2 Law of Electronic Surveillance § 9:61

Law of Electronic Surveillance
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Hon. James G. Carr and Patricia L. Bellia
Chapter 9. Foreign Intelligence Surveillance
XIV. Constitutionality of FISA

Correlation Table References

§ 9:61. Constitutional challenges to FISA—Fourth Amendment

The most substantial challenge to FISA, as adopted in 1978 and as amended in 2001, has come under the Fourth Amendment. The Foreign Intelligence Surveillance Court of Review, the entity responsible for reviewing denials of FISA applications, has described the requirements for a conventional warrant under the Fourth Amendment as follows:

> In the context of ordinary crime, beyond requiring searches and seizures to be reasonable, the Supreme Court has interpreted the warrant clause of the Fourth Amendment to require three elements. "First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally warrants must particularly describe the 'things to be seized,' as well as the place to be searched." [1]

A FISA order differs in important ways from a conventional warrant under the Fourth Amendment (and from an analogous surveillance order under Title III). FISA does requires prior judicial scrutiny of an application by a neutral, detached magistrate. The probable cause showing under FISA, however, differs from that required in the criminal context. Rather than requiring probable cause that the investigation will yield evidence of criminal activity, FISA requires a showing of probable cause that the target is a "foreign power" or "the agent of a foreign power." [2] Although several of the relevant definitions require a showing of an imminent violation of criminal law, some do not. With respect to the requirement that the warrant describe with particularity the person or thing to be seized, FISA does require certification by an executive official involved in national security or defense that the information sought is foreign intelligence information. [3] That certification, however, is reviewable only when the target is a U.S. person, and only then for clear error, rather than being subject to an independent finding of probable cause by a judge. [4] With respect to the requirement to state with particularity the place to be searched, FISA requires the court to find probable cause to believe that the target of the facility at which the surveillance is directed is being used or is about to be used by a foreign power or an agent of a foreign power, [5] but does not link the use of the facilities to a particular crime or a particular class of communications.

In light of these distinctions between a FISA order and an ordinary criminal warrant, the question is whether the Fourth Amendment permits foreign intelligence surveillance to proceed under a different standard than that which applies to ordinary criminal investigations.

In U.S. v. U.S. District Court [Keith, J.] ("Keith") [6] the Supreme Court stated that the Fourth Amendment's requirements may vary, depending on the governmental interests involved. FISA was enacted to create procedural safeguards which Congress deemed to be "necessary to ensure that electronic surveillance by the United States Government within this country conforms to the fundamental principles of the fourth amendment." [7]

Accordingly, various courts assessing the constitutionality of FISA as originally adopted in 1978 have found the procedures to be consistent with the Fourth Amendment. [8] Though defendants have asserted that the requirements of Title III set "the

minimum constitutional standards by which telephone conversations may lawfully be seized," [9] FISA has been held to strike a fully adequate balance between individual rights and the government's need for foreign intelligence surveillance. [10]

Specific objections to the ability to obtain a FISA warrant upon a showing that is less than the probable cause standard of the Fourth Amendment likewise have been rejected. [11] The same result has been reached with regard to claims that the Amendment's particularization requirement is not met by a FISA order. [12] Thus, where FISA procedures have been followed in the application and order, the surveillance has been found to be constitutionally acceptable.

Although Fourth Amendment objections to surveillance under FISA as originally passed in 1978 have consistently been rejected, the amendment of FISA in 2001 to allow use of FISA procedures in any case in which foreign intelligence gathering is "a significant purpose" of the investigation, even if the "primary" purpose of the investigation is to assist in a criminal prosecution, raised those objections anew.

As noted in § 9:10, on the understanding that FISA itself or the Fourth Amendment barred use of FISA unless gathering of foreign intelligence information was the "primary purpose" of the investigation, the Executive Branch adopted various procedures designed to minimize the involvement of officials responsible for criminal investigation and prosecution in foreign intelligence investigations. These procedures included prohibitions on the direction or control of FISA investigations by officials involved in criminal prosecution. Perceiving a need to preserve these procedures even after the 2001 amendments to FISA, particularly in light of revelations about FBI errors and violations of Foreign Intelligence Surveillance Court orders in past cases, the FISC adopted the Executive Branch procedures in November 2001. [13] FISA requires the Attorney General to propose, and the court to approve, "minimization procedures," defined in § 1801(h) as procedures designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." The FISC treated the procedures it adopted as "minimization procedures" that the court was permitted to direct the Attorney General to follow. [14] Following the 2001 amendments to FISA, the Attorney General, believing that the statute now permitted FISA surveillance even in cases in which criminal prosecution was the primary objective, adopted new intelligence sharing procedures that permitted greater involvement in such surveillance of Executive Branch officials responsible for criminal investigation and prosecution.

