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To cite this article: Nicholas R. Seabrook & Nicholas C. Cole (2016) Secret Law: The Politics of Appointments to the U.S. Foreign Intelligence Surveillance Court, Justice System Journal, 37:3, 259-271, DOI: 10.1080/0098261X.2015.1110468

To link to this article: http://dx.doi.org/10.1080/0098261X.2015.1110468

Published online: 16 Nov 2015.

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Secret Law: The Politics of Appointments to the U.S. Foreign Intelligence Surveillance Court

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ABSTRACT

This study investigates the politics of appointments to the United States Foreign Intelligence Surveillance Court, the court established under the 1978 Foreign Intelligence Surveillance Act (FISA) to review secret federal government requests for warrants related to national security investigations. Since the FISA Court’s creation, its members have been appointed entirely at the discretion of the Chief Justice of the United States, who selects FISA Court judges from among the pool of existing U.S. District Court judges. Using data on the common space scores of the federal district judges appointed to the court, and the limited information available on the court’s decisions, we explore the implications of this, both for the ideological makeup of the FISA Court’s judges and for the oversight function they perform. The results suggest that the court has become decidedly more conservative in recent years, far more so than the district courts overall, with potentially serious implications for its ability to function as an effective check on the power of the executive branch.

KEYWORDS

FISC; judicial ideology; chief justice appointments; surveillance

In June 2013, a copy of a top secret warrant issued by the United States Foreign Intelligence Surveillance Court (often referred to as the FISA Court, or FISC) was leaked to London’s Guardian newspaper by former defense contractor turned whistleblower Edward Snowden.1 The information contained in the FISA warrant, which was authored by U.S. District Judge Roger Vinson in his capacity as one of the 11 federal judges serving seven-year terms on the court,2 revealed that the National Security Agency had been and was continuing to collect data on the call records of millions of U.S. customers of the telecommunications company Verizon (Greenwald 2013). The warrant, which was scheduled to be classified until April 12, 2038, required Verizon to provide the NSA “on an ongoing daily basis” with “telephony metadata” for all communications “between the United States and abroad,” as well as those “wholly within the United States” (In Re Application of the FBI 2013, 2). The data in question include the originating and terminating number, the duration of the call, and various pieces of routing information. Additional revelations about the controversial domestic and foreign surveillance and intelligence activities of the United States federal government have followed, igniting a political debate about the proper balance between national security and individual liberty in the fight to combat global security threats.

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2 Vinson is best known for his decision in the 2010 case of Florida v. United States Department of Health and Human Services, in which he became the first federal judge to declare the Patient Protection and Affordable Care Act of 2010, also known as “Obamacare,” to be beyond the scope of Congress’s power to regulate commerce among the several states, and thus unconstitutional in its entirety. A federal judge in Virginia had previously declared only the individual mandate provision unconstitutional, while upholding the remainder of the legislation.

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terrorism. Central to this debate have been concerns about the limited judicial oversight of these and other surveillance programs by the FISA Court and the secret nature of its proceedings (Lichtblau 2013).

This study contributes to that ongoing debate by analyzing appointments to the Foreign Intelligence Surveillance Court, along with the effect that those appointees have had on its membership and surveillance oversight. The court was created under the 1978 Foreign Intelligence Surveillance Act (FISA) to adjudicate requests from federal law enforcement agencies for surveillance warrants against suspected terrorists and foreign intelligence agents outside of the United States. The power to appoint judges to the court resides, by statute, with the Chief Justice of the United States, who chooses from among the ranks of existing U.S. District Court judges, including senior status judges (50 U.S.C. § 1803). To date, all 55 judges to serve on the court have been appointed by Republican Chief Justices, potentially raising concerns about the impartiality of its decisions. This, in combination with the entirely secret nature of its proceedings—all the applications and briefs submitted to the court are classified top secret, as are its rulings and the warrants it issues—has thrust the FISA Court into the forefront of political debate for arguably the first time in its 35-year history.

Subsequent reporting on the court in the New York Times, based on almost 100 pages of classified rulings that the newspaper was able to obtain, has led to further revelations about its membership and growing policy influence. These include the fact that the court had taken on a greatly expanded role by “regularly assessing broad constitutional questions and establishing important judicial precedents, with almost no public scrutiny” (Lichtblau 2013, A1). Its decisions were also revealed to have given the National Security Agency (NSA) “power to amass vast collections of data on Americans while pursuing not only terrorism suspects, but also people possibly involved in nuclear proliferation, espionage and cyberattacks” (A1). It becomes important, therefore, to know as much as possible about the judges who make up the 11-member FISA Court, and to ascertain whether the appointments of Republican chief justices have biased its membership toward judges at the conservative end of the ideological spectrum. These results will have a major bearing on policy debates both over the role of the FISA Court itself, but also the power of the Chief Justice of the United States to appoint judges to this and other “specialty courts” within the federal system. We begin by briefly summarizing the history of the FISA Court and the appointment power of the chief justice, before proceeding to empirical analysis of FISA Court appointments.

