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as appropriate, and shall specify that the action has been suspended until a specific date (not less than 30 days from the date of mailing) in order to give the respondent the opportunity to return to military control. If the respondent does not return to military control by such date, the separation authority shall take appropriate action under subsection B.4. of this part 3.

3. *Members of reserve components.* See 10 U.S.C 1163 with respect to limitations on separation of members of reserve components.

[47 FR 10174, Mar. 9, 1982, as amended at 52 FR 46997, Dec. 11, 1987]

PART 42—INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES

Sec.

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AUTHORITY: 5 U.S.C. 301.

SOURCE: 43 FR 39988, Sept. 8, 1978, unless otherwise noted.

§42.1 Reissuance and purpose.

This part reissues part 42 to update established policies, procedures, and restrictions governing interception of wire and oral communications and the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad, in accordance with 47 U.S.C. 605 and 18 U.S.C. 2510–2520.

§42.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the military departments, the Organization of the Joint Chiefs of Staff, the defense agencies, and the unified and specified commands (hereafter referred to collectively as ''DoD components'').

(b) This part does not affect status of forces or other specific agreements that may otherwise limit implementation of its provisions in any particular geographical area abroad.

§42.3 Policy.

(a) The interception of wire and oral communications for law enforcement purposes is prohibited unless conducted in accordance with this part and applicable law.

(b) The only DoD components authorized to intercept wire and oral communications and conducts pen register operations under this part are the Departments of the Army, Navy, and Air Force. Within these components, authority to use this technique shall be limited to those offices specifically designated in writing by the head of the component.

(c) Interception of wire and oral communications is a special technique which shall not be considered as a substitute for normal investigative procedures and shall be authorized only in those circumstances where it is demonstrated that the information is necessary for a criminal investigation and cannot reasonably be obtained in some other, less intrusive manner.

(d) Nonconsensual interception of wire and oral communications is prohibited unless there exists probable cause to believe that:

(1) In the case of interceptions within the United States, a criminal offense listed in 18 U.S.C. 2516(1) has been, is being, or is about to be committed;

(2) In the case of interceptions abroad conducted pursuant to an order issued by a military judge under §42.7(a)(1)(ii)(A), one of the following violations of the Uniform Code of Military Justice has been, is being, or is about to be committed by a person subject to the Uniform code of Military Justice under article 2, 10 U.S.C. 802:

(i) The offense of murder, kidnapping, gambling, robbery, bribery, extortion, espionage, sabotage, treason, fraud against the Government, or dealing in narcotic drugs, marihuana, or other dangerous drugs; or

(ii) Any other offense dangerous to life, limb, or property, and punishable by death or confinement for 1 year or more; or

(iii) Any conspiracy to commit any of the foregoing offenses.

(3) In the case of other interceptions abroad, one of the following offenses has been, is being, or is about to be committed:

(i) An offense listed in 18 U.S.C. 2516(1); or

(ii) Fraud against the Government or any other offense dangerous to life, limb, or property and punishable under title 18 of the U.S. Code by death or confinement for more than 1 year; or

(iii) Any conspiracy to commit any of the foregoing offenses.

(e) Consensual interceptions of wire and oral communications shall be undertaken only when at least one of the parties to the conversation has consented to the interception and when the investigation involves:

(1) A criminal offense punishable, under the United States Code or Uniform Code of Military Justice, by death or confinement for 1 year or more; or

(2) A telephone call involving obscenity, harassment, extortion, bribery, bomb threat, or threat of bodily harm that has been made to a person authorized to use the telephone of a subscriber-user on an installation, building, or portion thereof, under Department of Defense jurisdiction or control, and when the subscriber-user has also consented to the interception.

(f) The prohibitions and restrictions of this part apply regardless of the official use or dissemination of the intercepted information. Any questions as to whether the use of a particular device may involve prohibited wire or oral interception shall be submitted with supporting facts through channels to the general counsel of the Department of Defense for resolution.

(g) No otherwise privileged wire or oral communication intercepted in accordance with this part shall lose its privileged character.

§ 42.4 Waivers.

Waivers of the requirements enunciated in this part will be authorized on a case-by-case basis only when directed in writing by the Secretary of Defense. Waivers will be authorized only under the most limited circumstances and when consistent with applicable law.

§ 42.5 Responsibilities.

(a) The Department of Defense General counsel or a single designee, shall:

(1) Determine whether to approve or deny requests for authorization to conduct nonconsensual interceptions under this part (§ 42.7(a)(1) (i) and (ii)).

(2) Determine whether to seek Attorney General authorization for emergency nonconsensual interceptions (§ 42.7(a)(1)(iii)).

(3) In the absence of the Secretary of the military department concerned, or a designee, determine whether to approve or deny requests to conduct consensual interceptions (§ 42.7(a)(2)(i)).

(4) Provide overall policy guidance for the implementation of this part.

(b) The Assistant Secretary of Defense (Comptroller) (ASD(C)), or a designee, shall:

(1) In consultation with the DoD General Counsel, act for the Secretary of Defense to insure compliance with the provisions of this part.

(2) Receive, process, and transmit to the DoD General Counsel all requests from the heads of the DoD components, or their designees, for authority to conduct nonconsensual interception of wire and oral communications.

(3) Furnish to the Attorney General those reports required by § 42.7(f)(1) and provide a copy of such reports to the DoD General Counsel.

(4) Receive those reports required by § 42.7(f)(1) and provide a copy of such reports to the DoD General Counsel.

(c) The head of each DoD component or a designee shall insure compliance with the policies and procedures set forth or referenced in this part.

(d) The secretary of each military department, or a designee, shall:

(1) Determine whether to approve or deny requests to conduct consensual interceptions (§ 42.7(a)(2)(i)). This approval authority shall not be delegated to an official below the level of assistant secretary or assistant to the secretary of the military department.

(2) Review requests for nonconsensual interception of wire or oral communications (§ 42.7(a)(1)).

(3) Designate a control point of contact and so advise the DoD General Counsel and the ASD(C) for:

(i) Interception activities and related applications covered by this part.