

# Foreign Intelligence Surveillance Court Declassified Material Shows Oversight and Enforcement

By Peter Swire

*This essay is part of a five-part series that highlights critical issues in my 300-page testimony in the Standard Contracts Clause case before the Irish High Court concerning data flows between the US and the EU. An overview of the testimony can be found at [www.alston.com/en/resources/peter-swire-irish-high-court-case-testimony](http://www.alston.com/en/resources/peter-swire-irish-high-court-case-testimony).*<sup>1</sup>

This essay discusses Chapter 5 of my testimony, on the Foreign Intelligence Surveillance Court (FISC). The Chapter was based on original research -- review of all of the FISC opinions and related materials that were declassified between 2013 (the time that the Snowden disclosures began) and filing of my testimony in November, 2016.<sup>2</sup> The overall conclusion is that the FISC provides far stronger oversight than many critics have alleged – my opinion to the Irish court, based on the research and my previous experience with government surveillance,<sup>3</sup> is that the FISC provides independent and effective oversight over US government surveillance.

The FISC was created by the Foreign Intelligence Surveillance Act (FISA) of 1978. The FISC was born of a fundamental political decision that “[w]iretaps and electronic surveillance for foreign intelligence purposes, conducted within the US,” should only be done with approval from a judge.<sup>4</sup> Federal district judges sit on the FISC for a term of years, as a legislatively-established response to earlier executive branch claims that it had inherent authority to conduct national security wiretaps.<sup>5</sup>

Based on the material declassified since 2013, the FISC now oversees a comprehensive compliance system. The declassified opinions show an earlier history of significant compliance

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<sup>1</sup> Swire is the Elizabeth and Thomas Holder Chair and Huang Professor of Law and Ethics at the Georgia Tech Scheller College of Business, and Senior Counsel at Alston & Bird. Swire’s expert report was submitted to the Irish High Court in the current litigation where Max Schrems is challenging whether transfers of personal data under Standard Contract Clauses are adequately protected under European Union privacy law. Under Irish rules, Swire was an expert selected by Facebook, but required to give his independent opinion about U.S. law, and Swire retained complete editorial control over the content of the testimony. The decision to make the report public was made by Swire, and was not the decision of Facebook. The full report is available [here](#), with other explanatory material [here](#).

<sup>2</sup> Dan Felz of Alston & Bird was the principal attorney assisting me with this Chapter.

<sup>3</sup> In 2013, I served as one of five members of President Obama’s Review Group on Intelligence and Communications Technology, many of whose recommendations have since been adopted. *See* Peter Swire, *The USA FREEDOM Act, the President’s Review Group, and the Biggest Intelligence Reform in 40 Years*, June 8, 2015, <https://iapp.org/news/a/the-usa-freedom-act-the-presidents-review-group-and-the-biggest-intelligence-reform-in-40-years>.

<sup>4</sup> Peter Swire, *US Surveillance Law, Safe Harbor, and Reforms Since 2013*, 32 Georgia Inst. Tech. Scheller College of Bus. Res. Paper No. 36, at 8 (Dec. 18, 2015), <http://ssrn.com/abstract=2709619>. This document was submitted as a White Paper to the Belgian Privacy Authority at its request for its Forum on “The Consequences of the Judgment in the Schrems Case.”

<sup>5</sup> For discussion of the history, *see* Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004), <http://peterswire.net/wp-content/uploads/Swire-the-System-of-Foreign-Intelligence-Surveillance-Law.pdf>.

problems, especially prior to 2009. Recent FISC opinions have expressed satisfaction with surveillance agencies' current compliance efforts, stating that "instances of noncompliance are identified promptly and appropriate remedial actions are taken."<sup>6</sup> In my view, the independent federal judges on the FISC have learned from earlier experiences, and today oversee a compliance program that I believe is unmatched by any other nation's intelligence service.

### *Takeaways from the newly declassified materials*

In recent years, numerous FISC decisions, orders, and opinions have been declassified, often along with the legal briefing and government testimony underlying them.<sup>7</sup> The FISC itself has disclosed its rules of procedure and its standard review procedures for government surveillance applications. This [information is now available on the Internet](#), but to date there has not been any systematic, published assessment of these newly released materials.

My assessment of these materials are:

*1. The newly declassified materials support the conclusion that the FISC today provides independent and effective oversight over US government surveillance.* Especially since the Snowden disclosures, the FISC was criticized in some media outlets as a "rubber stamp." Since the passage of the USA FREEDOM Act in 2015, the number of surveillance applications that the FISC has modified or rejected has, at least initially, grown substantially, from a low base to 17 percent of surveillance applications in the second half of 2015.<sup>8</sup>

The FISC has also shown a willingness to exercise its constitutional power to restrict surveillance that it believes is unlawful. The FISC's constitutional power is perhaps best illustrated by the FISC's halting President Bush's so-called "warrantless wiretapping" program. Following the September 11, 2001 attacks, President Bush authorized the NSA – without informing the FISC – to acquire within the United States the communications of persons the NSA suspected of being associated with international terrorism. This program was titled "StellarWind." After it became public, the NSA sought to bring the program under FISC oversight, filing an application with the FISC requesting that the court approve StellarWind as it

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<sup>6</sup> [Caption Redacted], No. [Redacted] at 28 (F.I.S.C. Aug. 26, 2014), <https://www.dni.gov/files/documents/0928/FISC%20Memorandum%20Opinion%20and%20Order%202026%20August%202014.pdf>.

