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Proposed Change to the Foreign Intelligence Surveillance Act (FISA) under S. 113

Jennifer Elsea
Legislative Attorney
American Law Division

Summary

In order to facilitate the surveillance of possible “lone wolf” terrorists, whose links to an international terrorist organization may be difficult to ascertain, several bills have been introduced to amend the Foreign Intelligence Surveillance Act (“FISA”). The Senate passed S. 113, a bill to extend the coverage of FISA to non-U.S. persons who engage in international terrorism or activities in preparation for terrorist acts, without a showing of membership in or affiliation with an international terrorist group. While the Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) does not call for such a measure, the Bush Administration has indicated its support. FISA provides the government authority to conduct electronic surveillance (wiretap) and other searches with respect to a foreign power or its agents to obtain intelligence related to espionage, terrorism, or other matters involving national security. Related proposals include H.R. 3179, § 304 of S. 2386, H.R. 3552, and S. 123.

The Foreign Intelligence Surveillance Act (FISA), P.L. 95-511, Title I, October 25, 1978, 92 Stat. 1796, codified at 50 U.S.C. § 1801 *et seq.*, provides a framework for the use of electronic surveillance and other investigative methods to acquire foreign intelligence information. S. 113 and companion measures seek to strike a balance between national security needs in the context of foreign intelligence gathering and privacy rights guaranteed by the Fourth Amendment of the Constitution.¹ FISA provides a means by which the government can obtain approval to conduct searches and surveillance of a foreign power or its agents without first meeting the more stringent standard in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.* [hereinafter “Title III”] that applies to criminal investigations. While Title III requires a showing of probable cause that a proposed target has committed, is committing,

¹ U.S. CONST. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

or is about to commit a crime, FISA requires a showing of probable cause to believe that the target is a foreign power or an agent of a foreign power.

In the aftermath of the September 11, 2001 terrorist attacks on the United States, Congress amended FISA so that it no longer requires a certification that the (primary) purpose of a search or surveillance is to gather foreign intelligence information.² As amended by the USA PATRIOT Act,³ FISA requires that a “significant purpose” of the investigation be the collection of foreign intelligence information, which has been interpreted to expand the types of investigations that may be permitted to include those in which the primary purpose may be to investigate criminal activity, as long as there is at least a measurable purpose related to foreign intelligence gathering.⁴ S. 113 and its companion measures would remove the requirement for the government to show that the intended target, if a non-U.S. person, is associated with a foreign power.

The bill was introduced in the 107th Congress as S. 2586 (known as the Schumer-Kyl Bill). In its original form, it would have amended the definition of “foreign power”⁵ to include (4) *any person, other than a United States person, or group that is engaged in international terrorism or activities in preparation therefor [proposed new language in S. 2586 emphasized].* The Senate Select Committee on Intelligence held hearings on the bill on July 31, 2002,⁶ but the bill never reached a floor vote. Re-introduced in the 108th Congress as S. 113, the bill was amended in committee to retain the existing definition

² See CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance*. “Foreign Intelligence Information” is defined in 50 U.S.C. § 1801(e) to mean:

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against —
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —
 - (A) the national defense or the security of the United States; or
 - (B) the conduct of the foreign affairs of the United States.

³ P.L. 107-56 § 218.

⁴ See *In re Sealed Case*, 310 F.3d 717, 735 (F.I.S.Ct.Rev. 2002) (“The addition of the word “significant” to section 1804(a)(7)(B) imposed a requirement that the government have a measurable foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes.”).

⁵ “Foreign power” is defined in 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 and 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
- (6) an entity that is directed and controlled by a foreign government or governments.

⁶ Amending FISA: Hearings before the Senate Select Committee on Intelligence, July 31, 2002 (hereinafter “FISA Hearing”).

of “foreign power,” but to add subparagraph (c) to the definition of “agent of a foreign power”⁷ in 50 U.S.C. § 1801(b)(1) (which excludes United States persons⁸). A companion bill was subsequently introduced in the House as H.R. 3552. The amendment would add non-U.S. persons⁹ who “engage[] in international terrorism or activities in preparation therefor” to the definition of “agents of a foreign power” for FISA purposes, making FISA warrants available to investigate such non-U.S. persons without demonstrating reason to believe the person is acting on behalf of a terrorist organization, a foreign country, or entity fitting the definition of “foreign power.” The new definition would sunset with certain other provisions added in P.L. 107-56 on December 31, 2005.¹⁰

The bill’s sponsor says an amendment is necessary to fight foreign terrorists because it is sometimes difficult to show that a proposed target is associated with a foreign power. The new definition would allow the FBI to conduct surveillance on persons who might otherwise evade surveillance through a “loophole” in the present law, covering a terrorist:

who is either acting on his own or . . . who, while acting on behalf of an international terrorist organization or state, has not yet clearly signalled that to our law enforcement officials to the point that we can succeed in getting a FISA warrant.¹¹

⁷ “Agent of a foreign power” is currently defined in 50 U.S.C. § 1801(b) to mean:

- (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;
 - (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; or
- (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 [U.S.] criminal statutes;
 - (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 [U.S.] criminal statutes;
 - (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; or
 - (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 [such] activities. . . .

