U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

February 14, 1995

MEMORANDUM FOR MICHAEL VATIS
DEPUTY DIRECTOR
EXECUTIVE OFFICE FOR NATIONAL SECURITY

From: Walter Dellinger WSD
Assistant Attorney General

Re: Standards for Searches Under Foreign Intelligence Surveillance Act

You have asked for our opinion whether a search under the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1800-1811 ("FISA"), may be approved only when the collection of foreign intelligence is the "primary purpose" of the search or whether it suffices that the collection of foreign intelligence is one of the purposes.[1] We believe that courts are more likely to adopt the "primary purpose" test than any less stringent formulation. Nevertheless, in criminal cases where the prosecution seeks to introduce evidence gathered through intelligence searches, the courts have been exceedingly deferential to the government and have almost invariably declined to suppress the evidence, whether they applied the "primary purpose" test or left open the possibility of a less demanding standard. The deference shown by the courts suggests that, in any case where the government asserts in good faith that the "primary purpose" was the collection of foreign intelligence, the government is quite likely to defeat a motion to suppress evidence from a FISA search.

Of course, the greater the involvement of prosecutors in the planning and execution of FISA searches, the greater is the chance that the government could not assert in good faith that the "primary purpose" was the collection of foreign intelligence. While the ultimate decision must be based on a balance of risks and rewards, we believe that there is enough elasticity to permit the involvement of prosecutors without running an undue risk of having evidence suppressed.

[1] In this memorandum, "search" is used to cover both electronic surveillances and physical searches.

I. The History of the Standard

Even before FISA, the courts recognized that the government could conduct searches to obtain foreign intelligence without satisfying all of the requirements applicable to searches for evidence of crime. The Fourth Circuit, for example, held that "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance." United States v. Truong Dinh Hung, 629 F.2d 908, 914 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982) (citations omitted).[2] Nevertheless, as two courts of appeals ruled, this exception to the warrant requirement applied only where the "primary purpose" of the search was to obtain foreign intelligence. Otherwise, the government would need a warrant to conduct the search "because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." Id. at 915 See United States v. Butenko, 494 F.2d 593, 606 (3d Cir.), cert. denied, 419 U.S. 881 (1974).

With the enactment of FISA in 1978, Congress created a procedure under which a Foreign Intelligence Surveillance Court ("FISA court") could authorize electronic surveillance to gather foreign intelligence. See Pub. L. No. 95-511, 92 Stat. 1783 (1978). Recently, Congress passed a statute extending the jurisdiction of the court, so that the FISA court may now authorize physical searches. See Pub. L. No. 103-359, 108 Stat. 3423, 3443 (1994).

The passage of FISA has raised the question whether the "primary purpose" test should still apply. The test had been formulated as a standard for warrantless searches. FISA provided for the issuance of judicial orders, and the interposition of a neutral magistrate arguably erases the need for a test designed to prevent the executive from unduly intruding on privacy. To be sure, FISA orders are unlike traditional search warrants in ordinary criminal cases, because they are not based on the same requirement of probable cause. Cf. Fed. R. Crim. P. 41 (standards for search warrant in criminal case). Instead, an application for an order approving a search under FISA states the facts relied upon to show

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[2] See also United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); United States v. Buck, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); United States v. Clay, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971); but see Zweibon v. Mitchell, 516 F.2d 594, 651 (D.C. Cir. 1975) (dictum in plurality opinion), cert. denied, 425 U.S. 944 (1976). The Supreme Court held that a warrant was required for electronic surveillance of domestic groups allegedly threatening the nation, but pointedly noted that the "case require[d] no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." United States v. United States District Court, 407 U.S. 297, 308 (1972).

that the target of the search is "a foreign power or an agent of a foreign power" and certifies that "the purpose of the surveillance [or physical search] is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(4)(A) & (a)(7)(B); § 303(a)(7)(B), in § 807, 108 Stat. at 3446.[3] Nevertheless, the FISA court does make a determination of probable cause (albeit not the traditional one for criminal cases), and a "primary purpose" test designed for warrantless searches might thus be found inapplicable.