The Changing Role of the Foreign Intelligence Surveillance Court

The FISA Court was established under the 1978 Foreign Intelligence Surveillance Act, which was passed by Congress in response to the Church Committee’s recommendations for intelligence-gathering oversight. The Church Committee was tasked with investigating allegations of intelligence service misdeeds, most notably those that had occurred during the Nixon administration (Schwartz 2009). The legislation that created the court also tasked it with reviewing applications for warrants that pertain to national security investigations. It would be composed of seven federal district judges appointed to rotating seven-year terms by the Chief Justice of the United States, staggered so that a new judge would be appointed each year. Designed to secure compliance with the Fourth Amendment without unduly intruding on executive branch discretion in matters of national security, the FISA Court determines whether there is probable cause to establish that the target of a warrant application is a foreign power or an agent of a foreign power. The proceedings of the FISA Court are ex parte (the Department of Justice (DOJ) makes all applications to the court) and non-adversarial. Copies of its decisions are generally not released to either the target of the surveillance or the public at large (Burton 2006).

The court remained principally unchanged in its composition and role for more than two decades. Notable changes, however, would occur in the wake of the 9/11 terror attacks. Passed less than two

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3 The statute also requires that the FISA judges come from at least seven different federal judicial circuits, and it was amended in 2001 by the USA PATRIOT Act to include the additional stipulation that at least three of them must reside within 20 miles of the District of Columbia. This radius encompasses the U.S. District Courts for the District of Maryland and the Eastern District of Virginia.
months after the attacks, the USA PATRIOT Act expanded the scope of the government’s multi-point “roving wiretap” authority under FISA, while removing the pre-existing statutory requirement that they prove the surveillance target is an agent of a foreign power before obtaining a pen register or trap and trace order from the FISA Court. The Act also increased the number of judges on the court from seven to eleven and extended the time period for which they could authorize surveillance to take place. Though the passage of the Act greatly expanded the scope of FISA-based surveillance, the Court was effectively bypassed by President Bush’s secret authorization of the Terrorist Surveillance Program (TSP). This program allowed the NSA to eavesdrop on various persons in the United States without a court-approved warrant (Risen and Lichtblau 2005). The TSP generated considerable controversy when its existence was revealed by the New York Times in 2005, and in response Congress enacted the Protect America Act of 2007 (PAA). This legislation removed the requirement to secure a FISA warrant for electronic surveillance that was “directed at a person reasonably believed to be located outside of the United States” (50 U.S.C. § 1805a). Designed to be a temporary measure, the PAA expired after 180 days, restoring the status quo ex ante until the passage of the FISA Amendments Act of 2008 (FAA).

The FAA extended retroactive immunity to telecommunications companies that participated in the TSP, and it tasked the FISA Court with reviewing all new procedures and certifications to ensure their compliance with the FAA and the Fourth Amendment. Furthermore, it provided that U.S. citizens abroad may be subject to surveillance if found to be an agent, officer, or employee of a foreign power, although this could not serve as a pretext for obtaining information about a domestic party in the United States (known as “reverse targeting”). This was the first time that the FISA Court had been given jurisdiction over the surveillance of U.S. citizens (Schwartz 2009). Moreover, the government was given access to extensive resources to monitor international communications, as telecommunications companies themselves were required to “cooperate with the government to intercept international phone calls and e-mail” of U.S. citizens suspected of terrorism or surreptitious activities (Risen and Lichtblau 2009, A13). These provisions were renewed for an additional five years under the FISA Amendments Act Reauthorization Act of 2012.

The Appointment Power of the Chief Justice

While the vesting of appointment powers in the office of the Chief Justice of the United States has at times raised both normative and constitutional questions, the practice has been fairly commonplace since its origins during the progressive era (Ruger 2004). The federal judiciary at the time was plagued with case backlogs and had no mechanism to reallocate judicial resources based on need. Reformers saw the chief justice, as the natural head of the judicial branch of the federal government, as the most appropriate office in which to vest the authority to reassign existing Article III judges in order to make the most efficient use of judicial resources. After early experiments such as the Commerce Court (1910–1913), the appointment powers of the chief justice were further expanded during and after World War II to include the Emergency Court of Appeals (1942–1943) and its successor, the Temporary Emergency Court of Appeals (1971–1992). While most of the functions of this court were eventually transferred to the U.S. Court of Appeals for the Federal Circuit, its success was cited as a notable precedent for the chief justice’s appointment power during congressional debates over FISA (Ruger 2004).

