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WHITE SHEET: White Paper by Charmaine Klein on Oversight of the Foreign Intelligence Surveillance Act

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FACT SHEET: White Paper by Chairman Adam Klein on Oversight of the Foreign Intelligence Surveillance Act

Privacy and Civil Liberties Oversight Board Chairman Adam Klein has issued a White Paper on *Oversight of the Foreign Intelligence Surveillance Act*.

In response to a 2020 request, the Board received 19 complete, classified Title I FISA applications filed by the government in counterterrorism investigations. (The request did not seek applications from non-counterterrorism matters, such as the counterintelligence case involving Carter Page.) All of the applications targeted U.S. persons. The Board also received hundreds of other classified documents related to oversight of FISA.

Because few people outside of the FISA process have the opportunity to review counterterrorism-related applications, Chairman Klein's White Paper offers an unclassified glimpse into the process, as well as recommendations to improve it.

HIGHLIGHTS:

THE APPLICATIONS

- The applications involve the use of FISA to investigate U.S. persons suspected of acting as agents of international terrorist organizations. Most of the targets were in the United States when the application was filed.
- Overall, the facts of these cases indicate that the FBI relies on surveillance and searches under Titles I and III of FISA to help it detect and prevent international acts of terrorism against the U.S. homeland.
- These applications are detailed and lengthy, and they appropriately provide the FISA court with a

great deal of factual information. Applications could do more, however, to identify the most important facts and facilitate critical analysis of the need for surveillance. The White Paper proposes best practices to improve the organization and clarity of applications.

RECENT OVERSIGHT REFORMS

- In the wake of Inspector General reports issued in 2019 and 2020, the government has increased oversight of the FISA process and, in particular, strengthened the checks related to FISA applications under Titles I and III.
 - The FBI and DOJ conduct recurring oversight and accuracy reviews of these applications. In the wake of recent Inspector General findings DOJ has added another layer of oversight, known as “completeness reviews.”
- Completeness reviews are important because they search the case file for potential *omissions*, in addition to checking statements in the application against source documents.
 - Because completeness reviews are substantially more time-consuming for DOJ attorneys, this change represents a significant new investment of Department resources in the accuracy of the FISA process.
- Between May 2020 and March 2021, DOJ conducted 95 completeness reviews.
 - For comparison, in 2020, the FISA Court issued 524 FISA probable-cause orders, down from 907 in 2019.



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WHICH USES OF FISA MERIT GREATEST SCRUTINY?

- Oversight resources and other checks on the FISA process should assign the greatest energy and attention to matters that are most likely to affect the privacy and civil liberties of Americans.
- Oversight reviews should focus on U.S.-person applications, with special attention given to FISA applications in cases deemed “Sensitive Investigative Matters” under FBI policy.
- Congress should support and fund DOJ’s use of automated tools to streamline manual, repetitive oversight tasks, allowing specialized oversight professionals to focus on matters that are most significant for Americans’ privacy and civil liberties.
- The White Paper proposes other specific changes that would redirect the time and energy of government attorneys toward activities with a higher return on investment for privacy and civil liberties.

FISA’S LAPSED BUSINESS RECORDS PROVISION

- In March 2020, FISA’s post-9/11 authority to obtain business records expired. That sunset has created gaps in the government’s ability to investigate the activities of foreign agents in the U.S. The classified version of the White Paper provides additional information about the nature of those gaps.
- A “savings clause” allows the government to continue to use the broader, pre-lapse authority for investigations that began or relate to conduct that occurred before the authority expired.
 - The government confirms that the vast majority of the 28 business-records orders issued in calendar year 2020 would not have been possible in a new investigation not covered by the savings clause.”
- Chairman Klein recommends that Congress reauthorize the post-9/11 version of FISA’s business records provision. When it does so, Congress should also reinstate the 2015 ban on using this authority for bulk collection.



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