

LAWFARE RESEARCH PAPER SERIES

VOL. 2

JUNE 3, 2014

NO. 2

THE CHANGING COMPOSITION OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT AND WHAT IF ANYTHING TO DO ABOUT IT

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INTRODUCTION

The Foreign Intelligence Surveillance Court (FISC) acts on government applications to undertake national security-related investigations, principally domestic electronic surveillance. The now-eleven-member FISC has been the object of debate about the costs and benefits of its largely non-adversary proceedings and its comparative secrecy. There has also been controversy over whether the three chief justices in office since the FISC's 1978 creation (Warren E. Burger, William H. Rehnquist, and John G. Roberts, Jr.) have designated FISC members, from among sitting district court judges, who are disproportionately Republican appointees or former prosecutors and debate over the implications of any such disproportions.

The three-member Foreign Intelligence Surveillance Court of Review (FISCR) hears appeals from denied applications, but that court has been largely inactive because the FISC grants almost all final applications—a somewhat imprecise statement that overlooks such twists as applications the government

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withdraws in the face of likely denials and applications it modifies at the FISC's suggestion before resubmitting.

The FISC's designation regime has gained attention since last summer, when [Ezra Klein](#), [Charlie Savage](#) and others noted the heavy preponderance of Republican appointees among Chief Justice Roberts's FISC designees, and legislators introduced several bills to change the designation process. In May, 2014, I counted 18 FISC-related bills pending in Congress, five of which would reassign the designation responsibility to various configurations of the president and Senate, the chief justice and other justices, the Congressional leadership, and the chief circuit judges.

Those proposing change claim that the FISC has been overloaded with judges who, as Republican appointees and former prosecutors, may be less likely than others to question surveillance requests rigorously, and more likely to stress national security over privacy when the court, as Representative Adam Schiff put it, "oversee[s] the constitutionality and scope of the programs." Schiff [said](#) in July 2013 that "10 of the 11 judges currently serving on the FISC were appointed to the federal bench by Presidents from one political party." (The division is now nine of 11.) Senator Richard Blumenthal [pointed to](#) the preponderance of Republican appointees, and noted that "half of ... Chief Justice [Roberts's] choices have been former executive branch officials." He called for a FISC that "is geographically and ideologically diverse and better reflects the full diversity of perspectives on questions of national security, privacy, and liberty."

The December 2013 [report](#) of the President's Review Group on Intelligence and Communications Technologies, noting the heavy majority of Republican appointees, said that "Republican-appointed and Democratic-appointed judges sometimes have divergent views, including on issues involving privacy, civil liberties, and claims of national security."

Implicit in these comments is another consideration: if the FISC is dominated by appointees of one political party, or by former prosecutors, it may appear ideologically oriented even if it is not, and optics matter to the FISC's legitimacy during debates over national security and privacy.

Former FISC presiding judge John D. Bates (D.C.), who is now director of the Administrative Office of the U.S. Courts (and the chief justice's designated liaison for the judiciary on FISA matters), [responded](#) to various FISC-related recommendations. As to the designation process, he cautioned that proposals involving "more persons" and "likely to introduce political factors" could prolong FISC vacancies, risk leaking embarrassing information from prospective designees' security background investigations, and ignores the chief justice's "unique role in the Judicial Branch."

In this paper, I look at the patterns of designations to the FISC since the 1978 passage of the Foreign Intelligence Surveillance Act (FISA). I have confined this analysis to the FISC, since the FISCR sees so few actual cases. This examination reveals the following:

- The party of the judges' appointing presidents, and the judges' prosecutorial experience, merit examination even if links between these variables and FISC decisions is speculative at best.
- Circuit representation on the FISC has been generally balanced apart from the statutory preference for judges from the District of Columbia Circuit.
- The proportion of FISC judges who are white males has been declining; who are Republican appointees has been increasing; who are former prosecutors has declined slightly; and who are former long-time prosecutors has increased slightly.
- FISC designees, compared to larger groups of presumptively FISC-eligible judges, have included proportionately more white males, Republican appointees, and former prosecutors.
- Republican-appointees have been in the majority on 32 of the 34 different iterations of FISC membership created by chief justices' designations. Former prosecutors have been the majority on 28, but former long-time prosecutors have had a much smaller presence.

I conclude the paper with a brief assessment of the pros and cons of changing the designation process and of the major alternatives on the legislative table.

I. ASSESSING POSSIBLE LINKS BETWEEN BACKGROUND CHARACTERISTICS & FISC DECISIONS

The FISA authorized the chief justice to designate seven district judges from separate judicial circuits to seven-year, non-renewable terms on the FISC. The 2001 USA PATRIOT Act raised the court's size to 11 judges from at least seven circuits and provided that at least three designees must reside within 20 miles of the District of Columbia. Judges rotate weekly into the court's Washington, D.C., site to review applications as the "duty judge." The court's [rules](#) authorize en banc hearings or rehearings in very limited circumstances.

