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***The Fine Line between Security and Liberty*:**
The "Secret" Court Struggle to Determine the Path of Foreign Intelligence Surveillance in the Wake of September 11th

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Introduction

"No government interest is more compelling than the security of the Nation."[1]
"Security is like liberty in that many are the crimes committed in its name."[2]

The structure of the United States federal court system can be considered common knowledge: the Supreme Court sits atop a pyramid of lower circuit courts and trial courts, all of which are, for the most part, open to the public. Until 2002, most Americans were unaware of the existence of a "secret" court whose sole duty is to review and approve applications authorizing foreign intelligence surveillance conducted by the Executive Branch. The year 2002 was an unprecedented year for the Foreign Intelligence Surveillance Court ("FISC"),[3] and the statute that created it, the Foreign Intelligence Surveillance Act of 1978 ("FISA").[4] For the first time in FISA's twenty-three year history, FISC denied an application for electronic surveillance and the Foreign

[1] Haig v. Agee, 453 U.S. 280, 307 (1980).
[2] Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950).
[3] *See* 50 U.S.C. §1803(a) (2002). The FISC is created under this statutory provision. The judges that sit on FISC are eleven district court judges from seven of the United States judicial circuits appointed by the Chief Justice of the Supreme Court. *Id.* Prior to the amendment of FISA by the USA PATRIOT Act , the FISC consisted of seven judges. Pub. L. No. 107-56, Title II, § 208, 115 Stat. 283 (2001).
[4] *See* 50 U.S.C. §§1801- 1862 (2002).

Intelligence Surveillance Court of Review ("Court of Review") was convened to hear its first appeal.[5]

Before 2002, FISC was shrouded in a cloud of mystery. No one knew the identity of the presiding judges[6] and few paid attention to any of its activities. Under the language of FISA, all proceedings in front of the court, applications made to the court, and orders of the court are guarded under strict security measures.[7] All proceedings regarding FISA orders are completely *ex parte*.[8] Any evidence gathered in the course of foreign intelligence surveillance authorized under FISA is usually unavailable for the review of the defendant at his criminal trial.[9]

FISC was called the "rubberstamp court" by those who were paying attention to its activities,[10] a nickname it fully earned because in its twenty-three year existence it had never once turned down an application by the Executive Branch requesting foreign intelligence surveillance.[11] The fact that FISC "rubberstamped" all these applications became especially troublesome when, in 2002, the Justice Department admitted to FISC

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[5] In re All Matters Submitted to the Foreign Intelligence Court of Review, 218 F. Supp. 2d 611, 620 (Foreign Int. Surv. Ct. 2002); *see also* 50 U.S.C. §1803(b) (2002). The Court of Review is convened by operation of this statute and consists of three federal district court or court of appeals judges appointed by the Chief Justice. *See id.*

[6] FAS: Judges of the Foreign Intelligence Courts *available at* http://fas.org/irp/agency/doj/fisa/court2002.html (made the identities of the judges sitting upon the court in 2002 common public knowledge); *See also* 50 U.S.C. §1803 (2002).

[7] 50 U.S.C. §1803(c) (2002).

[8] *Id*. § 1806(f).

[9] *Id*.

[10] *See id.* at § 1807. FISA requires the Attorney General to submit a report each year to the Administrative Office of the US Courts, the Speaker of the House of Representatives and the President Pro Tempore of the Senate detailing the number of applications from the FBI and NSA requesting surveillance/and or physical searches, the number of orders approved and the number of applications modified or denied by the FISC. *Id. See also*, FAS: *"Annual Reports," available at* http://fas.org/irp/agency/doj/fisa/ (provides copies of all such reports between 1979 and 2000).

[11] *The "Secret Court," at* http://www.courts.net/secret.htm (last visited Nov. 17, 2003) ("Various reports have suggested that anywhere from 7,500 to 10,000 applications had been submitted, without a single denial, from 1978 until May 2002."); *See also* Federation of American Scientists: *Foreign Intelligence Surveillance Act at* http://fas.org/irp/agency/doj/fisa/; Patrick S. Poole: *Inside America's Secret Court: The Foreign Intelligence Surveillance Court, at* http://fly.hiwaay.net/~pspoole/fiscshort.html.

that it knew of at least seventy-five instances where it provided false or misleading information in order to obtain approval for surveillance.[12] Within the context of this admission and the growing concerns of civil libertarians in the wake of September 11th, in an unprecedented action on May 17, 2002, FISC denied a motion from Attorney General John Ashcroft laying out new procedures for pursuing foreign intelligence surveillance and issued an order modifying those procedures.[13] The May 2002 opinion, *In re All Matters Submitted to the Foreign Intelligence Court of Review*, was the first time that the court had refused to authorize a search or surveillance as requested by the Justice Department. With the ensuing appeal of this decision the public was, for the first time, granted a clear glimpse into the inner-workings of FISA and the FISA courts.[14] This was the first time that any information had been publicly disseminated about the FISA Courts and its decisions. The *Matters* opinion was released by the chairman of the Senate Judiciary Committee, with the concurrence of the Chief Judge of the Court.[15] The public was given access to not only the Department of Justice's ("DOJ") appellate briefs, the amicus curiae briefs from the American Civil Liberties Union ("ACLU") and the National Association of Criminal Defense Lawyers ("NACDL"), but the public was allowed to read a decision of FISC, and the first decision of the Court of Review. This unprecedented activity thrust FISC and FISA into the limelight and has revived an old

[12] *Matters*, 218 F. Supp. 2d at 620. *See also* Letter from William D. Delahunt, House Representative from Massachusetts, to Robert S. Mueller, Director of the FBI (June 14, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/del061402.pdf; Letter from M.E. Bowman, Deputy General Counsel for National Security Affairs, Office of the General Counsel, to Congressman William Delahunt (August 7, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/ec.pdf.
[13] *Matters*, 218 F. Supp. 2d at 625-27.
[14] *See* In re Sealed Case No. 02-001, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002). *Sealed Case* is the appeal of FISC's decision in *Matters* approving the two surveillance applications, but ordering that the government conduct the surveillance under modified minimization procedures. *Id.* at 720.
[15] *The "Secret Court," at* http://www.courts.net/secret.htm (last visited Nov. 17, 2003).

debate on the freedom the Executive Branch should be given to pursue surveillance in the name of "national security."

This Note will analyze the landmark first appellate decision issued by the Court of Review, *In re Sealed Case No. 02-001*, with regard to the history of foreign intelligence surveillance and the importance of the civil liberty questions raised by the relaxed Fourth Amendment standards that FISA allows. The Court of Review's decision attempts to resolve two contentious issues surrounding FISA. The first issue concerns the statutory interpretation of the limits of foreign intelligence electronic surveillance under FISA. The federal courts, Congress, and the DOJ have all come up with differing interpretations over time of what the limits of the foreign intelligence warrant exception should be. Adding to the confusion over the interpretation of FISA, the United States Congress amended two critical FISA provisions as part of its "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (The USA PATRIOT Act)[16] (hereinafter "Patriot Act"). In its *Sealed Decision* case, the Court of Review attempts to settle these questions of statutory interpretation, taking into account the new amendments.

