

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

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UNITED STATES

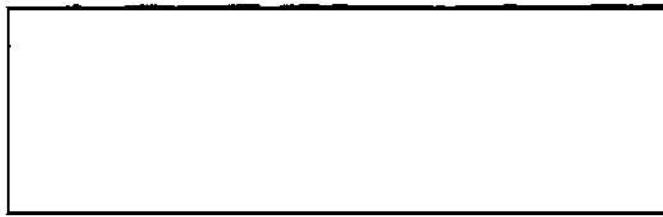


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FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

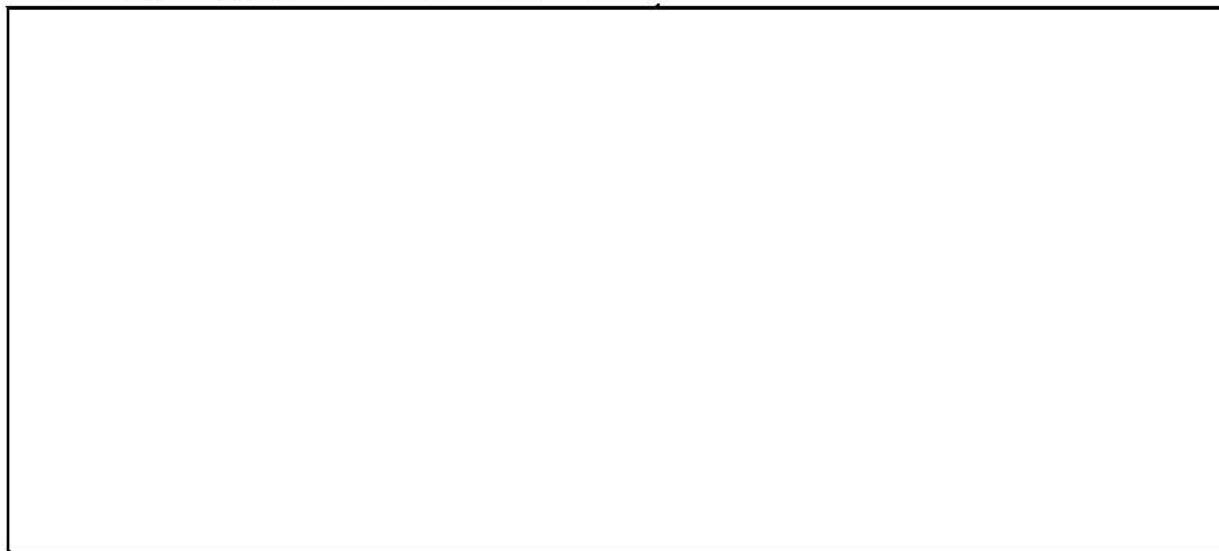
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Docket Number:



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Classified by: James A. Baker, Counsel for
Intelligence Policy, OIPR, DOJ
Reason: 1.4(c)
Declassify on: XI

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I. Introduction (U)

As discussed below, federal law permits the Government, through the use of pen registers, to collect and use all "dialing, routing, addressing or signaling information transmitted by" a target telephone,

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II. Factual Background (U)

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III. Legal Analysis (U)

A. The Definition of Pen Register Authorizes the Government to Collect and Use Call Dialing, Routing, Addressing or Signaling Information. (U)

FISA authorizes the Court to issue orders approving the installation and use of pen registers and provides that "the term[] 'pen register' . . . ha[s] the meaning[] given such term[] in Section 3127 of Title 18, United States Code." 50 U.S.C. § 1841(2). Title 18, Section 3127 defines pen register, in relevant part, as follows:

the term "pen register" means a device or process which records or decodes dialing, routing, addressing or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted.

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provided, however, that such information shall not include
the contents of any communication

18 U.S.C. § 3127(3) (emphasis added). (U)

This definition was adopted as an amendment in the "Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct and Intercept Terrorism Act of 2001" (USA PATRIOT Act), Public Law 107-56, Title II, § 216(a)(1)-(4), Oct. 26, 2001, 115 Stat. 290,

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[redacted]
[redacted]
Prior

to the USA PATRIOT Act, section 3127 defined the term pen register in terms of out-dated telephone line technology, referring to a "device" being attached to a "telephone line."¹ The definition of pen register was broadened to include the recording or decoding of "dialing, routing, addressing or signaling information" in order to confirm the statute's proper