In a May 2002 decision following oral argument before all then-sitting FISC judges, the FISC rejected the government's proposed procedures in relevant part, by modifying those procedures to incorporate the procedures the court had adopted in November 2001. [15] The government appealed a subsequent order incorporating the procedures imposed by the FISC, and the Foreign Intelligence Surveillance Court of Review reversed. [16] Although the FISC had characterized the procedures as "minimization procedures," and viewed adoption of the "a significant purpose" language as not affecting its power to order such procedures, the Court of Review rejected this approach. Because the Court of Review accepted the government's argument that FISA surveillance could proceed even when investigation and prosecution of foreign intelligence crimes was the primary purpose of the surveillance, the court necessarily had to consider whether the Fourth Amendment mandated the procedures in question, even if the statute itself did not. [17]

With respect to the Fourth Amendment issue, the court concluded that the Fourth Circuit decision in U.S. v. Truong Dinh Hung, [18] which initially set forth the primary purpose test, did not articulate the appropriate constitutional standard. In particular, the court rejected *Truong's* suggestion that, once an investigation becomes "primarily" criminal, the government cannot conduct foreign intelligence surveillance without a warrant meeting all the requirements that typically apply in ordinary criminal cases. [19] The court found Truong*'s* line between foreign intelligence investigations and criminal investigations "unstable," and instead focused more directly on the Supreme Court's analysis in Keith, which the court read to require a "balanc[ing of] the government's interest against individual privacy rights." [20] Where the government has "'special needs, beyond the normal need for law enforcement,'" the Fourth Amendment may permit a warrantless search, so long as the search is reasonable. [21] The court concluded that "[t]he procedures and government showings required under FISA, if

they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorized are reasonable." [22] Because FISA could constitutionally be applied even when the prosecution of foreign intelligence crimes was the primary purpose of an investigation, the Fourth Amendment did not require minimization procedures of the sort the FISC had adopted.

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Footnotes

1 In re Sealed Case, 310 F.3d 717, 738, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002) (quoting Dalia v. U.S., 441 U.S. 238, 255, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979)) (internal quotation marks omitted).

2 50 U.S.C.A. § 1805(a).

3 50 U.S.C.A. § 1804(a)(7)(A).

4 50 U.S.C.A. § 1805(a)(5).

5 50 U.S.C.A. § 1805(a)(3)(B).

6 U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 308, 92 S. Ct. 2125, 2138–39, 32 L. Ed. 2d 752, 768–69 (1972).

7 U.S. v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984). *See also* U.S. v. Falvey, 540 F. Supp. 1306 (E.D. N.Y. 1982).

8 U.S. v. Johnson, 952 F.2d 565, 573, 34 Fed. R. Evid. Serv. 1117 (1st Cir. 1991); U.S. v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987); U.S. v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987); U.S. v. Cavanagh, 807 F.2d 787, 788–89, 86 A.L.R. Fed. 771 (9th Cir. 1987); U.S. v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984); U.S. v. Benkahla, 437 F. Supp. 2d 541, 554 (E.D. Va. 2006); U.S. v. Spanjol, 720 F. Supp. 55, 58 (E.D. Pa. 1989). *See* Saltzburg, National Security and Privacy: Of Governments and Individuals Under the Constitution and the Foreign Intelligence Surveillance Act, 28 Va. J. Int'l Law 1 (1987).

9 U.S. v. Duggan, 743 F.2d 59, 72 (2d Cir. 1984); U.S. v. Falvey, 540 F. Supp. 1306, 1312 (E.D. N.Y. 1982).

10 U.S. v. Damrah, 412 F.3d 618, 624, 2005 FED App. 0249P (6th Cir. 2005); U.S. v. Posey, 864 F.2d 1487, 1491 (9th Cir. 1989); U.S. v. Cavanagh, 807 F.2d 787, 788–89, 86 A.L.R. Fed. 771 (9th Cir. 1987); U.S. v. Falvey, 540 F. Supp. 1306, 1312 (E.D. N.Y. 1982).

11 U.S. v. Abu-Jihaad, 630 F.3d 102, 122 (2d Cir. 2010), cert. denied, 131 S. Ct. 3062, 180 L. Ed. 2d 892 (2011); U.S. v. Ning Wen, 477 F.3d 896, 897–98 (7th Cir. 2007); U.S. v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987); U.S. v. Cavanagh, 807 F.2d 787, 790, 86 A.L.R. Fed. 771 (9th Cir. 1987); U.S. v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984); U.S. v. Medunjanin, 2012 WL 526428, *2 (E.D. N.Y. 2012); U.S. v. Mahamud, 838 F. Supp. 2d 881 (D. Minn. 2012); U.S. v. Jayyousi, 2007 WL 851278 (S.D. Fla. 2007). *See* Birkenstock, "The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis," 80 Geo. L.J. 843 (1992).