After resolving that issue, the Court of Review then examines the constitutionality of FISA, reconciling its lower procedural requirements for electronic surveillance with the Fourth Amendment's search and seizure prescriptions. The constitutionality of FISA's lower probable cause standards and allowance for *in camera*, *ex parte* proceedings were fervently contested by amicus briefs supplied by the ACLU[17] and the

[16] Pub. L. No. 107-56, 115 Stat. 272 (2001).
[17] Brief for Amici Curiae American Civil Liberties Union, *In re Sealed Case No. 02-001*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) (No. 02-001), *available at* http://archive.aclu.org/court/091902FISCRbrief.pdf. [hereinafter *ACLU Br.*]. The ACLU brief was joined

NACDL.[18] The Court of Review cautiously analyzes the Fourth Amendment concerns that surround electronic surveillance in the name of national security, and through a well-drafted analysis, helps to put to some of them to rest.

Before analyzing the Court of Review's decision, part I of this Note will provide a general explanation of the history leading up to the passage of FISA, FISA's statutory provisions, and the FISA application process. Part II will provide analysis of the first issue in the appeal to the Court of Review, the dichotomy between criminal prosecution objectives and foreign intelligence purposes. Part III will analyze the constitutionality of FISA. Finally, the Note will conclude with what the future holds in the arena of foreign intelligence electronic surveillance in light of the Court of Review's rulings.

Part I: The History and the Structure of FISA

A. Background and History

> [E]very President since Franklin Delano Roosevelt has claimed the 'inherent' constitutional power to authorize warrantless surveillance in cases vitally affecting the national security. Furthermore, all presidents to hold office since *Katz* was decided have advocated a broad exception to the warrant requirement for surveillance target at agents of foreign governments.[19]

Since its inception, the Executive Branch's evoking of this "national security" exception to the warrant requirement of the Fourth Amendment has been problematic. In order to address many problems raised by electronic surveillance for general criminal surveillance the Congress first enacted Title III of the Omnibus Crime Control and Safe Streets Act

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by the Center for Democracy and Technology, Center for National Security Studies, Electronic Privacy Information Center, and Electronic Frontier Foundation. *Id.*

[18] Brief of Amicus Curiae, National Association of Criminal Defense Lawyers, *In re Sealed Case No. 02-001*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) (No. 02-001), *available at* http://www.eff.org/Privacy/Surveillance/FISCR/20020927_nacdl_fisa_amicus.html. [hereinafter *NACDL Br.*].

[19] Chagon v. Bell, 642 F.2d 1248, 1259-60 (D.C. Cir. 1980).

("Title III")[20] in 1968, which prohibits most warrantless electronic surveillance. However, as originally drafted, Title III explicitly stated that it did not apply to or regulate surveillance in the name of national security.[21] In a series of opinions in the 1970s, the federal courts molded the concept of a national security exception to the warrant requirement, giving great deference to the Executive Branch's assertions that this particular type of surveillance was needed to protect national security.

In a case deciding the fate of civil rights leader, H. Rap Brown, the Fifth Circuit decided that a number of conversations between Brown and his lawyer, which were overheard through warrantless wiretapping, were, though irrelevant to the criminal conviction at hand, legally obtained through the foreign intelligence exception.[22] The court affirmed that the President has a "constitutional duty to act for the United States in the field of foreign relations, and . . . inherent power to protect national security in the context of foreign affairs . . . Restrictions . . . which are appropriate in cases of domestic security become artificial in the context of the international sphere."[23]

In *United States v. Butenko*, a Soviet national and an American citizen appealed their conviction for transmitting to a foreign government materials and information relating to the national defense.[24] The Third Circuit accepted the lower court's decision that the surveillance was within the power of the Executive Branch, as it was mostly designed to determine the leak of the sensitive information concerning foreign policy and

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[20] 18 U.S.C. §§ 2510-2522 (2000).
[21] *Id.* § 2511(3) (1968) ("Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities"). This provision was deleted with the passage of FISA and replaced by language referencing FISA's procedures for gathering foreign intelligence information. *Id.* § 2511(2)(f) (2000).
[22] United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).
[23] *Id.*
[24] 494 F.2d 595, 596-97 (3d Cir. 1974).

military posture. The court endorsed the foreign intelligence warrant exception by stating:

> While we acknowledge that requiring prior approval of electronic surveillance . . . might have some salutary effects . . . the better course is to rely . . . on the good faith of the Executive . . . [A] strong public interest exists: the efficient operation of the Executive's foreign policy-making apparatus depends on a continuous flow of information.[25]

Giving the Executive Branch wide latitude to conduct electronic surveillance in the name of "national security" turned out to have some serious repercussions. The trend started to change when it was revealed that by invoking "national security" as a justification, the Executive Branch engaged in widespread spying on American citizens not working for foreign powers without first obtaining a warrant.

In *Zweibon v. Mitchell*, sixteen members of the Jewish Defense League ("JDL"), a domestic organization whose goals included opposing the Soviet Union's restrictive emigration policies for Soviet Jews, brought suit against the Attorney General and nine Federal Bureau of Investigation ("FBI") agents for conducting illegal electronic surveillance, claiming that the surveillances violated their rights under both Title III and the Fourth Amendment.[26] The Attorney General claimed that the surveillance of the JDL was "essential to protect this nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the security of the United States."[27] The court held, after reviewing the historical policy grounds behind Executive-authorized surveillance and prior case law, that a "warrant must be obtained before a wiretap is installed on a *domestic* organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under

[25] *Id.* at 605.
[26] 516 F.2d 594, 605-06 (D.C. Cir. 1975).
[27] *Id.* at 607.

presidential directive in the name of foreign intelligence gathering for protection of the national security."[28] The court's decision criticized the decisions in *Brown* and *Butenko* for not giving sufficient weight to First and Fourth Amendment rights: "[A]bsent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional."[29] The D.C. Circuit, with *Zweibon*, was the sole federal court in this time period to not recognize a broad warrant exception in the area of foreign intelligence surveillance.

Around the same time *Zweibon* was decided, the Executive Branch was entrenched in numerous scandals for surveillance under the guise of national security. The Watergate investigation uncovered evidence of widespread illegal wiretapping of citizens by the Nixon administration.[30] In 1975-76, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee") conducted an investigation of the United States intelligence agencies to determine the extent of alleged invasions of the privacy interests of U.S. citizens.[31] The Church Committee uncovered the alarming truth that the CIA spied illegally on as many as seven thousand Americans throughout the 1960s and early 1970s in “Operation CHAOS”, including individuals involved in the peace movement, student activists, and

[28] *Id.* at 614 (emphasis added).
[29] *Id.*
[30] Encyclopedia Americana, *Watergate Affair*, *at* http://ap.grolier.com/article?assetid=0411680-00&templatename=/article/article.html.
[31] SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, 94TH CONG., FINAL REPORT WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE (2nd Sess. 1976), *at* http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm.

black nationalists.[32] The FBI's "COINTELPRO" program similarly authorized illegal wiretapping and harassment of dissenters and anti-war protesters.[33]

Each of these revelations exposed to Congress how the absence of a clear statutory or judicial standard led to widespread abuse of the warrant exception for foreign intelligence. The president and other executive agencies conducted a great deal of warrantless electronic surveillance of individuals who were not associated in any way with a foreign power, did not pose a threat to national security, and were not suspected of being involved in criminal activity. These findings compelled Congress to enact a statute code to definitively determine the limits of the Executive Branch in conducting intelligence surveillance. In creating FISA, "Congress sought to accommodate and advance both the government's interest in pursuing legitimate intelligence activity and the individual's interest in freedom from improper government intrusion."[34]