The most direct way to test the relationships, if any, between FISC decision-making and the background characteristics of its judges would be to measure judicial behavior on the FISC in light of those characteristics. Measuring that behavior would be a challenge due to the secrecy in which the FISC operates and because its review of surveillance requests can be iterative and interactive, particularly in comparison to district courts' often up-or-down decisions.

So we are left to informed speculation as to how much, if at all, these background characteristics matter. Some note, for example, that the most famous confrontations between the FISC and the executive branch have involved Judges Bates, Reggie Walton, and Royce Lamberth, Republican appointees with law enforcement experience (broadly defined)—the background characteristics that critics worry may make the FISC a "rubber stamp." Noting those confrontations, though, is not the same as systematically analyzing large sets of FISC decisions. Professor Theodore Ruger tried to

[assess](#) the impact of Chief Justice Rehnquist's FISC designees by comparing their Fourth Amendment decisions with those of a random sample of other district judges. He concluded that Rehnquist's designees were no more conservative on those matters than the control group. Such analysis, though, as Ruger points out, is methodologically difficult and subject to its own limitations.

Substantial research has found that the party-of-appointing-president—the most referenced variable in the debate over FISC designations—has some power to predict judges' decisions *on the district courts*. The most recent [study](#), based on thousands of district judge decisions, found that those of Democratic and Republican appointees varied but not greatly on a collection of criminal justice questions and on another collection of civil rights and civil liberties questions. For appointees of Presidents Ronald Reagan through Barack Obama (presidents whose appointees have served on the FISC since 2005), the range on the criminal justice questions was 13 percentage points: at one end of the spectrum, Clinton appointees found for defendants 38 percent of the time versus 25 percent for Reagan appointees at the other end. On the civil liberties questions, the range was smaller—10 percentage points: Obama appointees found for claimants 42 percent of the time to 32 percent for W. Bush appointees.

Those findings are of limited use in predicting variations in FISC decision making. Not only are the ranges narrow, but the questions presented to district courts are much broader than those that come before the FISC. The “vast majority” of the latter, according to Judge Bates, “involve the application of a probable cause or other factual standard to case-specific facts and typically implicate the privacy interests of few persons other than the specific target.” On the other hand, factors that might encourage more ideological decision making on the FISC include its largely non-adversarial process, the slim likelihood of appellate review, and, to the very limited degree FISC judges make collective decisions, the possibility that “group polarization” (a somewhat disputed theory) may amplify like voting in groups dominated by Republican (or Democratic) appointees.

Senator Blumenthal, a former U.S. attorney and state attorney general, has [said](#) that “judges who used to be executive branch lawyers were more likely to . . . defer to the Justice Department if executive branch officials told them that new surveillance powers were justified.” Blumenthal's experience is instructive, although courthouse conventional wisdom sometimes depicts former prosecutors as especially alert to prosecutorial chicanery. In any event, I have found little recent academic analysis of decisional differences between district judges with and without prosecutorial experience (a broader category than former executive branch officials). One [article](#) treated the topic briefly and with inconclusive results. A methodologically more rigorous [analysis](#) concerning U.S. *circuit* judges found no statistically significant correlation.

Appointing president and prosecutorial experience may be side-effects of designations made for more specific reasons. Chief justices do not designate FISC judges at random, either from all judges or from those appointed by

presidents of either party or among those with or without prosecutorial experience. It is reasonable to assume that chief justices, beyond learning of prospective designees' willingness to serve, use information about their track records, reputations among colleagues, up-to-date dockets, and background factors they find relevant. But to the degree (if at all) that chief justices designate FISC judges because of a perceived strong orientation toward law enforcement and national security, those judges may be more likely to be Republican appointees or ex-prosecutors or both. (A slightly higher proportion of Republican appointees on the FISC were ex-prosecutors than were Democratic appointees—67 percent to 59 percent—and all of the FISC designees with over ten years of prosecutorial experience had been appointed to the district court by Republican presidents.)

And, as noted above, even if the FISC is not ideologically oriented, it may appear so if it is dominated by appointees of one political party, or by former prosecutors.

II. RESEARCH APPROACH

To assess any variations among chief justices' FISC designees, and any variations between those designees and larger groups of judges who are or were presumptively eligible for FISC service, I used the commonly referenced lists of designees on the [Federation of American Scientists website](#) and information from the Federal Judicial Center's [Biographical Directory of Federal Judges](#).

