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Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act

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Summary

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, amended the definition of “agent of a foreign power” in the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801(b)(1), to add a new category of covered individuals. Under the new “lone wolf” provision, a non-United States person who engages in international terrorism or activities in preparation for international terrorism is deemed to be an “agent of a foreign power” under FISA. The new provision does not change the procedures to be used to apply for a court order authorizing electronic surveillance or a physical search under FISA. If an order is sought under this definition of an “agent of a foreign power,” however, the applicant is not required to demonstrate a connection between the target of the electronic surveillance or the physical search and a foreign nation, foreign group, or international terrorist group. Nor does the Foreign Intelligence Surveillance Court (FISC), in approving such an order, have to find probable cause to believe that such a connection existed. Rather, if the court authorizes such a surveillance or physical search using this new definition of “agent of a foreign power,” the FISC judge has to find, in pertinent part, that, based upon the information provided by the applicant for the order, the target had engaged in or was engaging in international terrorism or activities in preparation therefor.

The Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1862, provides a statutory framework for the use of electronic surveillance or physical searches to acquire foreign intelligence information.¹ It also provides a vehicle

¹ As part of the application process for a Foreign Intelligence Surveillance Court order authorizing electronic surveillance or a physical search, the Assistant to the President for National Security Affairs or an executive branch national security or defense official or officials designated by the President must certify, among other things, that the he or she deems the information sought to be foreign intelligence information, that a significant purpose of the electronic surveillance or physical search is to obtain foreign intelligence information, and that such information cannot reasonably be obtained by normal investigative techniques. The
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for the use of pen registers or trap and trace devices in investigations conducted by the FBI under guidelines approved by the Attorney General under E.O. 12333 or a successor order to acquire foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. In permitting the use of pen registers and trap and trace devices, FISA provides that such an investigation of a United States person may not be conducted solely on the basis of activities protected under the First Amendment of the U.S. Constitution. In addition, FISA provides a means for the government to obtain access to certain business records or other tangible things for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, again provided that such investigation of a United States person may not be conducted solely based upon First Amendment protected activities.

An applicant for a court order under FISA authorizing electronic surveillance or a physical search must include in the application, among other information, a statement of the facts or circumstances relied upon by the applicant to justify his or her belief that the target of the electronic surveillance or the physical search is a “foreign power” or an “agent of a foreign power” as those terms are defined in Section 101 of the act, 50 U.S.C. § 1801. Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, amended the definition of “agent of a foreign power” under Section 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1), to add a new category of non-United States persons covered under this definition. The amendment added a new subparagraph 101(b)(1)(C), 50 U.S.C. § 1801(b)(1)(C) (as reflected in italics below). As amended by Section 6001, “agent of a foreign power” under FISA means:

- (1) any person other than a United States person, who—
 - (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;²

¹ (...continued)

certification that “a significant purpose” of the electronic surveillance or physical search is obtaining foreign intelligence information has been interpreted to provide latitude for such investigative techniques to be used for law enforcement purposes as well, so long as a significant foreign intelligence purpose also exists. *See In re Sealed Case*, 310 F.3d 717, 732-736 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002).

² “Foreign power” is defined for purposes of FISA in Section 101(a) of the act, 50 U.S.C. § 1801(a), to mean:

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed or controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or

(continued...)

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;

(C) *engages in international terrorism or activities in preparation therefore* [sic]; *or*³

(2) any person who–

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

The term “United States person” in FISA is used to describe a citizen of the United States, a permanent resident alien, an unincorporated association a substantial number of the members of which are U.S. citizens or permanent resident aliens, or a corporation which is incorporated in the United States. This term does not include a corporation or association which is a foreign power as that term is defined in Section 101(a)(1), (2), or

² (...continued)

(6) an entity that is directed and controlled by a foreign government or governments.

³ In light of the phrasing in the definition of “foreign power” in 50 U.S.C. § 1801(a)(4) and of the definition of “agent of a foreign power” in 50 U.S.C. § 1801(b)(2)(C), “therefore” as it appears in the new subsection (C) added to 50 U.S.C. § 1801(b)(1) seems likely to have been intended to read “therefor.” “International terrorism” is defined in 50 U.S.C. § 1801(c) to mean activities that:

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended–

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnaping;

and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(3) of FISA, 50 U.S.C. § 1801(a)(1), (2), or (3).⁴ Thus, under the new subsection added by Section 6001 of P.L. 108-458, a non-U.S. person who engages in international terrorism or in activities in preparation for international terrorism may be considered an “agent of a foreign power” for purposes of FISA. An applicant for a FISA court order using this definition of “agent of a foreign power” need not provide facts and circumstances justifying a belief that the target of the electronic surveillance or physical search is connected to a foreign nation, foreign group, or international terrorist organization. Nor does the Foreign Intelligence Surveillance Court (FISC), in granting such an application, have to find probable cause, based on the facts submitted by the applicant, to believe that such a connection to a foreign nation, foreign group, or international terrorist group exists in order to find probable cause to believe that the target of the electronic surveillance or physical search is a foreign power or an agent of a foreign power.⁵

This amendment does not change the procedures to be followed by an applicant seeking a FISA order for electronic surveillance or for a physical search. However, the facts and circumstances used by the applicant to demonstrate the basis of his or her belief that the target of the electronic surveillance or physical search is a “foreign power or an

⁴ 50 U.S.C. § 1801(i).