B. Elements of FISA

FISA establishes that a court order must be obtained authorizing foreign intelligence electronic surveillance.[35] FISA created a special court, the FISC, whose sole duty it is to hear these applications for surveillance. The purpose in establishing such a specialized court was to create a panel of judicial experts who would come to understand the nature of foreign intelligence surveillance and the competing interests at work

[32] *Id.*
[33] Ward Churchill and Jim Vander Wall, The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Dissent in the United States (1990), *at* http://www.icdc.com/~paulwolf/cointelpro/cointel.htm.
[34] United States v. Cavanaugh, 807 F.2d 787, 789 (9th Cir. 1987).
[35] 50 U.S.C. § 2511 et. seq. The FISA was amended in 1994 to also allow its use for authorizing physical searches that fall under its definitions of foreign intelligence information. Pub. L. No. 103-359, 108 Stat. 3444 (1994). This note, however, focuses mostly of the use of the FISA for electronic surveillance, not only because this is its principle use, but also because the Department of Justice appeal discussed herein is based on two applications for electronic surveillance.

therein.[36] To obtain a surveillance order, a federal officer, having first obtained the Attorney General's approval, must submit an application to one of the FISC judges. The application must detail:

1. the identity of the target;[37]
2. the information relied on by the government to demonstrate that the target is a "foreign power" or an "agent of a foreign power";[38]
3. evidence that the place where the surveillance will occur is being used, or is about to be used by the foreign power or its agent;[39]
4. the type of surveillance to be used; [40]
5. the minimization procedures to be employed;[41] and
6. certification by either the Assistant to the President for National Security Affairs or an executive branch official designated by the President that the information sought is "foreign intelligence information"[42] and that the information cannot reasonably be obtained by normal investigative techniques.[43]

Before issuing the order, the FISC judge must make specific findings that:

1. there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power;[44] and
2. in the case of a United States person, or legal resident alien, that the target of surveillance is not being considered an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution.[45]

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[36] S. Rep. No. 95-701, at 93 (1978), *reprinted at* 1978 U.S.C.C.A.N. 3973, 4044 ("[A] federal judge has lifetime tenure and could presumably develop an expertise in the field of foreign affairs if consistently [resorted] to for authorizations for foreign security wiretaps.") (Senator Wallop quoting *Zweibon*, 516 F.2d 594, 644 n.138 (1975)).
[37] 50 U.S.C. § 1804(a)(3).
[38] *Id.* § 1804(a)(4)(A). The statute defines "foreign power." *Id.* § 1801(a). It also defines "agent of a foreign power." *Id.* § 1801(b).
[39] *Id.* § 1804(a)(4)(B).
[40] *Id.* § 1804(a)(8).
[41] *Id.* § 1804(a)(5). Minimization procedures are defined in § 1801(h)(1) as " specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information."
[42] *Id.* § 1804(a)(7)(E)(i).
[43] *Id.* § 1804(a)(7)(E)(ii).
[44] *Id.* § 1805(a)(3)(A).
[45] *Id.*

For surveillance of "U.S. persons,"[46] the FISC judge must find probable cause that one of four conditions has been met:

1. the target knowingly engages in clandestine intelligence activities on behalf of a foreign power which "may involve" a criminal law violation;
2. the target knowingly engages in other secret intelligence activities on behalf of a foreign power under the direction of an intelligence network and his activities involve or are about to involve criminal violations;
3. the target knowingly engages in sabotage or international terrorism or is preparing for such activities; or
4. the target knowingly aids or abets another who acts in one of the above ways.[47]

The FISC consists of eleven U. S. District Court judges appointed by the Chief Justice of the United States, of whom no fewer than three must reside within twenty miles of the District of Columbia.[48] FISA provides that government appeals of FISC decisions be made to the Foreign Intelligence Surveillance Court of Review, consisting of three district or circuit judges, also appointed by the Chief Justice.[49] As of June, 2002, the Court of Review had never met, nor had any appeal ever been lodged because the FISC had never rejected an application made by the government. The Court of Review convened for the first time on September 9, 2002, to hear the DOJ's appeal from the May, 2002 FISC ruling in *Sealed Case*.

The Patriot Act made several changes to FISA. It permits FISC to approve a surveillance application when the government demonstrates that the collection of foreign intelligence information is "a significant purpose" of the investigation.[50] The language of

[46] FISA defines "U.S. persons" to mean "a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power." *Id.* § 1801(i).
[47] *Id.* §1801(b)(2).
[48] *Id.* § 1803(a). The number of judges was increased from seven to eleven by the Patriot Act. Patriot Act, Pub. L. No. 107-56, § 208, 115 Stat. 272, 291 (2001).
[49] 50 U.S.C. § 1803(b) (2002).
[50] *Id.* § 1804(a)(7)(B).

the statute previously read simply that the application certify that "the purpose" of the surveillance or search was to secure information on foreign intelligence.[51] The Patriot Act also added section 1806(k) that allowed for the increased sharing of the intelligence information with "any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties."[52] This amendment expanded the power of these agencies and officers to consult, share information, and coordinate their efforts in order to more effectively work against foreign threats. The scope of these changes is at the heart of the Court of Review's ruling in *Sealed Case*.

Two main problems that have been present throughout the history of FISA resurfaced in this appeal to the Court of Review. The first problem has existed since FISA's enactment and has come to be characterized by legal commentators and the media as "the wall." The wall, as characterized in the DOJ briefs, arose from the "false dichotomy" between criminal law enforcement purposes and foreign intelligence purposes of surveillance that the courts read into FISA.[53] The second problem is the constitutionality of foreign intelligence surveillance. FISA allows for a lower standard of procedural safeguards than Title III and other laws governing electronic surveillance conducted in typical domestic criminal investigations. The Patriot Act's amendments to the language of the statute seem to further relax those procedural safeguards, thus FISA's constitutionality has again come under scrutiny.

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[51] Patriot Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001).
[52] 50 U.S.C. § 403-5d (2002); *see also* 50 U.S.C. § 1804(k) (2002).
[53] Supplemental Brief for the United States at 8, In Re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) (No. 02-001), *available at* http://fas.org/irp/agency/doj/fisa/092502sup.html.

Part II: The "False Dichotomy" and "The Wall"

The Patriot Act's amendments to FISA expressly sanctioned consultation and coordination between intelligence and law enforcement officials. These amendments were meant by Congress to specifically address the problem of separation between criminal and intelligence investigations – "the wall."[54]

In the joint hearings investigating the September 11th hijackings, a New York special agent of the FBI, who in 1999 began serving on the New York field office's "Usama Bin Laden case squad" criticized "the wall." "The Wall, and implied, interpreted, created or assumed restrictions regarding it, prevented myself and other FBI Agents working a criminal case out of the New York Field Office from obtaining information from the Intelligence Community, regarding Khalid Al-Mihdar and Nawaf Al-Hazmi" (who later turned out to be two of the September 11th hijackers) because they were part of an open FBI intelligence case.[55] The criminal investigators were told that they could not investigate or attempt to locate either individual, even though they were suspected to have met with a suspect connected to the attack against the USS Cole. [56] Frustrated at being up against "the wall", the agent wrote in an August 29, 2001 email, "someday someone will die - and wall or not - the public will not understand why we were not more effective and throwing every resource we had at certain 'problems'."[57] Many saw this "wall" as directly contributing to our lack of preparedness for the events of September 11th.

