

cyberlaw: the brave new e-world



By Anne F. Downey

The Secret Court

This first column in a series about the Foreign Intelligence Surveillance Act (FISA) provides basic background information about the FISA court. Future columns will explore related topics, including situations where FISA court warrants are not needed, arguments about the constitutionality of surveillance authorized by FISA court warrants, and the status of past and pending legal challenges.

In the era of Edward Snowden, America’s “secret court” has gotten a lot of attention. Despite the new level of public scrutiny, the court is not a new tribunal. It was established in 1978 under the Foreign Intelligence Surveillance Act (FISA). Formerly housed in the Robert F. Kennedy Department of Justice Building, the court is now located a few blocks away in the E. Barrett Prettyman Courthouse, home of the U.S. District Court for the District of Columbia.

The Chief Justice appoints the FISA court judges. Originally composed of seven judges, the court was expanded under the Patriot Act to eleven members. Judges must be drawn from at least seven judicial districts, and three of the judges must reside within twenty miles of the courthouse. The current judges are Presiding Judge Reggie Walton (D.D.C.), Rosemary Collyer (D.D.C.), Thomas Hogan (D.D.C.), Raymond Dearie (E.D.N.Y.), Claire Eagan (N.D. Okla.), Martin Feldman (E.D. La.), Mary McLaughlin (E.D. Pa.), Michael Mosman (D.Ore.), Dennis Saylor (D. Mass.), Susan Wright (E.D. Ark.), and James Zegel (N.D. Ill.).

Judges are appointed to staggered seven-year terms. Each week, one of the eleven judges is on duty at the court. Court proceedings follow the FISA court’s own Rules of Procedure, which can be found at <http://www.uscourts.gov/uscourts/rules/FISC2010.pdf>.

At the request of a federal intelligence agency, government attorneys submit to the court staff a proposed FISA warrant application. Applications seek authorization to conduct electronic surveillance of foreign intelligence information. The probable cause standard for a FISA warrant is low. An applicant must simply demonstrate probable cause to believe that the target of the proposed surveillance is a “foreign power” or an “agent of a foreign power,” without any need to link the target to a crime. While additional pleadings are required if the target is a U.S. citizen, U.S. resident alien or a U.S. corporation, the bottom line is that many U.S. persons’ calls and messages have been swept up in the broad scope of surveillance activities authorized by the court.

Last year, the court reviewed 1,789 applications to conduct electronic surveillance under Title I of FISA. One application was withdrawn by the government. All the remaining requests were approved, although 40 were modified. The court also reviewed 212 applications under Title V of FISA seeking access to business records, which can

include a wide variety of records such as library records, book sales records, firearms sales records, tax return records, educational records, or medical records.

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Of these, all requests were granted, though 200 were modified.

Another type of request is a Section 702 application. Section 702, part of the 2008 amendments to FISA, permits the Director of National Intelligence and the Attorney General to jointly authorize surveillance to acquired foreign intelligence information targeting non-U.S. persons believed to be located outside the U.S. This information may consist of data held by U.S.-based communications service providers. Under Section 702, the court can grant authorization for as long as a year. An order under Section 702 is called a “mass acquisition order.”

Although proceedings before the FISA court are almost always non-adversarial, there was one instance in which the court heard arguments from a non-government party challenging a government directive. In 2008, a Yahoo!, Inc. representative appeared before the court when the government sought to compel Yahoo to comply with a surveillance order. Despite the appearance of the Yahoo attorney, the order was granted. This summer, in response to criticism over the one-sided nature of court proceedings, President Obama indicated that he will create a special advocate who can challenge the government’s requests before the court on privacy and constitutional grounds.

If a warrant application is denied, the decision can be appealed to the Foreign Intelligence Surveillance Court of Review. Three Circuit Court judges, appointed by the Chief Justice, serve seven-year terms on the Court of Review. The current members are Presiding Judge Morris Arnold (8th Cir.), William Bryson (Fed. Cir.) and José Cabranes (2d Cir.).

Proceedings of the FISA court are closed to the public, and its decisions are not publicly available unless the court chooses to make them available. In June 2013, the court made a select number of records available online at <http://www.uscourts.gov/uscourts/courts/fisc/index.html>. The records include letters dated July 29, 2013 sent by Presiding Judge Walton to Sen. Patrick Leahy and Sen. Charles Grassley with answers to their questions about the operations of the court. The records also include some redacted proceeding records. In addition, there was a recent release of a redacted copy of a 2011 ruling in which the FISA court rebuked the government for misleading the court about the scope of its surveillance activities. <http://www.scribd.com/doc/162016974/FISA-court-opinion-with-exemptions>

The court reports annually to Congress, as required by FISA and the Patriot Act. The April 2013 report can be viewed at http://www.justice.gov/nsd/foia/foia_library/2012fisa-ltr.pdf. [B]

DO YOU KNOW...

...the site on which Buffalo’s first County-City Hall sat, along with a jail? Or where to find the likeness of the person who once recommended that Buffalonians during a major blizzard “go home, buy a six pack of beer, and watch a good football game?”

If so, you might have been part of the First Annual Summer Scavenger Hunt, presented by the BAEC Young Lawyer’s Committee, WBASNY, and the Minority Bar Association.

Teams of summer associates, attorneys, and non-legal eagles raced around downtown on a

photo scavenger hunt, trying to get their photos taken with Keith Radford, performing random acts of kindness for strangers, and unlocking clues to Buffalo’s history. Thanks to Hodgson Russ LLP, who sponsored the event, teams were able to do all of this and enjoy a night of networking at Pan-American before and after the hunt.

Fun? You bet. If you think YOU have what it takes, keep your eyes peeled for next year’s event. Because this is one networking opportunity you do NOT want to miss!