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Office of Intelligence Policy and Review

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MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Merrick Garland
Chief Associate Deputy Attorney General

FROM: Jim McAdams
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RE: Factors For Determining Whether Investigative Efforts Are In Pursuit of National Security Or Are In Pursuit of Law Enforcement

I. INTRODUCTION

At the core of most intelligence activities undertaken by foreign governments against U.S. interests is the intent to commit a criminal act, usually espionage or international terrorism. Necessarily, then, there will often be significant intertwining of national security (counterintelligence) and law enforcement investigations. Whenever the government decides to pursue both national security and law enforcement investigations simultaneously, as the law clearly permits, it must carefully decide whether, or at what point, one of the investigations must be halted in order to preserve the other. The timeliness and manner in which the government makes that decision may easily become the subject of review by a trial court. If the law enforcement investigation results in a criminal prosecution, the trial court hearing the case likely will be faced with deciding, in the context of a motion to suppress evidence critical to the prosecution, whether the government timely and properly made that choice.

In light of the considerable concern by various components over these issues, we offer this paper to provide some insights into how OIPR has approached them as they have lately arisen and to suggest how we believe the courts will address them when they arise in future criminal litigation.

II. DISCUSSION

By definition, the main purpose of a counterintelligence investigation (CI) is to protect the U.S. government from the clandestine efforts of other governments to compromise or affect

adversely U.S. military and diplomatic secrets or the integrity of U.S. government processes. Nevertheless, federal law clearly contemplates that criminal prosecution may be a secondary purpose of counterintelligence investigations.[1] In fact, the Eighth Circuit has held that, "when a monitoring agent overhears evidence of domestic criminal activity, it would be a subversion of his oath of office if he did not forward that information to the proper prosecuting authorities."[2] Furthermore, given the nature of the activities that foreign governments most often employ to harm U.S. interests, i.e., international terrorism and espionage, it certainly is appropriate to preserve the option to pursue a criminal prosecution for such activities.

When a counterintelligence investigation leads ultimately to a criminal prosecution, the trial court usually will scrutinize the government's reliance upon evidence obtained pursuant to FISA. This will entail not only a determination of whether the government complied with the procedural requirements of FISA, but also an examination of whether it was legally permissible for the government to rely upon FISA rather than upon the more strident criminal procedures.

Most courts base this inquiry upon the "primary purpose" test first articulated by the Fourth Circuit in United States v. Truong Dinh Hung:

> "First, the government should be relieved of seeking a warrant only when the object of the search or the surveillance is a foreign power, its agent or collaborators ... Second, as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons."[3]

Significantly, post-FISA courts have adopted the primary purpose test as the determinant for whether or not the government properly relied upon CI investigative techniques. In United States v. Duggan, the Second Circuit held that, "[t]he requirement that foreign intelligence information be the primary

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[1]See the Foreign Intelligence Surveillance Act (FISA), 50 USC §§ 101(c)-(d), § 106.

[2]United States v. Isa, 923 F.2d 1300, 1305 (8th Cir. 1991), quoting United States v. Hawamadi, 1989 WL 235836, 4-5 (E.D. Va. April 17, 1989).

[3]United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982).

objective of the surveillance is plain..."[4]

The timing of the government's decision to shift its primary purpose from counterintelligence to law enforcement is critical. If the government miscalculates the factors that contribute to its decision, there can be significant repercussions. Certainly, the trial court can suppress all the intelligence-based evidence the government obtained after the time the court believed the primary purpose shifted. But even greater harm can ensue.

If a court believes that a defendant's rights were violated by the government in the conduct of its investigation, the court can order that FISA derived information be turned over to the defendant. Faced with such an order, the government would have to decide whether pursuing the prosecution was sufficiently important to expose sensitive intelligence sources and methods, or whether protecting those sources and methods was so important that the government should abandon the prosecution.

The challenge, of course, is knowing when the President's interest in foreign intelligence is paramount, or, perhaps more importantly from a constitutional standpoint, when does that interest cease being paramount? The following are several factors that the case law suggests are relevant and irrelevant to consideration of that query.

