The Foreign Intelligence Surveillance Act of 1978 prescribes procedures for requesting judicial authorization for electronic surveillance and physical search of persons engaged in espionage or international terrorism against the United States on behalf of a foreign power. Requests are adjudicated by a special eleven member court called the Foreign Intelligence Surveillance Court. See http://www.fas.org/irp/agency/doj/fisa/ for more information.

FISA Court Decision

by Paul Wolf, 2 September 2002

Introduction

The May 2002 FISA court decision on the sharing of information gathered for foreign intelligence purposes with criminal investigators highlights the discriminatory and "unbalanced" effects of putting political and religious groups under surveillance. Under these rules, any evidence of a crime detected in an FBI intelligence investigation must be passed along to the criminal investigative division, which may open its own criminal investigation.

While the FISA court was rightly concerned about criminal prosecutors "taking over" intelligence investigations and making use of the lower standards for wiretapping, etc., the court did not consider that even if the criminal investigators don't direct the investigations, the effect would still be to put a disproportionate amount of law enforcement pressure on the members of those groups.

An analogy can be found in the political use of the IRS against dissident groups in the 1960s. Investigating the tax returns of all the members of a group would, unsurprisingly, uncover tax compliance problems among a certain number of them. In the terminology of the IRS, auditing people for non-tax reasons was called "unbalanced" enforcement of the tax laws.

The discretion to choose which groups to put under surveillance, and especially the discretion to say who are the members of those groups, are really the issues here. According to the FISA statute, "foreign power" includes what we call terrorist organizations, and "agent of a foreign power" includes anyone working with them.

Does this mean that a person attending a mosque under FBI surveillance has lost their Fourth

Amendment rights? It would seem so. If the FBI obtains a FISA warrant to put a group under surveillance, any evidence of a crime will be passed on to criminal investigators. While this evidence might not be admissable in a criminal trial, the criminal investigators can open their own investigations and start gathering evidence that will be admissable. Overall, the effect is to discriminate against legitimate groups associated with issues or parts of the world that are also of interest to terrorist organizations.

Paul

From: "Steven Aftergood" <saftergood@fas.org>
Date: 27 August 2002
Secrecy News, from the FAS Project on Government Secrecy Volume 2002, Issue No. 83

FOREIGN INTELLIGENCE SURVEILLANCE COURT OPENS UP

More information about the legal principles of domestic surveillance of suspected foreign intelligence and terrorist targets has become public in the past week than for many years before.

The proximate cause of the new disclosures was a Senate Judiciary Committee request to the Justice Department for a copy of a secret court ruling on surveillance practices. The Ashcroft Justice Department characteristically rebuffed the request.

But Senators Leahy, Specter and Grassley then turned to the famously secretive Foreign Intelligence Surveillance (FIS) Court, which authorizes surveillance and searches for counterintelligence and counterterrorism purposes. Remarkably, the court responded with a small flood of previously inaccessible documents.

Among them was a May 2002 FIS Court opinion which criticized and revised the Justice Department's latest procedures for sharing information between intelligence officials and law enforcement personnel.

While Congress had clearly intended to reduce the barriers to such information sharing, the Court found that the Justice Department procedures had instead nearly eliminated them. Further, the Court said the procedures seemed intended to abuse foreign intelligence surveillance authority for ordinary law enforcement purposes.

> "The 2002 procedures appear to be designed to amend the law and substitute the FISA [i.e. the less demanding intelligence surveillance standards] for Title III electronic surveillances [i.e. the more demanding law enforcement standards]. This may be because the government is unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous."

The Court also revealed that false statements had been made by the FBI in years past on more than 75 occasions in seeking surveillance authorizations.

See the Court's May 2002 Memorandum Opinion and Order here:

> Memorandum Opinion of the Foreign Intelligence Surveillance Court,
> rejecting and revising Justice Department intelligence sharing procedures,
> 17 May 2002
> http://www.fas.org/irp/agency/doj/fisa/fisc051702.html

The *New York Times* today refers to the Justice Department's 2002 procedures that were reviewed by the Court as "secret regulations." But they are no longer secret, having been released by the Court last week (through the Senate Judiciary Committee).

See a copy of the March 2002 "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI" here:

> Attorney General Memorandum on Intelligence Sharing Procedures,
> 6 March 2002
> http://www.fas.org/irp/agency/doj/fisa/ag030602.html

On August 21, the Justice Department filed an appeal with the three-member Foreign Intelligence Surveillance Review Court, challenging the FIS Court's May ruling.

Far from being cowed by the May decision, the Department's appeal argues vigorously and rather persuasively that the FIS Court misinterpreted the requirements of last year's USA Patriot Act.

