

admitted to the United States for permanent residence, a corporation incorporated in the United States, an unincorporated association organized in the United States and substantially composed of United States citizens or aliens admitted to the United States for permanent residence.

(1) *Wire communication.* Any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. 18 U.S.C. 2510(1).

**§ 42.7 Procedures, record administration and reports.**

(a) *Procedures governing interception of wire and oral communications—(1) Non-consensual interception—(i) Nonconsensual interception in the United States.* When an interception is deemed necessary for a criminal investigation, the following procedures are applicable:

(A) The requesting component shall prepare and forward through channels a "request for authorization" to the Assistant Secretary of Defense (Comptroller), or an official designated by the ASD(C). This application shall be transmitted by expeditious means and protected to preclude unauthorized access or any danger to the officials or other persons cooperating in the case. Each request for authorization will contain the following information:

(1) The identity of the DoD investigative or law enforcement official making the application;

(2) A complete description of the facts and circumstances relied upon by the applicant to justify the intended interception, including:

(i) The particular offense that has been, is being, or is about to be committed;

(ii) A description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(iii) A description of the type of communication sought to be intercepted with a statement of the relevance of

that communication to the investigation; and

(iv) The identity of the person, if known, committing the offense and whose communications are to be intercepted;

(3) A statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(4) An identification of the type of equipment to be used to make the interception;

(5) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the interception will not terminate automatically when the described type of communication has been first obtained, a description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(6) The procedures to minimize the acquisition, retention, and dissemination of information unrelated to the purpose of the interception;

(7) A complete statement of the facts concerning each previous application for approval of interceptions of wire or oral communications known to the applicant and involving any of the same persons, facilities or places specified in the application and the action taken thereon; and

(8) When the application is for an extension of an order, a statement setting forth the results thus far obtained from the interception, or an explanation of the failure to obtain such results.

(B) The ASD(C), or an official designated by the ASD(C), will recommend to the DoD General Counsel that the request be approved or disapproved. Approval or disapproval of all requests for authorization will be made in writing by the DoD General Counsel, or a single designee.

(C) If the request is approved by the DoD General Counsel, the official making the request will coordinate directly with an attorney from the Department

of Justice or from a U.S. Attorney's office for preparation of documents necessary to obtain a court order in accordance with 18 U.S.C. 2518. These documents will be forwarded by the Department of Justice attorney to the Attorney General, or to the designated Assistant Attorney General, for approval in accordance with 18 U.S.C. 2516.

(D) Upon approval by the Attorney General, or the designated Assistant Attorney General, formal application for a court order will be made by the appropriate attorney from the Department of Justice, assisted by the appropriate military lawyer.

(ii) *Nonconsensual interceptions abroad.* Unless otherwise authorized by direction of the President or the Attorney General, the following procedures are applicable to interceptions for law enforcement purposes when the interception takes place abroad and when a DoD component, or members thereof, conduct or participate in the interception; or when the interception takes place abroad, is targeted against a U.S. person, and is conducted pursuant to a request by a DoD component:

(A) When the target of the interception is a person subject to the Uniform Code of Military Justice under Article 2, U.S.C. 802.

(1) The request for authorization shall include the information required by paragraph (a)(1)(i)(A) of this section, and shall be forwarded through channels to the Assistant Secretary of Defense (Comptroller), or the ASD(C)'s, designee. The ASD(C), or a designee, shall recommend to the DoD General Counsel that the request be approved or disapproved. Approval or disapproval of all Requests for Authorization shall be made in writing by the DoD General Counsel, or a single designee.

(2) Upon written approval of the DoD General Counsel, the DoD investigative or law enforcement officer shall prepare a formal application for a court order in accordance with the procedures of 18 U.S.C. 2518(1). The application shall be submitted to a military judge assigned to consider such applications pursuant to § 42.5(e).

(3) Only military judges assigned by the Judge Advocate General of their

service to receive applications for intercept authorization orders shall have the authority to issue such orders. The authority of military judges to issue intercept authorization orders shall be limited to interceptions conducted abroad and targeted against persons subject to the Uniform Code of Military Justice.

(i) A military judge shall be ineligible to issue an order authorizing an interception if, at the time of application, the judge (A) is involved in any investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832; or (B) is engaged in any other investigative or prosecutorial function in connection with any case; or if the judge has previously been involved in any investigative or prosecutorial activities in connection with the case for which the intercept authorization order is sought.