In addition to reassigning judges to the FISA Court and the FISA Court of Review, the chief justice also makes appointments to other specialized federal courts, such as the Judicial Panel on Multidistrict Legislation and the Alien Terrorist Removal Court. They are also responsible for filling a large number of positions within the judicial bureaucracy, including the members of key committees of the Judicial Conference of the United States, the policy-making body of the federal judiciary (Pfander 2013). While the FISA Court’s appointment procedures have been challenged in federal court, along with the lawfulness of its surveillance procedures, they were upheld by the Ninth Circuit in United States v. Cavanagh (1987), a decision authored by then-Judge Anthony Kennedy. Kennedy’s opinion referenced the aforementioned longstanding practice, concluding that there was “substantial precedent for the temporary
assignment of lower federal judges by the Chief Justice to serve on various specialized courts” (791). More recently, the power of the chief justice to make unilateral appointments to the FISA Court and the FISA Court of Review has come under increased media scrutiny, with several journalists criticizing the appointments record of current Chief Justice John Roberts (Savage 2013).

The Ideology of FISA Court Judges

To date, very few studies have examined the FISA Court, its judges, or decisions in any great detail. Though the appointment power of the Chief Justice has often been debated from a normative standpoint, the first study to analyze the partisanship of judges appointed to the FISA Court empirically appeared in the Northwestern University Law Review in 2007 (Ruger 2007). There, University of Pennsylvania Law School Professor Theodore W. Ruger examines the partisanship of judges appointed to the FISA Court by the late Chief Justice William Rehnquist. He finds that Rehnquist’s appointees did not differ significantly from the broader pool of district court judges from which they were chosen, either in their partisanship or their Fourth Amendment jurisprudence. However, Ruger’s analysis does have some inaccuracies, largely stemming from the incomplete list of Rehnquist’s FISA Court appointments from which he works. More recently, a 2014 study by Russell Wheeler of the Brookings Institution also examines the question of appointments to the FISA Court. It compares the appointees of different Chief Justices in terms of their partisanship, prior prosecutorial experience, and demographic characteristics such as race and gender (Wheeler 2014). Wheeler finds that Republican appointees have been in the majority on the court for 32 of its 34 iterations of membership, while judges with prosecutorial experience have been in the majority for 28. However, his attitudinal analysis is limited by the use of the partisanship of the appointing president as a proxy for judicial ideology. Studies in judicial politics have repeatedly demonstrated that although partisanship does have some utility as a predictor of judicial behavior, a measure of ideology derived from the influence of home-state Senators through the norm of senatorial courtesy consistently outperforms it (Epstein, Martin, Segal, and Westerland 2007). These previous studies, while making inroads toward a fuller understanding of the FISA Court and its judges, nevertheless also suggest additional questions that demand further empirical analysis. How does Rehnquist’s appointment record as chief justice compare to that of his predecessor, Chief Justice Warren Burger, and that of his successor, Chief Justice John Roberts, in terms of the ideology of the judges they have appointed? What effect have these appointments had on the overall ideological makeup of the FISA Court as a whole? It is to these questions that we now turn.

As part of its reporting on the 100 pages of classified FISA Court documents that were leaked in 2013, the New York Times was also able to obtain a list of the complete membership of the court since its creation in 1978. This list includes the names of every judge to serve on the FISA Court, current as of May 2013, as well as the start and end dates of their terms, and the federal judicial district to which they were assigned at the time of their appointment. For appointments since 2013, we referred to the FISA Court’s own website, which maintains a record of its current membership. This resource also includes information on each judge’s home judicial district and the date on which they were reassigned to the court. A complete list of judges to have served on the court, compiled from the above sources, is included in Appendix A. It is this comprehensive list that forms the basis of our empirical analysis of each Chief Justice’s appointments to the court and the effect they have had on its ideological makeup. We were able to supplement this information with data on the partisanship of FISA Court appointees,

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4 No comprehensive list of FISA Court appointments was in existence at the time of Ruger’s study, so he was forced to piece together Rehnquist’s appointments record through detailed chronological review of a number of secondary sources. As a result, he misses the nominations of U.S. district judges Sidney M. Aronovitz in 1989, James Robertson in 2002, Frederick J. Scullin Jr. in 2004, and Malcolm Jones Howard (also in 2004). He also erroneously states that U.S. district judge Robert W. Warren was appointed to the court in 1989. (Warren was actually appointed to the Foreign Intelligence Surveillance Court of Review (FISCR), which reviews denials of applications for electronic surveillance warrants by the FISA Court.)