⁸ “United States person” is defined in 50 U.S.C. § 1801(i) to mean:

a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States. . . .

⁹ “Person” means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power. 50 U.S.C. § 1801(m).

¹⁰ P.L. 107-56 § 224.

¹¹ CONG. REC. S10426 (daily ed. Oct. 15, 2002) (statement of Sen. Kyl).

The case of Zacarias Moussaoui is advanced as a case in point. Although he is a foreign person who was engaged in suspicious activity, the FBI did not approve a request to seek a FISA application to search his computer hard drive because it could not connect him with a foreign government or specific foreign terrorist organization.¹² Some argue that the FBI's misinterpretation of the requirements of FISA, rather than defects in the statute itself led to the failure of the FBI to seek a FISA warrant.¹³ The FBI had sufficient information about Moussaoui's connections with Chechen rebels to acquire a FISA warrant, but deciding officials construed FISA to require proof of an association with Al Qaeda or another organization officially listed as a terrorist organization by the State Department.¹⁴ Others interpret the statute to require no certification that the proposed target is associated with any specific group, inasmuch as a "group" of terrorists covered by current law might be as small as two or three persons.¹⁵

The Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report) found that Moussaoui represented a missed opportunity for U.S. law enforcement and intelligence, concluding that if he had been linked to Al Qaeda sooner, "questions should instantly have arisen about a possible al Qaeda plot that involved piloting airliners, a possibility that had never been seriously analyzed by the intelligence community."¹⁶ While the 9/11 Commission notes that FBI Headquarters declined to request a FISA warrant based on its interpretation of FISA requirements, the 9/11 Report suggests that ample evidence was available to pursue a criminal warrant, and that the perceived "wall" preventing FBI agents from informing the U.S. Attorney's Office played a greater role in the failure, rather than any gap in FISA.¹⁷

Supporters of S. 113 argue that whether the measure would have been necessary to avert the problems associated with the Moussaoui case is beside the point, and that the September 11 attacks nonetheless have exposed a gap in FISA coverage.¹⁸ The Justice Department supports the proposed definition, saying it would enable the FBI to target the

¹² See *id.* Whether a timely search of Moussaoui's computer data would have revealed information that might have allowed the government to prevent the Sept. 11, 2001 attacks is a matter open to debate. See FISA Hearing, *supra* note 6 (Testimony of Jerry Berman, Executive Director, Center for Democracy and Technology)[hereinafter "Berman Testimony"], available at [<http://www.cdt.org/testimony/020731berman.shtml>].

¹³ See *id.*; Beverley Lumpkin, *The 'Lone Wolf,'* ABC News Online, Aug. 2, 2002, at [<http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice133.html>].

¹⁴ See Sens. Patrick Leahy, Charles Grassley, and Arlen Specter, *Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures*, at 23-25, Feb. 2003 [hereinafter "Interim Report"] (concluding that FBI officials misapplied the FISA standards for determining whether there was reason to believe Moussaoui was an agent of a foreign power); *Hill Probers Upgrade Evidence Gathered From Moussaoui*, WASH. POST, June 6, 2002, at A18 (reporting reason given by officials for rejecting Minneapolis FBI agent's request for a FISA warrant to search Moussaoui's computer hard drive).

¹⁵ See H.Rept. 95-1283, at pt. 1, 74 and n. 38 (1978).

¹⁶ 9/11 Commission Report at 273.

¹⁷ 9/11 Commission Report at 540 & n94. The Report also notes that publicity of Moussaoui's arrest might have caused Al Qaeda leaders to abort the plot. *Id.* at 276.

¹⁸ See 150 CONG. REC. S5927 (daily ed. May 8, 2004)(statement of Sen. Hatch).

new type of terrorist threat faced by the United States today.¹⁹ An FBI official describes the new threat, that of the “international Jihad movement” thus:

Historically, terrorism subjects of FBI investigation have been associated with terrorist organizations. As a result, FBI has usually been able to associate an individual with a terrorist organization pled, for FISA purposes, as a foreign power. To a substantial extent, that remains true today. However, we are increasingly seeing terrorist suspects who appear to operate at a distance from these organizations. . . . [W]hat we see today are (1) agents of foreign powers in the traditional sense who are associated with some organization or discernible group, (2) individuals who appear to have connections with multiple terrorist organizations but who do not appear to owe allegiance to any one of them, but rather owe allegiance to the international Jihad movement and (3) individuals who appear to be personally oriented toward terrorism but with whom there is no known connection to a foreign power.²⁰