Identifying appointing president, gender, race, and service dates was straightforward. To identify judges with prosecutorial experience, I used the FJC site's "Professional Career" narrative data to identify any former positions in the Justice Department, and any other positions (federal or state, line or supervisory) that appeared to investigate or prosecute alleged criminal activity or alleged civil violations. I also included those few judges who served on, or as staff to, executive or legislative committees concerned with national security policies. The great majority of judges whom I coded as having prosecutorial experience, however, were former federal and state prosecutors. I also recorded service in public defender positions, and in non-judicial positions in the Judge Advocate General Corps, though both returned meager numbers.

III. COMPARING DESIGNEES OF CHIEF JUSTICES BURGER, REHNQUIST, & ROBERTS

A. Circuit Representation

The 1978 statute directed that the FISC's then-seven judges each come from a different circuit. The 2001 statute enlarged the FISC to 11 judges but did not expand the required circuit representation. The 11 FISC designees serving as of May 2014 include three from the District of Columbia and one each from eight other circuits. The three D.C. judges reflect the 2001 statutory mandate that at least three FISC judges live within 20 miles of the capital, which has boosted the D.C. Circuit's representation (but not the Fourth

Circuit's). That requirement aside, both Rehnquist and Roberts appear to have spread the designations broadly among the circuits, as opposed to Burger, who drew his designees disproportionately from fewer circuits.

TABLE 1: CIRCUIT REPRESENTATION ON THE FISC AND AMONG ALL DISTRICT JUDGESHIPS

	ALL	DC	1	2	3	4	5	6	7	8	9	10	11
WEB '79-'86	15	2		3	1	2			2	2	1	1	1
WHR '86-'01	17	2	3	1	1	2	1	1	1	1	1	1	2
WHR '02-'05	9	2		1		1	1	1			1	2	0
JGR '05-'14	15	5	1	1	1		1	1	1	1	1	1	1
ALL FISC	56	11 20%	4 7%	6 11%	3 5%	5 9%	3 5%	3 5%	4 7%	4 7%	4 7%	5 9%	4 7%
2014 A J'ps	680	16 2%	29 4%	62 9%	59 9%	56 8%	83 12%	63 9%	47 7%	44 6%	111 16%	41 6%	69 10%

The 11 D.C. Circuit designees comprise 20 percent of the FISC total, although its 16 authorized district judgeships are only two percent of all 680 permanent and temporary authorized district judgeships system-wide in 2014, according to the Federal Judicial Center. (Judgeships added between 1979 and 2014 have barely altered circuit representation percentages.) There is no requirement that circuit representation on the FISC mirror circuit representation among authorized judgeships, and it does not. For one thing, 31 of the 56 FISC judges have been senior judges, who do not occupy authorized judgeships. Beyond the overweighted membership of the D.C Circuit, five circuits (First, Second, Fourth, Eighth, and Tenth) have contributed, in percentage terms, more to the FISC than to the national pool of authorized judgeships, while the Third, Fifth, Sixth, Ninth, and Eleventh have been underrepresented. Most differences are very slight, although the Fifth and Ninth Circuits' representations nationally are more than twice that of their FISC representation.

B. Background Characteristics

This table shows the breakdown overall and of each chief justice's designees as to demography, Article III tenure when designated, appointing president's party, prosecutorial experience (as well as public defender and JAG experience). The small numbers (15 designees each by Burger and by Roberts) caution against expansive inferences.

TABLE 2: CHIEF JUSTICES' FISC DESIGNEES

		WhM ¹	Ten. ²	R appt	Pros Ex.	Pros ³ Yrs	# 10 Yrs+ ⁴	JAG	Pub Def
WEB '79-'86	(15)	14 93%	16	9 60%	11 73%	5	1/11	0	1 14%
WHR '86-'05	(26)	23 88%	13	18 69%	16 62%	8	4/16	2 8%	3 12%
JGR '05-'14	(15)	9 60%	15	12 80%	9 60%	11	4/9	1 7%	1 7%
TOTAL	56	46 82%	14	39 70%	36 64%	8	9/36	3 5%	5 9%

¹ White males² Average Art. III tenure when designated³ Average years as prosecutor⁴ Ten or more years as prosecutor

Demographic diversity has not been a major point of contention as to the FISC. As shown by the first column, the proportion of white males has declined steadily—and not surprisingly given the increase of diversity in the judiciary generally.

FISC judges' district judge tenure at the time of designation has varied. Burger's designees had served on average 15.9 years on the district court when they joined the FISC, versus 13.3 years for Rehnquist's. For Roberts, the average tenure at designation is 14.6, but the median is 11.3 years. Five of Robert's designees are Reagan appointees, each with more than 20 years on the bench when designated. But his 15 designees also include the two with the shortest Article III service when designated—4.2 years for his first designee and 3.2 for his most recent designee.

The proportion of Republican appointees has been increasing—from three-fifths of Burger's designees to four fifths of Roberts's. So far, President Reagan's appointees have dominated the FISC—13 judges, almost a quarter of the total—followed by eight Nixon appointees, six each for Clinton and W. Bush and five or fewer for other presidents, starting with Eisenhower. Johnson (two) and Obama (one) have the fewest designees.