¹ Specifically, the previous version of Section 3127 defined pen register, in part, as a "device which records or decodes electronic or other impulses which identify the number dialed or otherwise transmitted on the telephone line to which such device is attached," (U)

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application to tracing communications in an advanced electronic environment. (U)

The amended pen register definition also clarified the limits of existing law by stating that the information collected by a pen register "shall not include the contents of any communication." Thus, as stated in the USA PATRIOT Act legislative history, "the amendments reinforce[d] the statutorily prescribed line between a communication's contents and non-content information, a line identical to the constitutional distinction drawn by the U.S. Supreme Court in Smith v. Maryland, 442 U.S. 735, 741-43 (1979)." H.R. Rep. No. 107-236(I) at 53 (Oct. 11, 2001). In Smith, the Supreme Court held that the installation and use of a pen register to obtain dialing data is not a search under the Fourth Amendment and no warrant is required to obtain such information. 442 U.S. at 745-746. The distinction is clearly maintained that through a pen register device, the Government may obtain any non-content information -- "dialing, routing addressing or signaling information" -- transmitted by a targeted telephone. (U)

"Content," for purposes of a pen register, is defined as information concerning the "substance, purport or meaning of that communication." 18 U.S.C. § 2510(8). (U)

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B. Congress Recognized that Current Technology May Result
in [redacted]

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In the USA PATRIOT Act, Congress also amended
18 U.S.C. § 3121(c), which provides:

A government agency entitled to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

Section 3121(c) applies in the FISA context because FISA pen registers are authorized under "this chapter," i.e., Chapter 206 of Title 18, 18 U.S.C. § 3121(a). [redacted]

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[redacted] (U)

C. [redacted]

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[redacted] (U)

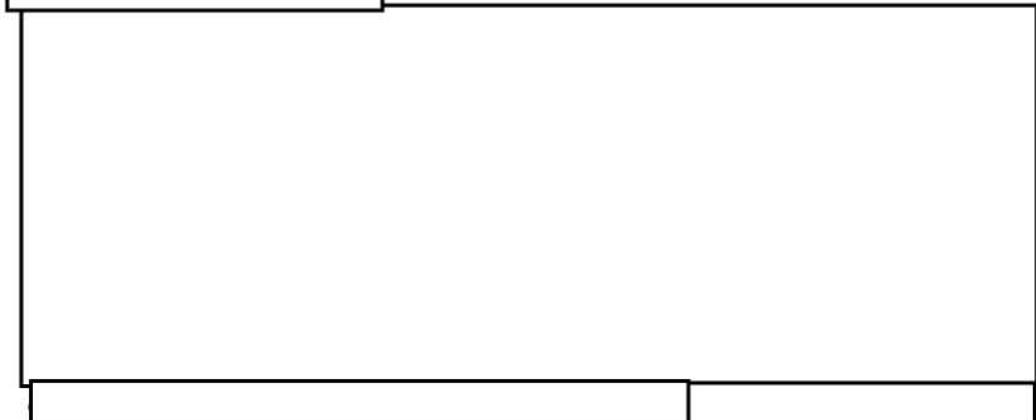
As stated in the previous section, the definition of pen register specifically authorizes the Government to "record or decode dialing, routing, addressing or signaling information."