Even after FISA, however, most courts have adhered to the "primary purpose" standard, either because they have read FISA as incorporating that standard or because they have considered the standard constitutionally required. In United States v. Duggan, 743 F.2d 59 (2d Cir. 1984), for example, the Second Circuit held that FISA enacted the "primary purpose" test:

> FISA permits federal officials to obtain orders authorizing electronics [sic] surveillance "for the purpose of obtaining foreign intelligence information." 50 U.S.C. § 1802(b). The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information . . . .

Id. at 77. In United States v. Johnson, 952 F.2d 565 (1st Cir. 1991), cert. denied, 113 S.Ct. 58 (1992), the First Circuit, taking a different approach, justified the "primary purpose" test as a means to prevent "an end-run" around the Fourth Amendment. Id. at 572. See United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987), cert. denied, 485 U.S. 937 (1988); United States v. Megahey, 553 F. Supp. 1180, 1190 (E.D.N.Y. 1982) (an earlier proceeding in Duggan, reaching the same conclusion), aff'd, 729 F.2d 1444 (2d. Cir. 1983); United States v. Chin, Crim. No. 85-263-A, slip op. at 10 (E.D. Va. Jan. 29, 1986) (same); see also United States v. Rahman, 861 F. Supp. 247, 251 (S.D.N.Y. 1994) (following Duggan).[4]

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[3] When the target is a United States person, however, FISA requires at least a showing that the person's activities "may involve" violation of a criminal statute. See 50 U.S.C. § 1801(b)(2)(A).

[4] The decision in Badia is less explicit than the other court of appeals decisions in dealing with the "primary purpose" test, but the court rejected the argument that "the surveillance was imposed not to seek foreign intelligence information, but to conduct a criminal investigation," by holding that "the documents establish that the telephone surveillance . . . did not have as its purpose the primary objective of investigating a criminal act." 827 F.2d at 1462, 1464.

Although the "primary purpose" test is supported by substantial judicial authority, not all courts have felt compelled to hold it applicable to searches under FISA. The Ninth Circuit has reserved the question whether, in a search authorized under FISA, the "primary purpose" test is too strict and the proper test is simply whether there was a legitimate foreign intelligence purpose. United States v. Sarkissian, 841 F.2d 959, 964 (9th Cir. 1988) (under either test, evidence admissible); accord In re Kevork, 634 F. Supp. 1002, 1015 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986). One district court in the Second Circuit appears to have concluded that, given the judicial orders authorizing FISA searches, a legitimate foreign intelligence purpose suffices, United States v. Falvey, 540 F. Supp. 1306, 1313-14 (E.D.N.Y. 1982), but this ruling preceded the Second Circuit's decision in Duggan applying the primary purpose test.[5]

II. The Applicable Test

We believe that courts, in passing on the admissibility of evidence gathered pursuant to FISA searches, are likely to adhere to the use of the "primary purpose" test. Three considerations support this position.

First, the weight of precedent is decidedly on the side of that test, rather than the lesser "purpose" standard. Four circuits (in Duggan, Johnson, Pelton, and Badia) have used the "primary purpose" test. None has endorsed a less stringent formula, although the Ninth Circuit (in Sarkissian) has reserved the question. The one district court opinion adopting the "purpose" test (Falvey) was undermined by a later opinion by the relevant court of appeals (Duggan) embracing the "primary purpose" test.

Second, the language of FISA, although not entirely clear on this point, offers more support to the "primary purpose" test than to the alternatives. Under FISA, an application for a search order must include a certification that "the purpose" of the search is the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B). Although the Second Circuit perhaps overstated the case in declaring the "plain" meaning of this and other, similar language to be that the intelligence purpose must be primary, the language readily lends itself to that interpretation. It is far easier to read "the purpose" to mean the "primary purpose" than it is to read it as meaning "a purpose."[6]

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[5] In United States v. Kozibioukian, No. Cr 82-460 (CBM) (C.D. Cal. filed March 4, 1983), the United States expressed the belief that Falvey was correct in rejecting the "primary purpose" test, but went on to invite the court to conduct the factual inquiry that the "primary purpose" test would require. The brief was filed before the decision in Duggan.