Accordingly, including individuals engaging in or preparing for terrorist activities under the definition of “agent of a foreign power” would allow investigators to use FISA to pursue the “lone wolf” terrorist, without the need to show any association to a foreign terrorist group or other foreign power. To treat a United States person as an agent of a foreign power would continue to require a showing that the person is working for or on behalf of a foreign power.²¹ In order to obtain a FISA warrant to conduct searches or surveillance of a non-U.S. person as an “agent of a foreign power” under the proposed language, probable cause to believe that the proposed target is or will be engaged in an act of international terrorism²² would be required. Critics argue that if such evidence is already available, a Title III warrant would be appropriate.²³ Additionally, some question whether there is any rational purpose for treating foreign “lone wolf” terrorists, who are ordinarily covered by the Fourth Amendment, and U.S. “lone wolf” terrorists under separate legal regimes, possibly raising significant constitutional issues.²⁴

¹⁹ See FISA Hearing, *supra* note 6; *but see* 150 CONG. REC. S5916 (statement of Sen. Leahy)(asserting that FBI representatives have stated in private briefings that they do not need the change in order to protect against terrorism).

²⁰ See FISA Hearing, *supra* note 6 (Statement for the Record of Marion E. (Spike) Bowman, Deputy General Counsel, Federal Bureau of Investigation).

²¹ 50 U.S.C. § 1801(b)(2)(C).

²² “International terrorism” is defined by 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 kidnapping; 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.

²³ See Berman Testimony, *supra* note 12.

²⁴ See *id.*; Letter from Kate Martin, Director, Center for National Security Studies, *Proposed Amendments to Foreign Intelligence Surveillance Act*, July 31, 2002.

It has also been argued that to divorce FISA from the purpose of gathering intelligence about foreign powers and their agents, as those terms are normally understood, is a significant departure from the original purpose of the statute and part of the reason courts have held that searches under FISA do not violate the Fourth Amendment.²⁵ The proposed addition to the definition of “agent of a foreign power” would also broaden other definitions in the statute. For example, “foreign intelligence information” under 50 U.S.C. § 1801(e) would include “information that relates to ... the ability of the United States to protect against ... actual or potential attack or other grave hostile acts of” an individual non-U.S. person suspected of terrorism but unaffiliated with a foreign power, as defined; and “sabotage or international terrorism” committed by same.

On the other hand, the bill’s proponents argue that the new definition, by requiring probable cause that the target is engaging in or preparing for terrorist activity that transcends international boundaries, already meets a high enough standard of particularity to satisfy Title III and constitutional standards.²⁶ They believe that the interest that the courts have identified to justify the procedures of FISA are not likely to differ appreciably between a case involving a single terrorist and a case involving a group of two or three terrorists, who may be treated as a “foreign power” under existing law.²⁷ Furthermore, the Justice Department argues that the magnitude of harm presented by international terrorists justifies a different set of parameters for determining whether a search is “reasonable” under the Fourth Amendment, which depends on an analysis of whether the government’s interests outweigh an intrusion into individual privacy interests.²⁸ In light of the efforts of international terrorists to obtain weapons of mass destruction, it is argued, a terrorist whose ties to an identified group remain obscure presents a grave danger that outweighs the minimal privacy interests likely to be impacted by the proposed change.

S. 113 and H.R. 3552 would require the Attorney General to submit an annual report, in addition to reports already required under FISA, describing the number of times the new authority is used, according to the types of searches or seizures that are conducted, the number of times information obtained through these uses is approved for use by prosecutors in a criminal trial, and any significant court interpretations of the new language that may follow. S. 2386, as reported in the Senate, includes the definitional change (with the sunset provision, § 304), but does not include a reporting requirement. H.R. 3179 would change the definition of “agent of a foreign power” in the same manner as the other bills, but would not include a sunset provision.

²⁵ See Berman Testimony, *supra* note 12. Cf. *United States v. United States District Court*, 407 U.S. 297, 308 (1972) (differentiating a domestic intelligence surveillance from a foreign intelligence case because it “require[d] no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without the country”); *In re Sealed Case*, 310 F.3d at 746 (same).

²⁶ See 149 CONG. REC. S10426-28 (daily ed. Oct. 15, 2002) (statement of Sen. Kyl with respect to S. 2586 of the 107th Congress).

²⁷ See *id.* at S10430 (citing letter from Daniel J. Bryant, Assistant Attorney General, Department of Justice, Office of Legislative Affairs to Sens. Kyl and Schumer).

²⁸ See FISA Hearing, *supra* note 6 (Statement for the Record of Marion E. (Spike) Bowman, Deputy General Counsel, Federal Bureau of Investigation), *reprinted at* 149 CONG. REC. S10430-32 (daily ed. Oct. 15, 2002).