

2002

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Recommended Citation

Jeremy D. Mayer, *9-11 and the Secret FISA Court: From Watchdog to Lapdog*, 34 Case W. Res. J. Int'l L. 249 (2002)
Available at: <http://scholarlycommons.law.case.edu/jil/vol34/iss2/12>

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9-11 AND THE SECRET FISA COURT: FROM WATCHDOG TO LAPDOG?

*Jeremy D. Mayer**

In August 2001, the FBI arrested Zacarias Moussaoui, a French citizen of Moroccan descent, for violating his visa. Moussaoui had been enrolled in a Minnesota flight school, and had attracted the suspicion of his instructors because he only wanted to practice on jumbo jets, and only wanted to practice flying, not taking off or landing. The FBI wanted to search his computer, and applied to the Justice Department for a Foreign Intelligence Surveillance Act (FISA) warrant.

The Justice Department did not forward the warrant request to the Foreign Intelligence Surveillance Court (FISC) because the evidence linking Moussaoui to Al Qaeda was too weak and fragmentary. September 11th, however, provided more than enough grounds for a traditional warrant. When the FBI opened the computer, they found information suggesting Al Qaeda was planning a large operation that involved hijacking airplanes.

Perhaps unsurprisingly, less than a month after 9-11, Congress passed the USA PATRIOT Act, which expanded the government's powers under FISA. Clearly, some in Congress and President Bush's Administration felt that the current limits on government surveillance were too restrictive to successfully defend the nation against terror. The Moussaoui case seemed to be exhibit one in the argument that our government was fighting terror with one hand tied behind its back.

An examination of FISA's operations prior to 9-11, however, suggests that the judiciary has been an inadequate watchdog on our government's domestic surveillance, and the changes wrought to the law will only make things worse. In many ways, the judiciary has become little more than a rubberstamp to the executive's trashing of the Fourth Amendment in the name of national security.

ORIGINS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT

The FISC began life as a reform, an attempt to put a judicial check on executive abuse of wire-tapping and surveillance. The exposure of these abuses in the 1970s shocked the Congress, and embarrassed the nation. Several sinister programs, including the FBI's COINTELPRO, the NSA's Shamrock and Minaret, and the CIA's CHAOS, were shown repeatedly to have violated the privacy of thousands of innocent American citizens. Some of these programs even involved infiltration and subversion of *legal* domestic political groups.

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How to stop these unconstitutional abuses and yet preserve the executive's ability to safeguard national security in a dangerous world was the dilemma before Congress in the 1970s. Some wanted to simply apply the Fourth Amendment to domestic surveillance of foreign agents. Others argued that requiring traditional search warrants before monitoring foreign spies and domestic traitors would leave us open to massive espionage. From these two warring viewpoints emerged FISC, a panel of seven federal judges appointed by the chief justice of the Supreme Court to seven year non-renewable terms, staggered so that today, a new judge enters the court each year.

The judges serve brief rotations in Washington, typically alone, approving or denying government request for surveillance. There is a system of appeal to a three judge panel, but as only one of more than 10,000 requests has ever been turned down (and that at the request of the executive branch) there has never been an appeal.

STANDARDS

By what standards has the FISC judged the government's applications for surveillance authority? According to 50 U.S.C. §§ 1804-5, the Justice Department must show why they believe the target of surveillance is the agent of a foreign power, why high ranking executive officials believe the information is relevant to ongoing foreign intelligence monitoring, and why less intrusive means cannot be used. The government must also specifically outline the manner in which the order will be implemented. The court is supposed to apply the standard of probable cause to the government's claim, but the entire process is radically different from criminal wiretap warrants.

Moreover, the agencies are not required to report back on their conduct to the court. No one ever knows if the government minimized the invasion of the privacy of non-targeted innocents, as the law commands. The court itself makes almost no report of its activities, except to tell Congress annually how many orders for surveillance were requested and how many were granted. In rare instances, a defendant in a criminal trial makes a motion for suppression of evidence obtained under a FISA order. In that case, the trial judge may examine the government's claims in camera and ex parte. Non-disclosure is the norm. And when a warrant fails to lead to any court proceedings, as is most common, there is never any disclosure to the targets or to any other governmental authority that surveillance occurred.

The scope and use of the FISA has grown exponentially since 1978. For instance, during the Clinton administration, the FISA was amended so that break-ins to plant listening devices would be covered.

POST 9-11 CHANGES AND CHALLENGES

The USA PATRIOT Act extends the scope of FISA's power in a number of ways. First, the length of a FISA warrant has changed from 45 days to 120, with the possibility of a one-year extension. The FISC court can now approve wiretaps and break-ins when foreign intelligence is merely a "significant" part of the operation, rather than its focus. The Act also calls for unprecedented intelligence sharing among domestic and foreign agencies, breaking the wall so carefully erected in the 1970s between domestic crime fighting and foreign intelligence gathering. Perhaps most ominously, the number of the judges on the court is expanded to eleven, suggesting that the government intends to greatly increase its usage of the FISC.

Why should we care about the FISA and the FISC? Imagine that you have rented a room to a Libyan student covered by a FISA warrant. With the permission of a federal judge, agents of the government secretly break-in to your house and plant listening devices in the walls and on your phones. After a year's monitoring of all emails, phone calls, and conversations in the house, the FBI determines that your renter is merely a strong advocate for Palestinian rights, and has no connection to terrorist groups or foreign governments. The agents remove the listening devices, and stop monitoring your house. In all likelihood, you will never know they were there. However, under the newly revised FISA, it is possible that information from the surveillance will be shared with domestic police agencies.

When the Founders wrote the Fourth Amendment, they were quite conscious of the tendency of governments to invade the privacy of citizens during times of war and conflict. It was that specific concern that led to the Fourth Amendment protections we have today. FISA violates those principles, and FISC implicates the judiciary in the violation. Yes, our country must combat espionage and terror, and to do that, we must monitor foreign agents and their accomplices. But the FISA system was fundamentally flawed prior to 9-11, and has only gotten worse since then. Once the passions of 9-11 cool, Congress must launch a full investigation of how FISA has operated since it was created.

Perhaps the most frightening aspect of the current surveillance system is that there is no effective watchdog, and no disclosure of methods. It is of course possible that the government has not abused the broad and unchecked powers of FISA in the more than 10,000 times a supine court has granted warrants. But considering the horrors found by Congress in the 1970s when it finally learned what had been done to US citizens in the name of national security, it seems unlikely. When we discover what our government has been doing with the secret approval of federal judges, we may again be shocked.

Such disclosures are years away, since the current political climate makes it highly unlikely that Congress will investigate, much less reform, FISA. As Alexander Hamilton wrote in Federalist Paper 8, in times of fear, the public “to be more safe... become[s] willing to run the risk of being less free.” Thus, it is a responsibility for the unelected federal judiciary to take the unpopular step of turning the FISC back into the watchdog it was intended to be.

The FISC appointing chief justices, Burger and Rehnquist, have not been known as zealous defenders of privacy against government intrusion. Perhaps the success rate for government requests for warrants would not be nearly one-hundred percent if FISC had been appointed by Justice Stephen Breyer, or even Justice Antonin Scalia (a conservative jurist usually more suspicious of government than Rehnquist). Will the four new FISC judges balance the legitimate need for surveillance of terrorists with the constitutional demand of limited police power and citizen privacy? The judges of this secret court will have a great, if hidden, influence on determining whether the liberty and privacy of Americans will be the unnecessary victims of the terrorist acts of 9-11.