

randum of President of the United States, Apr. 21, 2005, 70 F.R. 23925, set out as a note under section 3001 of this title.

Amendment by Pub. L. 108-458 effective not later than six months after Dec. 17, 2004, except as otherwise expressly provided, see section 1097(a) of Pub. L. 108-458, set out in an Effective Date of 2004 Amendment; Transition Provisions note under section 3001 of this title.

EX. ORD. NO. 12139. EXERCISE OF CERTAIN AUTHORITY
RESPECTING ELECTRONIC SURVEILLANCE

Ex. Ord. No. 12139, May 23, 1979, 44 F.R. 30311, as amended by Ex. Ord. No. 13383, §1, July 15, 2005, 70 F.R. 41933; Ex. Ord. No. 13475, §1, Oct. 7, 2008, 73 F.R. 60095, provided:

By the authority vested in me as President by Sections 102 and 104 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1802 and 1804), in order to provide as set forth in that Act [this chapter] for the authorization of electronic surveillance for foreign intelligence purposes, it is hereby ordered as follows:

1-101. Pursuant to Section 102(a)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1802(a)), the Attorney General is authorized to approve electronic surveillance to acquire foreign intelligence information without a court order, but only if the Attorney General makes the certifications required by that Section.

1-102. Pursuant to Section 102(b) of the Foreign Intelligence Act of 1978 (50 U.S.C. 1802(b)), the Attorney General is authorized to approve applications to the court having jurisdiction under Section 103 of that Act [50 U.S.C. 1803] to obtain orders for electronic surveillance for the purpose of obtaining foreign intelligence information.

1-103. Pursuant to Section 104(a)(6) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1804(a)(6)), the following officials, each of whom is employed in the area of national security or defense, is designated to make the certifications required by Section 104(a)(6) of the Act in support of applications to conduct electronic surveillance:

- (a) Secretary of State.
- (b) Secretary of Defense.
- (c) Director of National Intelligence.
- (d) Director of the Federal Bureau of Investigation.
- (e) Deputy Secretary of State.
- (f) Deputy Secretary of Defense.
- (g) Director of the Central Intelligence Agency.
- (h) Principal Deputy Director of National Intelligence.
- (i) Deputy Director of the Federal Bureau of Investigation.

None of the above officials, nor anyone officially acting in that capacity, may exercise the authority to make the above certifications, unless that official has been appointed by the President with the advice and consent of the Senate. The requirement of the preceding sentence that the named official must be appointed by the President with the advice and consent of the Senate does not apply to the Deputy Director of the Federal Bureau of Investigation.

[1-104, 1-105. Amended Ex. Ord. No. 12036, formerly set out under section 401 (now 3001) of this title.]

§ 1803. Designation of judges

(a) Court to hear applications and grant orders; record of denial; transmittal to court of review

(1) The Chief Justice of the United States shall publicly designate 11 district court judges from at least seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approv-

ing electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection (except when sitting en banc under paragraph (2)) shall hear the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b).

(2)(A) The court established under this subsection may, on its own initiative, or upon the request of the Government in any proceeding or a party under section 1861(f) of this title or paragraph (4) or (5) of section 1881a(i) of this title, hold a hearing or rehearing, en banc, when ordered by a majority of the judges that constitute such court upon a determination that—

- (i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (ii) the proceeding involves a question of exceptional importance.

(B) Any authority granted by this chapter to a judge of the court established under this subsection may be exercised by the court en banc. When exercising such authority, the court en banc shall comply with any requirements of this chapter on the exercise of such authority.

(C) For purposes of this paragraph, the court en banc shall consist of all judges who constitute the court established under this subsection.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this chapter shall be conducted as expeditiously as possible. The record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.

(d) Tenure

Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the

judges first designated under subsection (a) shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) shall be designated for terms of three, five, and seven years.

(e) Jurisdiction and procedures for review of petitions

(1) Three judges designated under subsection (a) who reside within 20 miles of the District of Columbia, or, if all of such judges are unavailable, other judges of the court established under subsection (a) as may be designated by the presiding judge of such court, shall comprise a petition review pool which shall have jurisdiction to review petitions filed pursuant to section 1861(f)(1) or 1881a(i)(4) of this title.