<sup>7</sup> The materials that have been declassified contain redacted material, to protect national security-sensitive information. These redactions also play a privacy protective role, by preventing public release of the identities of individuals whose information was collected in a foreign intelligence investigation.

<sup>8</sup> The first statistics available are for the final months of 2015, when the USA FREEDOM Act had gone into effect. During this six-month period, the number of surveillance applications or certifications the FISC modified or rejected grew to 17 percent. See Section I(B)(4), *infra*, for a more detailed discussion.

had existed.<sup>9</sup> The FISC denied the NSA's application.<sup>10</sup> The FISC's ruling meant that a surveillance program authorized by the President could not continue in its previous form.

The FISC ultimately issued orders authorizing a modified form of the program, in which the FISC first approved the telephone numbers and email addresses used to conduct surveillance under this program.<sup>11</sup> After US agencies determined this modified version of the program was creating an "intelligence gap," Congress amended FISA by passing the Protect America Act (PAA) in 2007, followed by the FISA Amendments Act in 2008.<sup>12</sup>

*2. The FISC monitors compliance with its orders, and has enforced with significant sanctions in cases of noncompliance.* The FISC's jurisdiction is not confined to approving surveillance applications. The FISC also monitors government compliance and enforces its orders. The Chapter details the interlocking rules, third-party audits, and periodic reporting that provide the FISC with notice of compliance incidents. FISC compliance decisions have resulted in (1) the NSA electing to terminate an Internet metadata collection program; (2) substantial privacy-enhancing modifications to the Upstream program; (3) the deletion of all data collected via Upstream prior to October 2011; and (4) a temporary prohibition on the NSA accessing one of its own databases.

*3. In recent years, both the FISC on its own initiative and new legislation have greatly increased transparency.* In recent years, the FISC itself began to release more of its own opinions and procedures, and the USA FREEDOM Act now requires the FISC to disclose important interpretations of law. The Chapter also discusses how litigation before the FISC resulted in transparency reporting rights, and how these rights have been codified into US surveillance statutes.

*4. The FISC now receives and will continue to benefit from briefing by parties other than the Department of Justice in important cases.* After 2001, the FISC played an expanded role in overseeing entire foreign intelligence programs, such as under Section 215 and Section 702. The Chapter reviews newly declassified materials concerning how the FISC created some opportunities for privacy experts and communication services providers to brief the court. The USA FREEDOM Act created a set of six experts in privacy and civil liberties who have access to classified information and brief the court in important cases.

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<sup>9</sup> *In re [Redacted]*, No. [Redacted] (F.I.S.C. Apr. 3, 2007),

<https://www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-%20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf>.

<sup>10</sup> Initially, the FISC permitted the program to continue for 30 days, during which time discussions between the FISC and the NSA regarding the program were ongoing. A different FISC judge then issued the opinion summarized here, which required the program to be modified. *See id.*

<sup>11</sup> The FISC initially extended the program by just under sixty days, during which period it permitted the government to draft and submit "a revised and supplemented application that would meet the requirements of FISA." *Id.* at 20-21. The FISC's modified orders, on the basis of FISA "roving" or "after-acquired" authorities, permitted the government to add some newly discovered telephone numbers and email addresses without an individual court order in advance. *See* Declassified Certification of Attorney General Michael B. Mukasey, at para. 38, *In re Nat'l Sec. Agency Telecommunications Records Litig.*, MDL No. 06-1791-VRW (N.D. Cal. Sept. 19, 2008), <http://www.dni.gov/files/documents/0505/AG%20Mukasey%202008%20Declassified%20Declaration.pdf>; *see also* PCLOB 702 REPORT, *supra* note 66, at 17-18.

<sup>12</sup> *See* PCLOB 702 REPORT, *supra* note 66, at 18.

*2017 update since my testimony was finalized*

Developments in 2017 illustrate the ongoing and significant effects of FISC review on US surveillance practices. Since my testimony in February of this year, the [NSA announced](#) that it had ended the portion of its Section 702 Upstream program known as “about” collection. “About” collection can best be thought of in contrast to the collection of email that is sent “to” and “from” the email address of a foreign intelligence target. An email communication would be retained as part of “about” collection if the body of the email contained the targeted email address, even though the persons that the email is sent “to” and received “from” are not targeted themselves.

[This change](#) came about as part of the NSA’s annual application to the FISC to review the agency’s Section 702 certifications. As part of the review process, the NSA self-reported to the FISC its inadvertent failures to comply with rules imposed by the court. In exploring how the agency could address the concern, the NSA concluded that it could best resolve the issue by ending the collection of “about” email communications. This action provides additional evidence of the power of the FISC to curb intelligence activities of the NSA, to protect the rights of those whose data is collected.

In sum, review of the declassified materials from the FISC provides shows the extensive impact of FISC decisions on foreign intelligence surveillance practices. As discussed in other parts of my testimony in the Ireland case, this ongoing practice of judicial review of US government surveillance practices is far more extensive and effective than judicial review in other nations of their own foreign intelligence practices.