



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 29, 2020

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

The Honorable Mike Lee
United States Senate
Washington, DC 20510

Dear Senator Leahy and Senator Lee:

This responds to your letter to the Attorney General and the Director of National Intelligence dated July 21, 2020, regarding Government use of certain national security legal authorities under the Foreign Intelligence Surveillance Act (FISA) following the March 15, 2020 sunset of the USA FREEDOM Act. More specifically, your letter requested confirmation that "federal agencies have terminated surveillance operations authorized by now-expired FISA provisions under the USA FREEDOM Act." July 21, 2020 Letter at 1. These provisions have been part of FISA for well over a decade and are vital tools in terrorism and espionage cases. Additionally, Congress has authorized those provisions multiple times, and we continue to urge their renewal.

The Department of Justice can confirm that, with the sunset of these provisions of FISA, the Federal Bureau of Investigation (FBI) has not used these important national security tools for foreign intelligence investigations initiated after March 15, 2020. Nor has the FBI relied on E.O. 12333 or any other Article II authority to conduct collection activities previously authorized under these FISA provisions. However, as explained below, the Government has relied upon the exception in the sunset provisions to seek business record production orders and/or surveillance orders with roving authority in a limited number of circumstances for foreign intelligence investigations that began before March 15, 2020.

As you know, Section 215 of the USA PATRIOT Act, and the "roving wiretap" and "lone wolf" provisions of FISA, all sunset on March 15, 2020. The sunset provisions applicable to Section 215 and the "roving wiretap" authorities state that "[e]ffective March 15, 2020, [FISA] is amended so that [50 U.S.C §§ 1861, 1862 and 1805(c)(2) (2018)] read as they read on October 25, 2001." Pub. L. 109-177, tit. I, § 102(b)(1), 120 Stat. 192,195. Similar sunset language applies to the "lone wolf" provision. *See* The Intelligence Reform and Terrorism Prevention Act of 2004, Pub L.108-458, Title VI, Sec. 6001(b), 118 Stat. 3638 at 3742.

Each sunset provision also provides, as an exception, that each of the otherwise expired authorities would continue in effect as written prior to expiration, "[w]ith respect to any particular foreign intelligence investigation that began before the date on which [the relevant provisions] cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect." Pub. L. 109-177, tit. I, § 102(b)(2), 120 Stat. at 195; Pub L. 108-458, tit. VI, § 6001(b), 118 Stat. 3638 at 3742. Therefore, a plain reading of the applicable law and the respective sunset provisions authorizes the Government to seek and the Foreign Intelligence Surveillance Court (FISC) to issue appropriate legal process (i.e., a production order with respect to a business records application, or a surveillance order with respect to a FISA Title I application seeking a "roving wiretap" or to target a "lone wolf") applying the relevant version(s) of Section 215, "roving wiretap" or "lone wolf" in effect prior to March 15, 2020, with respect to certain investigations.

The "lone wolf" provision was added to FISA in 2004 to close a gap in the Government's ability to surveil a foreign person who is engaged in international terrorism or international proliferation of weapons of mass destruction but who lacks traditional connections to a terrorist group or other foreign power and when the Government has evidence of such connections but is unable to establish probable cause that they exist. With the sunset of this provision, the Government is now unable to rely on FISA to respond to those kinds of threats.

Following the sunset of Section 215 and the "roving wiretap" provisions, the Government has relied upon the exception described above to seek, and the FISC has granted, production orders and/or surveillance orders with roving authority in a limited number of circumstances for foreign intelligence investigations that began before March 15, 2020. In addition, FBI may be able to use a grand jury subpoena or national security letter, or seek a district court order under 18 U.S.C. Section 2703, to obtain information they would have been able to obtain under the expired business record provision, to the extent either would be legally available and appropriate in a particular investigation. However, some national security investigations of foreign persons do not implicate criminal activity and, as such, criminal authorities are not available to the FBI. Even when criminal authorities are available, the FBI may not have enough unclassified information to seek a district court order under Section 2703. The lapse of these authorities has created critical gaps in our investigative options.

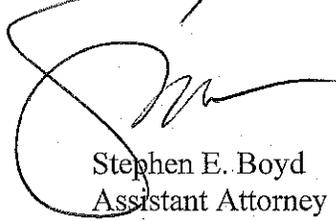
Regarding any foreign intelligence investigation initiated after March 15, 2020, the FBI may only seek a business records order under FISA for records in the possession of a common carrier (e.g., an airline or a bus company but not a telecommunications company), public accommodation facility (e.g., a hotel), physical storage facility, or vehicle rental facility. 50 USC §§ 1861-1862 (2020). Finally, the Government may not seek (and has not sought) an electronic surveillance order with roving wiretap" authority under FISA for any foreign intelligence investigations initiated after March 15, 2020. Accordingly, with the sunset of these provisions, the FBI has not used these important national security tools for foreign intelligence investigations initiated after March 15, 2020.

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Regarding your questions relating to Intelligence Community collection programs conducted by agencies other than the FBI, we recommend that you contact the Office of the Director of National Intelligence or the relevant Intelligence Community agencies with specific questions you may have.

We hope this information is helpful. Please do not hesitate to contact us if we may provide assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Boyd', written over a circular stamp or mark.

Stephen E. Boyd
Assistant Attorney General