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THE ATTORNEY GENERAL'S REPORT ON
ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH
UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

June 2007

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Section 1: Introduction (U)

[Redacted text block]

~~(S)~~

[Redacted text block]

~~(S)~~

The FISC denied one application in part during this reporting period. (U)

[Redacted text block]

~~(S)~~

[Redacted text block]

~~(S)~~

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[Redacted] ~~(S)~~

2. *Descriptions* (U)

[Redacted] ~~(S)~~

[Redacted] ~~(S)~~

[Redacted] ~~(S)~~

[Redacted] ~~(S)~~

¹⁴ Some of the individuals listed below, however, may be current targets of Court-authorized pen register/trap and trace surveillance. (U)

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[REDACTED]

~~(S)~~

[REDACTED]

~~(S)~~

[REDACTED]

~~(S)~~

3.

[REDACTED]

~~(S)~~

[REDACTED]

~~(S)~~

D. Emergency Surveillance or Physical Search (U)

During this reporting period, the Attorney General (or Deputy Attorney General or Acting Attorney General) authorized emergency electronic surveillance and/or physical search pursuant to 50 U.S.C. §§ 1805(f), 1824(e), or 1843(a)-(b), [REDACTED]

[REDACTED]. These emergency authorizations resulted in [REDACTED] b(1), b(7) [REDACTED] b(7) [REDACTED] two applications for pen register/trap and trace surveillance.¹⁹ Applications or

[REDACTED]

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other appropriate pleadings were filed with the FISC within 72 hours of each emergency authorization (for electronic surveillance and/or physical search applications), or within 48 hours (for pen register/trap and trace applications). The FISC approved all of the applications and/or accepted the other pleadings. (S)

E. [REDACTED] (C)

[REDACTED]

[REDACTED] (S)

[REDACTED]

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[REDACTED]

~~(S)~~

F. [REDACTED] ~~(C)~~

[REDACTED]

~~(S)~~

G. Pen Register/Trap and Trace Surveillance (U)

During this reporting period, the United States filed 98 applications with the FISC seeking authorization for the FBI and/or the NSA to conduct pen register/trap and trace surveillance pursuant to 50 U.S.C. §§ 1841-1846, as amended. The FISC denied no applications, as they were originally presented, during this reporting period. Eighteen orders authorizing pen register/trap and trace surveillance were modified by the FISC. ~~(S)~~

H. [REDACTED]

[REDACTED]

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C. **FISC Modifications of Orders** (U)

As reported in previous semi-annual reports, in some cases considered by the FISC during the time period covered by this Semi-Annual Report, the FISC has modified orders submitted by the government. Substantive changes (not technical corrections) to orders, are usually handwritten but sometimes are issued as a separate amendment or addendum to an order. The changes made by FISC judges during the period covered by this report include:



- deleting language, in an application for pen register/trap and trace device, permitting affirmative investigative use of possible content information in rare cases in order to prevent an immediate danger of death, serious physical injury, or harm to the national security;



- adding a specific time period within which the government must report the use of any affirmative investigative use of possible content information in an application for pen register/trap and trace device;



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the FISC in a combined format with pen register/trap and trace applications. Because of that combination, the number of requests for the production of tangible things increased in past semi-annual reports because the practice of filing combined business record and pen register/trap and trace applications continued. ~~(S)~~

As noted in prior semi-annual reports, on March 9, 2006, 50 U.S.C. §§ 1861 and 1842 were amended. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (March 9, 2006) ("Reauthorization Act"). As part of the revisions, 50 U.S.C. § 1842 (the FISA Pen Register provision) was amended to include telephone subscriber data as part of the information that must be disclosed by the wire or electronic communication service provider upon request of the Department through a pen register or trap and trace device. Because of this amendment to the statute, the Department anticipated in prior semi-annual reports that the number of requests for production of tangible things pursuant to Section 215 would decrease in future reporting periods. In the reporting period covering July 1, 2005, through December 31, 2005, there were [REDACTED] requests for the production of tangible things pursuant to 50 U.S.C. § 1861. There were [REDACTED] in the last reporting period, covering January 1, 2006 through June 30, 2006. As anticipated in prior semi-annual reports, the number of requests for production of tangible things pursuant to Section 215 continued to decline, to five in this reporting period. ~~(S)~~

b1-1 Per FBI
b3-1

As further discussed below, as required by one of the provisions of the Reauthorization Act, on September 5, 2006, the government filed interim standard minimization procedures governing the retention and dissemination by the FBI of any tangible things, or information therein, received by the FBI in response to an order under 50 U.S.C. § 1861. As also discussed further below, pursuant to the Reauthorization Act, the Office of the Inspector General (OIG) was directed to conduct an audit of the effectiveness and use of FISA's authority to obtain access to certain business records or tangible things for foreign intelligence purposes, pursuant to 50 U.S.C. § 1861. The OIG issued its first report, as required by statute, in March 2007. This report is discussed further in Part N. ~~(S)~~

F. Post-Cut-Through Digits (U)

As reported in prior semi-annual reports, in May 2006, at the request of one of the judges on the FISC, the government filed a memorandum of law to advise the FISC regarding the government's collection of post-cut-through digits through