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[54] Prepared Statement of a New York Special Agent before the United States Senate and the House of Representatives (Sept. 20, 2002), *available at* http://intelligence.senate.gov/0209hrg/020920/fbi.pdf. "From my perspective, and in its broadest sense – 'The Wall' is an information barrier placed between elements of an intelligence investigation and those of a criminal investigation." *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

The DOJ argued to the Court of Review that the primary purpose test that created "the wall" was an illusion - a false dichotomy never intended by the statutory language of FISA.[58] To analyze the strength of that argument, it is important to understand how "the wall" was built.

For a long period of time, the law did not precisely delineate the permissible scope of the warrant exception for foreign intelligence surveillance. Most federal courts, before the passage of FISA, recognized that the Executive Branch had wide discretion for warrantless electronic surveillance to collect counterintelligence information. However, in *United States v. Truong Dinh Hung*, [59] the Fourth Circuit Court of Appeals set a limit on the acceptable scope of the exception with its "primary purpose" test. In *Truong*, the Attorney General authorized a massive surveillance of Truong Dinh Hung, a Vietnamese citizen who was known to be passing diplomatic cables and other classified papers of the United States government's dealings with Southeast Asia to North Vietnamese government officials. In the case against him, Truong sought to suppress the evidence obtained from the surveillance as not comporting with the requirements of the Fourth Amendment. The court recognized that the Executive Branch does have the power to conduct electronic surveillance for the gathering of foreign intelligence, without first obtaining a warrant, but the power is not without limits.

> [B]ecause individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the Executive are paramount. . . [T]he Executive should be excused from securing a warrant only when the surveillance is conducted **"primarily" for foreign intelligence reasons**. . . [O]nce surveillance becomes primarily a criminal investigation, the courts are entirely

[58] *DOJ Supp. Br.* at 12, *supra* note 55.
[59] United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

> competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.[60]

The above excerpt is the origin of the dichotomy between a foreign intelligence purpose and a criminal prosecution purpose. The court found that in the course of their surveillance of Truong, the DOJ's purpose switched from intelligence gathering to gathering evidence for use in a criminal prosecution and thus required a warrant to be legal. The primary purpose test from *Truong* spells out that the Executive Branch should be excused from securing a warrant only when "the surveillance is conducted 'primarily' for foreign intelligence reasons."[61] Targets must "receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution."[62] The court then rejected the government's argument that if the surveillance was in any small way directed at gathering foreign intelligence, they could ignore the Fourth Amendment's warrant requirement.[63] The court also rejected the other extreme offered by defendants: a "sole purpose" test, wherein the sole purpose of the surveillance must be to obtain foreign intelligence. The court found this an unacceptable standard because "almost all foreign intelligence investigations are in part criminal investigations."[64] Thus, to fit within the foreign intelligence exception to the warrant requirement, the surveillance must have greater than a mere minor objective of gathering foreign intelligence information, but the surveillance need not be solely directed toward that objective.

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[60] *Id.* at 915.
[61] *Id.*
[62] *Id.* at 916.
[63] *Id.* at 915.
[64] *Id.*

It is important to note that *Truong* involved electronic surveillance that was done prior to the passage of FISA. The decision, however, was handed down by the Court of Appeals after FISA's passage. This fact is significant, for despite the fact that FISA was not controlling law, *Troung's* "primary purpose" test shaped subsequent Executive, congressional and judicial interpretation of FISA. The court in *Truong* was not completely hands-off with FISA, however, as the DOJ briefs in *Sealed Case* contend[65] and the Court of Review decision implies.[66] The *Troung* court, in a footnote interpreting FISA's provisions, discusses the language of FISA's exception to warrant requirement:

> [T]he complexity of the [FISA] statute . . . suggests that the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, should be left to the intricate balancing performed in the course of the legislative process by Congress and the President. The elaborate structure of the statute demonstrates that the political branches need great flexibility to reach the compromises and formulate the standards which will govern foreign intelligence surveillance.[67]

The *Truong* court explicitly notes that one of the reasons deference should be given to the Executive in the area of foreign intelligence, and the reason the Executive should be allowed to operate outside the normal confines of the warrant requirement is that the judiciary, lacking foreign intelligence knowledge and expertise, is ill-equipped to review warrant applications in this area. But, the court points to the statutory establishment of FISC as "creat[ing] a special group of judges who will develop expertise in this arcane area."[68] This lengthy footnote makes clear that not only did the *Truong* court engage in statutory interpretation of FISA and contemplate its proper application in this decision, but it intended its decision to conform with FISA's "intricate balancing" in creating

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[65] *DOJ Supp. Br.* at 6-7, *supra* note 55.
[66] *Sealed Case*, 310 F.3d. at 726, 742, *supra* note 14.
[67] *Truong*, 629 F.2d at 915 n.4.
[68] *Id.*

requirements analogous to Fourth Amendment standards for the foreign intelligence arena. While this is dicta, since FISA is not controlling law, this footnote still provides some legitimacy to the application of the *Troung* primary purpose test to later cases wherein FISA was controlling law. In this respect, the idea from the DOJ and the Court of Review that the *Truong* precedent was mistakenly applied to FISA cases and Executive decisions is not entirely accurate.[69]

The primary purpose test was further ingrained with subsequent circuit court opinions interpreting and applying FISA. Reviewing the conviction of several alleged agents of the Provisional Irish Republican Army (PIRA) in *United States v. Duggan* ,[70] the Second Circuit stated that "[t]he requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain."[71] The *Duggan* court then found that the purpose of the surveillance at issue was initially and thereafter to secure foreign intelligence information, and not directed towards criminal investigation or prosecution. It further elaborated that

> [an] otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial . . . the fact that domestic law enforcement concerns may also have been implicated did not eliminate the government's ability to obtain a valid FISA order.[72]

Thus, as long as the predominant purpose throughout is gathering foreign intelligence, the government need not obtain a traditional warrant.

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[69] *DOJ Supp. Br.* at 9; *see also Sealed Case*, 310 F.3d at 726.
[70] United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).
[71] *Id.* at 77.
[72] *Id.* at 78.

Relying explicitly on *Duggan* and *Truong*, the First Circuit acknowledged in *United States v. Johnson,* that "although evidence obtained under FISA subsequently may be used in criminal prosecutions,…the investigation of criminal activity cannot be the primary purpose of the surveillance…The act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches."[73] The court went on to find that there had been no "end-run" around the Fourth Amendment in the *Johnson* case. The court found that the government's inquiries were all directed to activities relating to the support of the Provisional Irish Republican Army (PIRA) in Northern Ireland. From inception to conclusion, the purpose of the surveillance remained to gather foreign intelligence.[74]

In leveling its destruction of the primary purpose test, the Court of Review in *Sealed Case* criticizes these decisions, declaring that "neither *Duggan* nor *Johnson* tied the 'primary purpose test' to actual statutory language."[75] The Court of Review calls into question whether the *Duggan* court accurately pinpointed the sections of FISA where the "requirement that foreign intelligence information be the primary objective of the surveillance is plain."[76] The court also condemns the *Johnson* court for not more neatly tying its analysis of foreign intelligence purpose to the basic language of section 1804(a)(7)(B) of FISA.[77] The Court of Review chides these two circuit court decisions for relying too heavily upon the precedent in *Truong* and not upon the plain, unadorned language and the plain intent of the original language of section 1804(a)(7)(B): "that the