A. Relevant Factors

1. The first relevant factor is whether the internal requirements of FISA have been met. The government must provide the appropriate executive certifications and statements in the FISA surveillance application. The procedural standards and requirements in FISA establish a presumption that the surveillance sought is being conducted "primarily" for foreign intelligence reasons.[5] When the FISA application has been properly made and approved by a FISA judge, it carries a strong presumption of veracity and regularity in a reviewing court.[6]

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[4]United States v. Duggan, 743 F.2d 49, 77 (2d Cir. 1984).

[5]United States v. Megahey, 553 F.Supp. 1180, 1189 (E.D. NY 1982), aff'd sub nom. United States v. Duggan, 743 F.2d 49 (2d Cir. 1984).

[6]United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987). See also Duggan, 743 F.2d at 77 ("Once the certification is made, however, it is, under FISA, subjected to only minimal scrutiny by the courts.") and 50 USC §1805(a) ("Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds ...") (emphasis added).

Such a presumption of regularity is consistent with judicial action in other areas of the law where certification is required.[7] Inquiry into the accuracy of statements made in a certification by the Attorney General is appropriate only when the defendant has established bad faith on the part of the government.[8]

2. A second determinative factor is whether the goal of the electronic surveillance is broader than the known criminal activity -- or at least the subsequent criminal charges. While careful not to reveal the materials submitted for ex parte, in camera review, various courts have implied that the information sought of foreign agent activities is comprehensive in nature, with stated goals beyond the elements of one or more criminal offenses.[9]

3. A third relevant factor is whether investigators were looking for evidence of criminal conduct unrelated to the foreign affairs needs of the President. FISA is meant to take into account "[t]he difference between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities."[10] Conversely, when the object of the surveillance is an entity known to engage in activities covered by FISA, then it will be inferred that the aim is counterintelligence. In Duggan, the court's primary purpose determination was in part based upon the fact that the information sought involved international terrorism, and the subject of the proposed surveillance played a leadership role in activities of a known international terrorist organization.[11]

4. A fourth determinative factor, strongly suggested by the decision in Truong, is whether the investigation was led by members of the DOJ's and FBI's intelligence components or whether it was under the leadership of the criminal components. A

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[7]For example, under the Federal Juvenile Delinquency Act, 18 USC §5031 et seq., the Attorney General must, after investigation, certify to the appropriate district court that no state court has jurisdiction over the defendant's acts of juvenile delinquency.

[8]E.g., Franks v. Delaware, 438 U.S. 154 (1978); United States v. C.G., 736 F.2d 1474, 1478 (11th Cir. 1984).

[9] See, e.g., Megahey, 553 F.Supp. at 1190; Duggan, 743 F.2d at 78; United States v. Ott, 827 F.2d 473, 475 (9th Cir. 1987).

[10]United States v. Sarkassian, 841 F.2d 959, 965 (9th Cir. 1988).

[11]Duggan, 743 F.2d at 78.

related inquiry is whether the investigation changed hands between those two entities. Activities undertaken during a CI investigation that fairly can be described as assembling a criminal prosecution are very likely to be interpreted during later judicial review of those activities as indicia that the primary purpose has changed. For example, the Truong court found that, although the Justice Department knew about the intelligence investigation from its inception, it was when DOJ's Criminal Division circulated proposed prosecution memoranda that it became apparent that the government was assembling a prosecution.[12]

5. Finally, there is the question of whether the government initiated a CI surveillance without any decision having been made to use the information collected in a criminal proceeding.[13] Once the Executive Branch decides to prosecute a U.S. citizen involved with espionage or international terrorism, that decision may undercut the appropriateness of initiating a FISA electronic surveillance of that citizen, which surveillance is likely to produce evidence for use in the criminal proceeding.[14]

B. Irrelevant Factors

1. It has been judged to be irrelevant that the surveillance was undertaken with a suspicion that criminal activity may be discovered. In Truong, Attorney General Griffin Bell was quoted as saying,

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[12]Truong, 629 F.2d at 916.

[13]Megahey, 553 F.Supp. at 1190 ("As the Government's publicly filed affidavit makes clear, the FBI was conducting an international terrorist investigation at the time the electronic surveillance was instituted, and the surveillance was sought to further that investigation without any decision being made to use the information in criminal proceedings.")

