

FEDERAL BUREAU OF INVESTIGATION

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To: All Divisions

Attn: ADIC, SAC
CDC

From: Office of the General Counsel
NSLU/NSLB, Room 7975

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Case ID #: 66F-HQ-A1247863 (None)

Title: NEW LEGISLATION
REVISIONS TO FCI/IT LEGAL AUTHORITIES
FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Synopsis: Summarizes recent changes to FISA statute and related legal authorities.

Details:

Background

On October 26, 2001, the President signed the "Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" which significantly revises many legal authorities relating to counterterrorism. The Act, which consists of more than 150 sections, effects changes in national security authorities, the substantive criminal law, immigration law, money laundering statutes, victim assistance statutes, and other areas. The National Security Law Unit, OGC, is issuing guidance on those portions of the Act relating to national security operations. This communication addresses changes in the Foreign Intelligence Surveillance Act of 1978 (FISA) and certain other statutes relating to information sharing; a related serial describes changes to National Security Letter authorities. Other OGC communications address the non-national security law portions of the Act.

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In the wake of the September 11, 2001 attacks, the Administration proposed to Congress a variety of proposals to increase the efficiency and effectiveness of FCI/IT operations, and a substantial portion of the Act is given over to this purpose. In particular, the Act seeks to improve the efficiency of the FISA process and to remove barriers to the timely sharing of information between FCI/IT intelligence operations and criminal investigations.

Many provisions of the Act, including most of the national security provisions, are subject to the "sunset" provision described in Section 224 of the Act. This Section states that the authorities expire on December 31, 2005. At that time, Congress will have to decide whether or not to re-authorize the provisions.

The following summarizes the changes in national security authorities by various sections in the Act (A separate EC of this same date addresses changes to National Security Letter (NSL) authorities). For each section, there is a summary of potential changes in FBI operational procedures. Recipients should note that this is only initial guidance; more detailed explanations and procedures may follow in subsequent communications.

1. Sharing Grand Jury, Title III and Criminal Investigative Information

Section 203 first amends Federal Rule of Criminal Procedure 6(e) to permit the disclosure of grand jury information involving intelligence information "to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties." The Section also requires subsequent notice to the Court of the agencies to which information was disseminated and adds a definition of "foreign intelligence information" to Rule 6(e). The Grand Jury portion of this Section (Section 203(a)) is not subject to the sunset provision.

Section 203 then amends Title III to allow the same sort of disclosure of Title III information when the matters involve foreign intelligence "to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties." The Section adds a definition of foreign intelligence information to Title III, and requires the Attorney

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General to develop procedures for the sharing of Grand Jury or Title III information that identifies a U.S. person.

Finally, Section 203 establishes that "notwithstanding any other law" it is lawful for criminal investigators to share foreign intelligence information obtained in the course of a criminal investigation with any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official, as above.

The intent of Section 203 is to eliminate barriers to the timely sharing of information between criminal investigators and other entities (the Intelligence Community, the INS, DoD, etc.) involved in the protection of the national security. The Section essentially gives the FBI full discretion to share criminal investigative information, regardless of its source, whenever it involves foreign intelligence information (which is defined to include all foreign intelligence, counterintelligence, and counterterrorism information).

Procedural Changes: FBI components in possession of information obtained through criminal investigative techniques that is also foreign intelligence information should arrange for the appropriate dissemination of the information. Dissemination to the Intelligence Community must be coordinated through the relevant NSD or CTD units at FBIHQ. When the DOJ issues procedures relating to the dissemination of U.S. person information, the field will receive additional guidance.

2. "Roving" FISA ELSUR Authority

Section 206 amends FISA to allow the Court to issue a "generic" secondary order where the Court finds that the "actions of the target of the application may have the effect of thwarting the identification of a specified person." This means that, when a FISA target engages in tradecraft designed to defeat ELSUR, such as by rapidly switching cell phones, Internet accounts, or meeting venues, the Court can issue an order directing "other persons," i.e., the as yet unknown cell phone carrier, Internet service provider, etc., to effect the authorized electronic surveillance. Even if the target is not engaged in obvious tradecraft, we can obtain such an order as long as the target's actions may have the effect of thwarting surveillance. This will allow the FBI to go directly to the new carrier and establish surveillance on the authorized target without having to return to the Court for a new secondary order. It is likely that the Court will require certain procedures for the use of this authority, to include special minimization requirements and timely after-the-fact reporting.