6 This list is available at: http://www.fisc.uscourts.gov/current-membership (accessed June 2015).
measured as whether they were originally nominated to the federal bench by a Democratic or Republican president. We also collected data on their ideologies, which we obtained from a database of the common space scores of all district court judges confirmed between 1945 and 2006 (Boyd 2010).7

Figure 1 shows the partisanship (based on presidential appointment) of all the FISA judges to have served during the court’s existence, as well as the same information broken down by the chief justice who appointed them. Unsurprisingly, given that all three chief justices who have made appointments to the court since its creation were originally nominated by conservative Republican presidents,8 a sizeable majority of the judges who have served on the Court have also been Republican appointees. Of the 58 judges to be appointed to the FISA Court since 1978, 39 (67 percent) were originally nominated to their district court seats by Republican presidents, whereas only 19 (33 percent) were nominated by Democratic presidents.9 Nevertheless, the figure also reveals much variation between chief justices in terms of the partisanship of their appointments. Warren Burger seemingly strove for a reasonable degree of partisan balance in the district judges he chose for the FISA Court: nine of his 15 appointees (60 percent) were Republicans, considerably lower than the overall average, whereas six of 15 (40 percent) were Democrats. His successors, however, have nominated a much higher percentage of Republican judges. Eighteen of the 26 appointees (69 percent) to the court by William Rehnquist were Republicans, with only eight of 26 (31 percent) being Democrats, while John Roberts initially demonstrated an even stronger preference for Republican judges. Fully 86 percent (12 out of 14) of Roberts’s appointees from 2005–2013 were Republicans, whereas just 14 percent (two of 14) were Democrats.

The result was a court that by the time of the Snowden revelations in 2013 was dominated by Republican judges: 10 of the 11 members of the FISA Court at that time were originally appointed to the federal bench by Republican presidents, while just a single judge—Mary A. McLaughlin of the Eastern District of Pennsylvania—was a Democratic appointee. Since then, however, there has been an apparent change in the Chief Justice’s behavior, as each of the three most recent appointees to the FISA Court have been judges

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7 One FISA judge, James E. Boasberg, joined the district court bench after 2006, and so is not included in Boyd’s database. We calculated his ideology by replicating Boyd’s methodology, which uses the ideology of the appointing president or, in the case of senatorial courtesy, the home state senator(s) from the president’s party in the state where the vacancy occurred, as a proxy for judicial ideology.

8 Warren Burger was nominated by Richard Nixon in 1969; William Rehnquist was nominated for elevation to Chief Justice by Ronald Reagan in 1986, having been originally nominated to the Court by Richard Nixon in 1972; and John Roberts was nominated by George W. Bush in 2005.

9 The list of judges who have served on the FISA Court includes three Eisenhower appointees, four Kennedy appointees, two Johnson appointees, eight Nixon appointees, five Ford appointees, four Carter appointees, thirteen Reagan appointees, four Bush I appointees, eight Clinton appointees, six Bush II nominees, and one Obama appointee.
who were originally nominated by Democratic presidents. Roberts named James E. Boasberg, an Obama 
appointee, to the court in May 2014, and followed that in May 2015 with two additional Democratic 
judges, James P. Jones and Thomas B. Russell, both Clinton appointees.

It must be noted, however, that we would expect a pro-Republican bias in appointments even if 
FISA judges were selected at random, simply by virtue of the partisan makeup of the federal judiciary 
at large during this period. If we examine the broader universe of all federal district judges, including 
those in senior status, whose tenure overlapped with that of the three chief justices, we can see that the 
pool of judges from which John Roberts (2005–2010) selected his FISA Court appointees was made 
up of a higher proportion of Republican judges (60 percent) than those from which both Burger 
(1979–1986) and Rehnquist (1986–2005) selected their appointees, each of which contained 55 percent 
Republican judges.

Of course, partisanship tells us only part of the story. To paint a more detailed picture of the 
appointments record of each of the three chief justices, and to examine the effect that these appoint-
ments have had on the overall makeup of the FISA Court over time, we must turn to our measure of 
judicial ideology. Figure 2 presents the median common space scores for the judges appointed by each 
chief justice, as well as for the broader pool of all district court judges from which they were selected. 
The common space scale ranges between −1 and 1, with values toward the positive end of the spec-
trum indicating more conservative judges and values toward the negative end of the spectrum indicat-
ing more liberal judges. Judges located close to the zero point are considered to be moderates, although 
there is no formal cutoff point in the judicial politics literature to delineate moderate or extreme judges 
from those who are simply liberal or conservative. We can, however, compare the relative moderation 
and extremism both of individual judges and of the FISA Court itself when analyzing the appointments 
record of individual chief justices.

