

National Security Investigations and Prosecutions § 5:3

National Security Investigations and Prosecutions

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Part II. NSI Techniques

Chapter 5. The Foreign Intelligence Surveillance Court and the Court of Review

[Correlation Table](#)

§ 5:3. The Foreign Intelligence Surveillance Court—The FISC's personnel and facilities

West's Key Number Digest

West's Key Number Digest, War and National Emergency 🔑32

Treatises and Practice Aids

Guide to Homeland Security § 4:16 (2011 ed.)

The FISC consists of 11 district judges chosen by the Chief Justice and drawn from seven of the federal judicial circuits.¹ Under the original version of FISA, the FISC consisted of seven judges, but Congress increased the court's size as part of the Patriot Act.² Judges on the FISC sit for staggered seven-year terms and ordinarily continue to serve as judges in their home districts while sitting on the FISC.³ A judge may not sit for more than one seven-year term on the FISC.⁴ Although FISA originally made no provision for a presiding judge, the Chief Justice has historically designated one, and the FISC's rules define some of his or her duties.⁵ In 2006, Congress enacted legislation specifically referring to the FISC's "presiding judge."⁶ The presiding judge functions more or less like a chief judge of a district court.⁷

By statute, at least three of the FISC's 11 judges must reside within 20 miles of the District of Columbia, a requirement that has meant that the presiding judge and many of the other judges of the court usually are drawn from the United States District Court for the District of Columbia.⁸ For the same reason, the District Court for the Eastern District of Virginia often contributes a judge to the FISC. Other judges have been drawn from district courts around the United States.

This geographic requirement, imposed by the Patriot Act,⁹ reflects the increasing need for judges to be available at irregular hours near the Department of Justice. In the more than 20 years between FISA's enactment and September 10, 2001, there were a total of 46 emergency authorizations issued by various Attorneys General and later ratified by the FISC, but in the year immediately following September 11, 2001, there were 113 emergency authorizations issued and ratified.¹⁰ In the spring of 2002, when he was the presiding judge of the FISC,¹¹ Judge Royce Lamberth of the District of Columbia described three sets of emergency FISA hearings that he held between 1998 and 2002:

On the night of the bombings of the U.S. embassies in Africa [August 7, 1998] I started the first emergency hearings in my living room at 3:00 a.m.

Last Saturday afternoon [April 6, 2002], in fact, as I was cutting my grass at home, I had to stop to do seven emergency hearings with four carloads of agents. I love to tell the story of my wife Janice ... She has to go upstairs because she doesn't have a top-secret clearance. My beloved cocker spaniel, Taffy, however, remains at my side on the assumption that the surveillance targets cannot make her talk. The FBI knows Taffy well. They frequently play with her while I read some of those voluminous tomes [the FISA applications] at home.

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We took a three day trip for a Bar dinner in New York in March [2002]. [O]ver the course of three days ... I had 11 emergency notifications by phone in New York, so as soon as I arrived back in Washington on Sunday night I had a busy evening [reviewing the written FISA applications that had to be filed within 72 hours after an emergency search or surveillance] ... ¹²

In nonemergency situations, the FISC sits in a secure courtroom in the federal courthouse in Washington, D.C. ¹³ In general, each of the 11 judges sits for all or part of one week every 11 weeks, maintaining a continuous rotation. ¹⁴ It has a clerk of court, and he or she maintains a docket of more or less the usual sort. ¹⁵ The record of proceedings before the FISC, including the docket, applications, and orders, is “maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.” ¹⁶ The FISC also has hired Legal Advisors (who function like long-term law clerks), and in some cases, the Legal Advisors have been alumni of Office of Intelligence Policy and Review at the Department of Justice (now the Office of Intelligence in the National Security Division) or the Department of Defense—which is not surprising in light of the arcane nature of the law in this area. ¹⁷