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Procedural Changes: When the field wants to obtain roving ELSUR authority, the request for a FISA sent to FBIHQ should include specific facts that will allow the Court to find that the actions of the target may have the effect of thwarting the requested surveillance, absent the roving authority. Such facts could include examples of previous tradecraft by the target, by members of the target's group or service, or by others with training or background similar to that presumed for the target. DOJ/OIPR may issue more detailed guidance as experience with this provision grows.

3. Changes in the Duration of FISA Authority

Section 207 extends the standard duration for several categories of FISA orders. First, the section allow for ELSUR and search orders on non-U.S. person agents of a foreign power (pled under Section 101(b)(1)(A) of FISA (i.e., officers and employees of foreign powers, including members of international terrorist groups) to run for an initial period of 120 days (instead of 90) and to be renewed for periods of one year. The section also extends the standard duration of physical search orders in all other cases (U.S. persons and non-officer/employee targets) from 45 to 90 days.

Procedural Changes: None are required. OIPR will transition existing coverages to the new durations as they come up for renewal.

4. Expansion of the FISA Court

In order to increase the availability of FISA judges, Section 207 expands the Court from seven judges to eleven judges, three of whom must reside in the Washington, D.C. area.

Procedural Changes: None are required.

5. Changes in FISA Pen Register/Trap and Trace Authority

Section 214 makes a substantial revision to the standard for a FISA pen register/trap and trace. Prior to the Act, FISA pen registers required two showings: (1) relevance to an investigation, and (2) specific and articulable facts giving reason to believe that the targeted line was being used by an agent of a foreign power, or was in communications with such an agent, under specified circumstances. Section 214 simply eliminates the second of the required showings. FISA pen/trap and trace orders are now available whenever the FBI certifies that "the information likely to be obtained is foreign

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intelligence information not concerning a United States person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."

This new standard requires that the information sought be relevant to an "ongoing investigation to protect against international terrorism or clandestine intelligence activities." Use of this technique is authorized in full investigations properly opened under the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations ("FCI AGG"). The technique also may be authorized in preliminary inquiries, with prior coordination through the relevant NSD or CTD unit at FBIHQ. Although the language differs somewhat from that used in the previous versions of the statute, OGC and DOJ take the position that all investigations authorized pursuant to the FCI AGG are "to protect against international terrorism or clandestine intelligence activities."

The Section also inserts the language "provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States." Congress inserted this to indicate that the technique will not be used against U.S. persons who are merely exercising constitutionally protected rights. However, it is highly unlikely, if not entirely impossible, for an investigation to be authorized under the FCI AGG that is "solely" based on protected activities. In other words, all authorized investigations of U.S. persons will likely involve some allegation or possibility of illegal activity (e.g., terrorism, espionage, clandestine intelligence activities, etc.) which is not protected by the First Amendment.

Finally, the new standard does not mean that FISA pen register/trap and trace authority is only available on the subjects of investigations. The authority is available when the information sought is "relevant" to the investigation, as described above. For example, information concerning apparent associates or, or individuals in contact with, the subject of a investigation, may be relevant.

Procedural Changes: None are required. The field may continue to request FISA pen register/trap and trace authority through FBIHQ in the established manner. However, the requests now need only contain a brief statement explaining the nature of the investigation and the relevance to that investigation of the information sought through the pen register. NSLU and OIPR will

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develop additional guidance streamlining the process for requesting this authority.

6. Changes in FISA Business Records Authority

Section 215 changes the business records authority found in Title V of FISA. The old language allowed the FISA Court to issue an order compelling the production of certain defined categories of business records (the records of common carriers, public accommodations, vehicle rentals, and storage facilities) upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. Section 215 changes this standard to simple relevance (just as in the FISA pen register standard described above) and gives the Court the authority to compel production of "any tangible things (including books, records, papers, documents, and other items for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution." This is the same standard described above for Section 214.

In the past, the FBI has encountered situations in which the holders of relevant records refused to produce them absent a subpoena or other compelling authority. When those records did not fit within the defined categories for National Security Letters or the four categories then defined in the FISA business records section, the FBI had no means of compelling production. With the new language the FBI can seek a FISA court order for any such materials.