(2) Not later than 60 days after March 9, 2006, the court established under subsection (a) shall adopt and, consistent with the protection of national security, publish procedures for the review of petitions filed pursuant to section 1861(f)(1) or 1881a(i)(4) of this title by the panel established under paragraph (1). Such procedures shall provide that review of a petition shall be conducted in camera and shall also provide for the designation of an acting presiding judge.

(f) Stay of order

(1) A judge of the court established under subsection (a), the court established under subsection (b) or a judge of that court, or the Supreme Court of the United States or a justice of that court, may, in accordance with the rules of their respective courts, enter a stay of an order or an order modifying an order of the court established under subsection (a) or the court established under subsection (b) entered under any subchapter of this chapter, while the court established under subsection (a) conducts a rehearing, while an appeal is pending to the court established under subsection (b), or while a petition of certiorari is pending in the Supreme Court of the United States, or during the pendency of any review by that court.

(2) The authority described in paragraph (1) shall apply to an order entered under any provision of this chapter.

(g) Establishment and transmittal of rules and procedures

(1) The courts established pursuant to subsections (a) and (b) may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this chapter.

(2) The rules and procedures established under paragraph (1), and any modifications of such rules and procedures, shall be recorded, and shall be transmitted to the following:

(A) All of the judges on the court established pursuant to subsection (a).

(B) All of the judges on the court of review established pursuant to subsection (b).

(C) The Chief Justice of the United States.

(D) The Committee on the Judiciary of the Senate.

(E) The Select Committee on Intelligence of the Senate.

(F) The Committee on the Judiciary of the House of Representatives.

(G) The Permanent Select Committee on Intelligence of the House of Representatives.

(3) The transmissions required by paragraph (2) shall be submitted in unclassified form, but may include a classified annex.

(h) Compliance with orders, rules, and procedures

Nothing in this chapter shall be construed to reduce or contravene the inherent authority of a court established under this section to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court.

(i) Amicus curiae

(1) Designation

The presiding judges of the courts established under subsections (a) and (b) shall, not later than 180 days after June 2, 2015, jointly designate not fewer than 5 individuals to be eligible to serve as amicus curiae, who shall serve pursuant to rules the presiding judges may establish. In designating such individuals, the presiding judges may consider individuals recommended by any source, including members of the Privacy and Civil Liberties Oversight Board, the judges determine appropriate.

(2) Authorization

A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other statutory requirement that the court act expeditiously or within a stated time—

(A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; and

(B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.

(3) Qualifications of amicus curiae

(A) Expertise

Individuals designated under paragraph (1) shall be persons who possess expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise to a court established under subsection (a) or (b).

(B) Security clearance

Individuals designated pursuant to paragraph (1) shall be persons who are determined to be eligible for access to classified information necessary to participate in matters before the courts. Amicus curiae appointed by the court pursuant to paragraph (2) shall be persons who are determined to be eligible for access to classified information, if such access is necessary to participate in the matters in which they may be appointed.

(4) Duties

If a court established under subsection (a) or (b) appoints an amicus curiae under paragraph (2)(A), the amicus curiae shall provide to the court, as appropriate—

(A) legal arguments that advance the protection of individual privacy and civil liberties;

(B) information related to intelligence collection or communications technology; or

(C) legal arguments or information regarding any other area relevant to the issue presented to the court.

(5) Assistance

An amicus curiae appointed under paragraph (2)(A) may request that the court designate or appoint additional amici curiae pursuant to paragraph (1) or paragraph (2), to be available to assist the amicus curiae.

(6) Access to information**(A) In general**

If a court established under subsection (a) or (b) appoints an amicus curiae under paragraph (2), the amicus curiae—

(i) shall have access to any legal precedent, application, certification, petition, motion, or such other materials that the court determines are relevant to the duties of the amicus curiae; and

(ii) may, if the court determines that it is relevant to the duties of the amicus curiae, consult with any other individuals designated pursuant to paragraph (1) regarding information relevant to any assigned proceeding.

(B) Briefings

The Attorney General may periodically brief or provide relevant materials to individuals designated pursuant to paragraph (1) regarding constructions and interpretations of this chapter and legal, technological, and other issues related to actions authorized by this chapter.

(C) Classified information

An amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States.

(D) Rule of construction

Nothing in this section shall be construed to require the Government to provide information to an amicus curiae appointed by the court that is privileged from disclosure.