Once again, the figure reveals large differences between the three chief justices in terms of the rela-
tive liberalism or conservatism of their FISA Court appointees. The judges appointed by Warren Bur-
ger have a median common space score of −.0164, indicating that although Burger appointed more 
Republicans than Democrats, on average Burger’s appointees were extremely moderate and actually 
skewed slightly toward the liberal end of the ideological spectrum. This suggests that not only did Bur-
ger appoint a more balanced mix of Democrats and Republicans to the court but also that those Repub-
licans he did nominate tended to be considerably more moderate than either of his successors. A 
broadly similar pattern emerges for Chief Justice Rehnquist, who although he appointed a mixture of 
more and less ideologically extreme judges from both sides of the political spectrum, nevertheless

![Figure 2. Median Common Space Ideology of FISA Court Appointees and U.S. District Court Judges, by Chief Justice, 1979–2015.](image-url)

*Note: Ideology measured using Common Space Scores. Negative scores indicate liberal appointees, whereas positive scores represent conservative appointees. The All District Judges median includes all active and senior status judges whose tenure overlapped with a particular chief justice.

emerges with a moderate record overall. The judges appointed by Rehnquist had a median common space score of .135, indicating that, like Burger, his appointees were, on average, relatively moderate, although, unlike Burger, they skewed slightly toward the conservative end of the ideological spectrum. Rehnquist’s median FISA Court appointee is also similar to the overall district court median, which as during Burger’s tenure is located extremely close to the center of the spectrum.

The same cannot be said, however, for the most recent chief justice. John Roberts’s record demonstrates that not only has he overwhelmingly preferred Republicans to Democrats when making appointments to the FISA Court, but he also has tended to appoint Republican judges who are considerably more conservative than either of his predecessors. The judges appointed to the court by Chief Justice Roberts have a median common space score of .483, indicating that his appointees were, on average, skewed toward the conservative end of the political spectrum. In fact, while Roberts has so far made fewer appointments to the FISA Court than Rehnquist, seven of the ten most conservative judges ever to serve on the court have been Roberts appointees, and five of those seven are still on the court as of June 2015.10

As with the partisanship data, this is at least partly explained by the increasing conservatism of the district court bench overall, with the appointments of George W. Bush pushing the judiciary significantly to the right of where it had been under Bill Clinton. However, the district court median of .135 during Roberts’s tenure nevertheless remains well to the left of his median FISA Court appointee, and the discrepancy is far more pronounced than for either of his predecessors. We can therefore draw two main conclusions from Figure 2. First, that Chief Justices Burger and Rehnquist made an effort to appoint a mixture of liberal and conservative judges to the court, as evidenced by their average appointee being fairly close to both the center of the ideological spectrum and the median district judge overall. Second, that John Roberts has overwhelmingly favored Republican district judges, and his average appointee has been substantially more conservative than either his predecessors or the pool of district judges from which he selected. We now turn to the question of the effect that each of these chief justices’ appointments have had on the ideology of the FISA Court overall.

Figure 3 illustrates the ideological median of both the FISA Court and the overall pool of district court judges from the time of Warren Burger’s original appointments to the Court in 1979, up until the most recent year for which we have data available. The figure shows that the ideological median of the court remained fairly close to the political center during the tenure of Warren Burger, as did the median for district judges overall. In fact, the median FISA judge was a liberal during the Court’s early years and remained so until the time that William Rehnquist took over as chief justice in 1986. During the first part of Rehnquist’s tenure, the court drifted slowly and steadily to the right, crossing from moderately liberal to moderately conservative in 1989. This movement is clearly a consequence of the new chief’s more conservative appointments record than his predecessor, but it can be at least partly explained by the appointments to the district courts of Ronald Reagan, which shifted the overall median to the right. Interestingly, however, this rightward drift peaks at the end of 1997, when the court’s median reaches its most conservative point to date (.342 on the common space scale). From 1998–2003, however, Rehnquist’s appointments begin to shift the court back in the other direction. By the time of his death in 2005, the median is once again located slightly to the liberal side of the political center. This is a reflection of that fact that Rehnquist appointed far more Democrats to the court in the latter part of his tenure as chief justice than he did during the earlier part. From 1986–1997, 12 of the 14 district judges Rehnquist named to the court were Republican appointees, while from 1998–2005 he appointed seven Republicans and six Democrats, causing the court to shift back toward the ideological center.

