores available on the Poole-Rosenthal website, *see supra* note 31, for individual Senators during the relevant years of nomination.

<sup>34</sup> *See* Micheal Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 635 (2001).

<sup>35</sup> *See id.*

<sup>36</sup> As noted earlier, the actual FISA rulings are of little use for this assessment purpose, both because of the secret nature of much of the court's work, and because the government's overwhelming "win" rate (over 99.9%) at the FISA Court precludes meaningful assessment of the FISA Court judges based on their work on that court. *See supra* notes 20, 22.

<sup>37</sup> *See* discussion *supra* p. 242.

gard district judges' views on "regular" Fourth Amendment questions as a relevant signaling factor in selecting judges for FISA service.

To measure this more targeted variable for both the Rehnquist FISA judges and a randomly-selected control group of federal judges, I assessed revealed behavior on Fourth Amendment issues in criminal cases for all of the judges in both groups. This entailed the coding of a large number of judicial decisions, and presented a number of *ex ante* methodological dilemmas: where to look for cases, which cases to include as data, and how to code the cases. In addressing these questions I made a number of choices that, though defensible, are by no means unassailable and so merit further discussion.

First, I assessed only the Fourth Amendment decisions that were available in Westlaw's electronic district court and circuit court databases. As many have noted, such a limitation ignores a significant portion of the work of the federal courts. Moreover, publication of a district court opinion entails two volitional acts: one by the district court judge, who decides to send the opinion to West Publishing; and one by West editors to include the opinion in the Federal Supplement. Both of these decisions can skew the nature of the electronically available subset of cases.<sup>38</sup> To a certain extent the latter discretionary choice (to officially "publish" a case) is less important than the initial judicial decision to send it in, since West now includes "published" and "unpublished" decisions in searchable form in its district and circuit court databases. My dataset included numerous electronically available decisions that are unpublished in the formal sense.

I focused on this electronically available universe of cases despite these valid objections for several pragmatic and conceptual reasons. This project involves behavioral assessment of a large number of judges (fifty). Within the Westlaw databases alone, research into the Fourth Amendment decisions of these fifty judges yielded over 1,000 cases for review. I selected and coded several hundred of these for use in the project.

I limited my research to electronically available cases for two pragmatic reasons. First, the judges to be studied were spread throughout dozens of different judicial districts; this precluded in-depth focus on the paper records of a single district court. Second, the nature of Fourth Amendment rulings in actual cases made electronic text searching an essential tool for finding the greatest number of rulings. Fourth Amendment decisions—typically embodied in a grant or denial of a motion to suppress evidence—do not manifest as individualized "cases" themselves, but are usually embedded within ordinary criminal cases. Many of the decisions coded and utilized herein were interlocutory orders that would have evaded review if

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<sup>38</sup> See Deborah Jones Merritt & James Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Seigelman & Donohue, *supra* note 29; Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decision-making: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 534–36 (2004).

the search were limited to reviewing final case resolutions.<sup>39</sup> Locating these Fourth Amendment decisions within the larger case contexts required use of a database that permitted specific textual searching. Moreover, this search tool made it possible to identify Fourth Amendment decisions rendered at the district court level via review of *circuit court* decisions, as district court rulings could be discovered by locating circuit court references to them.<sup>40</sup>

In addition to these pragmatic reasons for limiting my search to these electronic sources, there is a conceptual justification that alleviates the usual incompleteness concern that might attend an empirical project of this type. The primary focus of this study is the appointment behavior of Chief Justice Rehnquist in filling the FISA Court seats, rather than a first-order inquiry into the precise Fourth Amendment views of the particular judges he chose. The fact that publication of a district court opinion is a public and volitional representation of a judge's Fourth Amendment views hardly makes that subset of cases irrelevant to assessing the Chief Justice's appointment choices. In fact, it may increase the relevancy of that more prominent set of cases. In other words, if all federal judges were *de facto* identical in their Fourth Amendment attitudes, but a certain group was more *visibly* pro-government as measured by the opinions they sent for publication, a finding that the Chief Justice chose judges predominantly from the high-profile Fourth Amendment group would say something important about his own appointment criteria and the signals that were relevant to him. This is not to claim that the Chief Justice relies exclusively, or even primarily, on published judicial opinions in selecting his FISA Court judges. However, a judge's behavior as revealed in published opinions is relatively more likely to influence the Chief Justice's perception of a lower court judge's attitudes than judicial behavior that is not reduced to a published opinion.