(ii) No military judge who has issued an order authorizing interceptions may act as the accuser, be a witness for the prosecution, or participate in any investigative or prosecutorial activities in the case for which the order was issued. A military judge who has issued an order authorizing interceptions is not disqualified from presiding over the trial in the same case.

(iii) A military judge otherwise qualified under § 42.7(a)(1)(ii)(C)(i) and (ii) enclosure shall not be disqualified from issuing orders authorizing interceptions because the judge is a member for a service different from that of the target of the interception or from that of the investigative or law enforcement officers applying for the order.

(4) The military judge may enter an ex parte order, as requested or as modified, authorizing or approving an interception of wire or oral communications if the judge determines on the basis of the facts submitted by the applicant that:

(i) There is probable cause to believe that a person subject to the Uniform Code of Military Justice is committing, has committed, or is about to commit a particular offense enumerated in § 42.3(d)(2);

(ii) There is probable cause to believe that particular communications concerning that offense will be obtained through such interception;

(iii) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(iv) There is probable cause to believe that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person; and

(v) The interception will not violate the relevant status of forces agreement or the applicable domestic law of the host nation.

(5) Each order authorizing an interception shall specify:

(i) The identity of the person, if known, whose communications are to be intercepted;

(ii) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(iii) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(iv) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(v) The period of time during which such interception is authorized, including a statement as to whether the interception shall terminate automatically when the described communication has been first obtained.

(6) Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this part, and shall be terminated upon attainment of the authorized objective.

(7) No order entered by a military judge may authorize an interception for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 60 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with the procedures of 18 U.S.C. 2518(1), and

after the military judge makes the findings required by paragraph (a)(1)(ii)(A)(4) of this section. The period of extension shall be no longer than is necessary to achieve the purpose for which it was granted and in no event for longer than 60 days.

(8) The contents of communications intercepted pursuant to an order issued by a military judge shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of such communications shall be done in such a way as will protect the recording from editing or other alterations. Custody of the recording shall be wherever required by the regulations promulgated under paragraph (e)(1) of this section and it shall not be destroyed except pursuant to paragraph (e)(4) of this section.

(9) The contents of a communication intercepted abroad, or evidence derived therefrom, shall be inadmissible in any court-martial proceeding, in any proceeding under Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, or in any other proceeding if the:

(i) Communication was intercepted in violation of this part or applicable law;

(ii) Order of authorization under which it was intercepted is insufficient on its face; or

(iii) Interception was not made in conformity with the order of authorization.

(B) When the target of an interception conducted abroad is a person who is not subject to the Uniform Code of Military Justice:

(1) The request for authorization shall be prepared and forwarded for approval in accordance with the procedures in paragraph (a)(1)(i) (A) and (B) of this section.

(2) The DoD General Counsel shall determine whether to approve the request and what further approval is required by law to conduct the interception.

(iii) *Emergency nonconsensual interceptions in the United States and abroad.* If, in the judgment of the head of the DoD component concerned, or a designee, the emergency need for a nonconsensual interception precludes obtaining the advance written approval and court order required by paragraph (a)(1) (i) and (ii) of this section, the component

head or designee shall notify the DoD General Counsel who shall determine whether to seek the authorization of the Attorney General for an emergency nonconsensual interception in accordance with the procedures of 18 U.S.C. 2518(7).

(iv) *Time limits.* Nonconsensual interceptions within the United States may be approved for a period not to exceed 30 days. Nonconsensual interceptions outside the United States may be approved for a period not to exceed 60 days. Renewal requests for specified periods of not more than 30 days each (60 days for interceptions outside the United States), may be submitted to the approving authority for consideration. The interception in all instances shall be terminated as soon as the desired information is obtained, or when the interception proves to be non-productive.

(2) *Consensual interceptions.* (i) The following procedures are applicable to all consensual interceptions of oral or wire communications:

(A) When one of the parties to the conversation consents to an intended interception of a communication, the DoD investigative or law enforcement official shall prepare a request containing the following information:

(1) A description of the facts and circumstances requiring the intended interception, the means by which it would be conducted, the place in which it would be conducted, and its expected duration;

(2) The names of all the persons whose conversations are expected to be intercepted and their roles in the crime being investigated. When the name of the nonconsenting party or parties is not known at the time the request is made, the official making the request shall supply such information within 30 days after termination of the interception. If such information is not known at the end of this period, it shall be supplied whenever it is later discovered;

(3) A statement that in the judgment of the person making the request the interception is warranted in the interest of effective law enforcement.

