Constitutionality of Expiring PATRIOT Act Provisions

Sec. 206 (roving wiretap authority) – allows the FISA Court to authorize the use of roving surveillance, attaching the wiretap authorization to a particular suspect as opposed to a particular communications device. **Constitutionality: unchallenged.**

Sec. 215 (FISA business records authority) – allows the FISA court to order the production of business records and other items, in the context of a national security investigation, to obtain foreign intelligence information not concerning a U.S. person; or to protect against international terrorism or clandestine intelligence activities. Section 215 cannot be used to investigate ordinary crimes or domestic terrorism, and it is expressly provided that the FBI cannot conduct an investigation on a U.S. citizen solely on the basis of activities protected by the First Amendment. **Constitutionality: challenge withdrawn**, *see Muslim Community Association v. Ashcroft,* 459 F.Supp.2d 592 (E.D. Mich. 2006).

The Muslim Community Association, the ACLU, and other organizations filed a lawsuit against the Justice Department and FBI in 2003 alleging that Section 215 of the USA PATRIOT Act violates the First, Fourth and Fifth Amendments to the U.S. Constitution.[1] The government filed a motion to dismiss. Following a hearing, the court took the matter under advisement.

While this action was pending, Congress approved the 2005 reauthorization of the PATRIOT Act, which, as noted above, made several procedural changes to the FISA business records provision. In light of these changes, the government argued that any alleged constitutional challenges were corrected by the reauthorization and urged dismissal.[2]

The government sought dismissal on several grounds, including lack of standing and ripeness and mootness of the plaintiff's claims. In 2006, the district court issued a Memorandum Opinion and Order finding that plaintiffs had standing to bring their First Amendment claims. On the issue or ripeness and mootness, the court allowed the plaintiffs to file an amended complaint within 30 days of its order in light of the reauthorization. If no such amendment was filed, the government would be allowed to renew its request for dismissal based upon ripeness and mootness.[3]

On October 27, 2006, plaintiffs filed a motion with the district court seeking voluntary withdrawal of their complaint.[4]

Sec. 6001 of IRTPA (lone wolf provision) – amends the definition of "agent of a foreign power" under FISA to include persons, other than citizens or permanent residents of the U.S., that are engaged in international terrorism, but who may not be linked to a foreign power or terrorist organization. **Constitutionality: unchallenged.**

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[1] 459 F.Supp.2d 592 (E.D. Mich. 2006).
[2] *Id.* at 596.
[3] *Id.* at 602.
[4] ACLU press release (Oct. 27, 2006), *available at* http://www.aclu.org/safefree/patriot/27211prs20061027.html.

Constitutionality of FISA Electronic Surveillance

The Fourth Amendment imposes specific requirements upon the issuance of warrants authorizing searches of "persons, houses, papers, and effects."[5] The Supreme Court extended application of the Fourth Amendment to certain types of electronic surveillance. In *Katz v. United States*, 389 U.S. 347 (1967), the Court held that the protections of the Fourth Amendment extended to circumstances involving electronic surveillance of oral communications without physical intrusion.[6] **The *Katz* Court stated, however, that its holding did not extend to cases involving national security.**

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act,[7] which addresses the permissible use of wiretaps and other forms of electronic surveillance. Much of Title III was based upon the constitutional requirements for electronic surveillance enunciated by the Court in *Katz* and *Berger v. New York*, 388 U.S. 41 (1967). The Crime Control Act did not extend to national security cases. The Act did, however, contain a disclaimer that the criminal wiretap laws did not affect the President's constitutional duty to protect national security.

In *United States v. United States District Court*, 407 U.S. 297 (1972) (the *Keith* case), the Court regarded *Katz* as "implicitly recogniz[ing] that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards."[8]

The Court held that, in the case of intelligence gathering involving *domestic* security surveillance, prior judicial approval was required to satisfy the Fourth Amendment.[9] Justice Powell emphasized that the case before 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."[10]

The Court expressed no opinion as to "the issues which may be involved with respect to activities of foreign powers or their agents."[11] The Court specifically invited Congress to establish similar standards for domestic intelligence that were established for criminal investigations by Title III of the Crime Control Act.[12]

In *In re Sealed Case,* the FISA Court of Review (FISCR) tacitly acknowledged the existence of a foreign intelligence exception to the Fourth Amendment warrant requirement.[13]

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[5] U.S. Const., amend. IV.
[6] *Katz,* 389 U.S. at 353.
[7] 87 Stat. 197, 18 U.S.C. §§ 2510-2520 (1970 ed.)
[8] *Keith,* 407 U.S. at 313-14.
[9] *Id.* at 319-21.
[10] *Id.* at 308.
[11] *Id.* at 321-22.
[12] *Id.* at 323-24.
[13] 310 F.3d 717 (FISCR 2002) ("We do not decide the issue but note that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment.")

> [W]hile Title III contains some protections that are not in FISA, in many significant respects the two statutes are equivalent, and in some, FISA contains additional protections. Still, to the extent the two statutes diverge in constitutionally relevant areas – in particular, in their probable cause and particularity showings – a FISA order may not be a "warrant" contemplated by the Fourth Amendment. . . . We do not decide the issue but note that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment.[14]

In 2008, the FISCR expressly confirmed such an exception.[15] "The question, then, is whether the reasoning of the special needs cases applies by analogy to justify a foreign intelligence exception to the warrant requirement for surveillance undertaken for national security purposes and directed at a foreign power or an agent of a foreign power reasonably believed to be located outside the United States. Applying principles derived from the special needs cases, we conclude that this type of foreign intelligence surveillance possesses characteristics that qualify it for such an exception."[16]

In addition to the 2008 FISCR ruling, eight federal courts have upheld the constitutionality of FISA electronic surveillance under the 4th Amendment.[17]

One court, the U.S. District Court for the District of Oregon, ruled in 2007 that electronic surveillance under FISA violates the 4th Amendment.[18] **This decision, however, was vacated by the 9th Circuit Court of Appeals in 2010 based on the holding that the plaintiff lacked standing to bring the challenge. The Supreme Court subsequently denied review of the case.[19]**

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[14] *Id.* at 741-42.
[15] *In re Directives,* 551 F.3d 1004 (FISCR 2008).
[16] *Id.* at 1011.
[17] *See, e.g., United States v. Wen,* 477 F.3d 896, 898 (7th Cir. 2007); *U.S. v. Damrah,* 412 F.3d 618, 625 (6th Cir. 2005); *American Civil Liberties Union v. United States Dep't of Justice,* 265 F.Supp.2d 20, 32 & n. 12 (D.D.C. 2003); *United States v. Pelton,* 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh,* 807 F.2d 787, 790-92 (9th Cir.1987); *States v. Duggan,* 743 F.2d 59, 77-78 (2d Cir. 1984); *United States v. Holy Land Found. for Relief & Dev.,* No. 3:04-CR-240-G, 2007 WL 2011319, at *5-6 (N.D.Tex. July 11, 2007); *U.S. v. Sattar,* 2003 WL 22137012, at *12-13 (S.D.N.Y. Sept. 15, 2003).
[18] *Mayfield v. U.S.,* 504 F.Supp.2d 1023 (D. Ore. 2007).
[19] *Mayfield v. U.S.*, 599 F.3d 964, 970 (9th Cir. 2010) *cert. denied*, 131 S. Ct. 503, 178 L. Ed. 2d 369 (U.S. 2010) *(citation to cert denial).*