

EXPANSION OF POWERS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

BACKGROUND TO FISA

Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to create a separate legal regime for the gathering of foreign intelligence information, as opposed to domestic law enforcement information.¹ FISA grants the FBI exceptional powers to monitor foreign powers and their suspected agents in counterintelligence operations within the United States.² In using these powers, the FBI is exempt from the traditional Fourth Amendment requirements applicable to criminal investigations.

Under FISA, for example, the FBI submits warrant applications to the Foreign Intelligence Surveillance Court, a secret court that hears the government's applications *ex parte* (hearing one side only). In order to obtain warrants under FISA, moreover, the government does not have to demonstrate probable cause of a crime.³ Instead, the FBI must demonstrate only that there is probable cause to believe that the target of the surveillance is an agent of a foreign power.⁴ In order to obtain FISA warrants against "U.S. persons" (i.e., U.S. citizens and legal permanent residents of the United States), however, the government also has to establish that the activities "involve" or "may involve" a violation of criminal statutes (a lower standard than applicable under ordinary criminal law).⁵ For "non-U.S. persons," on the other hand, the government does not have to make any showing that the suspected foreign agent is doing, or is planning to do, anything illegal.⁶

After obtaining a FISA warrant, the FBI can conduct surveillance and physical searches against a suspected foreign agent for a period of 90 days and against a foreign power for an entire year. The searches and surveillance are carried out surreptitiously,

¹ See 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-62.

² See, e.g., Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," p. 5, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

³ In determining whether there is probable cause to issue a traditional criminal warrant, the issuing judge makes "a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁴ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 5, available at <http://www.fas.org/irp/agency/doj/fisa/fisc051702.html> (accessed March 4, 2003).

⁵ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review, November 18, 2002, p. 34, available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf>. See also David Cole, "Secret Court Takes the Fourth," *CounterPunch*, November 22, 2002 (noting that FISA does not require probable cause of a crime), available at <http://www.counterpunch.org/cole1122.html> (accessed March 5, 2003).

⁶ Anita Ramasastry, "The Foreign Intelligence Surveillance Court of Review Creates a Potential End Run Around Traditional Fourth Amendment Protections for Certain Criminal Law Enforcement Wiretaps," *FindLaw Legal Commentary*, November 26, 2002, available at <http://writ.news.findlaw.com/ramasastry/20021126.html> (accessed March 5, 2003).

without any notice to the people being monitored unless and until they are prosecuted. Furthermore, even if the targets are prosecuted they are generally not permitted to challenge the substance of the government's FISA applications and affidavits, as FISA mandates an *in camera* (closed chambers), *ex parte* review of these materials "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security."⁷

Because of the extraordinary nature of these powers, Congress limited the circumstances under which they could be used. The FBI could only use its FISA powers for "the purpose of" gathering foreign intelligence information. The Foreign Intelligence Surveillance Court implemented procedures to enforce this line, trying to ensure that the information obtained through FISA searches and surveillance was not used *sub rosa* in criminal prosecutions.⁸

USA PATRIOT ACT AMENDMENT

At the urging of the administration, however, Congress significantly expanded the government's FISA powers shortly after September 11, 2001. Under Section 218 of the USA PATRIOT Act, the FBI can now seek FISA warrants when the gathering of foreign intelligence is merely "a significant purpose" of the warrant—a slight change in wording that has far-reaching implications. The administration immediately argued that the FBI could now seek a FISA warrant when the government's "primary purpose" was the gathering of information for domestic criminal investigations.⁹ This interpretation would mean that FISA, which was enacted to facilitate the gathering of foreign intelligence information, could now be used as a way to sidestep Fourth Amendment requirements in regular criminal investigations.

The Foreign Intelligence Surveillance Court did not agree with the administration's position. In May 2002, the secret FISA court issued its first ever public opinion, unanimously finding that the administration's interpretation of the amendment would turn the entire purpose of FISA on its head.¹⁰ The court—composed of seven federal judges¹¹—imposed restrictions on the administration's interpretation of its new powers, refusing to permit domestic law enforcement officials to "make

⁷ For a discussion of the FBI's powers under FISA, see *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, pp. 5-6.

⁸ *Ibid.*, p. 9.

⁹ See, e.g., Anita Ramasastry, "Why the Foreign Intelligence Surveillance Act Court Was Correct to Rebuke the Department of Justice," *FindLaw Legal Commentary*, September 4, 2002, available at <http://writ.news.findlaw.com/ramasastry/20020904.html> (accessed March 3, 2003).

¹⁰ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002.

¹¹ Section 208 of the USA Patriot Act called for the appointment of 11 federal judges to the Foreign Intelligence Surveillance Court. At the time the decision was issued, however, only seven federal judges sat on the court: (1) Honorable Royce C. Lamberth; (2) Honorable William H. Stafford, Jr.; (3) Honorable Stanley S. Brotman; (4) Honorable Harold A. Baker; (5) Honorable Michael J. Davis; (6) Honorable Claude M. Hilton; and (7) Honorable Nathaniel M. Gorton.

recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillance.”¹²

The Department of Justice appealed the decision to the Foreign Intelligence Surveillance Court of Review (“the Court of Review”), a court composed of three semi-retired federal judges.¹³ This court was created specifically to hear *ex parte* government appeals of FISA applications that have been denied by the Foreign Intelligence Surveillance Court (there is no mechanism for hearing appeals of successful FISA applications). The government had never before filed an appeal with the Court of Review, however, as the Foreign Intelligence Surveillance Court has never denied a FISA application out of the thousands of applications it has reviewed.¹⁴ On September 9, 2002, the Court of Review convened for the first time in its 24 year history to consider the Department of Justice’s appeal in this case.