Procedural Changes: None are required. The field may continue to request business records orders through FBIHQ in the established manner. However, such requests may now seek production of any relevant information, and need only contain information establishing such relevance. NSLU and OIPR will develop additional guidance streamlining the process for requesting this authority.

7. Changes to "Primary Purpose" Standard in FISA

Sections 218 and 504 clarify the "primary purpose" issue in the FISA statute. In its prior form, the FISA required a certification that foreign intelligence be "the" purpose of the requested authority. The FISA Court interpreted this to mean that foreign intelligence, as opposed to criminal prosecution,

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had to be the "primary" purpose of the requested authority. Thus, interaction between FBI personnel involved in a FISA and criminal prosecutors could call into question the primary intelligence purpose of the FISA (by indicating a purpose different from foreign intelligence). As a result, FISA pleadings have often contained detailed accounts of all communication with criminal prosecutors in cases involving FISA.

Section 218 changes FISA to require a certification that foreign intelligence be "a significant purpose" of the authority sought. Section 504 amends FISA to allow that personnel involved in a FISA may consult with law enforcement officials to coordinate efforts to investigate or protect against attacks, terrorism, sabotage, or clandestine intelligence activities, and that such consultation does not, in itself, undermine the required certification of "significant purpose."

These changes are meant to allow FBI agents greater latitude to consult criminal investigators or prosecutors without putting their FISAs at risk. As such, these changes address extraordinarily complex issues that have long occupied the FISA Court and DOJ. FBIHQ expects that DOJ shortly will issue revised policy on these topics.

Procedural Changes: None are required at present. The field should be aware that greater consultation with prosecutors is now possible, but, given the continuing uncertainty surrounding these issues, should continue to coordinate such consultation through FBIHQ. Additional guidance will be issued.

8. Civil Liability for Unauthorized Disclosure

Section 223 establishes civil liability for certain unauthorized disclosures, including unauthorized disclosures of FISA information. In reference to FISA, this is simply an expansion of existing civil liability, and should not significantly affect operations (since unauthorized disclosure of FISA information is already subject to more severe criminal penalties).

Procedural Changes: None are required. OGC may issue a more detailed analysis of this provision at a later date.

9. Immunity for Compliance with FISA

Section 225 grants providers of wire or electronic communication service, landlords, custodians, and other persons with immunity from civil liability for complying with the requirements of FISA. This provision simply clarifies that

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persons assisting the FBI in the execution of a FISA order are not at risk of civil lawsuits.

Procedural Changes: None are required.

10. Disclosure of Foreign Intelligence Information to the DCI

Section 905 establishes an affirmative requirement, subject to certain exceptions, that federal law enforcement components must expeditiously disclose to the Director of Central Intelligence any foreign intelligence acquired in the course of criminal investigations. The Attorney General will, within the next six months, develop guidelines to govern such disclosures.

Procedural Changes: Disclosures of foreign intelligence to the DCI should occur through FBIHQ, using established liaison channels. Field offices with previously undissemintated foreign intelligence in criminal investigations should communicate the information to FBIHQ. Additional guidance will be issued once the Attorney General has promulgated the required procedures.

11. Computer Trespass Amendment to FISA

Section 1003 incorporates into FISA a definition of "computer trespass" established for the criminal law in another section of the Act. The computer trespass language basically allows that an unauthorized intruder into a computer system (e.g., a hacker) can be subjected to surveillance with the consent of the owner of the computer system and without additional legal authority (before this change, we typically would have had to seek a Title III in criminal investigations). Section 1003 is a technical amendment clarifying that this language applies to the FISA as well. Therefore, under the same conditions as are established in the criminal law, FISA ELSUR authority will not be needed to conduct surveillance of a computer intruder.

Procedural Changes: Offices that believe this new language applies to an investigation should bring the matter to the attention of FBIHQ and seek a legal opinion from NSLU.

Questions and Additional Information

The National Security Law Unit is available to answer questions about this legislation. In addition, materials relating to the new legislation will be posted on the NSLU FBI Intranet website, which can be found

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<http://30.100.99.18/ogc/nslu/> or through the OGC Home Page.

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