[6] Furthermore, in its report on FISA, the Senate Judiciary Committee indicated that there would be "relatively few cases in which information acquired under this chapter may be used as evidence" in criminal prosecutions and drew a contrast between FISA searches and "Title III interceptions [that is, interceptions authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520] the very purpose of which is to obtain evidence of criminal activity." S. Rep. No. 604, 95th Cong., 1st Sess. 39 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3940. Although this passage conceivably could be read

Third, the "primary purpose" test, even if not compelled by the Fourth Amendment, probably will be attractive to a court as serving Fourth Amendment goals. A FISA order authorizes a search on a less stringent showing than would be required for a search warrant under Rule 41 of the Federal Rules of Criminal Procedure. Unlike a warrant under Rule 41, a FISA order does not require a showing of probable cause to believe that the information or things sought are to be found in the place to be searched. Compare Fed. R. Crim. P. 41(c) (warrant to command search of "the person or place named for the property or person specified"), with 50 U.S.C. § 1804(a) (application for FISA order). The departure from the usual requirements underlay the concern of the Johnson court that FISA could allow an "end-run" around the Fourth Amendment. Especially because (as discussed below), the "primary purpose" test in practice has proved less demanding than might be expected, courts may find the use of the test an appealing means for affirming Fourth Amendment interests without actually suppressing evidence.

This is not to deny that substantial arguments could be made against the "primary purpose" formula. We believe, in fact, that the Department would be justified in arguing against a motion to suppress that the appropriate test should be the more lenient one of whether there was a substantial intelligence purpose for a search or whether the intelligence purpose was a mere pretext for a criminal investigation. FISA unquestionably contemplates the use in criminal trials of evidence obtained in FISA searches. The statute sets up procedures for handling evidence of crime obtained in FISA searches, see, e.g., 50 U.S.C. §§ 1801(h) & 1806, including procedures for deciding suppression motions, id. § 1806(e). Congress understood, moreover, that "[i]ntelligence and criminal law enforcement tend to merge," that "foreign counterintelligence surveillance frequently seeks information needed to detect or anticipate the commission of crimes," and that "surveillances conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." S. Rep. No. 701 at 11 & n.4, reprinted in 1978 U.S.C.C.A.N. 3904, 3979-80. Because Congress recognized that the line between collection of intelligence and collection of evidence is unclear, that both purposes are generally present, and that the usual standards for criminal searches cannot be applied to searches under FISA, it arguably did not intend to lay down as stringent a standard as "primary purpose."[7]

Despite these arguments, we believe that a court would more likely apply a "primary purpose" test rather than a less exacting standard. The intrusion under a FISA order may be

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to mean that in Title III searches the only purpose is to obtain evidence but that in FISA searches the collection of foreign intelligence must also be one of the purposes, the more reasonable interpretation is that, in the Committee's view, the primary purpose of FISA searches, unlike Title III searches, must be intelligence-gathering.

[7] Furthermore, because both intelligence and law enforcement personnel may be involved to at least some degree, it may not be meaningful to talk about the government's purpose; different actors may have different purposes.

extraordinarily serious. A FISA order may permit searches of a person's home, where the expectation of privacy is particularly well-grounded, see Payton v. New York, 445 U.S. 573, 589-90 (1980), and these searches may take place even after the government has conclusive evidence of crime. Cf. Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (searches involved a "relatively limited invasion of the urban citizen's privacy" because "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime"). Furthermore, the secrecy under which a FISA order may be carried out distinguishes FISA from other non-criminal search regimes. Compare Fed. R. Crim. P. 41(d) (warrant and inventory provided to person whose property is searched), with 50 U.S.C. § 1806(j) (limited circumstances in which disclosure of FISA search is made). This secrecy removes some of the usual means by which the person subjected to a search could protect himself against abuses. The "primary purpose" test may help to restore a degree of protection. While these considerations may not mean that the "primary purpose" test is constitutionally required, they weigh heavily against a reading of FISA that, contrary to most authority, would find the statute not to require a "primary purpose" of intelligence-gathering.

III. The Meaning of "Primary Purpose"

Even if "primary purpose" is the proper test, the term has not yet been defined to the point of precision, and few bright line rules can be discerned as to when a "primarily" intelligence search becomes a "primarily" criminal investigation search. It is apparent, however, from the deference courts have shown the government in FISA cases that the test is likely to be applied in a way that, in any fairly contestable case, favors the government.