The Court of Review overruled the FISA court’s decision on November 18, 2002.¹⁵ The court determined that Congress had intended to relax the barriers between criminal law enforcement and foreign intelligence gathering when it passed the USA PATRIOT Act.¹⁶ It held that the government could now lawfully use its extraordinary FISA powers in criminal investigations, so long as those investigations had some purpose of gathering foreign intelligence information. This was true even when the government’s primary purpose was to prosecute a crime, provided that the crime, itself, was a “foreign intelligence crime” (such as espionage or terrorism).¹⁷ Under such circumstances, according to the court, criminal law enforcement officials could now directly influence the initiation and operation of searches and surveillance under FISA.¹⁸

In so holding, the Court of Review did not accept all aspects of the administration’s expansive interpretation of its new FISA powers. Although the court held that the government’s primary purpose could now be the prosecution of a crime related to foreign intelligence,¹⁹ it also held that “the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes.”²⁰ The court also noted, however, that ordinary crimes would sometimes be inextricably intertwined with foreign

¹² See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 14.

¹³ The judges on the Foreign Intelligence Surveillance Court of Review are: (1) Honorable Ralph Guy; (2) Honorable Edward Leavy; and (3) Honorable Laurence Silberman.

¹⁴ See David Cole, “Secret Court Takes the Fourth,” November 22, 2002, available at <http://www.counterpunch.org/cole1122.html> (accessed March 4, 2003).

¹⁵ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review, November 18, 2002, available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf> (accessed March 5, 2003).

¹⁶ See *Ibid.*, pp. 24-27.

¹⁷ See *Ibid.*, pp. 28-30.

¹⁸ See, e.g., Ramasastry, “The Foreign Intelligence Surveillance Court of Review,” *FindLaw Legal Commentary*, November 26, 2002, (explaining that criminal law enforcement can now “legally direct, or at least heavily influence, FBI investigations related to foreign intelligence”).

¹⁹ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 29-30.

²⁰ *Ibid.*, p. 30. See also Charles Lane, “In Terror War, 2nd Track for Suspects,” *Washington Post*, December 1, 2002.

intelligence crimes. In these intertwined cases, the government will now be able to use FISA and bypass traditional criminal law standards, provided that its investigation also serves some counterintelligence purpose.²¹

THE ADMINISTRATION'S NEW PROPOSALS FOR EXPANDING FISA

Not satisfied with the expansion of its FISA powers under the USA PATRIOT Act (as endorsed by the Court of Review), the Department of Justice has been drafting new proposals to further expand its FISA powers.²² These measures, part of the draft PATRIOT II bill, would further weaken the already tenuous line separating counterintelligence operations from domestic criminal investigations.

One PATRIOT II proposal would significantly increase the scope of FISA by altering the definition of a "foreign power." Currently, a foreign power under FISA is either a foreign government or a foreign organization (ranging from a foreign political organization to a group engaged in international terrorism). Section 101 of the draft bill would expand the definition of a foreign power to cover individuals (including U.S. citizens and permanent residents) suspected of engaging in international terrorism, but who have no known links to any foreign government or to any group engaged in international terrorism. By including unaffiliated individuals within the definition of a "foreign power," the administration would weaken the already minimal due process protections applicable in FISA proceedings. Under the proposal, the administration could obtain a FISA warrant without even establishing that there is probable cause to believe that the target is an agent of a foreign power.²³

Another proposal in the PATRIOT II draft bill would break down the current distinction under FISA between "U.S. persons" and "non-U.S. persons." As discussed above, in order to get a FISA warrant against a U.S. citizen or legal permanent resident, the administration currently has to show that the person is engaged in activities that "involve" or "may involve" some violation of law. For "non-U.S. persons," (i.e., those who are neither U.S. citizens nor legal permanent residents) however, the administration does not have to make any such showing. Section 102 of the draft bill would eliminate this distinction and apply the lower non-U.S. person standard to U.S. citizens and permanent residents.²⁴

A third PATRIOT II proposal would expand the circumstances under which the government can sidestep the FISA courts altogether, using its FISA powers without any judicial review. The Attorney General may currently authorize the use of FISA powers without a warrant, for example, for up to 15 days following a congressional declaration of war. Section 103 of the draft bill would expand the scope of the wartime exception,

²¹ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 28-30.

²² See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed March 5, 2003).

²³ See, e.g., Timothy H. Edgar, "ACLU Interested Persons Memo: Section-by-Section Analysis of Justice Department Draft "Domestic Security Enhancement Act of 2003," February 14, 2003, p. 4, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206> (accessed March 5, 2003).

²⁴ *Ibid.*

allowing it to be invoked after Congress authorizes the use of military force or after an attack on the United States “creating a national emergency.” Presumably, the administration would unilaterally decide when such an attack had occurred and whether it had created a period of national emergency.²⁵

²⁵ Ibid.