As demonstrated in the next table, chief justices' percentages of Republican appointees on the FISC have not necessarily reflected the comparable percentages in their designees to other bodies: the committees of the Judicial Conference, the Judicial Panel on Multidistrict Litigation (which consolidates large civil cases for pretrial proceedings), the Temporary Emergency Court of Appeals (created to hear appeals from district court decisions arising from various price stabilization statutes), the Foreign Intelligence Surveillance Court of Review, mentioned at the outset of this paper, and the special panel that appointed special prosecutors. (I have not included the five-member and apparently never-used Alien Terrorist Removal Court.)

TABLE 3: PERCENT OF REPUBLICAN APPOINTEES THAT CHIEF JUSTICES HAVE DESIGNATED TO DIFFERENT BODIES

	FISC	FISCR	JCUS Com*	JPMDL*	TECA**	Spec. Panel**
	1978-	1978-	1939-	1968-	1971-92	1978-2000
WEB	60%	3 of 5	58%	36%	41%	3 of 5
WHR	69%	8 of 9	60%	83%		4 of 6
JGR	80%	1 of 4	67%	30%		

* Source: T. George and M. Williams, Venue Shopping, The Judges of the U.S. Judicial Panel on Multidistrict Litigation, 97 *Judicature* 196 (Jan/Feb. 2014).

** Source: T. Ruger, The Judicial Appointment Power of the Chief Justice, 7 *U. Penn. J. Con. Law* 341 (2004).

The proportion of judges with prosecutorial experience has declined slightly, from 73 percent of Burger's designees to 60 percent of Roberts's. The 11 former prosecutors whom Burger designated had been in those positions an average of five years, a figure that went up slightly for Rehnquist's and more so for Roberts's designees. For those who had been prosecutors for ten years or more (a somewhat arbitrary cut-off that I adopted to eliminate, for example, judges who spent a short time right after law school in the state's attorney's office), the proportions have increased, from one of Burger's 11 ex-prosecutor designees to almost half of Roberts's nine.

FISC judges with experience as public defenders or in the Judge Advocate General's Corps have been small in numbers and percentages. Only one, a Rehnquist designee, served as a public defender for more than ten years.

Chief justices have designated nine FISC presiding judges, five of whom were already on the FISC when so designated. All but one have been District of Columbia Circuit district judges. Five of the nine were Republican appointees, a consequence primarily of Burger's and Roberts's designees; only one of Rehnquist's four presiding-judge designees was a Republican appointee.

TABLE 4: CHIEF JUSTICES' PRESIDING JUDGE DESIGNEES

		WhM	R appt	Pros Ex.	10 yrs +
WB '79-'86*	(2)	2	1	1	0
WR '86-'05	(4)	2	1	3	1
JR '85-'14	(3)	2	3	3	1
TOTAL	9	6	5	7	2

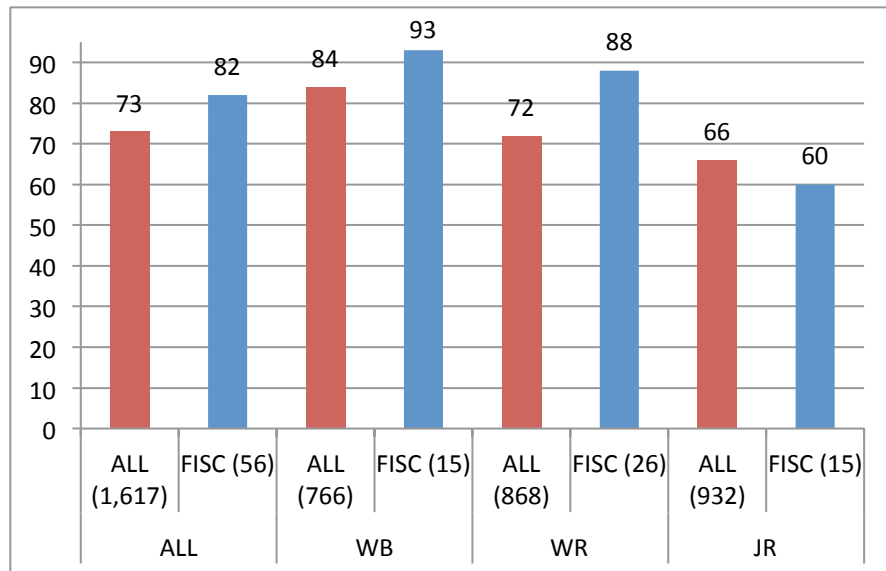
Comparisons with likely designee pools

Chief justices can only designate FISC judges from those who are district judges at the time of the designation and they would hesitate to select new judges, who are learning the ropes of their principal position. They have, however, selected, of the 56 total, 31 senior (or soon-to-be-senior-eligible) judges, who generally have more experience and lower caseloads.

