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b1, b3 2021

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

Maura Peterson, Clerk of Court

IN RE ELECTRONIC SURVEILLANCE
AND PHYSICAL SEARCH APPLICATIONS
SUBMITTED TO THE FOREIGN
INTELLIGENCE SURVEILLANCE COURT

Docket No. b1, b3

STANDING ORDER

In applications for approval of electronic surveillance or physical search, the government is directed to include information that supports its position that the proposed means of conducting surveillance or search is “electronic surveillance” or “physical search” as defined at 50 U.S.C. §§ 1801(f), 1821(5), as well as any information adverse to that position.

Statutory Background

The government may submit to the Foreign Intelligence Surveillance Court (FISC) applications for orders approving electronic surveillance under § 1804 and applications for orders approving physical searches under § 1823.

An electronic surveillance application must include, among other things, “a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance.” § 1804(a)(7). Such applications “shall be

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made . . . to a judge having jurisdiction under” § 1803. § 1804(a). Section 1803(a)(1) requires the Chief Justice of the United States to “designate 11 district court judges . . . who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth” in the Foreign Intelligence Surveillance Act (FISA), as amended, 50 U.S.C.

§§ 1801–1885c.

A physical search application must include, among other things, “a statement of . . . the manner in which the physical search is to be conducted.” § 1823(a)(5). Such applications “shall be made . . . to a judge of the [FISC],” § 1823(a), which is defined as the court established by § 1803(a). *See* § 1821(3). The FISC “shall have jurisdiction to hear applications for and grant orders approving a physical search for the purpose of obtaining foreign intelligence information anywhere within the United States under the procedures set forth” in Title III of FISA.¹

§ 1822(c).

“Electronic surveillance” and “physical search” are defined terms. As used in Title I of FISA, “electronic surveillance” means:

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

¹ Title III, codified at §§ 1821–1829, concerns physical searches. Title I of FISA, codified at §§ 1801–1813, concerns electronic surveillance.

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(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

§ 1801(f).

As used in Title III of FISA, "physical search" means:

any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, but does not include (A) "electronic surveillance", as defined in [§ 1801(f)], or (B) the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in [§ 1801(f)].

§ 1821(5).

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Applying the Definitions of Electronic Surveillance and Physical Search

Since its enactment forty-three years ago,² the definition of “electronic surveillance” has been amended just once, by adding to § 1801(f)(2) the clause regarding computer trespassers.³ The definition of “physical search” has not been amended since its enactment in 1994.⁴ Because of advances in information and communication technologies, the FISC has repeatedly applied those definitions to circumstances far removed from those contemplated when Congress adopted them.⁵

Whether some forms of information-gathering constitute electronic surveillance or physical search can depend on whether certain activities occur in the United States. *See, e.g.*, § 1801(f)(4) (defining electronic surveillance to mean, under specified circumstances, “the

² *See* FISA, Pub. L. 95-511 § 101(f), 92 Stat. 1783, 1785 (1978).

³ *See* USA PATRIOT Act, Pub. L. 107-56 § 1003, 115 Stat. 272, 392 (2001).

⁴ *See* Pub. L. 103-359, § 807(a)(3), 108 Stat. 3423, 3443-44 (1994).

⁵ *See, e.g.*, Docket No. [REDACTED] Memorandum Opinion at 1-3 (FISC [REDACTED] 2013) (applying § 1801(f)(4) to [REDACTED] by agents of a foreign power in [REDACTED]); Docket Nos. [REDACTED] *et al.*, Memorandum Opinion at 2-5, 8-10 (FISC [REDACTED] 2013) (applying §§ 1801(f)(4) and 1821(5) to [REDACTED]; Docket No. [REDACTED] Memorandum Opinion at 4-9 (FISC [REDACTED] 2012) (concluding that [REDACTED] fell under § 1801(f)(4), not § 1801(f)(2)); Docket No. [REDACTED] Memorandum Opinion at 1-4 (FISC [REDACTED] 2005) (applying § 1801(f)(2) to [REDACTED]; Docket No. [REDACTED] Memorandum Opinion as to Electronic Surveillance Pursuant to Section 1801(f)(2) at 1-4 (FISC [REDACTED] 2004) (applying § 1801(f)(2) to [REDACTED]; Docket No. [REDACTED] Order at 2-6 (FISC [REDACTED] 2004) (applying § 1801(f)(4) [REDACTED]).