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Footnotes

- 1 [50 U.S.C.A. § 1803\(a\)](#). A defendant in one criminal case argued that the FISC violated the Appointments Clause of Article II of the Constitution because the judges were not assigned by the President. The court rejected that contention on the ground that the Supreme Court has held that “the temporary assignment of a federal district judge to another district did not violate the President's appointment power under the Constitution.” *U.S. v. Cavanagh*, 807 F.2d 787, 792, 86 A.L.R. Fed. 771 (9th Cir. 1987) (quoting *Lamar v. U.S.*, 241 U.S. 103, 118, 36 S. Ct. 535, 60 L. Ed. 912 (1916)).
- 2 Prior to 2008, the statute provided that the 11 FISC judges had to be from “seven of the United States judicial circuits.” [50 U.S.C.A. § 1803\(a\)](#). To eliminate the possibility that the statute would be read to require that all 11 judges must come from only seven judicial circuits, the FISA Amendments Act of 2008 inserted the words “at least” before the word “seven.” FISA Amendments Act of 2008, [Pub. L. No. 110-261](#), § 109(a). That change codified existing practice, as both Chief Justices Rehnquist and Roberts had interpreted FISA to allow designation of judges from at least seven judicial circuits.
- 3 [50 U.S.C.A. § 1803\(d\)](#).
- 4 [50 U.S.C.A. § 1803\(d\)](#).
- 5 See Foreign Intelligence Surveillance Court R. 5, 26, 27(a), 37, 38(a).
- 6 [50 U.S.C.A. § 1803\(e\) to \(f\)](#), enacted by USA Patriot Improvement and Reauthorization Act, [Pub. L. No. 109-177](#), § 106, 120 Stat. 192, 196 (2006). The statute explicitly gave the FISC authority to promulgate rules. [50 U.S.C.A. § 1803\(g\)\(1\)](#).
- 7 See Foreign Intelligence Surveillance Court R. 5, 26, 27(a), 37, 38(a).
- 8 [50 U.S.C.A. § 1803\(a\)\(1\)](#).
- 9 [Pub. L. No. 107-56](#), § 208, 115 Stat. 272, 283 (2001), amending [50 U.S.C.A. § 1803\(a\)](#).
- 10 Letter from Daniel Bryant, Assistant Attorney General, Office of Legislative Affairs, to Senator Joseph Biden (Oct. 7, 2002). Under [50 U.S.C.A. § 1808\(a\)\(2\)\(C\)](#), the Attorney General annually must report “the total number of emergency employments of electronic surveillance.” (For a more complete discussion of FISA reporting, see §§ 13:1 et seq.) When the Attorney General authorizes an emergency FISA electronic surveillance, physical search, or pen/trap surveillance, a judge of the FISC must be notified at once, and an application must be submitted to that judge within seven days. See [50 U.S.C.A. § 1805\(e\)\(1\)\(D\)](#) (electronic surveillance), 1824(e)(1)(D) (physical search), 1843(a) (pen/trap surveillance). Between 2002 and 2008, the time limit was 72 hours for electronic surveillance and physical searches, and 48 hours for pen/trap surveillance (see FISA Amendments Act of 2008, [Pub. L. No. 110-261](#) §§ 105(a)(1)(6), 107(b)(2), 108), and prior to the Intelligence Authorization Act for Fiscal Year 2002, [Pub. L. No. 107-108](#), § 314(a) (1), 115 Stat. 1394, 1402 (2001), the time limit was 24 hours for electronic surveillance and physical searches and 48 hours for pen/trap surveillance. In a report issued in September 2012, the Department of Justice's Inspector General stated that the Department's National Security Division (NSD) “reported that 100 percent of the FY 2009 Foreign Intelligence Surveillance Act emergency applications were processed within 7 days. The NSD provided us a classified list of the applications processed. Because the numbers are classified, we do not disclose these numbers in this unclassified report. We tested a sample of the applications reported and found

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no discrepancies.” The report provided the same 100% statistic for FY 2010 FISA emergencies. Department of Justice, Office of the Inspector General, Follow-Up Audit of the Department of Justice’s Internal Controls Over Reporting of Terrorism-Related Statistics: The National Security Division at 12, 23 (Sept. 2012), available at <http://www.justice.gov/oig/reports/2012/a1237.pdf> (last viewed Dec. 17, 2012).

- 11 Judge Lamberth’s term expired in May 2002.
- 12 Judge Royce Lamberth, Remarks on the Role of the Judiciary in the War on Terrorism (Apr. 13, 2002) (available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/lamberth.html>) (last viewed October 26, 2009) [hereinafter Lamberth Speech].
- 13 See Del Quentin Wilber, Surveillance Court Quietly Moving, *Washington Post*, March 2, 2009 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030101730.html> (last visited July 13, 2009)). Prior to 2009, the FISC sat in a special secure courtroom in the Department of Justice Building. While in the Department, the courtroom resembled a conference room, and the judge sat at a table with the Department of Justice lawyer representing the government and the FBI agents who served as witnesses. See Benjamin Wittes, *Night Courts* (Aug. 24, 1996) (available at <http://slate.msn.com/id/2129> (last visited July 13, 2009)). According to the *Washington Post*, in its new setting, the courtroom has a traditional bench on which the judge sits.
- 14 At a conference sponsored by the National Association of Criminal Defense Lawyers on May 3, 2008, Judge James Carr, then a member of the FISC, confirmed that the judges sit one out of every 11 weeks.
- 15 Foreign Intelligence Surveillance Court Rules, PART II.
- 16 50 U.S.C.A. § 1803(c). See Security Procedures Established Pursuant to [Pub. L. No. 95-511, 92 Stat. 1783](#), by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (May 18, 1979), reprinted in [H.R. Rep. No. 96-558 at 7 to 10](#) (1979). The 1978 legislative history explains that “[t]he security provisions could include the use of executive branch personnel to perform the duties normally exercised by a court’s own reporter, stenographer, or bailiff—measures suggested by the [Supreme] Court in the *Keith* case, [U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 \(1972\)](#), and by the General Counsel of the Administrative Office of the United States Courts. Such provisions could also provide that responsibility for the storage of documents be undertaken by the executive branch on behalf of the court.” FISA House Intelligence Report at 72; see FISA Conference Report at 27 (noting that the FISC may use “secure premises provided by the executive branch to hear an application”). The FISC’s rules, effective November 1, 2010, provide that “the Court and its staff shall comply with the security measures established pursuant to [50 U.S.C.A. §§ 1803\(c\), 1822\(e\), 1861\(f\)\(4\), and 1881a\(k\)\(1\)](#) as well as [Executive Order 13526](#), ‘Classified National Security Information,’ (or its successor).” That Executive Order governs the handling of classified information within the executive branch. The FISC’s rules are at [Appendix H](#). In [U.S. v. Amawi, 531 F. Supp. 2d 832, 838 n.10 \(N.D. Ohio 2008\)](#), Judge James Carr observed that he and his colleagues on the FISC informally adhere to traditional “need to know” principles in interactions with one another. “That we don’t talk with each other about things we know about unless we need to do so evidences, obviously, no concern about the integrity and discretion of our colleagues.”
- 17 See [In re Sealed Case, 310 F.3d 717, 728 n.15, 190 A.L.R. Fed. 725 \(Foreign Intel. Surv. Ct. Rev. 2002\)](#). At a conference sponsored by the National Association of Criminal Defense Lawyers on May 3, 2008, Judge James Carr, then a member of the FISA Court, stated that the FISC employs five legal advisors (increased from one advisor in 2001), and that all are experienced attorneys.