For each chief justice, I created a cohort of all district judges commissioned within the same date range as that chief justice's FISC designees. Burger's earliest commissioned judge received his commission on February 7, 1955. The most recent commission was July 29, 1971. All district judges commissioned between those dates became the comparison group for Burger's FISC designees, except those who became statutorily ineligible before 1979 as a consequence of an appellate appointment or resignation (or death). I drew the Rehnquist and Roberts pools in the same way—commission dates between October 17, 1972 and March 26, 1997 and between August 20, 1982 and March 17, 2011—excluding those who became ineligible before Rehnquist and Roberts took office. Overall, by my count, 1,617 district judges were (a) commissioned within these ranges and (b) were serving on the district court at the time of at least one FISC vacancy. Below I offer simple percentage comparisons. More rigorous statistical tests might suggest different relationships.

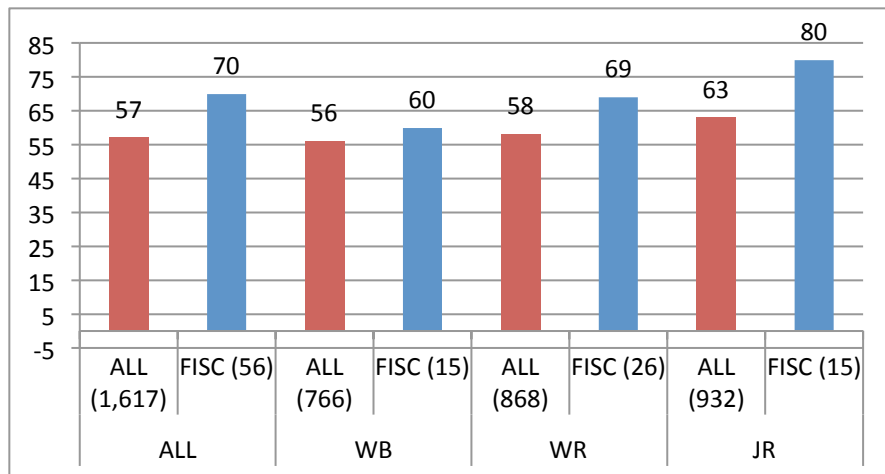
As to white males, overall they constitute 82 percent of FISC designees compared to 73 percent in the comparison group. The difference was greatest for Rehnquist. Roberts, on the other hand, selected a smaller percent of white males for the FISC (60 percent) than were in the larger cohort (66 percent).

FIGURE 1: PERCENTAGE WHITE MALES



As to party of appointing president, overall, 57 percent of the 1,617 district judges were Republican appointees but 70 percent of the FISC judges have been Republican appointees. The difference was narrowest for Burger (56 percent of the pool and 60 percent of his 15 designees). It was greatest for Roberts, a gap of 17 percentage points.

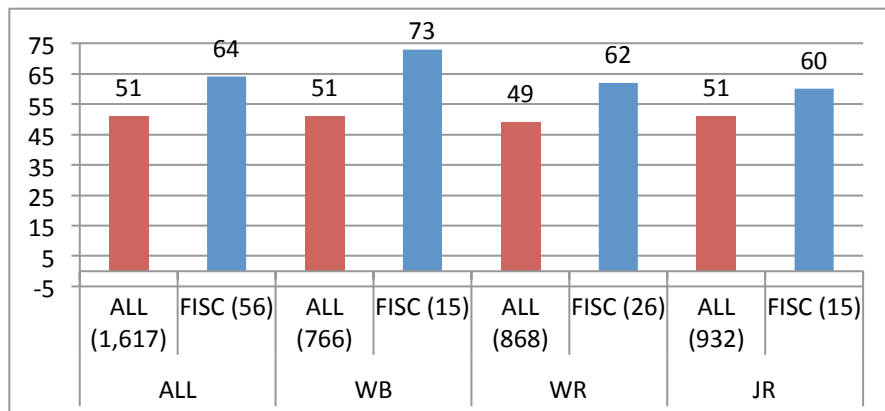
FIGURE 2: PERCENTAGE OF REPUBLICAN APPOINTEES



I explored whether the gap for Roberts's designees may have been skewed by his 2014 designation of one Obama appointee, which brought into the comparison group all Obama appointees commissioned by March 17, 2011. In fact, that added only 55 Democratic appointees to the pool. Removing the Obama appointees from Roberts's comparison group and his FISC designees increases the percentage of Republican appointees overall to 67 percent, and boosts Roberts's percentage of Republican designees on the FISC to 86 percent—a gap greater than in the chart above.

