

FOREIGN INTELLIGENCE COLLECTION OVERVIEW

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA) to provide the sole means via which Executive agencies could engage in electronic surveillance on U.S. soil.¹ The law responded to public outcry at the extent to which the U.S. intelligence community was collecting information on citizens,² and the Supreme Court's determination that the Fourth Amendment prohibited the government from engaging in electronic surveillance for domestic security purposes without judicial process.³

The statute created two specialized Article III courts: the Foreign Intelligence Surveillance Court (FISC) and the (appellate) Foreign Intelligence Court of Review (FISCR).⁴ FISC's role was to examine requests for surveillance orders to ascertain whether the government had met its burden of establishing probable cause that the target was a foreign power or an agent of a foreign power, and likely to use the facility to be placed under surveillance, prior to issuing orders.⁵

In 1994, Congress expanded the Court's remit to include orders for physical search.⁶ In 1998, it incorporated the authority to use pen register and trap and trace (PRTT) (capturing the numbers dialed and the calls received), as well as to collect certain business records.⁷

These laws, collectively, are referred to as "Traditional FISA." In carrying out its duties under these authorities, the FISC initially functioned as a warrant-granting body, issuing more than 14,000 orders and just one opinion between 1978 and 2001.⁸ Applications were sealed and procedures conducted *in camera* and *ex parte*.⁹

¹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1885c (2018)).

² See *Intelligence Activities: Senate Resolution 21: Hearing Before the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States*, 94th Cong., vol. 5, at 1 (1975); 124 CONG. REC. 34,845 (1978) (statement of Sen. Kennedy); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 767-82 (2014).

³ See *United States v. U.S. District Court*, 407 U.S. 297 (1972).

⁴ 50 U.S.C.A. § 1803(a)-(b) (2018). See also *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, GID.C.00127, at 6 (FISA Ct. Jan. 25, 2017) (Collyer, J.); *In re Sealed Case*, 310 F.3d 717, 731, GID.CA.00001, at 731 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

⁵ 50 U.S.C.A. § 1805(a) (2018); 124 CONG. REC. 35,389 (statement of Sen. Mathias).

⁶ Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807(a)(3), 108 Stat. 3423, 3445 (1994) (codified as amended at 50 U.S.C. § 1822(c)).

⁷ Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601-02, 112 Stat. 2396, 2404–2412 (1998) (codified as amended at 50 U.S.C. §§ 1841–1846, 1861-63). See also Donohue, *supra* note 2, at 793.

⁸ FISA Annual Reports to Congress, 1979-2002, *Foreign Intelligence Surveillance Act*, FED'N AM. SCIENTISTS, <https://fas.org/irp/agency/doj/fisa/> (last visited May 1, 2019); *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISC Ct. June 11, 1981), *reprinted in* S. REP. NO. 97-280, at 16-19 (1981).

⁹ *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 488 & n.12, GID.C.00021, at 6 & n.12 (FISA Ct. 2007). The law provides special protections for U.S. persons, who can only be considered an "agent of a foreign power" when the government has evidence of some level of criminality on a par with criminal law. 50 U.S.C.A. § 1801(b)(2) (2018). See also Donohue, *supra* note 2, at 789-90. Even then, further minimization procedures apply. 50 U.S.C.A. § 1801(h)(2) (2018). Where special non-judicial procedures targeting non-US persons are used, the Attorney General can only authorize collection where there is "no substantial likelihood" that citizens' communications will be obtained or that the search will involve the "premises, information, material, or property of a" U.S. person. 50 U.S.C.A. § 1822(a)(1)(A)(ii) (2018). In the event that a citizen's communications or property are involved, the government must obtain a court order within 72 hours before the information or property in question can be "disclosed, disseminated, or used for any purpose." 50 U.S.C.A. § 1801(h)(4) (2018) (electronic surveillance), 50 U.S.C.A. § 1821(4)(D) (2018) (physical search).