(B) An application for a court interception order is not necessary in this situation. Written approval of the re-

quest shall be made by the Secretary of a military department, or a designee, or, in their absence, the DoD General Counsel. This approval authority shall not be delegated to an official below the level of Assistant Secretary or Assistant to the Secretary of a military department.

(C) The Secretaries of the military departments shall designate an official to act upon telephonic requests when emergency needs preclude advance written approval. A written record of such requests shall be made.

(ii) The following restrictions are applicable to all consensual interceptions of oral or wire communications:

(A) Within the United States, approval shall be granted for a period of no more than 30 days. Abroad, approval may be granted for 60 days. Renewal requests for specified periods of not more than 30 days each (60 days for interception outside the United States) may be submitted to the approving authority for consideration. The interception in all instances shall be terminated as soon as the desired information is obtained, or when the interception proves to be nonproductive.

(B) The authorization for consensual interception of communications shall define clearly the manner in which the interception is to be accomplished. A "consensual interception" shall not involve the installation of equipment in violation of the constitutionally protected rights of any nonconsenting person whose communications will be intercepted.

(b) *Procedures governing the use of pen registers and similar devices or techniques.* The procedures of this section apply to the use of pen registers, touch-tone telephone decoders, and similar devices. Unless otherwise authorized by direction of the President or the Attorney General, pen register and similar operations shall be conducted only upon probable cause and pursuant to a court order.

(1) *Operations conducted on a military installation and targeted against persons subject to the Uniform Code of Military Justice.* Except as provided in §42.7(b)(3), when a pen register operation is conducted on a military installation, in the United States or abroad, and when the target of the operation is

a person subject to the Uniform Code of Military Justice, the following procedures apply:

(i) The application for a court order authorizing the operation shall be made in writing upon oath or affirmation and shall be submitted to a military judge assigned by the Judge Advocates General, pursuant to paragraph (f)(5) of this section, to receive such applications. An application shall include the following information:

(A) The identity of the DoD investigative or law enforcement officer making the application;

(B) A complete statement of the facts and circumstances relied upon by the application to justify the applicant's belief that there exists probable cause to believe that the operation will produce evidence of a crime, including a description of the particular offense involved, a description of the nature and location of the facilities from which the intercepted information originates, and the identity of the person, if known, who has committed, is about to commit, or is committing the offense and who is the target of the operation;

(C) A statement of the period of time for which the operation is required to be maintained.

(ii) Subject to the limitations of paragraph (a)(1)(ii)(C) (*i*), (*ii*), and (*iii*) of this section, a military judge assigned to receive applications for orders authorizing operations covered by this subsection may enter an order authorizing the operation upon finding that the target of the operation is a person subject to the Uniform Code of Military Justice, that the operation will be conducted on a military installation, and that there exists probable cause to believe that the operation will produce evidence of a crime. Each order shall specify the:

(A) Identity of the person, if known, who is the target of the operation;

(B) Location of the facilities from which the intercepted information originates and of the facilities on which the operation will take place;

(C) Period of time during which such operation is authorized.

(iii) When the application is for an operation conducted abroad, the mili-

tary judge may not authorize the operation if it would violate the relevant Status of Forces Agreement or the applicable domestic law of the host nation.

(2) *Other pen register operations.* (i) When the target of a pen register operation abroad is a person who is not subject to the Uniform Code of Military Justice:

(A) The application for authority to conduct a pen register operation shall include the information in paragraph (b)(1)(i) of this section and shall be forwarded to the DoD General Counsel.

(B) The DoD General Counsel shall determine whether to approve the request and what further approval is required by law to conduct the pen register operation.

(ii) Except as provided in paragraph (b)(3) of this section, all other pen register and similar operations in the United States shall be conducted pursuant to a search warrant (or other judicial order authorizing the operation) issued by a judge of competent jurisdiction.

(3) *Pen register operations which include nonconsensual interceptions of wire communications.* When an operation under this section is to be conducted in conjunction with a nonconsensual interception of a wire communication under § 42.7(a)(1), procedures of § 42.7(a)(1) shall apply to the entire operation.

(c) *Procedures governing telephone tracing.* When prior consent of one or more parties to a telephone tracing operation has been obtained, the use of telephone tracing equipment and techniques shall be authorized only after coordination with appropriate judge advocate personnel or other component legal counsel. The local military facility commander may approve consensual telephone tracing operations on military facilities. For use outside military jurisdiction, the local military commanders, in coordination with judge advocate personnel, shall coordinate with local civilian or host country authorities when appropriate. In all

cases, use of this technique must comply with the provisions of DoD directive 5200.27.<sup>1</sup>

(d) *Interception equipment*—(1) *Control of interception equipment.* (i) DoD Components other than the military departments are not authorized to procure or maintain equipment primarily useful for the interception of wire and oral communications described in this part. The heads of military departments shall establish controls to insure that only the minimum quantity of interception equipment required to accomplish assigned missions is procured and retained in inventories.