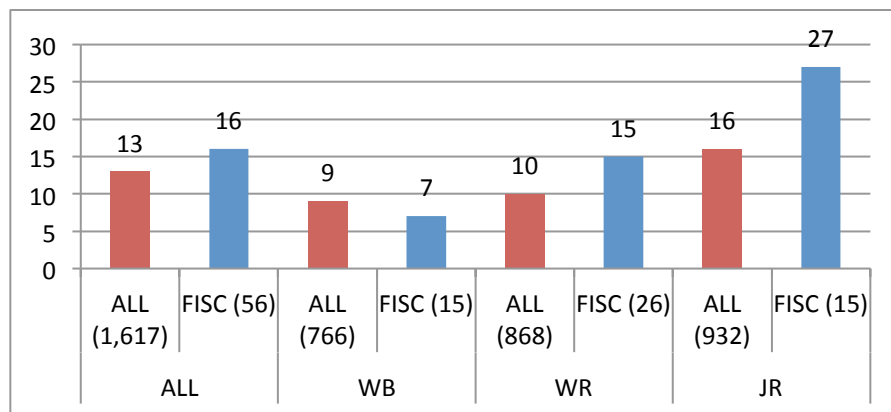
As to former prosecutors, about half the judges in the comparison groups had some prosecutorial experience. All three chief justices' FISC designees had greater percentages of former prosecutors than in the comparison pools. Overall and for Burger and Rehnquist, the percentage point gaps were in double digits; for Roberts it was nine points.

FIGURE 3: PERCENTAGE WITH PROSECUTORIAL EXPERIENCE



As to former prosecutors with at least ten years of experience as prosecutors, the percentage of long-term prosecutors in the larger groups has been rising but only slightly (from nine percent in Burger's group to 16 percent in Roberts's), but that percentage among FISC designees has been increasing more sharply. Only one of Burger's 15 designees was a long-term prosecutor, versus nine percent in the larger group. Rehnquist's percentage difference was in the opposite direction (four of 26). Of Roberts's 15 designees, four, or 27 percent had served for ten or more years in prosecutorial positions, compared to 16 percent in the respective population.

FIGURE 4: PERCENTAGE WITH 10+ YEARS OF PROSECUTORIAL EXPERIENCE



IV. THE CHANGING COMPOSITION OF THE FISC

With the designation of new FISC members, chief justices have created 34 sets of designees. The chart below shows the seven courts designated by Burger, the 18 by Rehnquist, and the nine by Roberts. Obviously, Rehnquist and Roberts did not designate all of the FISC judges serving during their years in office. Burger designated six of the 32 judges on the FISC during Rehnquist's term, and Rehnquist designated nine of the 24 judges during Roberts's tenure. But sorting the data this way shows the changing composition of the court and the gradual impact of chief justices' choices.

FIGURE 5: REPUBLICAN AND DEMOCRATIC APPOINTEES



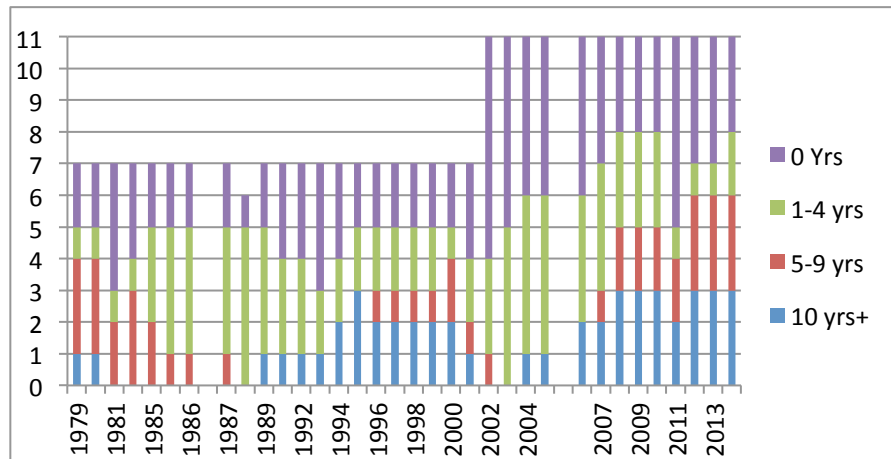
As this chart shows, the Republican-appointee component of the FISC has been rising gradually. By and large, Republican appointees heavily dominated the FISC until 2002, when its membership expanded to eleven. At that point, under Rehnquist, the balance became fairly even; in 2003 and 2004 Democratic appointees were a majority of FISC members, the only time that has occurred. Then the balance shifted back toward Republican appointees. At first glance, that shift would seem to show the growing prominence, then decline, of Clinton appointees in the presumptive eligibility pool and the growing availability of George W. Bush appointees. I observed that trend in a separate [paper](#) on Roberts's designations of Judicial Conference committee chairs. The pattern on the FISC, however, is more complicated and suggests that more is at work than simple changes in the eligibility pool. Of Rehnquist's four Democratic-appointed designees from 2002 to 2005, Clinton had appointed three and Carter one. But Roberts did not turn heavily to George W. Bush appointees. Of his 12 Republican-appointed designees, five had been appointed by Reagan, one by George H.W. Bush, and six by the second President Bush. Of Roberts's six designees who were not named to the bench by George W. Bush, three were in senior status when designated (four are in senior status now).