See the slightly redacted text of the Department's August 21 appeal here:

> Justice Dept Appeal to the U.S. Foreign Intelligence Surveillance Court of Review,
> seeking to vacate FIS Court Opinion and Order,
> 21 August 2002
> http://www.fas.org/irp/agency/doj/fisa/082102appeal.html

Much of the abundant commentary on the new court ruling and the Justice Department's appeal has been marred by extreme characterizations, erroneous claims and righteous indignation to the point that one almost despairs of having a serious conversation about the important issues involved.

But two critical editorials in the *Washington Post* have the unusual virtue of being informed by a reading of the actual documents. See "The Limits of Trust" (Aug. 23, 26):

> The Limits of Trust
> 23 August 2002, Page A26
> http://www.washingtonpost.com/ac2/wp-dyn/A51447-2002Aug22?language=printer
>
> The Limits of Trust (Cont'd)
> 26 August 2002, Page A14
> http://www.washingtonpost.com/ac2/wp-dyn/A61147-2002Aug25?language=printer

Secret Court Decision Silently Overrules Provision of PATRIOT Act

by Jennifer Van Bergen, www.truthout.org, Sunday, 25 August, 2002

The Senate Judiciary Committee last week released a decision by a secret court that determines issues arising under the Foreign Intelligence Surveillance Act (FISA). This court is known as the FISA court. This is the first time since the FISA court was established that it has released an opinion. Major news outlets covered the event, but these stories -- missing the core issue -- focused largely on the court's mention of 75 cases in which the FBI and DOJ gave erroneous information to the court.

According to the *New York Times*, DOJ officials deflected the court's criticism about the 75 cases, declaring that the criticism was directed mostly toward the FBI under the Clinton administration. This deflection is a ruse, a red herring. It is not the central issue.

While it is certainly significant that government employees gave the FISA court wrong information, what is more important is what Ashcroft is now asking the FISA court -- and what the court declined -- to permit.

The real core issue decided in the FISA court's opinion is whether (in the DOJ's words) the DOJ may now use FISA "**primarily** for a law enforcement purpose, so long as a significant foreign intelligence purpose remains."

This interpretation is a monumental distortion of FISA's meaning. It shows, furthermore, what the DOJ's real agenda is: to undermine and subvert the Fourth Amendment. That the FBI and the DOJ have long asked courts to interpret the FISA this way does not change the meaning of the DOJ's present act. Federal courts have uniformly ruled against such interpretation.

The DOJ's argument also raises questions about the intentions of those who passed the provision in the PATRIOT Act that the DOJ is now attempting to use.

Although it is nowhere stated in the FISA court opinion, the provision in question is Section 218 of the PATRIOT Act. This provision amends a section of FISA which, before the PATRIOT Act, required that in order for the FISA court to grant a foreign intelligence surveillance order the FBI must certify that "the purpose for the surveillance is to obtain foreign intelligence information."

The PATRIOT Act changed this section to read: "a significant purpose," thus changing the weight of the provision in favor of using it in criminal investigations, allowing it to be applied even where the acquisition of foreign intelligences was *NOT* the primary purpose for the FISA surveillance. The shift has concerned the ACLU and other civil rights organizations.

The purpose of FISA, which was enacted in 1978, is to keep foreign intelligence investigations separate from criminal investigations. Why? Because foreign intelligence

investigations are not meant to result in criminal prosecutions. They are intended merely to gather intelligence about foreign operatives. They are, therefore, not subject to the 4th Amendment.

Criminal investigations, on the other hand, are meant to lead to criminal prosecutions, and they are subject to requirements of the United States Constitution, namely the probable cause requirement of the search and seizure clause of the 4th Amendment. The 4th Amendment protects against unreasonable searches and seizures without probable cause of criminal activity.

In other words, unless law enforcement has probable cause to believe you are engaged in criminal activity, it cannot get a warrant from a court. This protects citizens from unreasonable searches and seizures. It means that law enforcement cannot just come into your home based on, say, a rumor spread by a nutty neighbor who thinks you should keep your windows cleaner. (This was an actual complaint I heard made by a tenant to a building manager a few years ago, who was trying to get the manager to evict her neighbor.)

The protection against unreasonable searches and seizures was considered so important by the Framers that they put it in the Constitution. One could say that it is a central tenet of our republic. Without the protection against unreasonable searches and seizures, one could question whether there is a republic, right wing, left wing, or political bird of any feather. If government can come into your home anytime it likes, on the basis of the slightest rumor (or even no rumor at all), forget the right to silence, the freedom to associate, freedom of religion, the right to counsel, and so on. They are all out the window.

Foreign intelligence investigations are not required to satisfy 4th Amendment requirements, because the information is not intended to be used to bring someone to justice. Intelligence is intended to find out what our enemies are up to so we can take counter-measures.