In identifying and coding decisions within the two Westlaw databases, I made two other substantive choices. The first was to focus only on core Fourth Amendment rulings in the context of criminal cases. Every judge studied here had issued at least several opinions in Section 1983 civil cases involving asserted deprivations of Fourth Amendment protections. After some trial and error in initial review of several dozen cases, I made a judgment that such civil liability cases were too often compounded by official immunity issues to reliably reflect a judge's outlook on the Fourth Amendment, and even where they were not, they reflected a different kind of attitudinal tradeoff: they looked at the question *ex post*, for purposes of awarding monetary damages, rather than from the *ex ante* perspective that

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<sup>39</sup> This would also make even full paper docket searching incomplete absent line-by-line review of transcripts of proceedings, since some motions to suppress are ruled on orally from the bench.

<sup>40</sup> A possible caveat to this use of circuit court decisions is as follows: Although most circuit court decisions, whether technically "published" or not, are included in Westlaw's electronic databases, focus on this set of cases is incomplete given the discretionary role of the losing party below in pressing an appeal.

provides a suitable proxy for the FISA Court's balancing of national security concerns with civil liberties. Similarly, I excluded most opinions involving prisoners' claims for post-conviction relief (habeas corpus or Section 2255<sup>41</sup>), unless it was clear that the judicial ruling on the Fourth Amendment issue was untainted by the differential standards of review normally applicable in such cases. Finally, I coded the relevant Fourth Amendment cases in blunt binary fashion, as either pro-government or pro-defendant, thereby ignoring significant doctrinal and factual nuance in order to capture a more general attitudinal measure across a large number of cases.

2. *The Random Control Group.*—One other fundamental aspect of the study design was construction of the random group of federal district judges that would provide the ideological baseline by which to assess Chief Justice Rehnquist's FISA choices. Because he made his twenty-five appointments incrementally over a period of 17 years, during which the composition of the lower federal judiciary changed, I did not select the random judges from a single point in time. Rather, I used three separate historical pools of district judges from five year intervals (1992, 1997, and 2002), and drew from those different pools to build a random FISA Court of twenty-five judges, the same number actually appointed by Chief Justice Rehnquist. Given Congressional expansion of the FISA Court in 2002, I selected more judges from the 2002 pool than the prior two pools to correspond with Chief Justice Rehnquist's more frequent selections toward the end of his career.<sup>42</sup> Once the twenty-five random judges were selected, I applied the same assessment techniques discussed above to each judge in that group.

### III. RESULTS AND DISCUSSION

The primary aim of this study was to assess whether the ideological profile of the judges Chief Justice Rehnquist chose for the FISA Court differed significantly from that of the background federal district court judiciary from which he made those appointments. The findings here show that the Rehnquist judges were not meaningfully different from the pool from which they were selected. In other words, the Rehnquist judges scored conservatively on the ideology measures used, and were overwhelmingly pro-government in Fourth Amendment cases, but not significantly more so than a group picked at random. Even the striking proportion of military veterans

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<sup>41</sup> 28 U.S.C. § 2255 (2004).

<sup>42</sup> I selected nine judges from the 2002 pool, and eight judges from each of the 1992 and 1997 pools. The actual selection of random judges entailed assigning a number to all eligible federal district judges (active and senior), and then using a random number generator program to select certain judges numerically. I included senior judges in the selection pool both because they are statutorily eligible for appointment, and because Chief Justice Rehnquist has in practice occasionally selected senior district judges for his FISA appointments.

on the FISA Court<sup>43</sup> was reproduced in the group of twenty-five judges on the random court. These findings could be solidified by constructing and evaluating a larger random sampling of judges.

#### A. The General Ideology Proxies

The congruence between the Rehnquist choices and the judges in the random group is most evident in the two general ideology scores I measured: party of appointing President and nominate score. As Table 1 illustrates, the proportion of Republican-appointed judges in both the FISA group and the random group was almost the same, varying by only one judge. Measured by the nominate scoring technique, the FISA judges were marginally *less* conservative than the random group of twenty-five.

Table 1: President's Party and Nominate Score Analysis.