(ii) Interception equipment shall be safeguarded to prevent unauthorized access or use, with appropriate inventory records to account for all equipment at all times. Storage shall be centralized to the maximum extent possible consistent with operational requirements. When equipment is withdrawn from storage a record shall be made as to the times of withdrawal and of its return to storage. Equipment should be returned to storage when not in actual use, except to the extent that returning the equipment would interfere with its proper utilization. The individual to whom the equipment is assigned shall account fully, in a written report, for the use made of the equipment during the time it was removed from storage. Copies of the completed inventories of equipment, the times of withdrawal and return and the written reports of the agents specifying the uses made of the equipment shall be retained for at least 10 years.

(2) *Disposal of interception equipment.* (i) Federal law prohibits the sale or possession of any device by any person who knows or has reason to know that “the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications \* \* \*.” Accordingly, disposal outside the Government of such interception equipment is prohibited.

(ii) If there is any question as to what purpose an item of equipment is

primarily useful for, then the officials involved should, in the exercise of due caution, prohibit its sale pending referral to the DoD General Counsel for a determination as to the proper classification of such devices under the law.

(e) *Records administration*—(1) *General.* All recordings and records of information obtained through interception activities conducted under the provisions of this part shall be safeguarded to preclude unauthorized access, theft, or use. Both the interest of the Government and the rights of private individuals involved shall be considered in the development of safeguarding procedures. The Secretaries of the military departments shall promulgate regulations specifying storage and access requirements for applications, orders, recordings, and other records of information obtained through interception activities. These regulations shall include provisions for storage and access while the case is active and after the case has become inactive and the records have been transferred to a centralized facility. Copies of all issuances and revisions shall be provided to the DoD General Counsel and the ASD(C) as promulgated.

(2) *Indexing*—(i) *Interceptions.* The records of consensual and nonconsensual interceptions shall be prepared and maintained to provide for centralized, readily accessible records or indices that include the following:

(A) Names, citizenship, and other available identifying data for each reasonably identifiable person intercepted (intentionally or otherwise), whether a case subject or not. If available, the social security account number and the date and place of birth of the individuals intercepted and identified;

(B) The telephone numbers of radio telephone call signs involved in the interception;

(C) The case number or other identifier for the interception;

(D) The address of the location of the interception;

(E) The inclusive dates of the interception.

(ii) *Denied interception applications.* Records of all applications submitted to and disapproved by a Federal or military judge for authorization to conduct a nonconsensual interception

<sup>1</sup>Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Ave., Philadelphia, Pa. 19120, attention code 301.

of a wire or oral communication shall be prepared and maintained in a separate, centralized index which shall include the following information:

(A) Names and other available identifying data for each reasonably identifiable target of the interception applied for;

(B) The telephone numbers or radio telephone call signs involved in the application;

(C) The address of the location of the interception applied for;

(D) The case number or other identifier for the application; and

(E) A statement of the other facts concerning the application and the reason that the application was refused.

(3) *Dissemination controls.* (i) The index and records maintained pursuant to paragraph (e)(2)(ii) of this section, shall be used only as required to satisfy the requirements of 18 U.S.C. 2518(1)(e), paragraph (a)(1)(i)(A)(7), (a)(1)(ii) (A) and (B) (statement of prior applications) and (f) (1) and (2) of this section.

(ii) In all cases, access to information obtained by interception activities conducted under the provisions of this part shall be restricted to those individuals having a defined need-to-know clearly related to the performance of their duties.

(iii) The information may be disseminated outside the Department of Defense only when:

(A) Required for the purposes described in 18 U.S.C. 2517;

(B) Required by law (including the Privacy Act of 1974, as amended, and the Freedom of Information Act of 1967, as amended, or order of a Federal court;

(C) Requested by a committee of the Congress and approved for release by the DoD General Counsel; or

(D) Required by the provisions of Status of Forces or other international agreements.

(iv) Secretaries of the military departments shall promulgate regulations, policies and procedural controls and designate responsible officials for both internal and external dissemination of the information described above. Procedures shall include sufficient records reflecting dissemination of this information. Copies of all issuances and revisions for these pur-

poses shall be provided the DoD General Counsel and the ASD(C) as promulgated.

