


CONTRARY TO REPORTS, WE CANNOT SAY FISC REJECTED A RECORD NUMBER OF FISA APPLICATIONS LAST YEAR

With the FISC report of its own surveillance approvals came out last week, some reporters claimed that the report showed the FISC Had rejected a record number of surveillance orders.

In Trump's first year, FISA court denied record number of surveillance orders

More surveillance orders were denied during President Donald Trump's first year in office than in the court's history.

 By Zack Whittaker for Zero Day | April 25, 2018 -- 19:35 GMT (12:35 PDT) | Topic: Security

In my own post on the report, I noted that the rise from 8 to 18 rejected applications under the FISC standard was alarming.

The FISA Court released its second annual report on approval rates today (the obligation to produce such a report dates to 2015 and it produced a **partial report** covering that year). It shows that the FISA Court rejected and modified far more joint applications last year than the prior year, with just a 70% complete approval last year as compared to a 79% complete approval the year before, as reflected in this table.

[snip]

Most alarming, though, is the rise in outright rejections, from 8 to 18. This suggests the government is trying to wiretap and otherwise surveil people as agents of a foreign power that the FISC doesn't agree are such.

And all this happened at a time when the government submitted fewer overall

combined applications. Remember, the government can and sometimes does take its wiretapping elsewhere if the FISC rejects a practice.

But given that's using a standard that has only been in place for 2.5 years, we can't use it to make judgments across historical FISC practice.

I had explained to Whittaker before this that FISC used a different standard than DOJ, and made 4 efforts to get him to correct this headline, to no avail.

DOJ has now released its own version, which tracks approvals for final applications. It shows while it withdrew two applications (which likely means that of the three applications DOJ withdrew or changed after FISC told the government it would appoint an amicus to review the application, two were for content), all of the final applications it submitted to the court were approved.

During calendar year 2017, the Government filed 1,349 final applications to the Foreign Intelligence Surveillance Court (hereinafter "FISC") for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes. The 1,349 applications include applications made solely for electronic surveillance, applications made solely for physical search, and combined applications requesting authority for electronic surveillance and physical search. Of these, 1,321 applications included requests for authority to conduct electronic surveillance.

Two of these applications were withdrawn by the Government. The FISC did not deny any final, filed applications in whole, or in part. The FISC made modifications to the proposed orders in 154 final, filed applications. Thus, the FISC

approved collection activity in a total of 1,319 of the applications that included requests for authority to conduct electronic surveillance.

In other words, we can't say whether last year was an outlier, with the court rejecting a bunch more applications (though there are reasons to suggest that's a trend), because the only metric for which we have historical numbers shows the same rubber stamp 100% approval.

Which is another way of saying that for decades the government gave us garbage numbers and only in the wake of the Snowden disclosures are we getting some meaningful metrics (though I Con the Record's numbers are already headed in the opposite direction, becoming even less useful).

Update: I think there's still a discrepancy in these reports. Here's what I understand the numbers to look like (I've added 2016 to show how this tracks across time). Last year, to find the total number of final applications (the number DOJ uses), you could simply take the FISC number and subtract the Denied in Full number (1485-8=1477). But if you do that this year (1372-24=1348), you're off by one. I think that's because FISC is counting one of the applications the government claims to have withdrawn as a Denied in Part.

		Applications	Granted	Denied in Full	Denied in Part	Withdrawn	Modifications
2016	DOJ	1477	1477	0	0	0	112
	AOUSC	1485	1141	8	26	0	310
2017	DOJ	1349	1347	0	0	2	154
	AOUSC	1372	948	24	47	0	353