	Republican Appointees	Average Nominate Score (+1 = cons.; -1 = lib.)
<b>FISA Judges (n=25)</b>	16 (64%)	0.055696
<b>Random Judges (n=25)</b>	15 (60%)	0.116783

The proportion of Republican-appointed judges in the two groups was not out of line with the federal judiciary at large during the relevant time periods. In 1988, the percentage of Republican appointees in the lower federal courts was 61.2%. By 1992 it was 72.2%.<sup>44</sup> By 2000, after a steady decline during the Clinton presidency, Republican appointees were approximately equally distributed with Democrat appointees.<sup>45</sup> Given this tilt in the federal judiciary during most of the studied period, it is unsurprising that the random court reflected a significant majority of Republican appointees, as did Chief Justice Rehnquist's choices.

What is more interesting about the specific appointments Chief Justice Rehnquist made is this: his willingness to select Democrat-appointed judges for the FISA Court increased dramatically in the last six years of his career. Of the first twelve FISA appointments the Chief Justice made, ten

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<sup>43</sup> Sixteen of the twenty-five Rehnquist-appointed FISA Court judges had served in the military. Although I did not start the project looking at this variable, when I noticed this feature in the biographies of many of the actual appointees, I decided to systematically check for it in both the actual and random courts, on the theory that prior military experience might correlate with pro-government attitudes on national security issues. I found, however, that a similar number (fifteen) of the random judges also were military veterans.

<sup>44</sup> See Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 253 (Mar.-Apr. 2001).

<sup>45</sup> See *id.*

were Republican appointees.<sup>46</sup> But the eleven appointments Rehnquist made since 1998 have been predominantly Democrat (six to five).

This shift is marked enough to merit some speculation about its origin. One can imagine a number of different motivations behind the Chief Justice's shift toward more even-handed appointment behavior in recent years. One could be that the Chief Justice held a more complex set of strategic goals than simple ideology maximization in choosing judges for the FISA Court. Congressional willingness to grant the Chief Justice this appointment power, and indeed the breadth of federal judicial authority generally, rests in significant part on the proposition that what the judiciary does is somehow different than the stuff of ordinary politics. The Chief Justice was instrumental in two episodes in recent years that have undermined the public confidence that the judiciary is separate from ordinary politics. First was the infamous *Bush v. Gore* decision. Second, the Chief Justice made controversial appointments—including David Sentelle—to the Special Division of the D.C. Circuit, which in turn authorized Kenneth Starr's sweeping investigation of President Clinton.<sup>47</sup> In the wake of such rancorous episodes, the Chief Justice may have modified his appointment behavior in an effort to rehabilitate his—and by proxy, the judiciary's—reputation for evenhandedness.

If this is so, it appears that the Chief Justice was able to accomplish this reputation-burnishing objective at little cost in terms of FISA Court outcomes. This follows from two considerations, both of which may help explain his markedly increased willingness to select Democrat appointees in recent years. The first is that by the late 1990s the Chief Justice had a sizeable pool of Clinton appointees from which to choose, and he may have perceived the Clinton judges as somewhat more conservative than the Carter cohort, particularly on law-and-order issues.<sup>48</sup> More specifically, the Chief Justice may have successfully identified particular Clinton appointees whose approach to criminal law and procedure he favored, and avoided particular judges he disfavored.

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<sup>46</sup> See *infra* app.

<sup>47</sup> See, e.g., Chemerinsky, *supra* note 5 (describing the Starr–Sentelle appointments and noting the “great danger” that “a conservative Chief Justice . . . is perceived as likely to select conservative judges”); Daley, *supra* note 5 (debating the selection of Kenneth Starr due to Starr's Republican affiliation).

<sup>48</sup> See Robert A. Carp, Kenneth L. Manning, & Ronald Stidham, *President Clinton's District Judges: “Extreme Liberals” or Just Plain Moderates?*, 84 JUDICATURE 282, 285 & tbls. 1, 2 (2001) (finding that Carter district court appointees were generally more “liberal” in voting behavior than district judges appointed by Clinton, and that the Carter district judges were more likely to rule for defendants in criminal cases than Clinton appointees); see also C.K. Rowland, Donald Songer & Robert A. Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC'Y REV. 191, 198 (1988) (finding a “high level of support for criminal defendants” among Carter appointees).