12 U.S. v. Cavanagh, 807 F.2d 787, 790, 86 A.L.R. Fed. 771 (9th Cir. 1987).

13 *See* In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 616 (Foreign Intel. Surv. Ct. 2002) (abrogated on other grounds by, In re Sealed Case, 310 F.3d 717, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002)).

14 In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 616 (Foreign Intel. Surv. Ct. 2002) (abrogated on other grounds by, In re Sealed Case, 310 F.3d 717, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002)).

15 In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 625 (Foreign Intel. Surv. Ct. 2002) (abrogated on other grounds by, In re Sealed Case, 310 F.3d 717, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002)).

16 In re Sealed Case, 310 F.3d 717, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002).

17 In re Sealed Case, 310 F.3d 717, 736, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002).

18 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

19 In re Sealed Case, 310 F.3d 717, 743, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002); *see also* U.S. v. El-Mezain, 664 F.3d 467, 569 (5th Cir. 2011), as revised, (Dec. 27, 2011) and cert. denied, 133 S. Ct. 525, 184 L. Ed. 2d 338 (2012) and cert. denied, 133 S. Ct. 525 (2012).

20 In re Sealed Case, 310 F.3d 717, 745, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002) (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564, 101 Ed. Law Rep. 37 (1995)).

21 In re Sealed Case, 310 F.3d 717, 745–46, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002); *see also* In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1011–12 (Foreign Intel. Surv. Ct. Rev. 2008) (concluding,

in the context of expired provisions of the Protect America Act, that foreign intelligence surveillance undertaken for national security purposes and directed at a foreign power or agent of a foreign power reasonably believed to be located outside of the United States qualifies for a foreign intelligence exception analogous to the special needs exception); U.S. v. Ning Wen, 477 F.3d 896, 898 (7th Cir. 2007).

22 In re Sealed Case, 310 F.3d 717, 746, 190 A.L.R. Fed. 725 (Foreign Intel. Surv. Ct. Rev. 2002); *see also* U.S. v. Duka, 671 F.3d 329, 344–45, 87 Fed. R. Evid. Serv. 287 (3d Cir. 2011), cert. denied, 132 S. Ct. 2754, 183 L. Ed. 2d 617 (2012) and cert. denied, 132 S. Ct. 2754, 183 L. Ed. 2d 617 (2012) and cert. denied, 132 S. Ct. 2756, 183 L. Ed. 2d 617 (2012) and cert. denied, 132 S. Ct. 2763, 183 L. Ed. 2d 616 (2012) and cert. denied, 132 S. Ct. 2764, 183 L. Ed. 2d 617 (2012); U.S. v. Abu-Jihaad, 630 F.3d 102, 119–27 (2d Cir. 2010), cert. denied, 131 S. Ct. 3062, 180 L. Ed. 2d 892 (2011); U.S. v. Ning Wen, 477 F.3d 896, 897–98 (7th Cir. 2007); U.S. v. Kashmiri, 2012 WL 3779107, *2 (N.D. Ill. 2012); U.S. v. Omar, 2012 WL 2357734, *5 (D. Minn. 2012); U.S. v. Medunjanin, 2012 WL 526428, *2 (E.D. N.Y. 2012); U.S. v. Sherifi, 793 F. Supp. 2d 751 (E.D. N.C. 2011); U.S. v. Kashmiri, 2010 WL 4705159 (N.D. Ill. 2010); U.S. v. Holy Land Foundation for Relief and Development, 2007 WL 2011319 (N.D. Tex. 2007); U.S. v. Jayyousi, 2007 WL 851278 (S.D. Fla. 2007); *cf.* U.S. v. Stewart, 590 F.3d 93, 128 (2d Cir. 2009) (upholding constitutionality of order where primary purpose was foreign intelligence gathering); In re Grand Jury Proceedings of Special April 2002 Grand Jury, 347 F.3d 197, 206 (7th Cir. 2003) (declining to address post-Patriot Act challenge to FISA on ground that challenge was "conclusory, underdeveloped and without citation to authority"); U.S. v. Warsame, 547 F. Supp. 2d 982, 993 (D. Minn. 2008) (upholding constitutionality of order where primary purpose was foreign intelligence gathering); U.S. v. Mubayyid, 521 F. Supp. 2d 125, 100 A.F.T.R.2d 2007-6526 (D. Mass. 2007) (same). *But see* Mayfield v. U.S., 504 F. Supp. 2d 1023, 1038 (D. Or. 2007), judgment vacated, 588 F.3d 1252 (9th Cir. 2009), opinion vacated and superseded, 599 F.3d 964 (9th Cir. 2010) and judgment vacated on other grounds, 599 F.3d 964 (9th Cir. 2010) (concluding that Patriot Act amendment was unconstitutional to the extent that it permitted electronic surveillance and physical search where primary purpose was to prosecute target for crimes).

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