⁵ If a FISC judge is to enter an ex parte order granting an application for electronic surveillance under 50 U.S.C. § 1805, he or she must find that:

- (1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
- (2) the application has been made by a Federal officer and approved by the Attorney General;
- (3) on the basis of the facts submitted by the applicant there is probable cause to believe that—
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and
 - (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used by a foreign power or an agent of a foreign power;
- (4) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and
- (5) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of statements made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

50 U.S.C. § 1805(a). In making a determination of probable cause under Section 1805(a)(3), the FISC judge may consider past activities of the target as well as facts and circumstances relating to current or future activities of the target. 50 U.S.C. § 1805(b). Similar findings must be made by a FISC judge issuing an order granting an application for a physical search under FISA, 50 U.S.C. § 1824(a), (b). Each provision also requires that a judge approving electronic surveillance or a physical search, respectively, under FISA must include certain specifications and directions in the orders issued. 50 U.S.C. §§ 1805(c), 1824(c).

agent of a foreign power” will vary depending upon the definition of “foreign power” or “agent of a foreign power” relied upon in the application. Nor does the amendment alter the requirements for such a court order except to the extent that the factual underpinnings for the probable cause determination will also vary depending upon definition of “foreign power” or “agent of a foreign power” relied upon in a given case.

The amendment to the definition of “agent of a foreign power” in Section 6001 of P.L. 108-458 is made subject to the sunset provisions of Section 224 of the USA PATRIOT Act, P.L. 107-56, including the exception provided in subsection (b) of Sec. 224. Therefore, the new Section 101(b)(1)(C) of FISA, 50 U.S.C. § 1801(b)(1)(C), would sunset on December 31, 2005, except with respect to any foreign intelligence investigation begun before that date or any criminal offense or potential offense that began or occurred before that date. Thus, where a foreign intelligence investigation was underway before December 31, 2005, or a criminal offense or potential offense began or was committed⁶ before that date, the definition of “agent of a foreign power” added by Section 6001 of P.L. 108-458 would still be available. Under those circumstances, an application for a FISA court order for electronic surveillance or a physical search involving a “lone wolf” target could still be pursued after December 31, 2005, and a court order issued authorizing such surveillance or search.

Section 6002 of P.L. 108-458 expanded the semi-annual reporting requirements under FISA.⁷ As part of these requirements, starting within six months of the date of

⁶ As discussed in greater depth in footnote 1, *supra*, FISA may be used for law enforcement purposes so long as “a significant purpose” of the investigation is to obtain foreign intelligence information.

⁷ Section 6002 of P.L. 108-458 redesignated the existing Title VI of FISA as Title VII and former Section 601 as Section 701. A new Section 601 of FISA was added, which required the Attorney General, on a semiannual basis, to submit to the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence and the House and Senate Judiciary Committees, in a manner consistent with the protection of the national security, reports setting forth with respect to the preceding six month period:

(1) the aggregate number of persons targeted for orders issued under this Act, including a breakdown of those targeted for—

- (A) electronic surveillance under section 105 [50 U.S.C. § 1805];
- (B) physical searches under section 304 [50 U.S.C. § 1824];
- (C) pen registers under section 402 [50 U.S.C. § 1842]; and
- (D) access to records under section 501 [50 U.S.C. § 1861];

(2) the number of individuals covered by an order issued pursuant to section 101(b)(1)(C) [50 U.S.C. § 1801(b)(1)(C)];

(3) the number of times that the Attorney General has authorized that information obtained under this Act may be used in a criminal proceeding or any information derived therefrom may be used in a criminal proceeding;

(4) a summary of significant legal interpretations of this Act involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, including interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Court of Review by the Department of Justice; and

(5) copies of all decisions (not including orders) or opinions of the Foreign

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enactment of P.L. 108-458, the Attorney General must submit semiannual reports, each covering the previous six month period, to the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Judiciary Committee, and the Senate Judiciary Committee, in a manner consistent with protection of national security, including, among other things, the number of individuals covered by an order issued pursuant to the new definition of “agent of a foreign power” in Section 101(b)(1)(C), 50 U.S.C. § 1801(b)(1)(C).

⁷ (...continued)

Intelligence Surveillance Court or Foreign Intelligence Surveillance Court of Review that include significant construction or interpretation of the provisions of this Act.