[73] 952 F.2d 565, 572 (1st Cir. 1991) (internal citations omitted).
[74] *Id.* at 572-73.
[75] *Sealed Case*, 310 F.3d at 726.
[76] *Id.* at 726-27 (quoting *Duggan supra* note 70, at 77).
[77] *Id.* at 727 (quoting 50 U.S.C. § 1804(a)(7)(B) (2000)).

purpose of the surveillance is to obtain foreign intelligence information,"[78] not the **primary** purpose, just the **purpose**. This critique disregards the fact that *Truong* actually engages in interpretation of FISA. The critique is even more disturbing, in light of the congressional history behind the passage of FISA that both decisions cite:

> In constructing this framework, Congress gave close scrutiny to departures from those Fourth Amendment doctrines applicable in the criminal-investigation context in order to ensure that the procedures established in [FISA] are reasonable in relation to legitimate foreign counterintelligence requirements and the protected rights of individuals. Their reasonableness depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. The differences between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities have been taken into account. Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods.[79]

This excerpt from the legislative history reveals that Congress intended to protect individuals from the government using the lower standards of FISA to obtain information that would normally have to be obtained under Title III procedures or normal warrant requirements. If these courts glossed the statutory language of section 1804(a)(7)(B) in creating a primary purpose test, it only effectuated this legislative intent.

Ignoring this rationale, however, the Court of Review sides with the DOJ argument that the primary purpose test created a dichotomy that the statute never itself contemplated. The Court of Review correctly notes that although these cases adopted what is a "false" dichotomy between criminal and intelligence investigations, they did so in the process of actually allowing the admission of evidence gained under FISA orders.

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[78] *Id.* at 726 (quoting 50 U.S.C. § 1804(a)(7)(B) (2000)).
[79] S. Rep. No. 95-701, at 14-15 (1978), 1978 U.S.C.C.A.N. 3973 (*quoted in Duggan*, 743 F.2d at 73; *cited in Johnson*, 952 F.2d at 572).

Therefore, the government had no need to challenge the existence of this dichotomy until now.[80]

Moreover, even if the statutory language of FISA did not create the dichotomy, the DOJ accepted the existence of such a dichotomy beginning sometime in the 1980s and specifically erected a "wall" with the adoption of new procedures in 1995.[81] In a memorandum entitled "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" ("1995 procedures") from then Attorney General, Janet Reno, the contacts between the FBI and the DOJ Criminal Division in cases where FISA surveillance was conducted were expressly restricted.[82] The 1995 procedures inserted the DOJ's Office of Intelligence Policy and Review ("OIPR") between the FBI and the Criminal Division as the intermediary for communication[83] and limited the amount of consultation allowed between the Criminal Division and the FBI.

> The FBI will apprise the Criminal Division, on a timely basis, of information developed during the [foreign intelligence] investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution … The Criminal Division shall not, however, instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches. Additionally, the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the [foreign intelligence] investigation toward law enforcement objectives. [84]

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[80] *Sealed Case*, 310 F.3d at 727.
[81] *Id.* at 727-28.
[82] *Id.* at 727.
[83] Memorandum from Janet Reno, Attorney General, to the Assistant Attorney General of the Criminal Division (July 19, 1995), Part A, Subsection 1, *available at* http://www.fas.org/irp/agency/doj/fisa/1995procs.html.
[84] *Id.* at Part A, Subsection 6.

It was the "directing or controlling" language that, according to the DOJ, was eventually read as requiring OIPR to act as a "wall" to stop the FBI from candidly communicating with the Criminal Division.[85] The Court of Review's decision notes that the Executive Branch itself has, "in an effort to conform to district court holdings, accepted the dichotomy it now contends is false."[86]

The DOJ offers an avenue to the Court of Review to discredit FISC's dependence on the primary purpose test: even if the primary purpose test was at one point in time a required part of FISA process, the passage of the Patriot Act eliminated that test and the resulting dichotomy. The Court of Review, reviewing this argument, takes note of the history of the significant purpose amendment of the Patriot Act. Originally, the Executive Branch specifically sought an amendment to section 1804(a)(7)(B) which would have changed the language from "that the purpose of the surveillance is to obtain foreign intelligence information", to "that ***a*** purpose of the surveillance. . . " and in this respect the government was seeking a minimal threshold for the use of FISA procedures. Congress, although seeing the need for an amendment to FISA's purpose requirement, declined to adopt this suggested broad language. As the Court of Review notes, Congress "adopted language which it perceived as not giving the government quite the degree of modification it wanted."[87] The Patriot Act instead added the word "significant" in front of "purpose." The Court of Review, while reviewing floor statements on this amendment,[88] views this as clearly establishing a threshold that is lower than primary purpose, while still more significant than a negligible purpose. "There is simply no

[85] *Sealed Case*, 310 F.3d at 728; DOJ Supp. Br. at 10-11.
[86] *Sealed Case*, 310 F.3d at 727.
[87] *Id.* at 732.
[88] *Id.* at 732-33.

question, however, that Congress was keenly aware that this amendment relaxed a requirement that the government show that its primary purpose was other than criminal prosecution."[89]

Further, with the adoption of section 1806(k) as part of the Patriot Act, Congress offered approval of more cooperative consultations between law enforcement officers and foreign intelligence officials.[90] The Court of Review rejects FISC's ruling on 1806(k) that is steadfast in asserting that law enforcement officers are still prevented from "directing or controlling" surveillances.[91] The Court of Review perceives the amendment's added definition of "consult" in the language of 1806(k) as including "giving of advice."[92] Further, the consultation and coordination that Congress explicitly allows for in the amendments nowhere suggests a limitation on who is to direct and control, and it "necessarily implies that either law enforcement officers or foreign intelligence officials could be taking the lead."[93]

The Court of Review agreed with the DOJ that the original FISA did not contemplate the 'false dichotomy,' between law enforcement investigations and foreign

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[89] *Id.* at 732.

[90] 50 U.S.C. § 1806(k) (Coordination with Law Enforcement.

> (1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against—
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage or international terrorism by a foreign power or an agent of a foreign power ; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.
>
> (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105 [50 U.S.C. § 1805 (2000)].).

[91] *Sealed Case*, 310 F.3d at 733.

[92] *Id.* at 733-34.

[93] *Id.*

intelligence investigations that the primary purpose test created. But, it observes that the Congress actually ***did*** contemplate the dichotomy when passing these Patriot Act coordination and purpose amendments. Consideration of the primary purpose test framed the drafting of the amendments, and thus they must be read in relation to that test's dichotomy, making the dichotomy no longer a false one.[94]

Once it established that the Congress intended to abandon the primary purpose requirement, the Court of Review was still left with interpreting the equally troublesome language they left behind them - the "significant purpose" test. The Court of Review provides a lengthy interpretation of the significant purpose amendment, replete with practical examples,[95] to fill this void. It rejects the DOJ argument that the surveillance is legitimate under the significant purpose test as long as there is at least a small semblance of foreign intelligence purpose, but also does not accept the amicus arguments for reinstating the threshold of the "primary purpose" test. The court concluded that, "The addition of the word 'significant' to section 1804(a)(7)(B) imposed a requirement that the government have a ***measurable*** foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes."[96] The court recognized that the amendments created somewhat of an analytical conundrum:

> On the one hand, Congress did not amend the definition of foreign intelligence information which . . . includes evidence of foreign intelligence crimes. On the other hand, Congress accepted the dichotomy between foreign intelligence and law enforcement by adopting the significant purpose test. The better reading . . . excludes from the purpose

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[94] *Id.* at 735.