This pattern was also observed by Ruger, who speculates that it may be a reflection of several different factors. One possible explanation he cites is the undermining of public confidence in the impartiality of the judiciary by Rehnquist’s involvement in the Starr investigation and the Supreme Court’s

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10 Judge John D. Bates of the U.S. District Court for the District of Columbia left the FISA Court at the conclusion of his term in 2013. He later became the Director of the Administrative Office of the United States Courts, coincidentally a position to which he was also appointed by Chief Justice John Roberts. The term of James Zagel of the U.S. District Court for the Northern District of Illinois expired in 2015. The next vacancy on the FISA Court is not scheduled to occur until May 2016.
decision in *Bush v. Gore* (2000). Also notable is the fact that by the late 1990s Rehnquist had a much larger pool of Clinton nominees to draw from, whom he may have perceived as being more conservative on law-and-order issues than Carter’s nominees. Finally, Ruger also finds evidence that Rehnquist was able to balance the more liberal appointments to the FISA Court with more conservative nominees to the FISA Court of Review. His second hypothesis is supported by the information in Figure 3, which demonstrates that the overall district court median shifted quite a bit to the left as a consequence of Bill Clinton’s appointments during the 1990s. The result was that Rehnquist had a more liberal pool of district court judges to draw from later in his term than he did during the earlier period. Whatever the reasons, by the time Roberts succeeded Rehnquist as Chief Justice in late 2005, the ideological makeup of the FISA Court was almost identical to that when Rehnquist had succeeded Burger in 1986. The median judge in both instances was slightly toward the liberal end of the spectrum, although located very close to the ideological center.

Since then, however, the appointments of John Roberts have shifted the FISA Court dramatically to the right, although there appears to have been a change in his behavior after 2013, which is discussed below. The FISA Court’s median crossed to the conservative side of the spectrum in 2006, when Roberts made his first two appointments to the court, and it has continued to move in a conservative direction in the years since. In fact, the court’s shift to the right under Roberts occurred at almost twice the rate as that during the first part of Rehnquist’s tenure (1986–2007), with the median reaching the most conservative point in its history at the end of 2011 (.531 on the common space scale). It must be noted, however, that Roberts’s four appointments in the period from 2011–2013 did not move the ideological median any further in the conservative direction, despite the fact that all four were Republican nominees. Nevertheless, it is clear that his conservative appointees had an immediate and profound effect on the ideological makeup of the FISA Court, one that cannot be explained by changes that have occurred in the broader pool of district judges from which he has selected.

Recent developments, though, may signal a change in direction. Since 2013, it appears that Roberts, like his immediate predecessor, is beginning to moderate his record by appointing more Democrats to the court as his tenure progresses. As mentioned previously, Roberts’s three most recent appointees to

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11 The median judge from 2011–2013 would have been the most conservative judge on the court for almost the entire first two decades of its existence, up until William Rehnquist’s appointment of U.S. District Judge Royce C. Lamberth in 1995.
the Court, one in 2014 and two in 2015, have all been Democratic nominees. The result has been a slight movement of the FISA Court median in the liberal direction, although it is still more conservative than at any point during Rehnquist’s tenure as chief justice and remains well to the right of the overall district court median. It seems plausible that this change in behavior is related to the increased media scrutiny and negative publicity that both Roberts and the FISA Court have received since the 2013 Snowden leaks. If so, we would expect to continue to see Roberts strive for greater ideological balance in his appointments moving forward, just as Rehnquist seemed to do in the latter half of his tenure.

Discussion

While the prevalence of Republican-appointed federal judges on the FISA Court and the increasing conservatism of the court overall may be cause for concern from a normative standpoint, it remains to be seen to what extent it is has actually had a substantive effect on the court’s decisions. Even less clear is its impact on federal government policy as a whole regarding electronic surveillance. One confounding factor is that attitudes toward the NSA’s spying activities do not necessarily break down neatly along partisan and ideological lines. Roll call data suggest that the most fervent recent opposition to the surveillance programs comes from the liberal wing of the Democratic Party and the more conservative Tea Party faction of the Republican Party (Voteview 2013). Nevertheless, there is cause for concern that the current ideological makeup of the FISA Court may potentially undermine its ability to provide an effective check on the power of the executive branch. Previous research suggests that judges who are more conservative are significantly more likely to decide in favor of the government in Fourth Amendment cases (Kritzer and Richards 2005). This would imply that the more conservative the FISA Court becomes, the more likely it is to side with the government when adjudicating warrant requests and reviewing surveillance policies.