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installation or use of an electronic, mechanical, or other surveillance device in the United States”); § 1821(5) (defining physical search to include, under specified circumstances, “any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property”). In a number of cases, the government has not provided accurate or complete information pertaining to these elements of the statutory definitions.

For example, in b1, b3 2020 the government submitted a proposed application under FISC Rule of Procedure 9(a) to renew an electronic surveillance and physical search authorization that had been granted previously in Docket Number b1, b3 b1, b3. The proposed application disclosed for the first time that b1, b3 b1, b3 were in foreign countries. Preliminary Rule 13(a) Notice Regarding Multiple Docket Numbers, Including b1, b3 b1, b3 2021) (“Preliminary Notice”). The government withdrew the proposed application after a member of the Court staff inquired how collection targeting b1, b3 b1, b3 involved electronic surveillance or physical search. *Id.* at 1-2.

The government took a closer look at the application in Docket Number b1, b3 b1, b3 which in pertinent part had sought approval of electronic surveillance and physical search of b1, b3 b1, b3. The government found that b1, b3 b1, b3 resolved b1, b3 b1, b3 outside the United States during the authorized period of surveillance and search. Supplemental Notice of Material Omissions and Misstatements in

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Multiple Docket Numbers, Including b1, b3 2021) (“Supplemental Notice”). That information had not appeared in the application. *Id.* at 2. The FBI case agent apparently was aware of it when the application was being prepared, but did not appreciate its significance under the definitions of electronic surveillance and physical search. *Id.*

The government also examined other cases from 2012 to 2020 involving electronic surveillance and/or physical search b1, b3 b1, b3 It found that, b1, b3 b1, b3 resolved b1, b3 outside the United States at the relevant times. *Id.* at 4. Those b1, b3 from 2015 to 2020. *Id.* In those dockets, the government generally did not inform the Court b1, b3 b1, b3 were located outside the United States, and frequently stated or implied otherwise.⁶ These misstatements and omissions appeared in applications, as well as search returns or other reports on the implementation of FISA orders. *Id.* at 4. The government acknowledges them to be material, “insofar as they erroneously represented b1, b3 were based in the United States, when in fact b1, b3 located outside the United States.” *Id.* at 1-2.

⁶ The government erroneously stated that b1, b3 were “U.S.-based.” *Id.* It omitted the fact b1, b3 resolved b1, b3 outside the United States, and stated that b1, b3 b1, b3 *Id.* at 4-5. It provided no information regarding the location of b1, b3 *Id.* at 5. (To arrive at the figures in this footnote and the corresponding text, b1, b3 was counted each time it appeared in a separate docket, e.g., b1, b3 *See id.* at 4.)

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In [REDACTED] b1, other cases, the government reported omission of the material fact [REDACTED] b1, b3

[REDACTED] b1, b3 located outside the United States. *Id.* at 7.

In [REDACTED] b1, 2021, the government was “assessing whether [REDACTED] b1, b3

[REDACTED] b1, b3 outside the United

States “constituted electronic surveillance or physical search” under the statutory definitions.

Preliminary Notice at 2. In [REDACTED] b1, 2021, the government reported [REDACTED] b1, b3

[REDACTED] b1, b3

Supplemental Notice at 3 n.5. The government further advised that, [REDACTED] b1, b3

[REDACTED] b1, b3

constituted electronic surveillance or physical search as defined by the statute.

In certain other cases, the government has not provided timely information about the basis for requesting approval of a particular collection as electronic surveillance or physical search. In connection with a proposed application submitted for consideration during the week of

[REDACTED] b1, b3 2021, the government could not specify what subpart(s) of § 1801(f) applied to proposed electronic surveillance of [REDACTED] b1, b3. The government did not submit that

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application in final form that week. At a hearing on b1, b3 2021, the government provided testimony about how electronic surveillance, as described in § 1801(f)(4), and physical search are conducted b1, b3

b1, b3 Thereafter, the government submitted another application for electronic surveillance and physical search b1, b3 which was granted on b1, b3 2021, in Docket No. b1, b3 In another recent matter, a FISC judge required the government to provide additional information about the proposed collection before granting an application under Titles I and III. See Docket No. b1, b3 Supplemental Declaration of b1, b3 at 2-3 (FISC b1, b3 b1, b3 2021).