(7) Notification

A presiding judge of a court established under subsection (a) or (b) shall notify the Attorney General of each exercise of the authority to appoint an individual to serve as amicus curiae under paragraph (2).

(8) Assistance

A court established under subsection (a) or (b) may request and receive (including on a nonreimbursable basis) the assistance of the

executive branch in the implementation of this subsection.

(9) Administration

A court established under subsection (a) or (b) may provide for the designation, appointment, removal, training, or other support for an individual designated to serve as amicus curiae under paragraph (1) or appointed to serve as amicus curiae under paragraph (2) in a manner that is not inconsistent with this subsection.

(10) Receipt of information

Nothing in this subsection shall limit the ability of a court established under subsection (a) or (b) to request or receive information or materials from, or otherwise communicate with, the Government or amicus curiae appointed under paragraph (2) on an ex parte basis, nor limit any special or heightened obligation in any ex parte communication or proceeding.

(11) Compensation

Notwithstanding any other provision of law, a court established under subsection (a) or (b) may compensate an amicus curiae appointed under paragraph (2) for assistance provided under such paragraph as the court considers appropriate and at such rate as the court considers appropriate.

(j) Review of FISA court decisions

Following issuance of an order under this chapter, a court established under subsection (a) shall certify for review to the court established under subsection (b) any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this subsection, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(k) Review of FISA court of review decisions**(1) Certification**

For purposes of section 1254(2) of title 28, the court of review established under subsection (b) shall be considered to be a court of appeals.

(2) Amicus curiae briefing

Upon certification of an application under paragraph (1), the Supreme Court of the United States may appoint an amicus curiae designated under subsection (i)(1), or any other person, to provide briefing or other assistance.

(Pub. L. 95-511, title I, § 103, Oct. 25, 1978, 92 Stat. 1788; Pub. L. 107-56, title II, § 208, Oct. 26, 2001, 115 Stat. 283; Pub. L. 108-458, title I, § 1071(e), Dec. 17, 2004, 118 Stat. 3691; Pub. L. 109-177, title I, §§ 106(f)(1), 109(d), Mar. 9, 2006, 120 Stat. 197, 205; Pub. L. 110-55, § 5(a), Aug. 5, 2007, 121 Stat. 556; Pub. L. 110-261, title I, § 109(a)-(b)(2)(A), (c), (d), title IV, § 403(a)(1)(B)(ii), July 10, 2008, 122 Stat. 2464, 2465, 2474; Pub. L. 111-259, title VIII, §§ 801(2), 806(a)(2), Oct. 7, 2010, 124 Stat. 2746, 2748;

Pub. L. 114-23, title IV, §401, June 2, 2015, 129 Stat. 279; Pub. L. 115-118, title I, §§101(b)(2)(A), 106, title II, §205(a)(1), (b)(1), Jan. 19, 2018, 132 Stat. 8, 13, 21, 22.)

REFERENCES IN TEXT

This chapter, referred to in subssecs. (a), (b), (c), (f), (g)(1), (h), (i)(6)(B), and (j), was in the original “this Act”, meaning Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of this title and Tables.

AMENDMENTS

2018—Subsec. (a)(2)(A). Pub. L. 115-118, §101(b)(2)(A), substituted “section 1881a(i)” for “section 1881a(h)”.

Subsec. (b). Pub. L. 115-118, §205(b)(1)(A), struck out “immediately” before “provide for the record”.

Pub. L. 115-118, §205(a)(1), which directed substitution of “designated as the” for “designate as the”, could not be executed because the words “designate as the” do not appear.

Subsec. (e)(1), (2). Pub. L. 115-118, §101(b)(2)(A), which directed substitution of “section 1881a(i)” for “section 1881a(h)”, was executed by substituting “1881a(i)(4)” for “1881a(h)(4)” to reflect the probable intent of Congress.

Subsec. (h). Pub. L. 115-118, §205(b)(1)(B), substituted “a court established under this section” for “the court established under subsection (a)”.

Subsec. (i)(11). Pub. L. 115-118, §106, added par. (11).

2015—Subsecs. (i) to (k). Pub. L. 114-23 added subssecs. (i) to (k).

2010—Subsec. (c). Pub. L. 111-259, §806(a)(2), made technical amendment to directory language of Pub. L. 108-458. See 2004 Amendment note below.