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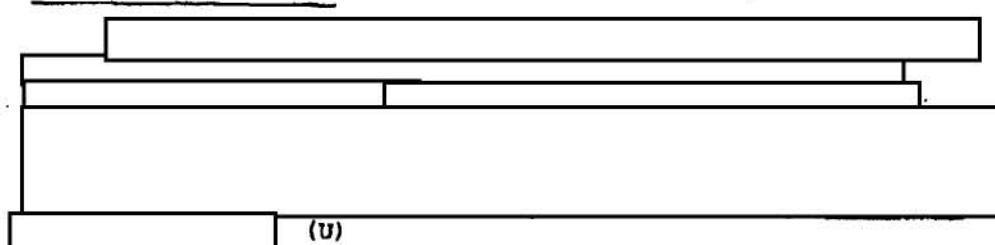
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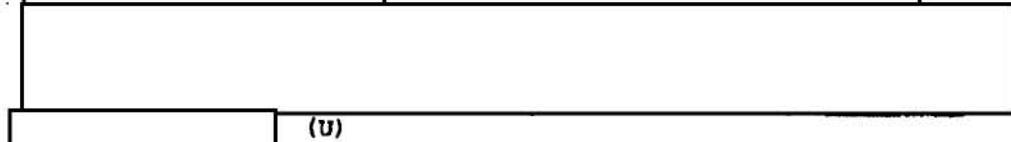
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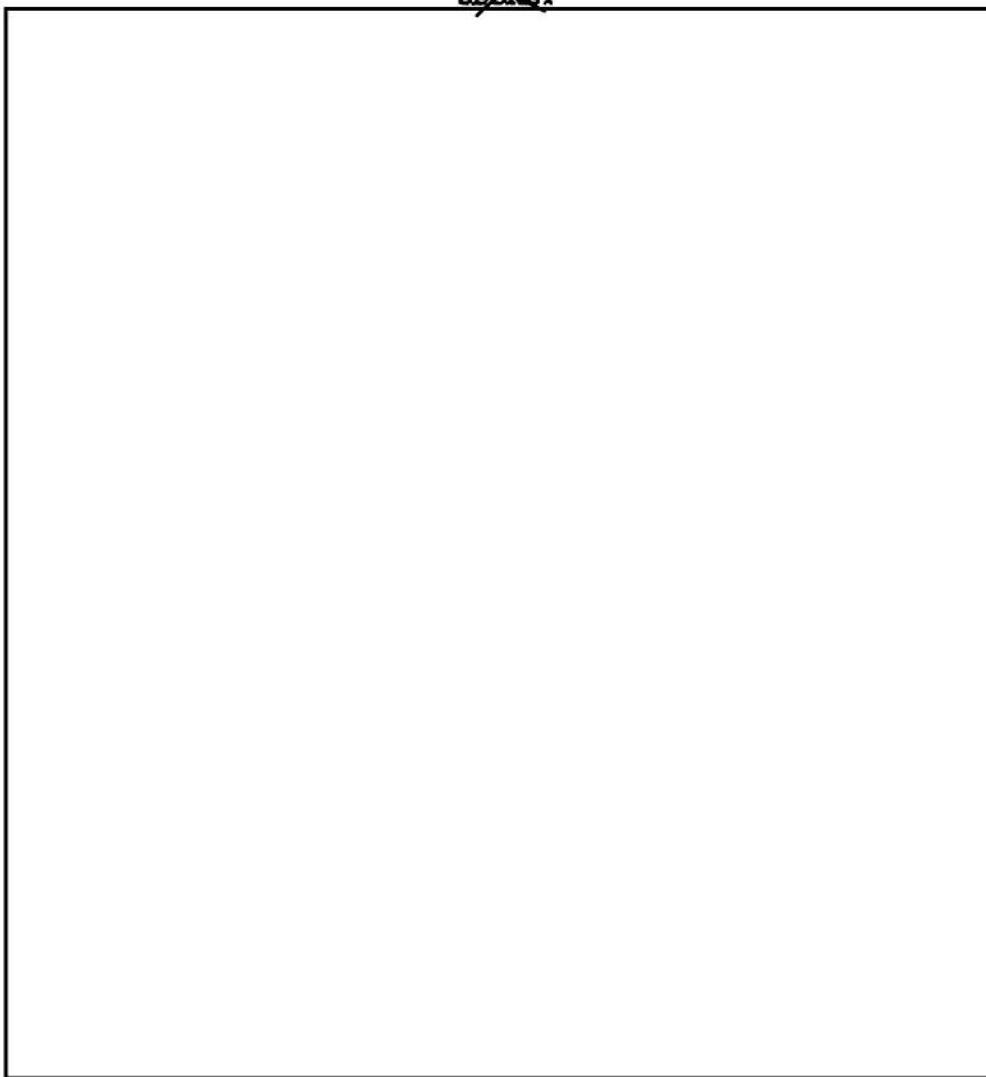
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IV. Conclusion (U)

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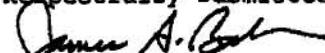
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Respectfully submitted,



James A. Baker
Counsel for Intelligence Policy
United States Department of Justice

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Federal Bureau of Investigation
Deputy Assistant Director,
Operations Technology Division

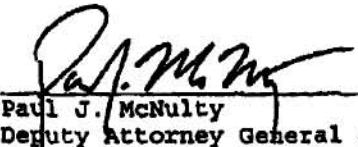
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Paul J. McNulty
Deputy Attorney General of the United States

May 23, 2006
Date

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