Conclusion

In 1981, the Honorable George L. Hart, Jr., then-Presiding Judge of the FISC, concluded that he lacked authority to approve a physical search, observing that “the language of the FISA clearly limits the authority of” FISC judges “to the issuance of orders approving ‘electronic surveillance’ as that term is defined in the act.” *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises & Personal Prop.* (FISC

⁷ See *In re* b1, b3 Draft Transcript of Proceedings (FISC b1, b3 b1, b3 2021). A government witness testified that b1, b3

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June 11, 1981), *reprinted in* S. Rep. No. 97-280 16, 17 (1981). Since then, Congress has expressly charged the FISC with considering applications for physical search and certain other forms of collection,⁸ but the principle remains the same: the FISC's authority to approve intelligence-gathering operations, and to direct third parties to assist them, extends only as far as Congress has provided. *See In re Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the FISA*, 957 F.3d 1344, 1349-50 (FISA Ct. Rev. 2020) (inferior federal courts are "creatures of Congress" and "empowered to adjudicate only those disputes prescribed by Congress").

In furtherance of that principle, the Court has determined that concrete measures are required to ensure that (1) each application, as initially submitted by the government, contains information necessary to evaluate whether the approvals requested are within the Court's authority under Titles I and III of FISA; and (2) such information is accurate, complete, and up-to-date. Accordingly,

IT IS HEREBY ORDERED THAT:

(1) Each electronic surveillance application⁹ (including proposed applications) for which the government requests FISC consideration during the week of b1, b3

⁸ *See, e.g.*, § 1842(b)(1) (application for order authorizing installation and use of a pen register or trap and trace device); § 1881c(a)(1), (b) (application for order authorizing the targeting of a U.S. person reasonably believed to be outside the United States to acquire foreign intelligence information).

⁹ For purposes of these requirements, the term "application" includes a motion to expand an electronic surveillance or physical search authorization previously granted by the FISC.

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2021, or thereafter shall identify the subpart(s) of the definition of electronic surveillance at § 1801(f) that apply to each form of surveillance proposed for each targeted facility or place.

(2) Each electronic surveillance application (including proposed applications) for which the government requests FISC consideration during the week of b1, b3 2022, or thereafter shall provide, for each form of surveillance proposed for each targeted facility or place, information that supports the government's position that the proposed surveillance falls within the applicable subpart(s) of § 1801(f), as well as any information adverse to that position, including information regarding:

(a) for electronic surveillance under § 1801(f)(2), whether (i) the surveillance will acquire the contents of wire communications to or from a person in the United States and (ii) acquisition will occur in the United States; and

(b) for electronic surveillance under § 1801(f)(4), whether the surveillance device(s) will be installed or used in the United States.

(3) Each physical search application (including proposed applications) for which the government requests FISC consideration during the week of b1, b3 2022, or thereafter shall provide, for each form of search proposed for each targeted premises or property, information that supports the government's position that the proposed search falls within the definition of physical search at § 1821(5), as well as any information adverse to that position, including information regarding whether the search will involve physical intrusion within the United States into premises or property b1, b3

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(4) By b1, b3 2022, the government shall submit an explanation of how the information provided in FBI applications in response to paragraphs (1) through (3) above will be verified in conformance with the *2021 Guidance to Ensure the Accuracy and Completeness of Federal Bureau of Investigation Applications Under the Foreign Intelligence Surveillance Act* (filed on b1, b3 2021).

(5) This Order does not limit the ability of a FISC judge to require the government to provide information deemed relevant to the consideration of a particular application.

ENTERED this b1, b3 2021.



RUDOLPH CONTRERAS
Presiding Judge, United States Foreign
Intelligence Surveillance Court

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I, the Deputy Clerk,
FISC, certify that this document is a true
and correct copy of the original.

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