

CONFIRMED: THE FISA COURT IS LESS OF A RUBBER STAMP THAN ARTICLE III COURTS

Although Rosemary Collyer's recent 702 opinion has made me rethink my position, I've long argued that the FISA Court gets a bad rap when it is called a rubber stamp.

But today, for the first time, we can test that claim. Today is the first time we have had US Court reports for for an entire year for both the FISC and for Article III Courts – as close as we can get to comparing apples to apples.

The FISC report showed that that court denied in full 8 of 1485 individual US based applications, at a rate of .5%, along with partially denying or modifying a significant number of others.

Section	Applications or Certifications	Orders Granted	Orders Modified	Orders Denied in Part	Applications or Certifications Denied
1805 only	105	61	39	5	0
1824 only	42	28	11	3	0
1805 and 1824 ¹	1,338	1,052	260	18	8
1842	60	50	10	0	0
1861	125	108	16	0	1
1881a	[redacted] ²	0	0	0	0
1881b	0	0	0	0	0
1881c	82	79	3	0	0

¹ Requests for combined authority to conduct electronic surveillance and physical searches under 50 U.S.C. § 1805 and § 1824, respectively, are included in this row and are not separately reflected in the rows addressing requests for authority to conduct electronic surveillance (Section 1805) and physical search (Section 1824) above.

² The government submitted this number of certification(s) during calendar year 2016 but the Court did not take action on any such certification(s) within the calendar year. After completing the declassification review specified in 50 U.S.C. § 1873 (a)(1), the U.S. Department of Justice has advised the AO that this number is currently classified for national security reasons.

The Article III report showed that out of 3170 requests, state and federal courts denied just 2 requests.

A total of 3,168 wiretaps were reported as authorized in 2016, compared with 4,148 the previous year. Of those, 1,551 were authorized by federal judges, compared with 1,403 in 2015. A total of 1,617 wiretaps were authorized by state judges, compared with 2,745 in 2015. Two wiretap applications were reported as denied in 2016.

That's a denial rate of .06%.

And remember, just 336 or so of the FISA orders target Americans, whereas the majority of the Article III warrants would target Americans.

None of that diminishes the potential privacy implications of either kind of warrant. Indeed, the relative ease with which Article III courts grant warrants may invite – as the differential standards for location data already have – FBI to use criminal courts when a FISC order would be too hard to obtain.

But if people are worried about rubber stamp courts, they probably need to focus more closely on the ~~magistrate~~ courts in their backyard.

Update: Swapped Article for Title because I was being an idiot. Thanks to JT for nagging.

Update: We get complaints from one of everyone's favorite magistrates, Stephen Smith.

Please remind your devoted readers that federal magistrate judges do not issue wiretaps. That fun task is reserved for the federal article III judges with lifetime appointments. We do issue all the other electronic surveillance orders and warrants, but unfortunately no stats are kept by anyone on our grants/denials/modifications. DOJ does keep track of pen/traps obtained, but of course the judge's role on those is purely clerical—we don't review the evidence, but merely check to see that the application is signed by the AUSA and in proper form. Some of us are working on the MJ warrant reporting issue, which is a pet peeve of mine. But I do not think it fair to tar all federal magistrate judges with the rubber stamp label, especially not based on the wiretap numbers with which we have nothing to do.

Corrected accordingly, and my apologies to the

magistrates I've maligned.