In applying for an order under FISA, the government must certify that the purpose of the search is to gather foreign intelligence. 50 U.S.C. § 1804(a)(7)(B). The courts probably will defer to this certification in almost all cases. Even when the person subjected to the search is a United States person, the certification is reviewed only on a "clearly erroneous" standard. Id. § 1805(a)(5). In Duggan, the Second Circuit stated that "[o]nce this certification is made . . . it is, under FISA, subjected to only minimal scrutiny by the courts" and that the courts are not to "second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information." 743 F.2d at 77 (footnote omitted). Indeed, "[t]o be entitled to a hearing as to the validity of those presentations, the person challenging the FISA surveillance would be required to make 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included' in the application and that the allegedly false statement was 'necessary' to the FISA Judge's approval of the application." Id. at 77 n.6 (quoting Franks v. Delaware, 438 U.S. 154, 155-56 (1978)). Furthermore, a court reviewing the FISA court's order is to apply no more stringent a standard. 743 F.2d at 77. In Pelton, the Fourth Circuit cited Duggan with approval and declared that the certification as to "the purpose" of the search "carrie[d] a strong presumption of veracity and regularity in a reviewing court." 835 F.2d at 1076. Thus, where the government in good faith can represent that "the purpose" of a search is the collection of foreign intelligence (which the

courts interpret to mean the "primary purpose"), that certification is not likely to be overturned.

Given the deference that courts, expressly or implicitly, accord to the government in this area, the cases offer little guidance for identifying the precise line where the use of intelligence information by prosecutors might make law enforcement the "primary purpose" of a FISA search. Typically, the analysis in the cases is perfunctory. The only extensive discussion by an appellate court appears in Truong, a pre-FISA decision that used the "primary purpose" test:

> [a]lthough the Criminal Division of the Justice Department had been aware of the investigation from its inception, until summer the Criminal Division had not taken a central role in the investigation. On July 19 and July 20, however, several memoranda circulated between the Justice Department and the various intelligence and national security agencies indicating that the government had begun to assemble a criminal prosecution. On the facts of this case, the district court's finding that July 20 was the critical date when the investigation became primarily a criminal investigation was clearly correct.

629 F.2d at 916. This passage shows that the mere receipt of information by the Criminal Division does not negate a "primary purpose" of intelligence-gathering. Cf. S. Rep. No. 701 at 11, reprinted in 1978 U.S.C.C.A.N. at 3980 ("surveillances conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate"). Nevertheless, Truong leaves unclear whether, in the court's view, the investigation became primarily criminal as soon as the Criminal Division started "to assemble a criminal prosecution" or whether the Criminal Division took on a "central role" only when it began to control the investigation.

Recognizing that we are attempting to extract principles from scanty discussions in only a few cases, we believe that some limited conclusions about the meaning of the "primary purpose" test may be drawn. First, some involvement of persons with law enforcement responsibilities does not negate the "primary purpose" of intelligence-gathering. The court in Truong admitted evidence obtained after the Criminal Division began to monitor the case. Furthermore, the FBI agents involved in FISA searches have both intelligence and law enforcement roles, but that dual allegiance does not result in the exclusion of evidence. When the Ninth Circuit in Sarkissian decided that the facts would satisfy the "primary purpose" test (although the court reserved the question whether that test was the correct one), it rejected the argument that the FBI agents had shifted their focus to criminal investigation. 841 F.2d at 964.

Second, because the "primary purpose" test necessarily allows that intelligence-gathering will not always be the sole purpose for a FISA search, it must be permissible for prosecutors to be involved in the searches at least to the extent of ensuring that the possible criminal case not be prejudiced. Thus, they can advise the FBI agents in charge of the investigation, at least insofar as that advice is necessary to prevent damage to the criminal case.

In view of the deference the courts are likely to give to the certification of the Attorney General that the "primary purpose" of the search was intelligence-gathering, both prudence and responsibility suggest that an appropriate internal process be set up to insure that FISA certifications are consistent with the "primary purpose" test. One celebrated case of abuse could impair the courts' deferential standard, and perhaps more importantly, could impair congressional and public trust in the executive's responsible use of what must be acknowledged to be expansive powers. We recognize that this guidance is not very exact, but the cases simply do not support more definitive conclusions.