Starting in 2001, however, Congress began making significant changes to the law.¹⁰ What is now referred to as “Modernized FISA” expanded the Government’s power and ushered in an era of bulk and programmatic collection of citizens’ and non-U.S. persons’ data.¹¹ As technology continued to advance, the government sought novel statutory and doctrinal interpretations, forcing the FISC/FISCR to consider constitutional and statutory limits and whether government action comported with the law.¹²

Beset by difficult questions, the courts’ roles fundamentally altered.¹³ Instead of just issuing orders, the FISC/FISCR now routinely rule on critically-important First, Fourth, and Fifth Amendment questions, the answers to which, daily, impact every citizen.¹⁴ Their decisions have an impact on separation of powers, common law, and the rule of law. The Court examines complex matters of statutory construction.¹⁵ And it monitors how the government wields its power.¹⁶ FISC/FISCR opinions also reveal the extent to which government actions comport with—or violate—court directions and the law.¹⁷

¹⁰ See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 206-08, 214-15, 218, 504, 1003, 115 Stat. 272, 282-83, 286-88, 291, 364-65, 392 (§ 206 roving wiretaps; § 207 changed duration of certain FISC authorization orders; § 208 increased the number of FISC judges to 11; § 214 amended FISA pen/trap provisions; § 215 amended business records/tangible items provisions; § 218 changed purpose of electronic & physical searches; § 504 authorized coordination between intelligence and law enforcement; § 1003 amended definition of “electronic surveillance”); Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6001, 118 Stat. 3638, 3742 (allowed “lone wolf” provision to be added, permitting surveillance of non-US persons engaged in international terrorism without requiring evidence linking those persons to an identifiable foreign power or terrorist organization); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; *In re Sealed Case*, 310 F.3d 717, 629 F.2d 908 (4th Cir. 1980)).

¹¹ See, e.g., Donohue, *supra* note 2; Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL’Y 117 (2015); Laura K. Donohue, *The Case for Reforming Section 702 of U.S. Foreign Intelligence Surveillance Law*, COUNCIL ON FOREIGN REL. (June 26, 2017), <https://www.cfr.org/report/case-reforming-section-702-us-foreign-intelligence-surveillance-law>.

¹² As Presiding Judge John Bates explained on one such occasion, “The current application relies on [the] prior framework, but also seeks to expand authorization in ways that test the limits of what the applicable FISA provisions will bear.” Memorandum Opinion, [REDACTED], No. PR/TT [REDACTED], GID.C.00092, at 4 (FISA Ct.) (Bates, J.) [hereinafter Bates Mem. Op.]. See also Opinion and Order, [REDACTED], No. PR/TT [REDACTED], GID.C.00091, at 1-2 (FISA Ct.) (Kollar-Kotelly, J.) (“This application seeks authority for a much broader type of collection than other pen register/trap and trace applications.”); Order, *In re [REDACTED]*, No. [REDACTED], GID.C.00016, at 12 & n.5 (FISA Ct. May 31, 2007) (Vinson, J.) (arguing for collection not just to or from but also about a selector); Order and Memorandum Opinion, *In re [REDACTED]*, No. [REDACTED], GID.C.00012, at 16 (FISA Ct. Apr. 3, 2007) (Vinson, J.) (arguing expanded understanding of “facility” and stating that the NSA makes the probable cause finding for selectors); Primary Order, [REDACTED], No. PR/TT [REDACTED], GID.C.00038 (FISA Ct.) (Walton, J.) (seeking bulk production of Internet metadata using PR/TT); Supplemental Opinion and Amendment to Primary Order, [REDACTED], No. [REDACTED], GID.C.00136, at 3-4 (FISA Ct.) (Bates, J.) (“Under the expansive interpretation of the relevant statutory provisions put forward by the government, the limitations may not have been warranted. But after careful consideration, the Court adopted a less expansive interpretation of the statute.”)

¹³ See, e.g., USA PATRIOT Act §§ 206, 208, 214-215, 218, 504, 1003, 115 Stat. at 282, 283, 286-88, 291, 364-65, 392; USA PATRIOT Improvement and Reauthorization Act of 2005, § 106, Pub. L. No. 109-177, 120 Stat. 192, 196 (2006) (codified as amended at 50 U.S.C.A. §1861 (2018)); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552; FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436. See also *In re Directives to Yahoo!, Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 105B(g): 07-01, GID.C.00025, at 3 (FISA Ct. Apr. 25, 2008) (Walton, J.) (noting “the [Protect America Act of 2007]...is hardly a model of legislative clarity or precision.”); Supplemental Opinion, *In re Production of Tangible Things from [REDACTED]*, No. BR 08-13, GID.C.00033, at 2-3 (FISA Ct. Dec. 12, 2008) (Walton, J.) (addressing tension between 50 U.S.C. §1861 and 18 U.S.C. §§2702-2703).