[14]It has happened, however, that evidence developed in a criminal case serves as a basis for opening a separate CI investigation of the same persons targeted in the criminal case. In that situation, before proceeding with the parallel investigations, the government carefully identified the separate CI objectives, i.e., the prevention of future (rather than prosecuting past) acts of terrorism and the collection of information about persons and groups engaged in international terrorism. The government also established a wall between the previously existing criminal case and the CI investigation, including designation of an attorney not involved in the prosecution to determine whether evidence from FISA intercepts could properly be shared with the prosecution team.

"[N]early all [counterintelligence investigations] involve crime in an incidental way. You never know when you might turn up with something you might want to prosecute."[15]

Foreign intelligence investigations always are part criminal investigations, regardless of the government's ultimate decision concerning what to do about the target's activities. When the target of a CI investigation is a United States person, the government must demonstrate that the target is engaged in espionage, sabotage, or international terrorism, or is aiding and abetting those who are so engaged.[16]

Hence, an otherwise valid FISA surveillance does not become invalid merely because the government anticipates using the fruits of that surveillance in a later criminal prosecution. Indeed, such use is allowed under 50 USC § 1806(b). The inclusion of this provision in the statute suggests that Congress recognized that the government's concerns about intelligence matters would overlap with its pursuit of law enforcement objectives.[17]

2. A second irrelevant factor, closely linked to the first, is that a criminal prosecution did ultimately occur.[18] Congress clearly contemplated that the fruits of FISA surveillances would be used in criminal proceedings; hence, the inclusion of § 1806(c)-(h) in the FISA statute to regulate such usage.

3. A third extraneous factor to the primary purpose inquiry is that the evidence of criminal activity was uncovered before the electronic surveillance commenced or extended. Indeed, FISA surveillance that was undertaken in response to a

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[15]Truong, 629 F.2d at 916.

[16]50 USC §1801(b)(2).

[17]See Duggan, 743 F.2d at 78 ("Finally, we emphasize that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial.").

[18] Sarkassian, 841 F.2d at 65 ("That the government may later choose to prosecute is irrelevant."). See also United States v. Falvey, 540 F.Supp. 1306, 1314 (E.D. NY 1982) ("In enacting FISA, Congress expected that evidence derived from FISA surveillances could then be used in a criminal proceeding.").

tip from an informer of criminal activity has been upheld.[19] Moreover, FISA surveillance has been upheld where surveillance was re-authorized after the FBI learned that the defendant and others had planned criminal activities.[20] The courts in both of the foregoing cases determined that the initial and continuing primary purpose of the electronic surveillance authorized by the FISC was foreign intelligence. "Surveillance 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."[21]

III. CONCLUSION

The foregoing suggests that, where there exist parallel CI and criminal investigations but where the government's primary purpose continues to be that of national security, the following general measures should be considered in order to maintain an appropriate distinction between the two investigations:

1. Ensure that each FISA application contains a clear articulation of the ongoing intelligence purpose of the electronic surveillance. Also, when a criminal investigation has been initiated or is anticipated, the FISA application should so inform the FISA judge.

2. Ensure that the scope of the CI investigation is broader than known criminal activities and any eventual criminal charges.

3. Ensure that the right people are controlling the investigation. Avoid blurring the distinction by activities that could later be construed as creating a conduit from the FISA surveillance team to the criminal investigative/ prosecutive team or suggesting that investigative directives are flowing from the latter to the former.

4. Avoid actions that will be construed to indicate that the Department's decision to initiate a criminal prosecution was made while the CI investigation was underway or that the decision to continue a CI investigation was influenced by the criminal investigation.

The last recommendation is perhaps the most difficult. The

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[19]Duggan, 743 F.2d at 65-66.

[20]Sarkassian, 841 F.2d at 961.

[21]Sarkassian, 841 F.2d at 965 (emphasis added).

nature of these cases is such that anticipatory prosecutive decisions will need to be made at a time when there remain viable CI objectives. It is especially at that point that constant and consistent coordination is required between executive CI and criminal components. In the end, we believe that, in close decisions (as most of these issues are likely to be), the perception created by these efforts, or the lack thereof, will significantly affect the district court's decision regarding the government's primary purpose.

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