It is important, therefore, to examine what we do know about the FISA Court’s decisions and to attempt to ascertain the potential impact the court’s increasing conservatism may be having. Though the opinions and warrants issued by the court are classified top secret, the attorney general is legally required to submit to Congress each year a report of its activities. This report details the number of warrant requests it receives and grants, as well as the number of warrants that were withdrawn, rejected, or substantially modified as a result of FISA Court review.12 Figure 4 illustrates the total number of warrant requests the FISA Court has received from the federal government each year since 1979, while Figure 5 shows the number that were withdrawn, rejected, or substantially modified.

Examining these data, there is clear evidence that the importance of the FISA Court and its decisions has changed markedly since the 9/11 terror attacks. As Figure 4 reveals, the number of warrant requests submitted to the court has increased dramatically during this period. While between 1979 and 2001, the Court generally received somewhere between 500 and 1,000 warrant requests per year, since 2002 this number has jumped to between 1,500 and 2,500. The average number of warrant requests per year has almost tripled since 9/11, going from 610 to 1,745. This suggests that the court has been playing a much more important oversight function since the beginning of the war on terror, and that the far more expansive use of domestic and foreign surveillance by the federal government has produced a corresponding increase in the workload of the FISA Court.

In addition to this, Figure 5 illustrates that the court has become much more active in terms of the number of warrant requests it has rejected or that have been withdrawn or substantially modified in response to its objections. While the court raised objections to just four of the warrant requests it received between 1979 and 2001, since 2002 more than 400 warrants have received such treatment, including nine that were denied outright, 29 that were withdrawn by the government, and 375 that were modified in light of FISA objections. There is also evidence, however, that the level of activity before the FISA Court has already peaked, with 2007 standing out as the high-water mark in both

12 An archive of the U.S Attorney General’s Annual FISA Reports to Congress is maintained by the American Federation of Scientists. It is available at http://www.fas.org/irp/agency/doj/fisa/ (accessed March 2014).
applications and modifications. Since 2007, the average number of warrant applications per year has returned to a level similar to that in the years immediately following 9/11, while the number of modifications per year has declined to less than half of what it was in 2007.

Of course, these reports to Congress reveal nothing about the nature of the FISA Court’s decisions, and while these data do illustrate that the court has been playing a more active role in recent years, they are insufficient to make any kind of inference about the effect that recent appointments have had on its oversight of the executive branch. Without knowing which judges are responsible for these modifications, withdrawals, or denials of warrants, and lacking a baseline with which to compare the rate at which the court has granted the DOJ’s warrant requests, we can go no further than to say that the FISA Court’s recent shift to the right has occurred at the same time as its role has grown dramatically as a consequence of the post-9/11 expansion of federal government surveillance. It seems notable, however, that on the vast majority of occasions in which the FISA Court raised some objection to a warrant application, this came in the form of a modification rather than an outright rejection or withdrawal. Though the volume of warrant requests received has expanded dramatically during the past decade, the federal government has still found itself on the winning side in the vast majority of cases.

![Figure 4. Total Warrant Requests Received by the FISA Court, 1979–2014.](image)
*Note:* All warrant requests to the FISA Court are submitted by the Department of Justice (DOJ), which reviews applications received from federal law enforcement and intelligence agencies before deciding which to forward to the court. Source: U.S. Attorney General’s Annual FISA Reports to Congress.

![Figure 5. Total Warrants Denied by the FISA Court, Withdrawn by the DOJ, or Modified before Approval, 1979–2014.](image)
*Note:* Warrant applications are made before a single judge of the FISA Court, who may approve, reject, or modify the request. Warrant denials and modifications may not be refiled before a different FISA court judge but may be appealed to the FISA Court of Review. Source: U.S. Attorney General’s Annual FISA Reports to Congress.
Despite this lack of publicly available information, the documents released by Edward Snowden, as well as others that have since been declassified by the court itself, may provide further insight into the expansive role that it has played in recent years. These documents reveal that the FISA Court has set some very noteworthy constitutional precedents in its rulings. For instance, the court has extended the applicability of the “special needs” principle used to justify warrantless DUI checkpoints and airport screening, which states that “minimal intrusion on privacy” can sometimes be justified by “the government’s need to combat an overriding public danger” (Lichtblau 2013, A1). This application of the special needs doctrine to the NSA’s surveillance practices effectively creates a new lawful exception to the Fourth Amendment. Furthermore, a subsequent declassified opinion revealed that the FISA Court has consistently upheld the constitutionality of the government’s metadata collection program, which the court has so far reauthorized thirty-six times, most recently in January of 2014 (Fung 2014).