Counter-measures exist in the realm of diplomacy, espionage, and meetings between heads of state. They do not, cannot, exist in open court.

Likewise, the battle over national security does not belong in the courts. This is one reason why the "national security" argument for secret evidence in criminal trials is bad. If the issue is national security, why is the government bringing a criminal case? If it is a criminal case, the evidence should not rest on national security issues. It should rest on clearly defined criminal conduct.

Likewise, in a case brought by a defendant against the government demanding the reasons for his incarceration (known as a habeas corpus petition), or one brought by others seeking access to hearings or the release of basic information about who is held and why, courts should not be required to decide a case on the basis of national security. This forces the court to become the mere instrument of the government, since the judge must then take the DOJ’s word as to the weight of the evidence. This is a breach of the independence of the judiciary.

The FISA court is the one exception. It stands in that no-man’s-land between the two worlds of espionage and criminal law enforcement and acts as protector of each. As the FISA court noted in its opinion, it has "often recognized the expertise of the government in foreign

intelligence collection and counterintelligence investigations of espionage and international terrorism, and accorded great weight to the government's interpretation of FISA's standards."

"However," the FISA court continued, "this Court" -- not the DOJ or the FBI -- "is the arbiter of the FISA's terms and requirements." The court's job, according to the enacting statute, is to determine the "need of the United States to obtain, produce, and disseminate foreign intelligence information."

In other words, the FISA court is saying, notwithstanding the USA PATRIOT Act's amendments to FISA, which appear to blur the lines between foreign intelligence investigations and criminal investigations, the FISA standards remain the same as prior to the PATRIOT Act.

Because of "FISA's preeminent role in preserving our national security, not only in the present national emergency, but for the long term as a constitutional democracy under the rule of law" and because the FISA court's entire purpose is to apply the FISA standards, which require the separation of foreign intelligence from criminal investigation information, the FISA court is saying that FISA -- even as amended by the PATRIOT Act -- cannot be unconstitutionally and undemocratically intended to "be used primarily for a law enforcement purpose."

The FISA court states that its decision "raises no constitutional questions." It states that its decision "involves straight-forward application of the FISA" and is "based on traditional statutory construction of the FISA's provisions." The court does not, therefore, overtly decide that the PATRIOT Act provision which amended FISA is unconstitutional.

The decision is, nonetheless, a clear ruling against the PATRIOT Act.

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from the Church Committee reports:
Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Congress, 2nd Session, 1976:
Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III
The Internal Revenue Service: An Intelligence Resource and Collector
http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIl.htm

... on balanced vs unbalanced law enforcement

Excerpts from the Church Committee Reports of 1975-76

The IRS Intelligence Division, with 2,800 special agents trained to gather financial data, unlimited access to tax returns, and the power to issue summonses requiring the production of financial information without probable cause to believe a crime has been committed,

represents a great investigative capability. Because of this capability, Congress, the Federal Bureau of Investigation, and even the White House have sought, sometimes successfully, to direct the efforts of IRS against certain groups or individuals, many of whom would not have been investigated under normal IRS criteria. ...

The IRS system of organization and control over investigative activities has not proved compatible with the pursuit of non-tax objectives. The IRS was decentralized in 1952 in an effort to end widespread political influence congressional investigators had discovered. Under this decentralized structure, the intelligence chief in each of the fifty-eight IRS districts largely controls and supervises investigations. The essence of decentralization is heavy reliance upon the professional, independent judgment of agents at the field level, subject to the setting of general policy by the National Office. Under these general guidelines, agents and supervisors in the field apply tax related criteria in making decisions concerning the identification of targets of investigations, and the initiation and scope of investigations. The result has generally been that investigative resources are applied to particular taxpayers or categories of taxpayers in proportion to the tax compliance problems they present, based upon the IRS experience of prior years. This system is generally known as "balanced tax enforcement."

The use of the IRS for non-tax purposes requires "unbalanced enforcement," where the target group is selected for reasons other than the significance of the tax compliance problem it presents. Unbalanced tax enforcement has given rise to a combination of elements which have produced abuse: **(1)** the subordination of tax criteria to achieve a concentration of enforcement resources creates an atmosphere within the IRS which encourages excessive zeal and departure from other normal criteria of IRS operation; **(2)** the pursuit of non-tax objectives through selective tax enforcement by the IRS Intelligence Division has historically involved the use of techniques such as paid informants, electronic surveillance, and undercover agents, all of which are prone to abuse; **(3)** because the IRS decentralized organizational structure is designed to achieve tax objectives and is, by design, resistant to pressure from above, in order to bring about the desired imbalance in the enforcement program, the IRS has generally found it necessary to bypass its normal organizational structure; **(4)** in doing so, the IRS has bypassed the normal administrative mechanisms which check excess and abuse at the lower levels.