The table below shows the ratio of Republican appointees among the designees, both as to range and average. The ranges and the average ratios have both increased.

TABLE 5: PROPORTION OF FISC JUDGES APPOINTED BY DEMOCRATIC AND REPUBLICAN PRESIDENTS

During the tenure of	Number of courts	Ratio of R app'tees, range	Ratio of R app'tees, average
WEB, '79-'86	7	.57-.86	.65
WHR, '87-'05	18	.45-.86	.70
JGR, '05-'14	9	.73-.91	.81
TOTAL	34	.45-.91	.72

Similarly, designees with prosecutorial experience have been majorities on 28 of the 34 FISC iterations, all except 1981, 1993, 2001-03, and 2011.

FIGURE 6: FISC MEMBERS & YRS. OF PROSECUTORIAL EXPERIENCE

The prosecutorial background component of the various FISC courts has remained fairly steady, as seen in this table's summary of the ratios.

TABLE 6: PROPORTION OF FISC JUDGES WITH PROSECUTORIAL EXPERIENCE

During the tenure of	Number of courts	Ratio of ex pros'rs, range	Ratio of ex pros'rs, average
WEB, '79-'86	7	.43-.71	.65
WHR, '87-'05	18	.55-.83	.62
JGR, '05-'14	9	.45-.73	.65
TOTAL	34	.43-.83	.64

The Restricting the count to FISC designees who had ten years or more of prosecutorial experience changes the picture, showing a slight but gradual increase. But the *number* of such prosecutors has been small, as shown in the chart (e.g., one in 1979, three in 2014), and in the ratios, as shown below.

TABLE 7: PROPORTION OF FISC JUDGES WITH 10 YEARS OR MORE PROSECUTORIAL EXPERIENCE

During the tenure of	Number of courts	Ratio of ex pros'rs, range	Ratio of ex pros'rs, average
WEB, '79-'86	7	.0-.14	.04
WHR, '87-'05	18	.0-.43	.17
JGR, '05-'14	9	.18-.27	.24
TOTAL	34	.0-.43	.16

V. THOUGHTS ON THE MERITS OF REFORM PROPOSALS

Overrepresentation of Republican appointees and experienced prosecutors may create an optics problem for the FISC—an appearance of a stacked deck—but it hardly establishes how differently the FISC would have behaved, if at all, with a different membership. Nevertheless, here are some preliminary observations.

The case against change: There have been a number of legislative proposals for change but no groundswell in favor of them. Changes are not in the bills of some of the most prominent critics of the current surveillance regime, in particular Senate Intelligence and Judiciary committee chairs Diane Feinstein and Patrick Leahy, and former House Judiciary chair James Sensenbrenner. Title III of Sensenbrenner's USA FREEDOM ACT, which the House approved on May 22, 2014, and its Senate counterpart, introduced by Leahy, both have titles on "Foreign Intelligence Surveillance Court Reforms" without any provision for changes in judge designation. (Senator Ron Wyden, and House Judiciary Committee ranking member John Conyers, are co-sponsors of bills that, by contrast, would alter the designation process.) Although the President's Review Group on Intelligence and Communications Technologies proposed a change, the Privacy and Civil Liberties Oversight Board, in a January 2014 [report](#) dealing in part with "the Operations of the Foreign Intelligence Surveillance Court" and replete with calls for bolstering public confidence in the court, made no recommendations concerning designating its judges.

To the degree that Republican appointees' dominance presents an appearance problem, Chief Justice Roberts can change the picture on his own. This year, he selected a District of Columbia Democratic appointee to replace a term-expired D.C. Republican appointee, although that was partly of necessity if he wanted to draw from that court (as opposed to Fourth Circuit district

judges who reside in the Washington, D.C. area). For whatever reasons, all but one of the Republican appointees now on the D.C. district court are, or have been, on the FISC, compared to only three of the 10 Democratic appointees now on the court with commission dates before that of the current Democratic-appointed designee from D.C.

All the extant proposals would diversify participation in the designation process, which, as Judge Bates has argued, could delay filling FISC vacancies. With FISC duty judges taking a week away from their district courts to review roughly 40 surveillance applications a week, plus the need to deal with other applications, FISC vacancies are nothing to take lightly. That need will be more compelling if Congress adds to its workload with additional statutory responsibilities. Prolonged FISC vacancies have been rare because termination dates, usually in mid-May, are clear, providing ample lead time for security and other investigations of prospective designees. Eight FISC designees, though, have left earlier than the end of their seven year terms—a consequence of death, appellate appointment, retirement from the bench, objections to administration procedures, and other reasons that are not apparent on the public record. We can presume that not all of these early departures could be anticipated.