[95] *Id.* at 736 ("[O]rdinary crimes might be inextricably intertwined with foreign intelligence crimes…but the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes." The court then provides an illustrative example: "if a group of international terrorists were to engage in bank robberies in order to finance the manufacture of a bomb, evidence of the bank robbery should be treated just as evidence of the terrorist act itself.").

[96] *Id.* at 734-35.

> of gaining foreign intelligence information a ***sole*** objective of criminal prosecution.[97]

In practice, this new standard will not make much difference, because the DOJ will not have decided whether to prosecute when it first commences surveillance. Regardless of practical concerns, the Court of Review finds it important to lay to rest where this significant purpose threshold actually lies: "So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test."[98]

It is not clear whether the Court of Review's description of the "measurable foreign intelligence purpose" and the "sole objective" test will be any more effective than the defunct "primary purpose" test in guiding the district courts as to when a FISA search and seizure was legitimate. The practical effect of the amendment on the district courts may be no effect at all. Before the passage of the amendment, courts were more often than not allowing the FISA-obtained evidence to be used in a criminal prosecution by finding that the government had fulfilled the primary purpose test, now it will only be easier for the courts to make the same ruling.[99] If ever a court finds this to be a closer question however, the Court of Review's proffered "measurable purpose" test only provides a new adjective to the analysis.

To summarize, the evolution of the purpose requirement of FISA can be viewed rather simply. When FISA was first adopted, the language did not explicitly include a

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[97] *Id.*
[98] *Id.*
[99] *See generally Johnson*, 952 F.2d 565; United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff'd sub nom. Duggan*, 743 F.2d 59; *see also* United States v. Falvay, 540 F. Supp. 1306, 1313-14 (E.D.N.Y. 1982) ("Evidence derived from warrantless foreign intelligence searches will be admissible in a criminal proceeding only so long as the primary purpose of the surveillance is to obtain foreign intelligence."); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988).

primary purpose test - it merely stated that “the purpose of the surveillance is to obtain foreign intelligence information".[100] Then, the federal courts read a gloss on the statute, requiring that the government show that the surveillance was conducted for the primary purpose of obtaining foreign intelligence information, not primarily to gather evidence for a criminal prosecution. This purpose was then abandoned by the Patriot Act's amendment to section 1804(a)(7)(B) in favor of the significant purpose test. The decision of the Court of Review has added to the fury of adjectives, leaving the courts to figure out if the government has proven there to be a "measurable foreign intelligence purpose" behind FISA surveillance.

Part III: Is FISA, as Amended, Constitutional?

Before the Patriot Act, courts held that FISA represented a reasonable balance between the needs of the government in gathering national intelligence information and the rights of individuals under the Fourth Amendment.[101] Because the governmental interest in gathering intelligence information is different from that of a criminal investigation, it has been held that the lower standard of probable cause needed for a FISA order passes constitutional muster, even though it does not meet the standard needed in a criminal investigation.[102] The federal courts have also held that the particularity requirement of the Fourth Amendment is satisfied by FISA[103] and that the *ex*

[100] S*ee* Patriot Act, s*upra* note 53.
[101] *See Cavanaugh*, 807 F.2d at 790; *Duggan*, 743 F.2d at 73; *Johnson*, 952 F.2d at 575; *Pelton*, 835 F.2d at 1075.
[102] *Cavanaugh*, 807 F.2d at 791.
[103] *Id.* .

parte, *in camera* review under section 1806(f) is constitutional in light of the circumstances.[104]

The primary purpose test was previously the screen federal courts used to determine the constitutionality of a particular instance of foreign intelligence surveillance under Fourth Amendment standards.[105] Having disposed of the primary purpose test in its opinion, the Court of Review was left to determine if FISA is still constitutionally consistent with Fourth Amendment requirements.

The Fourth Amendment imparts:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[106]

The Supreme Court has interpreted the Fourth Amendment to impose three requisites:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. Finally, "warrants must particularly describe the 'things to be seized.'" as well as the place to be searched.[107]

The *amici* argue that the statute, as amended, provides an unconstitutional "end-run" around the Fourth Amendment,[108] first because a FISA order is not analogous to a warrant within the meaning of the Fourth Amendment and second because any government surveillance whose primary purpose is criminal prosecution of any crime is

[104] United States v. Ott, 827 F.2d 473, 475-77 (9th Cir. 1987).
[105] NACDL Br. at 13.
[106] U.S. CONST. amend. IV.
[107] Dalia v. United States, 441 U.S. 238, 255 (1979) (internal citation omitted), *cited in Sealed Case*, 310 F.3d at 738.
[108] ACLU Br. At 8; NACDL Br. at 3.

per se unreasonable if not based on a warrant.[109] In the lower court ruling, the FISC was concerned that the government could use a FISA order, if the primary purpose test was eliminated, as an improper substitute for a normal criminal warrant required for electronic surveillance under Title III.[110] The Court of Review rejects that reasoning, relying on a Supreme Court opinion which indicates that with respect to even **domestic** national security intelligence (i.e. surveillance of citizen terrorists, such as Timothy McVeigh), Title III procedures are not constitutionally required.[111] Nevertheless, the Court of Review follows the lead of the *amici* and engages in a comparison of Title III and FISA. The court analogizes FISA to Title III to buttress its constitutional legitimacy. It declares that since Title III has been found consistent with the Fourth Amendment, and since "In many significant respects the two statutes are equivalent and in some FISA contains additional protections,"[112] FISA must accordingly be constitutional as well.

In comparing the two laws it is crucial to first note that Title III and FISA differ in their proscribed probable cause standard. Title III authorizes electronic surveillance if it determines that "there is a probable belief that an individual is committing, has committed, or is about to commit" a specified predicate offense.[113] FISA mandates, instead, a showing of probable cause that the person subject to the surveillance is a

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[109] *Sealed Case*, 310 F.3d at 737.
[110] *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 624 (Foreign Int. Surv. Ct. 2002).
[111] *Sealed Case*, 310 F.3d at 737 *citing* United States v. United States District Court (Keith), 407 U.S. 297, 322 (1972). One defendant in *Keith* was charged with the dynamite bombing of a CIA office. The government asserted that, under the national security powers of the President, surveillance of the defendant was lawful, though conducted without prior judicial approval. The Court found that the government's security concerns did not justify departure from the Fourth Amendment requirement of judicial approval prior to a search or surveillance. However, the Court recognized "that domestic security surveillance may involve different policy and practice considerations from the surveillance of 'ordinary crime.'" *Keith* at 322. And thus, the same type of procedures prescribed by Title III may not be required in this situation. *Sealed Case* at 737.
[112] *Sealed Case*, 310 F.3d at 741.
[113] 18 U.S.C. § 2518(3)(a) (2000).

foreign power or an agent of a foreign power, not that the person's activities are necessarily subversive.[114] While Congress intended a lesser showing of probable cause for foreign intelligence surveillance than required for domestic electronic surveillance, it also established a safeguard to prevent the domestic spying incidents uncovered in the 1970s. Under the requirement that their must be probable cause to believe the target is acting "for or on behalf of a foreign power," FISA surveillance could not be authorized, for example:

> against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people. This definition would not authorize surveillance of ethnic Americans who lawfully gather political information and perhaps even lawfully share it with the foreign government of their national origin. It obviously would not apply to lawful activities to lobby, influence, or inform Members of Congress or the administration to take certain positions with respect to foreign or domestic concerns. Nor would it apply to lawfully gathering of information prepatory to such lawful activities.[115]

FISA surveillance would also not be authorized against a target engaged in purely domestic terrorism because the government would not be able to show that the target is acting for or on behalf of a foreign power. FISA is limited only to precisely defined, serious **foreign** threats to national security.