¹⁴ See, e.g., *In re Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008*, No. Misc 08-01, GID.C.00028 (FISA Ct. Aug. 27, 2008) (McLaughlin, J.); Opinion on Motion for Disclosure of Prior Decisions, [REDACTED], No. [REDACTED], GID.C.00112 (FISA Ct. 2014) (Collyer, J.); Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158, GID.C.00086 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.); *In re Sealed Case*, 310 F.3d 717, GID.CA.00001.

¹⁵ See, e.g., Supplemental Opinion, *In re Production of Tangible Things*, No. BR 08-13, GID.C.00033.

¹⁶ Memorandum Opinion and Order, [REDACTED], No. [REDACTED], GID.C.00050 at 10-11 (FISA Ct. 2009) (Hogan, J.).

¹⁷ See, e.g., Supplemental Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things [REDACTED]*, No. BR 09-15, GID.C.00048, at 3-4 (FISA Ct. Nov. 5, 2009) (Walton, J.) (NSA sent query results to email list of 189 analysts, “only 53 of whom had received the required training”); Memorandum Opinion, [REDACTED], No. [REDACTED], GID.C.00073, at 15-18, 78-80 (FISA Ct. Oct. 3, 2011) (Bates, J.) (NSA misled Court, violating

In reflection of the growing volume and importance of the specialized court's decisions, the FISC/FISCR, Executive branch, amici, non-specialized Article III judges (and their clerks and parties before them), regularly cite to FISC/FISCR opinions as precedent.¹⁸ In *Clapper v. Amnesty International*, the Supreme Court argued that denying litigants standing to challenge surveillance in no way insulated the statute from constitutional review, as the FISC would address such questions.¹⁹

An important and robust body of law is now emerging from a court that, for decades, has been largely shielded from public inspection. Nearly 90 declassified FISC/FISCR opinions and 290 orders are now in the public domain, as are hundreds of FISC/FISCR filings.²⁰

Even as the role of the FISC/FISCR has changed, ordinary Article III courts are increasingly having to confront FISA-related constitutional and statutory questions as a result of two foundational changes post-9/11. First, in 2001, the USA PATRIOT Act, and a subsequent decision by the FISCR, allowed the Government to use FISA not just when foreign intelligence collection is the primary purpose for surveillance, as was previously the case, but also when it is only a *significant purpose*²¹—including when the information being sought is primarily wanted for matters related to ordinary criminal law.²² This change was almost immediately followed by a decrease in the number of ordinary, criminal Title III warrants being sought and an increase in the number of FISA orders issued.²³

FISA and the Fourth Amendment); Bates Mem. Op., GID.C.00092, at 3, 18, 100-105 (“NSA exceeded the scope of authorized acquisition continuously during the more than [REDACTED] years of acquisition”; FBI, CIA, and NCTC “accessed unminimized U.S. person information”; NSA disseminated “reports containing U.S. person information”; government requested permission to violate law); Memorandum Opinion, [REDACTED], No. [REDACTED], GID.C.00078, at 26-27 (FISA Ct. Sept. 25, 2012) (NSA misrepresented upstream collection, acquiring U.S. person domestic communications).

¹⁸ For FISC/FISCR reference to prior opinions as precedent, see, e.g., *In re Directives [REDACTED] Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1010, GID.CA.00002, at 13 (FISA Ct. Rev. 2008); Memorandum, *In re Application of the FBI*, No. BR 13-158, GID.C.00086, at 4-5 (analyzing Judge Eagan’s constitutional analysis in the context of the Supreme Court’s recent decision in *United States v. Jones*). See also Bates Mem. Op., GID.C.00092, at 6, 74-75; Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 14-96, GID.C.00103, at 2-3 (FISA Ct. June 19, 2014) (Zagel, J.); Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109, GID.C.00083, at 19-20 (FISA Ct. Aug. 29, 2013) (Eagan, J.). For similar references by the U.S. Department of Justice, see, e.g., Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 16, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (2013) (No. 13 Civ. 3994(WHP)), 2013 WL 5744828 ([S]ince May 2006, fourteen separate judges of the FISC have concluded on thirty-four occasions that the FBI satisfied this requirement, finding ‘reasonable grounds to believe’ that the telephony metadata . . . are relevant to authorized investigations.”) (citation and quotation omitted); United States’ Legal Brief to the En Banc Court in Response to the Court’s Order of March 22, 2017 at 1, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Apr. 17, 2017), <https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20United%20States%27%20Legal%20Brief%20to%20the%20En%20Banc%20Court.pdf> (“It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this Court,” citing to four FISC opinions and orders in support.)

