# Chapter 7 - Congressional Authority for National Security Surveillance

## When was FISA passed?

## What abuses in the Church Report drove the passage of FISA?

## How about the concentration camp list?

## What did United States v. Duggan, 743 F.2d 59 (1984) tell us about what Congress was trying to balance when passing FISA?

### Did congress preserve the 4th Amendment in FISA?

## United States v. Rosen, 447 F. Supp. 2d 538 (DC EDV 2006)

### What is the underlying charge?

#### Who did Rosen and Weissman work for

#### Who eventually got the information?

### FISA

#### What is the FISC and who sits on it?

#### Is there an appeal from its decisions?

#### What is the FISA appeals court?

#### Procedure

##### Who is the application for a FISA warrant filed with?

##### Who must approve the application?

##### Is there any need for the usual 4th Amendment “reliable informant?”

##### What must the judge find that there is probable cause to believe??

##### This is a four corners” review of the document. What is the judge really deciding?

##### Do you expect for many of these to be denied?

##### Can evidence obtained with a FISA warrant be used in an ordinary criminal investigation?

##### How can this undermine the criminal law 4th amendment process?

##### Is a FISA warrant served on the person being investigated?

##### When, if ever, will that person find about the warrant?

#### Contesting the admission of information from a FISA warrant

##### What if the AG thinks the release of the information necessary to review the adequacy of the warrant would endanger national security?

##### The review of the basis for the warrant is *de novo*. Does the court defer to the agency?

##### But is there a presumption about the information provided in the application?

##### What standard does the plaintiff have to overcome to prove that the information is unreliable if the warrant concerns a United States person?

##### When does FISA allow the disclosure of the information in the application?

##### What do the defendants claim shows that the application is clearly wrong and thus the judge should disclose it contents?

##### What is the FISA definition of an agent of a foreign power?

##### Which construction of ‘‘clandestine intelligence gathering activities’ would apply to defendants?

##### What cannot be used as the sole reason to believe that a US person is an agent of a foreign government?

##### Does this mean that 1st Amendment activities cannot be used at all in supporting an application?

##### What is “lawful” 1st Amendment activities?

###### What is the example of an unlawful 1st Amendment activity?

###### Can an activity be a 1st Amendment activity if it is not lawful?

##### Can FISA be applied to pre-crime?

#### What is the purpose of minimization procedures for US persons?

##### Do minimization procedures prevent any sharing of information obtained with FISA?

##### What are the exceptions?

##### What is really protected?

##### What should government do with information on a US person once the investigation is complete?

##### Are these procedures really just a reaction to the dirty tricks of the CHAOS and COINTELPRO period?

#### If the government has a FISA warrant to listen to a suspect’s phone calls, can it listen to both sides of the call?

#### What if the third party caller is engaged in criminal or national security violations?

## Notes

### What is the FISA definition of international terrorism?

### What is definition (4) of electronic surveillance?

### What could this cover?

### Do you need FISA for calls that are between international cities?

#### Why didn’t Congress require this?

#### Would that be going beyond the Constitution?

### How long is a physical search warrant good for?

### What about against foreign powers?

### Do you need to serve a search warrant for FISA physical searches?

#### Will the suspect even know there was a search?

### 5. Who May Be Targeted?

#### What is a foreign power?

#### Who is an agent of a foreign power?

#### What is the provision that includes US persons?

#### How does provision C cover the “lone wolf”?

##### How can this swallow all the “agent of a foreign power” stuff?

##### Is there really a distinction between international terrorism and domestic terrorism?

### What is a roving wiretap?

### Does the agency have to show that the target is using the phone?

### Could you tap the phone of a third party when the target visits his house?

### How was this expanded by the Patriot Act?

#### What if you stop within 10 days?

#### Is there any review at all?

#### Is this like the 60 days under the War Powers Act?

### Emergency Surveillance

#### How long is the emergency period for foreign powers, i.e., not US persons?

#### What if it is a US person?

#### Do you think you can use info from the emergency surveillance in the FISA application?

### How was the basis for probable cause under FISA expanded in 2000?

### How does this broaden FISA?

### What does it mean for Jerry Adams?

### How was the pen register language modified after 9/11 to include email?

### What else might this allow the feds to collect?

### How might an automatic out of office message get you in trouble under this law?

### Constitutional Concerns

#### Does FISA pose a case and controversy problem?

##### What does the 4th Amendment say?

#### What does United States v. Duggan, 743 F.2d 59 (2d Cir. 1984) tell us about probable cause under FISA?

#### Does the Dugan court imply that national security investigations are not criminal, and thus do not need to meet the 4th amendment standards?

#### Do defendants have a right to see the documentation supporting a FISA warrant so that they can challenge it? (United States v. Squillicote, 221 F.3d 542 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001))

## B. FISA, LAW ENFORCEMENT, AND ‘‘THE WALL’’

### Who was Zacarias Moussaoui and why did he lead to the passage of the Patriot Act?

## In re: Sealed Case No. 02-001, 02-002 (Foreign Intelligence Surveillance Court of Review) 310 F.3d 717 (2002) (FIDA appeal)

### What did the FISA court order to limit the use of FISA warrants for criminal law investigation?

### What is the ‘‘chaperone requirement’’ in this case?

### What if representatives of OIPR are unable to attend such meetings?

### What is the "wall" that the FISA court assumed existed?

### Where did the court find the authority to enforce this wall?

### Despite the statutory language, what is the 4th amendment problem if FISA can wrap around criminal investigations?

### Would this matter if the intelligence was not used for a criminal prosecution?

### Why does the court say that United States v. Truong Dinh Hung does not apply to FISA?

### How did the 1995 Attorney General adopted ‘‘Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" enshrine Truong Dinh Hung?

### What provision did the Patriot Act add to encourage the cooperation the FISA court was trying to discourage?

### How did the 2002 Procedures for Contacts... supersede prior procedures?

### Did the FISA court accept the 2002 revisions?

### What are the purposes of minimization procedures?

### What do the minimization procedures allow as regard ordinary crimes?

### What is the constitutional issue with the FISA court refusing to implement the 2002 guidelines?

### How did the Patriot Act modify the purpose of FISA surveillance?

### How does this implicitly do away with the primary purpose test?

### What if the purpose is solely criminal investigation?

### Will any defendant ever prove this? Why not?

### Who has the responsibility for reviewing the government purpose?

### What did the court in *Keith* say about Title III warrant procedures for a domestic national security investigation?

### What is the false premise of *Truong*?

### How does the court distinguish City of Indianapolis v. Edmond, 531 U.S. 32 (2000) from Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976)?

### How did the court rule?

## FISA Trends

### Has FISA been used much?

### What are the limitations of FISA?