Title III and FISA both contain requirements of particularity comporting with the second required element of the Fourth Amendment. Title III requires probable cause to believe that **particular communications** concerning the specified crime will be obtained through the electronic surveillance.[116] FISA requires an intelligence officer to designate the type of foreign intelligence information being sought, and to certify that the

[114] 18 U.S.C. § 2518(3)(a) (2000).
[115] *Sealed Case*, 310 F.3d at 738, *citing* H.R. Rep. No. 95-1283, at 40 (1978).
[116] 18 U.S.C. § 2518(3)(b) (2002).

information is indeed foreign intelligence information.[117] When the target is a U.S. citizen, the FISC judge reviews the certification for clear error, which is different than a probable cause finding by the judge.[118] But there are additional safeguards, including that the certification must be made by a national security officer (typically the FBI director) **and** approved by the Attorney General or the Deputy Attorney General.[119] Congress intended that this certification would "assure written accountability within the Executive Branch" and provide "an internal check on Executive Branch arbitrariness".[120] Additionally, FISC can require the government to submit further information as it deems necessary to determine whether the certification is erroneous.[121]

Title III generally requires probable cause to believe that the facilities subject to surveillance are being used or are about to be used in connection with commission of a crime or are leased to, listed in the name of, or used by the individual committing the crime.[122] FISA requires probable cause to believe that each of the places under surveillance is being used, or is about to be used, by a foreign power or agent.[123] In cases where the premises are not leased to, listed in the name of, or used by the individual committing the crime, Title III requires the government to show a connection between the facilities and communications regarding the criminal offense.[124] The court notes that, "FISA requires less of a nexus between the facility and the pertinent communications

[117] 50 U.S.C. § 1804(a)(7)(E)(i) (2002).
[118] *Sealed Case*, 310 F.3d at 739.
[119] 50 U.S.C. § 1804(a) (2002).
[120] *Sealed Case*, 310 F.3d at 739, *citing* H.R. Rep. No. 95-1283, at 80 (1978).
[121] 50 U.S.C. § 1804(d) (2002).
[122] 18 U.S.C. § 2518(3)(d) (2002).
[123] 50 U.S.C. § 1805(a)(3)(B) (2002).
[124] *Sealed Case*, 310 F.3d at 740.

than Title III, but more of a nexus between the target and the pertinent communications."[125]

Both statutes have a necessity requirement, which requires the court to find that the information sought is not available through normal investigation procedures, i.e. that electronic surveillance is necessary.[126] The statutes have duration constraints. Title III orders can last for thirty days,[127] while FISA can last up to ninety days for United States persons.[128] The allowance for a longer surveillance period is based on the nature of foreign intelligence surveillance, which is "often long range and involves the interrelation of various sources and types of information."[129] The longer surveillance period is balanced by continuing oversight of minimization procedures by FISC during the period of surveillance.[130]

With a few exceptions that were not at issue in this particular decision, both Title III and FISA fulfill the first requirement of prior judicial authorization for electronic surveillance.[131] A FISC judge qualifies as a neutral and detached magistrate[132] and is an Article III judge.

The Court of Review resolves that although FISA and Title III are mostly parallel, FISA still does not constitute a warrant in the traditional constitutional sense, due to the different nature of probable cause showings and particularity requirements.[133] The DOJ brief never claims that a FISA order is equivalent to a warrant, though there is case law in

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[125] *Id.*
[126] 18 U.S.C. § 2511(3)(b) (2000); 50 U.S.C. §§ 1804(a)(7)(E)(ii), 1805(a)(5) (2002).
[127] *Id.* § 2518(5).
[128] 50 U.S.C. § 1805(e)(1) (2002).
[129] *Keith*, 407 U.S. at 322.
[130] 50 U.S.C. § 1805(e)(3) (2002).
[131] *Id.* § 1805; 18 U.S.C. § 2518 (2000).
[132] *Cavanaugh*, 807 F.2d at 790.
[133] *Sealed Case*, 310 F.3d at 741.

support of the point.[134] The Court of Review declined to answer definitively whether a FISA order qualifies as a warrant within the meaning of the Fourth Amendment, noting "that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment."[135] Here, the Court of Review seems to recognize the precarious ground it treads upon. It is plain that FISA orders do not fit neatly into our traditional notions of Fourth Amendment warrants. However, FISA does seem to fit the three requirements of the Fourth Amendment. A FISA order is issued by a neutral, disinterested magistrate. A FISA order does involve showings of probable cause. Also, FISA does have particularity requirements. The fact that FISA provides replacements for Title III procedures makes it seem equally safeguarded against infringement upon liberties. The Court of Review's holding that a FISA order "comes close" to a warrant is persuasive. However, in declaring that FISA's procedural steps display its reasonableness, the Court of Review may do little to calm the fears civil libertarians who have seen the results of DOJ oversight, which allowed for false or misleading information in FISA applications,[136] and the ineffective check on DOJ misconduct that has been provided by the FISC "rubberstamp" court.[137]

The *amici* briefs from the NACDL and the ACLU focus on the lack of notice in FISA to challenge its constitutionality.[138] Title III requires notice to the target of surveillance once the surveillance order expires,[139] while FISA does not. The *amici* also stress that Title III entitles a defendant to obtain the surveillance application and order to

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[134] *Id.* at 741-42, citing *Cavanaugh*, 807 F.2d at 790; United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1978); United States v. Falvey, 540 F. Supp. 1306, 1314.
[135] *Id.* at 742.
[136] S*ee supra* note 12.
[137] *See supra* notes 10, 11.
[138] NACDL Br. at 8-10; ACLU Br. at 5-6.
[139] 18 U.S.C. § 2518(8)(d) (2000).

challenge the legality of the surveillance.[140] FISA does not normally allow a defendant to see the surveillance application or order if the Attorney General states that disclosure or an adversary hearing would harm national security,[141] which is normally called for in such cases. If the Attorney General makes such a statement, the judge then conducts an *in camera* and *ex parte* review to determine if the electronic surveillance was lawful, whether disclosure and discovery is necessary, and whether to grant a suppression motion.[142] The Court of Review avoided answering the constitutionality of this issue, citing that the "decision whether to allow a defendant to obtain FISA materials is made by a district judge on a case by case basis, and the issue whether such a decision protects a defendant's constitutional rights in any given case is not before us."[143] The Court of Review was wise to not decide this issue in this case. The controversy in front of them deals only with the approval or denial of FISA applications, not the question of whether evidence obtained under a particular FISA application is admissible. To make a ruling on this issue, as the ACLU and NACDL briefs asked, would have undermined the legitimacy of this ruling by over-stepping the particular "case and controversy" in front of them.

