

THE FISA COURT ACCEPTED 9% FEWER COMBINED APPLICATIONS LAST YEAR

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.

Approval rates for combined orders, 2017 versus 2016

	Applications	Granted	Modified	Denied in Part	Denied in Full
2017	1,235	868	308	41	18
2016	1,338	1,052	260	18	8

These are for combined orders, meaning the government wants to collect both data in motion and (collect stored data and/or conduct a physical search). Modifications usually mean additional reporting and/or minimization procedures (meaning the government had to treat the collected data with additional care). An order denied in part might prohibit the collection on one of the selectors submitted to the court, but not a bunch of other ones. An order denied in full would represent a complete rejection of a preliminary order (these won't show up on DOJ's numbers because those are fluffed to look good).

There are several things that might explain

these numbers. First, the rising modification number might mean the government is using new techniques that present additional privacy concerns – accessing cell phones are a likely one, especially given the Riley SCOTUS precedent. Hacking is another technique that might pose specific privacy concerns, or accessing entire servers.

The denied in part number likely stems from the government asking to surveil selectors that are more attenuated from the actual target. The rejections might reflect individual selectors for which the FISC didn't agree the government had shown probable cause the selector was being used by an agent of a foreign power.

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. I'll do a follow-up post describing why this report may reflect that has happened.

Here's this year's report, covering 2017, and last year's report, covering 2016. This post provides background on the requirement and how these reports differ from the required DOJ report. The full tables from the two reports are below. They show an increased rate of modifications for 1861, which are 215 orders, as well.

2018 Report (covering 2017)

Section	Applications or Certifications	Orders Granted	Orders Modified	Orders Denied in Part	Applications or Certifications Denied
1805 only	104	60	36	4	4
1824 only	33	20	9	2	2
1805 and 1824 ¹	1,235	868	308	41	18
1842	34	19	13	1	1
1861	118	92	23	2	1
1881a	0	0	0 ²	0	0
1881b	0	0	0	0	0
1881c	90	88	2	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 This number reflects certification(s) submitted during calendar year 2016 that were decided in 2017. No additional certifications were submitted during 2017. 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.

2017 Report (covering 2016)

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.