The case for change: A single and unreviewable appointer—no matter who— may inevitably compromise the FISC’s image. Congress’s 1978 ssignment of that responsibility to the chief justice, according to one [history](#), reflected the gradual and unplanned accretion of authority to that office, rather than a specific determination that the office is the best place to lodge the responsibility. The debate over chief justices’ sole authority to designate FISC judges is part of a larger [debate](#) over whether the collection of executive authorities now vested by tradition or statute in the office of chief justice should be the sole responsibility of a single official with no external limits on the incumbent’s tenure. The framers, in this view, gave federal judges life tenure to help them decide cases independently, not to give any judge two or three decades in an executive role the framers never anticipated. Moreover, does any chief justice need the extra burdens and near-inevitable partisan controversy over his FISC designations, especially during times of national controversy over the permissible limits of surveillance?

Were Congress to pursue a change, it would be responding to two lines of criticism: The first holds that the FISC should not be heavily dominated by appointees of a single political party. One way to respond to this criticism would be to borrow from the Court of International Trade’s statute, which says “[n]ot more than five of its [nine (life-tenured)] judges shall be from the same political party.” That is evidently a legacy of its earlier incarnation as the Board of General Appraisers, created in 1890 in the days of contentious disputes over tariffs. Rather than political party membership (and the search it would create for declared independents), Congress could specify that no more than six FISC designees could be judicial appointees of presidents of the same political party. Although many would regard it as demeaning to bring party labels into the

structuring of the judiciary, that is the major stated bone of contention about FISC membership.

The other line of criticism, which blends into concern over Republican-appointee dominance, is vesting in a single individual unreviewable authority to designate the judges. Some legislative proposals would reserve eight FISC judgeship to two designees each of the Senate and House majority and minority leadership. That has somewhat the same drawback as making appointing party a FISC membership criterion, and, assuming the legislators would inevitably designate judges appointed by their parties' presidents, it would label the judges as party representatives.

Representative Schiff has proposed presidential nomination and Senate confirmation: "the American people – through the Senate – should have the opportunity to probe nominees on their Fourth Amendment views and other key matters." Although Schiff is justifiably well-regarded as a principled supporter of sound judicial administration, this strikes me as a seriously flawed proposal. If designation by the chief justice has provoked question about the FISC's impartiality, designation by the president would likely create even more questions. Unlike other courts to which the president appoints judges, the FISC has an extremely narrow jurisdiction. It is the only court in which the president is for the most part, directly or indirectly, the sole litigant. And consider Schiff's 2013 concern, noted above, that "10 of the 11 judges . . . on the FISC were appointed by presidents of one political party." FISC judges' seven-year, non-renewable terms means that its membership will turn over completely during the time in office of a two-term president. A determined president and a same-party Senate could thus designate every member. And to expect the Senate to right any dangers of executive overreach by probing nominees about the Fourth Amendment is to overlook the judicial confirmation process's sorry current state. Confirmation hearings could become efforts to extract promises from would-be designees about how they will treat government surveillance applications—not to mention the delays, which could prolong FISC vacancies.

The President's Review Group would direct each Supreme Court justice to designate district judges from the circuits they serve as circuit justices. Under such a regime, the justices would surely (as we can assume the chief justice does now) turn to the respective chief circuit judges, who are familiar with, or in a better position to find out, the situation of the district judges in the circuit, including the states of their dockets and their reputations among colleagues.

Thus, if Congress is inclined to seek alternatives in order to keep the FISC out of further controversy, it should consider Senator Blumenthal's proposal to vest principal designation responsibility in the chief circuit judges directly. Blumenthal would enlarge the FISC to 13 judges and, for a FISC vacancy in a circuit, authorize the circuit chief to submit a name to the chief justice. If rejected, the chief judge would submit two more, one of whom the chief justice would have to accept. Chief circuit judges come to office by virtue of their age and tenure on the court, not because they are inevitably solid judges of personnel (that is rarely a selection criteria for chief justices either). But a legitimate concern that circuit chiefs might submit designees who for some

reason known only to the chief justice would be inappropriate for the FISC probably could be satisfied by informal preliminary conversations between the chief justice and circuit chief.

Of course, requirements for special security screenings now in place would have to be maintained, and, especially when unexpected vacancies arise, there would be greater danger of delay in filling the vacancies.

This, of course, assumes that any change at all is really necessary. Before exploring the costs and benefits of this or any other major change to the designation process, Congress must first convince itself that the current process is sufficiently problematic—and incapable of self-correction—as to merit a major change.