Finally, because any FISA Court rulings denying government surveillance requests are reviewed by a three-judge panel of appellate judges selected by the Chief Justice, Rehnquist could have appointed a more diverse group of FISA district judges while protecting pro-government outcomes by selecting a more uniformly conservative group of judges for the FISA Court of Review. There is some evidence the Chief Justice did in fact engage in this kind of nuanced strategic behavior. The recent trend toward a more bipartisan FISA Court has not been matched by a similar pattern on the FISA Court of Review, which has been comprised of uniformly Republican appointees. Rehnquist picked six judges for this review court, all of whom were Nixon or Reagan appointees.<sup>49</sup> Further attitudinal research on the FISA appellate judges would help illuminate this possible explanation for the Chief Justice's appointment behavior.

### *B. Fourth Amendment Case Data*

As was the case for the general ideology scores, the FISA appointees' behavior in Fourth Amendment cases does not appear to differ dramatically from that in the random group. Table 2 illustrates that, taking all cases together, the Rehnquist appointees were only slightly more likely to rule for the government on Fourth Amendment issues. Constructing a larger random set, and coding the Fourth Amendment decisions of those judges, might lend greater significance to the small gap that exists, or might reveal a slightly larger divergence.

*Table 2: Fourth Amendment Case Analysis.*

	<b>Total Cases</b>	<b>Pro-Gov't Rulings</b>	<b>Gov't Win Rate</b>	<b>Std. Dev. Among Judges' Ind. Rates</b>
<b>FISA Judges (n=25)</b>	327	285	87.16 %	11.914
<b>Random Judges (n=25)</b>	216	187	82.87 %	26.037

An interesting variance does exist, however in the standard deviation among the government win percentages for the judges within the two groups, suggesting the Chief Justice may have consciously avoided judges who were more likely to rule against the government in this type of case. The randomly selected group was ideologically heterogeneous—including some extremely pro-government judges but also some at the other end of the spectrum. Such internal group variation (or lack thereof) is potentially important to the consistency of FISA Court outcomes, since the judges take

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<sup>49</sup> See Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* note 6, at 401 (appendix listing judges).

turns sitting individually to hear surveillance warrant requests.<sup>50</sup> The fact that the Rehnquist-selected cohort displays less dramatic variation is perhaps suggestive of a strategic choice to avoid preference outliers, particularly in a pro-defendant direction.

It is also striking, if perhaps unsurprising, that I found significantly more Fourth Amendment decisions for the actual FISA judges than for the random control group. This variance is not explained by more time on the federal bench; the random group was slightly senior to the appointed group. I speculate that the difference is attributable to two factors, productivity and self-promoting behavior, both of which might correlate with likelihood of special court appointment. The greater number of decisions from the FISA judges obviously suggests greater productivity, and it is easy to speculate about how busier district judges might gain relatively more notoriety among judges at higher levels, including the Chief Justice. There may also be an analogous variance in the eagerness of district judges to engage in affirmative reputation-enhancing behavior—here, by sending their written rulings to West Publishing.<sup>51</sup> To assess this volitional component I looked to the number of district court Fourth Amendment decisions available in the Westlaw database for each judge in both groups, and then averaged those figures. Table 3 illustrates the differences between the two groups.

*Table 3: Average Number of District Court Fourth Amendment Opinions, Per Judge.*

	<b>District Court 4A Opinions</b>	<b>District Court 4A Opinions, Excluding Single Most Productive Judge</b>
<b>FISA Judges</b>	5.4	4.9
<b>Random Judges</b>	4.3	2.9

The actual FISA group had a higher number of opinions in the aggregate, but on this measure the random group's basic average was heavily skewed by the inclusion of Gene Carter of Maine. Judge Carter, who apparently has taken on the Fourth Amendment as a personal specialty, had 35 such opinions in the relevant database. No other judge in either group exceeded 17. To remove the skew caused by Judge Carter's anomalous behavior, I averaged the number of opinions published by each group, excluding the data point from the single most frequently published judge in

<sup>50</sup> The judges rotate on a relatively fixed schedule, traveling to Washington, D.C., for brief stints to hear FISA cases, then returning to their regular judicial business.

<sup>51</sup> Publication of district court opinions occurs primarily because district judges choose to send particular opinions to West Publishing, although West selects some decisions for publication itself. See Stephen L. Wasby, *Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIRC. REV. 41, 64–65 (2005).

each. On this measure the FISA judges demonstrated significantly more self-promoting behavior than the random set. It is not surprising that such behavior might correlate with notoriety at the highest levels of the federal judiciary, which in turn could facilitate appointment to a special federal court.