The DOJ, recognizing that FISA represents a departure from traditional Fourth Amendment standards, urges the Court of Review to place foreign intelligence surveillance within the Supreme Court's "special needs" doctrine that justifies lower Fourth Amendment standards.[144] Under the special needs cases, the Supreme Court

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[140] *Id.* § 2518(9).
[141] 50 U.S.C. § 1806(f) (2002).
[142] *Id.* §§ 1806(f),(g).
[143] *Sealed Case*, 310 F.3d at 741 n. 24.
[144] Brief for the United States at 33-34, In re Sealed Case No. 02-001, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002), *available at* http://fas.org/irp/agency/doj/fisa/082102appeal.html [hereinafter *DOJ Br.*].

established that under exceptional circumstances the need to search often outweighs liberty interests and a strict application of Fourth Amendment requirements are not needed.[145] The doctrine which was developed in the areas of public school drug searches and random, suspicionless stop and search programs, is not easily applicable to the context of foreign intelligence surveillance.

Both the DOJ and the *amici* use the recent standard set by *City of Indianapolis v. Edmond*[146] to support their respective arguments regarding application of the special needs doctrine. In *Edmond,* the Supreme Court held that a highway checkpoint designed to catch drug dealers did not fit within the special needs exception because the government's main objective was "to uncover evidence of ordinary criminal wrongdoing."[147] The Court rejected the government's argument that the serious nature of the drug problem was sufficient to overcome the need for individualized suspicion.[148] *Amici* cite *Edmond* for the proposition that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[149] The Court of Review agrees that while the threat to society is not dispositive, it "remains a crucial factor, [for] our case may well involve the most serious threat our country faces."[150]

The DOJ finds *Edmond* persuasive in its argument that "while the general interest in crime control does not justify a departure from ordinary Fourth Amendment standards,

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[145] *See* Vernonia School Dist. 47J v. Action, 515 U.S. 646 (1995) (Random drug-testing of student athletes permitted under the special needs doctrine); Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (State sobriety checkpoints not a Fourth Amendment violation under special needs); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (Checkpoints for border control allowable under special needs).
[146] 531 U.S. 32 (2000).
[147] *Id.* at 41-42.
[148] *Id*. at 42.
[149] *Id*.
[150] *Sealed Case*, 310 F.3d at 746.

a 'special' interest concerning a particular type of crime may do so."[151] The Court of Review finds the DOJ's use of the *Edmond* precedent persuasive, holding that "the Court distinguished general crime control programs and those that have another particular purpose."[152] Warrantless searches and seizures have been allowed in special needs cases because the government interests involved "unique interests beyond ordinary, general law enforcement . . . The distinction between ordinary criminal prosecutions and extraordinary situations underlies the Supreme Court's approval of entirely warrantless and even suspicionless searches that are designed to serve the government's 'special needs, beyond the normal need for law enforcement.'"[153] The Court of Review is swayed by the fact that "[t]he government's concern with respect to foreign intelligence crimes . . . is overwhelmingly to stop or frustrate the immediate criminal activity."[154] And the Court of Review finds it significant to note, "The Court [in *Edmond*] specifically acknowledged that an appropriately tailored road block could be used 'to thwart an imminent terrorist attack.' The nature of the 'emergency,' which is simply another word for threat, takes the matter out of the realm of ordinary crime control."[155] The Court of Review finds that foreign intelligence surveillance is beyond normal, ordinary law enforcement interests and fits into the special needs exception. It comes to this holding by ultimately relying on our fears in post-September 11th America, "After the events of September 11, 2001 . . . it is hard to imagine greater emergencies facing Americans than those experienced on that date."[156]

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[151] DOJ Br. at 33.
[152] *Sealed Case*, 310 F.3d at 745.
[153] *Id.*, *citing Vernonia*, 515 U.S. at 653.
[154] *Sealed Case*, 310 F.3d at 744.
[155] *Id.* at 746, *quoting Edmond*, 531 U.S. at 44.
[156] *Id.*

To play upon the fears of a terrorist threat as the ultimate support for their holding undermines the strength of the Court of Review's opinion. The special needs doctrine was developed in the areas public school drug searches and random, suspicionless stop and search programs. The public school setting involves the Fourth Amendment rights of minors, who traditionally do not hold full civil liberty interests under our Constitution, especially considering the *in loco parentis* relationship associated with public schools. The stop and search programs involve an area where the common law has already developed a strong automobile exception to Fourth Amendment search and seizure requirements. Further, both areas where special needs apply involve physical searches, not electronic surveillance, to which even the Court of Review admits: "wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning."[157] To rely on the threat of terrorism plays right into the voiced fears of the ACLU, that civil rights and liberties are often eroded in the name of national security.[158] The Court of Review's decision would have more legitimacy had it not feebly analogized to the special needs doctrine, but instead relied more strongly upon the "unreasonable searches and seizures" language in the Fourth Amendment. The Court should have focused upon a simple balancing test of the government's reasonable need weighed against a citizen's liberty as protected by procedural FISA safeguards that are parallel to warrant requirements. The stronger need sometimes outweighs the strength of an individual's liberty interest.

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[157] *Id.*

[158] ACLU Br. at 38-39. *See also* ACLU, *Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11*, *available at* http://archive.aclu.org/congress/Insatiable Appetite.pdf.

The Court of Review concludes that FISA is constitutional because the surveillances it authorizes are reasonable.[159] FISA's procedures approach a classic warrant requirement. FISA seems reasonable because it is close to the requirements for electronic surveillance for criminal investigations in Title III.[160] Foreign intelligence surveillance is also analogous to the Supreme Court's line of decisions establishing special needs doctrine.[161] The Court of Review admits, however, that their analogies can only shed so much light on this problem, remarking: "the procedures and government showings under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close."[162] Thus, the Court of Review's decision amounts to a tentative answer as to whether FISA is actually constitutional under the Fourth Amendment's requirements or just "close" enough.

Part IV: Conclusion

The Court of Review's decision attempts to resolve two contentious issues surrounding FISA and in doing so, provides the first analysis of the relevant Patriot Act amendments. They interpret the "significant purpose" language of the amendment to imply something less than that required under the previous "primary purpose" standard, but still some "measurable" purpose. It will now lie with the district courts and FISC to determine what measures as significant. It may not matter, practically speaking, that the standard has changed. District courts, before the amendment, were more often than not affirming FISA searches and seizures under the stricter "primary purpose" standard. The

[159] *Sealed Case*, 310 F.3d at 742, 746.
[160] *Id.* at 742.
[161] *Id.* at 745-46.
[162] *Id* at 746.

effect of lowering the standard will likely have no consequence on the trend of these rulings.

The FISC, however, seems to have embarked on a trend, rebuking its former "rubberstamping" identity toward a more pro-active review of FISA applications, which may demonstrate to those concerned for the status of civil liberties in a post 9/11 America that the system does work. We may hear more from this court, in the future, in the way of denials of DOJ applications. At any rate, from an outsider's point of view, it seems as if the original congressional purpose of creating an expert panel to review these specialized surveillance requests has been fulfilled. The FISC does not always defer to the expertise of the Executive Branch. It does indeed have a mind of its own.

The Court of Review in its reexamination of the constitutionality of FISA, in light of the Patriot Act changes, ultimately “hung its hat” on public concerns over the threat of terrorism in finding FISA analogous to traditional Fourth Amendment requirements. Most federal courts which have a chance to review this issue in the future will also use this threat persuasive. Using this rationale to grant FISA surveillance legitimacy does not differ much from the rationale used prior to 1978 justifying the broader foreign intelligence exception to the warrant requirement that existed before FISA. In the end, with or without FISA, and with or without a primary or significant purpose test, there will always be a struggle between civil liberty interests and the interests of national security. So, though *Sealed Case* has added some guidance, it has not quelled the debate.