¹⁹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 421 (2013) (“[O]ur holding today by no means insulates § 1881a from judicial review. . . . Congress created a comprehensive scheme in which the FISC evaluates the Government’s certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment.”)

²⁰ More than two decades after its 1981 opinion, the Court issued two opinions. *In re Sealed Case*, 310 F.3d 717, GID.CA.00001 (FISA Ct. Rev. 2002); *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, GID.C.00002 (FISA Ct. 2002), abrogated by *In re Sealed Case*, 310 F.3d 717, GID.CA.00001. It published two more opinions between 2007 and 2008. *In re Directives [REDACTED] Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, GID.CA.00002 (FISA Ct. Rev. 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, GID.C.00021 (FISA Ct. 2007).

²¹ See USA PATRIOT Act, § 218, 115 Stat. at 291 (striking “the purpose” and inserting “a significant purpose.”)

²² See *In re Sealed Case*, 310 F.3d 717, 731, GID.CA.0001, at 731 (FISA Ct. Rev. 2002) (per curiam).

²³ From 932 Title I orders issued in 2001, the number increased steadily over the next six years to 1228, 1724, 1754, 2072, 2176, and 2370, respectively. FISA Annual Reports to Congress, 2001-2007, *Foreign Intelligence Surveillance Act*, FED’N AM. SCIENTISTS, <https://fas.org/irp/agency/doj/fisa/> (last visited May 2, 2019) 2002-2008. During this same six year period, the

Second, in 2013 DOJ changed its policy, informing criminal defendants when information derived from FISA is used against them. The shift followed a tumultuous exchange: in *Clapper*, Justice Alito, writing for the Court, pointed to statutory requirements that the Government inform criminal defendants when FISA information had been used—an argument raised by the U.S. Solicitor General during argument—to support the assertion that the lack of standing in the immediate case in no way foreclosed future constitutional challenges.²⁴ But just a few months later, a *New York Times* article revealed that DOJ had routinely refused to do just that—prompting a furious Solicitor General to engineer a change in Department policy.²⁵ Although the definition of “derived from” remains classified, an increasing number of criminal defendants are being informed that evidence against them derives in some measure from FISA.

Because of these shifts, there are now more than 125 FISA-related cases in regular Article III courts—more than the total number of FISC/FISCR cases that have been made publicly available .

Despite the increasing importance of the courts’ jurisprudence, FISC/FISCR opinions and orders have not hitherto been easily accessible. Less than two dozen declassified and redacted opinions are available on the court’s web site. Some opinions are only available through the Office of the Director of National Intelligence (ODNI). Others are only available from individuals who have submitted Freedom of Information Act requests or engaged in litigation with the Department of Justice to obtain the materials—and decided to place them online. Neither Westlaw nor Lexis, moreover, carry most of the opinions, despite FISA issues regularly now appearing in ordinary Article III courts. No site has all of the declassified and redacted court filings available.

The law has become increasingly complex. Fourteen statutes now constitute FISA. The NSA, FBI, CIA, and National Counterterrorism Center have different targeting and minimization procedures, as applicable, which frequently change. The DOJ, CIA, ODNI, and DOD have different guidelines for implementing FISA, which differ in important yet subtle ways from those adopted in regard to Executive Order 12,333. Even the formal reports on how FISA is being implemented are difficult to follow: fifteen separate statutory provisions require specific or annual reporting from the FISC/FISCR, the Administrative Office of the U.S. Courts, the Director of National Intelligence, the Attorney General, DOJ’s Office of Inspector General, and the NSA Office of Inspector General. Dozens of other reports have been issued by the Civil Liberties and Privacy Office at the NSA, the House of Representatives, the DOJ, the FBI, the Privacy and Civil Liberties Oversight Board, the President’s Review Group, and others.