Subsecs. (h), (i). Pub. L. 111-259, §801(2), redesignated subsec. (i) as (h).

2008—Subsec. (a). Pub. L. 110-261, §109(a)-(b)(2)(A), designated existing provisions as par. (1), inserted “at least” before “seven of the United States judicial circuits” and “(except when sitting en banc under paragraph (2))” before “shall hear”, and added par. (2).

Subsec. (e)(1), (2). Pub. L. 110-261, §403(a)(1)(B)(ii), which directed substitution of “1861(f)(1) or 1881a(h)(4)” for “1805b(h) or 1861(f)(1)”, was executed by making the substitution for “1861(f)(1)” to reflect the probable intent of Congress and termination of the temporary amendment by Pub. L. 110-55, §5(a). See 2007 Amendment note and Effective and Termination Dates of 2007 Amendment note below.

Subsecs. (f), (g). Pub. L. 110-261, §109(c), added subsec. (f) and redesignated former subsec. (f) as (g).

Subsec. (i). Pub. L. 110-261, §109(d), added subsec. (i).

2007—Subsec. (e). Pub. L. 110-55, §§5(a), 6(c), temporarily substituted “1805b(h) or 1861(f)(1)” for “1861(f)(1)” in pars. (1) and (2). See Effective and Termination Dates of 2007 Amendment note below.

2006—Subsecs. (e), (f). Pub. L. 109-177 added subssecs. (e) and (f).

2004—Subsec. (c). Pub. L. 108-458, as amended by Pub. L. 111-259, §806(a)(2), substituted “Director of National Intelligence” for “Director of Central Intelligence”.

2001—Subsec. (a). Pub. L. 107-56 substituted “11 district court judges” for “seven district court judges” and inserted “of whom no fewer than 3 shall reside within 20 miles of the District of Columbia” after “judicial circuits”.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110-261 effective July 10, 2008, except as provided in section 404 of Pub. L. 110-261, set out as a Transition Procedures note under section 1801 of this title, see section 402 of Pub. L. 110-261, set out as an Effective Date of 2008 Amendment note under section 1801 of this title.

EFFECTIVE AND TERMINATION DATES OF 2007 AMENDMENT

Pub. L. 110-55, §6, Aug. 5, 2007, 121 Stat. 556, as amended by Pub. L. 110-182, §1, Jan. 31, 2008, 122 Stat. 605; Pub.

L. 110-261, title IV, §403(a)(3), July 10, 2008, 122 Stat. 2474, provided that:

“(a) EFFECTIVE DATE.—Except as otherwise provided, the amendments made by this Act [enacting sections 1805a to 1805c of this title and amending this section] shall take effect immediately after the date of the enactment of this Act [Aug. 5, 2007].

“(b) Repealed. Pub. L. 110-261, title IV, §403(a)(3), July 10, 2008, 122 Stat. 2474.]

“(c) SUNSET.—Except as provided in subsection (d), sections 2, 3, 4, and 5 of this Act [enacting sections 1805a to 1805c of this title and amending this section], and the amendments made by this Act [enacting sections 1805a to 1805c of this title and amending this section], shall cease to have effect 195 days after the date of the enactment of this Act.

“(d) AUTHORIZATIONS IN EFFECT.—Authorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration. Such acquisitions shall be governed by the applicable provisions of such amendments and shall not be deemed to constitute electronic surveillance as that term is defined in section 101(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(f)).”

[Repeal by Pub. L. 110-261 of section 6(b) of Pub. L. 110-55, set out above, effective July 10, 2008, except as provided in section 404 of Pub. L. 110-261, set out as a Transition Procedures note under section 1801 of this title, see section 402 of Pub. L. 110-261, set out as an Effective Date of 2008 Amendment note under section 1801 of this title.]

EFFECTIVE DATE OF 2004 AMENDMENT

For Determination by President that amendment by Pub. L. 108-458 take effect on Apr. 21, 2005, see Memorandum of President of the United States, Apr. 21, 2005, 70 F.R. 23925, set out as a note under section 3001 of this title.

Amendment by Pub. L. 108-458 effective not later than six months after Dec. 17, 2004, except as otherwise expressly provided, see section 1097(a) of Pub. L. 108-458, set out in an Effective Date of 2004 Amendment; Transition Provisions note under section 3001 of this title.

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include—

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the specific target of the electronic surveillance;

(3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;