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telephone pen register surveillance under FISA. "Post-cut-through digits" is a term of art that refers to digits dialed from a targeted telephone number after the initial call set-up is completed or "cut-through." Some post-cut-through digits are simply telephone numbers that constitute call processing information, such as when a party dials a toll-free number to connect to a service provider (e.g., 1-800-CALL-ATT), then, after the initial call is connected to the service provider, enters an account number and another phone number in order to be connected to a party. Other post-cut-through digits may not include call processing information but instead may constitute exclusively call content, such as when a caller phones and is connected to an automated system, such as a pharmacy, and enters information like a prescription number. ~~(S)~~ (U)

In the May 2006 memorandum of law, the government provided the factual and legal bases for its authority to collect and use call processing-type post-cut-through digits under FISA. The government also advised the FISC that future telephone pen register applications would specifically seek authority for secondary orders requiring a service provider to provide all dialing, routing, addressing or signaling information transmitted by a target telephone, which, in light of technological constraints, may include content and non-content digits alike. In addition, the United States advised that future requests for pen register authority would include the restriction that the government would make no affirmative investigative use of any captured post-cut-through digits that constitute the contents of a communication, except in a rare case in order to prevent an immediate danger of death, serious physical injury, or harm to the national security. Since the filing of the May 2006 memorandum, the FISC has approved pen register applications specifically authorizing the government to record or decode all post-cut-through digits. ~~(S)~~ (U)

In July 2006, a magistrate judge in the Southern District of Texas denied a government application to acquire post-cut-through digits under criminal pen register authority in Title 18, expressly rejecting the government's argument that 18 U.S.C. § 3121(c) implicitly authorizes the acquisition of content using a pen register/trap and trace device given the current state of filtering technology. In July 2006, the FISC issued an order requesting that the government submit a written brief to the FISC discussing how, if at all, the magistrate's opinion affected the government's analysis as set forth in its May 2006 memorandum on acquisition of post-cut-through digits under FISA. ~~(S)~~ (U)

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On September 25, 2006, the Department filed a memorandum of law in response to the FISC's July 2006 order regarding the recording and decoding of post-cut-through digits under FISA. The memorandum noted that the magistrate's decision was not binding on the FISC, and asserted that because the magistrate misconstrued the plain meaning and legislative history of the criminal pen register statute and misapplied certain canons of statutory construction, the FISC should decline to follow the opinion. In addition, the government noted that the revised USA PATRIOT Act provided additional authority in the FISA pen register provision, which was not relevant in the magistrate judge's decision under Title 18, pursuant to which the government may obtain "non-content" post-cut-through digits dialed for call processing. ~~(S)~~ (U)

Although the FISC has not yet issued a written opinion or order with respect to this memorandum, since its filing, the FISC has continued to approve pen register applications specifically authorizing the government to record or decode all post-cut-through digits. After the filing of the September 25, 2006, memorandum, however, some of the judges on the FISC have made modifications to the government's proposed pen register orders. Although the FISC has authorized the government to record and decode all post-cut-through digits dialed by the targeted telephone, some of the judges on the FISC have struck the language specifically authorizing the government to make affirmative investigative use of possible content post-cut-through digits in cases in order to prevent immediate danger of death, serious physical injury or harm to the national security, and substituted language prohibiting any investigative use of such digits absent further leave of the FISC. The government believes the proposed exception is reasonable under the Fourth Amendment and such emergency exceptions for the Fourth Amendment's warrant requirement have long been recognized as a matter of statutory and common law. The government made this argument to the FISC in the September 25, 2006, memorandum of law. Most of the judges on the FISC have continued to strike this language. ~~(S)~~ (U)

On August 7, 2006, the FISC issued a supplemental order regarding the maintenance and use in FBI databases of post-cut-through digits that have been collected pursuant to FISA. Specifically, the FISC ordered the government to submit a report that: (1) explained how the government is implementing its obligation to make no affirmative use of post-cut-through digits that do not constitute call dialing, routing, addressing or signaling information except in emergency situations; and (2) explained the procedures in place to ensure that the FISC is

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notified whenever the government decides to make affirmative investigative use of such digits that do not constitute call dialing, routing, addressing or signaling information. On November 1, 2006, the government submitted the report describing the FBI systems that contain the post-cut-through digit information, the processes through which the pen register information enters FBI databases, the FBI's handling of dialed-number information acquired pursuant to pen register orders, and the proposed procedures to better ensure that no affirmative investigative use is made of post-cut-through digits that do not constitute call dialing, routing, addressing or signaling information. The report also addresses the current procedures in place to ensure that the FISC is notified in the event that the government makes affirmative investigative use of post-cut-through digits that do not constitute call dialing, routing, addressing, or signaling information in order to prevent immediate danger of death, serious injury, or harm to the national security. ~~(S//NF)~~ (U)

G.

[REDACTED] ~~(S)~~

[REDACTED] ~~(S)~~

[REDACTED]

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[REDACTED]

~~(S)~~

L. FISA Process Improvements (U)

[REDACTED]

~~(S)~~

In addition to the changes to the FISA process made at the Attorney General's April 2004 direction referenced in prior semi-annual reports, OIPR continues to seek ways to further improve the processing of FISA requests. In particular, and in response to OIPR's growing number of attorneys, as was reported in previous semi-annual reports, OIPR reorganized in November 2004 into sections that reflect the current nature of FISA work and to a significant degree mirror the FBI's internal organization. OIPR's current reorganization is discussed below in Part M. (U)

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