#### CONCLUSION

I embarked on this empirical project with the hypothesis that Chief Justice Rehnquist has selected FISA Court judges who are conservative ideologically and who tend to favor government interests when assessing surveillance requests. Nothing in these findings leads me to think otherwise. However, the study findings also suggest that the Rehnquist choices were not significantly more conservative than the baseline federal judiciary during the period he served as Chief Justice. It appears that the Chief Justice's choices generally reflected background attitudinal features present on the federal district bench at the time he made his selections. This congruence is not necessarily evidence of random selection by the Chief Justice. It is probable that Chief Justice Rehnquist was aware of the ideological background rate of the federal district court judiciary, and possible that he strategically chose a group of judges that roughly approximated that conservative baseline. The fact that the actual FISA judges' Fourth Amendment behavior was more consistently pro-government than the individual random judges (a group with much higher variance on this dimension) provides at least a hint of this kind of conscious selection. Ultimately, we do not know on what grounds, or by what process, Chief Justice Rehnquist chose this particular group of judges to serve on the FISA Court. This inscrutability may provide an independent reason to object to this feature of the Chief's authority. In the face of this silence, we can speculate that William Rehnquist exercised his authority in this area with the same sophistication he brought to his management of the Supreme Court and the Article III judiciary more broadly, selecting a cohort of FISA judges that was generally but not uniformly conservative and that did not deviate significantly from the overall federal district court bench.

APPENDIX: CHIEF JUSTICE REHNQUIST'S APPOINTMENTS TO THE FISA COURT<sup>52</sup>

<b>District Judge</b>	<b>FISA Appt. Date</b>	<b>Home Court</b>	<b>Original Appt. Date</b>	<b>Appt'g Pres.</b>
Conrad K. Cyr	1987	D. Me.	1981	Reagan
James E. Noland	1987	S. D. Ind.	1966	Johnson
Joyce H. Green	1988	D.D.C.	1979	Carter
Robert W. Warren	1989	E.D. Wis.	1974	Nixon
Wendell A. Miles	1989	W.D. Mich.	1974	Nixon
Frank Freedman	1990	D. Mass.	1972	Nixon
Ralph G. Thompson	1990	W.D. Okla.	1975	Ford
Charles Schwartz Jr.	1991	E.D. La.	1976	Ford
Earl H. Carroll	1992	D. Ariz.	1980	Carter
James C. Cacheris	1993	E.D. Va.	1983	Reagan
John F. Keenan	1994	S.D.N.Y.	1983	Reagan
Royce C. Lamberth	1995	D.D.C.	1987	Reagan
William Stafford	1996	N.D. Fla.	1975	Ford
Stanley S. Brotman	1997	D.N.J.	1975	Ford
Harold A. Baker	1998	C.D. Ill.	1978	Carter
Michael J. Davis	1999	D. Minn.	1994	Clinton
John Edward Conway	2000	D.N.M.	1986	Reagan
Claude M. Hilton	2000	E.D. Va.	1985	Reagan
James G. Carr	2001	N.D. Ohio	1994	Clinton
Nathaniel M. Gorton	2001	D. Mass.	1992	Bush
James Robertson	2002	D.D.C.	1994	Clinton
Colleen Kollar-Kotelly	2002	D.D.C.	1997	Clinton
Robert Broomfield	2003	D. Ariz.	1985	Reagan
George Kazen	2003	S.D. Tex.	1979	Carter
Dee Benson	2004	D. Utah	1991	Bush

<sup>52</sup> Historical data on the FISA Court appointments assessed here are not compiled in any one official or secondary source, and apparently (based on telephone and email requests by the author) are not kept in comprehensive form by the Administrative Office of U.S. Courts, the Federal Judicial Center, or the Justice Department's FISA Court clerk. Accordingly, the information in this Appendix was compiled through detailed chronological review of several sources: (1) The Third Branch, an official periodical of the federal judiciary, which occasionally listed individual FISA Court appointments when made; (2) the current FISA Court page on the Department of Justice website, which for recent years has listed the judges; (3) the Federal Judicial Center's judicial biography database, found at <http://www.fjc.gov>; (4) the judicial biographical information available in electronic editions of the West Legal Directory and the Almanac of the Federal Judiciary; and (5) individual media reports found in searchable electronic databases recounting relevant appointments.