The importance of the FISA Court also appears to have grown considerably since a 2007 decision by the Bush administration to allow it to review its previously warrantless electronic-eavesdropping program, and its decisions interpreting the Fourth Amendment have so far not been subject to Supreme Court review. All this suggests that there is indeed reason to be concerned that the court’s ideological makeup has shifted so dramatically to the right in recent years, even though we can draw no concrete inferences about the effect this has had on its decisions.

Already, the political pressure resulting from leaked details of the NSA’s surveillance programs has led both the Obama administration and Congress to adopt certain policy changes that will affect the FISA Court’s activities. In August 2013, President Obama commissioned a special White House review group on intelligence and communication technologies to investigate ways to strengthen the oversight of key NSA programs. The committee’s report, released in December 2013, made 46 specific recommendations “designed to protect our national security and advance our foreign policy while also respecting our longstanding commitment to privacy and civil liberties” (Clarke et al. 2013, 1).

President Obama, in a speech at the Justice Department in January 2014, called for the adoption of several of the committee’s proposals, including new disclosure rules, a plan to turn over the immense metadata collection to the phone companies, and the installation of a public advocate to provide greater balance to the FISA Court’s proceedings. This advocate would serve as a potential check on the court regarding matters of civil liberties, presenting prospective cases for turning down surveillance certifications that may endanger those rights. However, the president did not endorse a recommendation that would have allowed each Supreme Court Justice to select a judge on the FISA Court, a proposal that would likely produce major changes in the composition of the surveillance judiciary (Kaplan 2014).

More significantly, in June 2015 Congress passed and President Obama signed the USA FREEDOM Act, which made major changes in federal surveillance law affecting the FISA Court’s operations. Passed by large bipartisan majorities in both houses, the Act reauthorized or modified several expired provisions of the USA PATRIOT Act, while calling for an end to the controversial NSA bulk telephone metadata collection program following a six-month transition period (Chappell 2015). It also codified the idea of a public advocate to bring balance to the FISA Court’s proceedings, although the FISA judges themselves would be responsible for appointing these advocates as amici curiae. While falling short of what many privacy advocates had hoped for, these reforms seem to indicate that the FISA Court, now firmly fixed in the glare of the political spotlight, will be subject to much greater scrutiny from both the media and Congress moving forward.

**Conclusion**

In conclusion, this study demonstrates that while previous chief justices appeared to strive for some degree of ideological and partisan balance in their appointments to the FISA Court, Chief Justice John Roberts has overwhelmingly appointed judges who are Republican and conservative. As a result, the

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13 FISA Court decisions may be appealed to the U.S. Foreign Intelligence Surveillance Court of Review, whose judges are also selected by the Chief Justice, this time from the existing ranks of U.S. Court of Appeals judges. However, these appeals are extremely rare.
ideological median of the FISA Court, which had previously tracked fairly closely to the right in recent years. At the same time, the court’s role has transitioned from largely rubber-stamping federal government warrant requests to providing oversight of an ever-expanding program of foreign and domestic communications surveillance, while deciding substantive questions of constitutional law. Perhaps of greater concern, there is also reason to believe that the prevalence of Republican and conservative judges on the court has the potential to seriously undermine the court’s ability to provide an effective check on the power of the executive branch, although this is impossible to test empirically as long as the vast majority of its rulings are kept secret. What documents have become public suggest that the FISA Court’s decisions have arguably created a kind of secret law, one that takes into consideration only one side of the case, the government’s, where all the arguments, deliberations, and decision making takes place behind closed doors away from the scrutiny of the media and public, and which has so far not been subject to review on the merits by the U.S. Supreme Court or any other higher Article III federal tribunal.

References


Florida v. United States Department of Health and Human Services, 716 F.Supp.2d 1120 (N.D.Fla. 2010).


United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987).


# Appendix A

## Appointments to the U.S. Foreign Intelligence Surveillance Court, 1979–2015

<table>
<thead>
<tr>
<th>Name</th>
<th>Chief Justice</th>
<th>Year Appointed</th>
<th>Home Court</th>
<th>Appointing President</th>
<th>Ideology</th>
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**Note.** Appointing President refers to the president who originally nominated the judge to their U.S. District Court seat. Ideology measured using Common Space Scores.

**Sources:** *New York Times* (2013); *Current Membership – Foreign Intelligence Surveillance Court* (2015); *Federal District Court Judge Ideology Data* (2010).