

Former Judge Slams Foreign Intelligence Surveillance Court Procedures

by Lauren Henry
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The Privacy and Civil Liberties Oversight Board (PCLOB) [met yesterday for a workshop](#) [1] addressing the National Security Agency's controversial approach to surveillance in programs supposedly authorized by Section 215 of the PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act. The workshop consisted of three panels of experts, which focused on the legal, technological, and policy aspects of the programs.

Many panelists worried that the current procedures of the Foreign Intelligence Surveillance Court (FISC) seriously hamstring its ability to adequately protect civil liberties. Panelists concerned on this included Hon. James Robertson, a retired judge of that court. Without reform, the FISC runs the risk of being a mere rubber stamp of approval, not a true check on misuse of government authority.

Judge Robertson flagged two key concerns with the Foreign Intelligence Surveillance Court's procedures after they were amended in 2008 by the FISA Amendment Act (FAA).

First, since the government presents instances where it wants to use its powers under FISA to the FISC without an adversary it is not well placed to act as an unbiased court and judge the merits of the case. Judge Robertson noted that as a district court judge, he and his colleagues often deepen their understanding of the case and find their ultimate position only by reading briefs prepared by each party. Lawyers and judges are trained to operate in an adversarial system. When the government presents its case to the FISC without an adversary, Judge Robertson suggested that the process becomes more like administrative approval than a true judgment on the merits.

Judge Robertson's second concern was that the FISC is regularly tasked to handle cases of general application. The deliberative process particular to judges is designed to handle specific controversies based on comparing one individual case to another. Courts are less good at resolving forward-looking questions of broad application. The administrative state and the legislature are the government organs designed to resolve general questions of policy affecting the interests of an open-ended number of people. Courts should apply the rule of law, not create policy.

Judge Robertson expressed the belief that these problems with the FISC could be fixed through reforming its procedures. Policy proposals arose in both the legal and policy panels to address these concerns.

Panelists suggested that the non-adversarial nature of the proceedings could be cured by beefing up companies' ability to contest in the FISC (currently, companies don't have access to much of the relevant information), and permitting civil society groups to file amicus briefs.

The problem of how to prevent the FISC from making major policy determinations in secret was somewhat thornier. As board member Jim Dempsey suggested, there may be no avoiding some grouping of cases to be investigated. The policy panelists suggested that this might be a reason to allow some subset of cases that may have broad implications to be appealed or directly sent to Article III courts. Where the generality of the holding cannot be averted, sunlight (or even just the threat thereof) may be a good remedy to encourage accountability and moderation in judicial holdings.

The PCLOB would do well to consider the concerns and recommendations of Judge Robertson and the other panelists from yesterday's workshop. The administration has justified its data collection procedures by [arguing](#) [2] that all three branches of government are involved with the procedure. It is a serious blow to the government's position and the legitimacy of the program if, as panelists persuasively argued, the judicial organ is not adequately able to protect civil rights. Tailored reform



of FISC procedures could go a long way to giving teeth to the government's assurance that the constitutional rights of Americans are being respected by the NSA's programs.

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