(4) *Retention and disposition of records.* Records and recordings of interception shall be retained for 10 years after termination of the interception and then disposed of in accordance with component records retirement procedures. If the interception was conducted in the United States under the provisions of 18 U.S.C. 2516, the records may be destroyed only pursuant to order of the court involved.

(f) *Reports*—(1) *By the Assistant Secretary of Defense (Comptroller).* The ASD(C), or a designee, shall submit the following reports to the Attorney General:

(i) *Quarterly.* For the quarters ending in March, June, September, and December, to be submitted by the end of each following month, a report of all consensual interceptions of oral communications by DoD components in the United States and abroad. This report shall specify for each interception the means by which the interception was conducted, the place in which it was conducted, its duration, and the use made of the information acquired. This report shall also contain the names and positions of persons authorized to approve consensual interceptions of oral communications, including those persons authorized to approve emergency, telephonic requests.

(ii) *Annually.* (A) By January 31, a report of all nonconsensual interceptions of wire or oral communications conducted for investigative or law enforcement purposes abroad by DoD components during the preceding year and of all unsuccessful applications for orders to conduct such interceptions during the preceding year. This report shall contain the information required in 18 U.S.C. 2519(2).

(B) By July 31, an inventory of all DoD electronic or mechanical equipment primarily useful for interception of wire or oral communications.

(2) *By the Secretaries of the military departments.* The Secretaries of the military departments, or their designees, shall submit the following reports to the ASD(C):

(i) *Quarterly.* For the quarters ending in March, June, September, and December, to be received by the 15th day of each following month, a report of all interceptions of wire and oral communications, pen register operations, and unsuccessful applications for non-consensual interceptions conducted by the military departments in the United States and abroad. This report shall include the information listed in §42.8.

(ii) *Annually.* By July 15, a complete inventory of all devices in the DoD component that are primarily useful for interception of wire or oral communications or for operations covered by paragraph (b) of this section. This report shall include a statement that the amount of equipment is being maintained at the lowest level consistent with operational requirements.

**§42.8 Information to be included in reports of interceptions and pen register operations.**

(a) *Consensual interceptions.* (1) Identity of DoD component making this report.

(2) Indicate whether the report is a wire or oral interception operation and whether the interception included the use of a pen register. (If more than one operation is authorized, a separate entry should be made for each.)

(3) Purpose or objective of operation. Specify offense being investigated and included a brief synopsis of the case.

(4) Investigative case number or identifier for the operation.

(5) Location of the operation.

(6) Type of equipment used and method of installation.

(7) Identity of the performing organizational unit. (Indicate if the interception was conducted for a DoD component other than the component making the report or for a non-DoD activity.)

(8) Identity of DoD investigative or law enforcement officer who requested or applied for the interception.

(9) Approval authority and date of approval.

(10) Length and dates for which operation was approved.

(11) Actual date operation was initiated, and date terminated.

(12) If operation was extended, state name of authority approving extension and dates to which extended.

(13) State where tapes, transcripts, and notes are stored.

(14) Evaluation of results of operations, including the use made of the information in subsequent investigation or prosecution.

(15) The names and positions of persons authorized to approve consensual interceptions, including those persons authorized to approve emergency, telephonic requests.

(16) Indicate whether the interception took place in the United States or abroad.

(b) *Nonconsensual interceptions in the United States.* In addition to items in §42.8(a) (1)-(14), include the following:

(1) Identity of court and judge who issued the intercept authorization order and date of order.

(2) Nature and frequency of incriminating communications intercepted (specify dates and approximate duration of each communication).

(3) Nature and frequency of other communications intercepted.

(4) Number of persons whose communications were intercepted. Indicate number of U.S. persons known to have been intercepted and whether such persons were targets or incidentals.

(c) *Nonconsensual interceptions abroad.* In addition to items in paragraphs (a) (1)-(14) and (b) (1)-(4) of this section, include the following:

(1) Number of persons located in the United States whose communications were intercepted.

(2) In the report for the last quarter of each calendar year, include:

(i) The number of arrests and trials resulting from each interception conducted during the year. Indicate the offense for each interception.

(ii) The number of convictions resulting from the interceptions conducted during the year and the offenses for which convictions were obtained.

(d) *Pen register operations.* Pen register operations conducted in conjunction with nonconsensual interceptions should be included in §42.8 (a) and (b). For all other pen register operations include items (1)-(15) from §42.8(a), items (1)-(4) from §42.8(b), and indicate whether the operation was conducted in the United States or abroad.