Congress has the responsibility of debating provisions set to sunset and determining the scope of future surveillance authorities, yet much of the information on which an educated discussion could be based is not easily accessible to Members or their staff, or their constituents. A similar dearth of information hinders the ability of companies served with FISA orders to evaluate them with the benefit of the court’s jurisprudence and ready access to the scope of the law. It further impacts civil society, think tanks, and scholarship that could shed light on this important area.

number of total federal wiretaps generally decreased from 497 in 2002 to 578, 730, 625, 461, and 457, respectively. *Wiretaps Reports*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/wiretap-reports> (last visited May 2, 2019).

²⁴ *Clapper*, 568 U.S. at 421-22; Nina Totenberg, *Government Takes A U-Turn on Warrantless Wiretaps*, NPR (Oct. 23, 2013), <https://www.npr.org/2013/10/23/240163063/government-changes-policy-on-warrantless-wiretap-defendants>.

²⁵ See Eric Schmidt et al., *Administration Says Mining Data Is Crucial to Fight Terrorism*, N.Y. TIMES (June 7, 2013), <https://www.nytimes.com/2013/06/08/us/mining-of-data-is-called-crucial-to-fight-terror.html?module=inline>; Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES (July 15, 2013), <https://www.nytimes.com/2013/07/16/us/double-secret-surveillance.html>; Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. TIMES (Oct. 26, 2013), <https://www.nytimes.com/2013/10/27/us/federal-prosecutors-in-a-policy-shift-cite-warrantless-wiretaps-as-evidence.html>; Totenberg, *supra* note 24.

This website is therefore dedicated to ensuring public access to the declassified and redacted opinions, as well as the relevant laws, legislative histories, judicial reports, congressional reports, agency guidelines, declassified and redacted minimization and targeting procedures, and other materials essential to U.S. foreign intelligence collection. Specifically, the collection includes:

- foreign intelligence-related statutory and regulatory instruments;
- legislative histories of all statutory changes to FISA;
- declassified opinions and orders issued by the FISC/FISCR;
- declassified FISC/FISCR court filings;
- FISA-related cases in non-specialized Article III courts;
- statutorily-required, department, and inspectors general reports on the operation of FISA and formal correspondence between the FISC/FISCR and Congress; and
- an annotated bibliography of select secondary sources related to FISA, the FISC/FISCR, and foreign intelligence law.

In addition to FISA-related materials, the site incorporates background on other laws and Executive Orders that round out foreign intelligence law, such as the National Security Letter statutory provisions and annual reports, and Executive Order 12,333 with its associated departmental guidelines.

The website is meant as a resource for the judiciary, clerks, legal advisors, amici, government attorneys, agency and department inspectors general, members of Congress and their staff, lawyers, scholars, journalists, students, law firms, corporations, members of the public, and anyone with an interest in or need to understand the legal framework for U.S. foreign intelligence collection.

Because many of the dates and filing references in the FISC/FISCR opinions and orders remain redacted, I have assigned each document a Georgetown identification (GID) number, preceded by the Court issuing the opinion or order in the following format: GID.C.##### for FISC and GID.CA.##### for FISCR. Each time an opinion or order is released with different material redacted, it is issued a unique identifier. Individual records contain the recommended bibliographic reference for Bluebook and Maroonbook purposes.

All opinions and orders and FISC/FISCR filings are text searchable, as are most of the statutory and regulatory authorities and official reports and correspondence, as well as the annotated bibliography. Owing to intellectual property protections, the legislative histories, non-specialized Article III decisions, and law review articles are not directly searchable. They are available through Lexis and Westlaw and, in some cases, Hein or Google, with links provided. I will continue to update this site as new materials become available.

I am deeply grateful to Jeremy McCabe at the Georgetown Law Library for his help researching and obtaining many of the materials included in the collection. Leah Prescott has been central in building the site and ensuring that the material is available and, to the greatest extent possible, searchable. I will continue to update the material on a semi-annual basis, as new cases, laws, guidelines, reports, and secondary sources become available. If there are any additional materials that you think should be included, please contact me at lkdonohue@law.georgetown.edu.



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