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ARTICLES

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT THROUGH THE LENS OF THE 9/11 COMMISSION REPORT: THE WISDOM OF THE PATRIOT ACT AMENDMENTS AND THE DECISION OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

DAVID S. JONAS*

For the first time, the number of secret surveillance warrants issued in federal terrorism and espionage cases last year exceeded the total number of wiretaps approved in criminal cases nationwide, according to new statistics released yesterday. The data provides further evidence of how the Justice Department and the FBI have shifted their focus from traditional criminals to suspected terrorists and their associates, and mark a milestone in the history of domestic surveillance by U.S. law enforcement agencies, government officials and legal and privacy experts said.¹

I. INTRODUCTION

On September 11, 2001, many aspects of American life changed. The focus of our government, charged with protecting citizens and the nation from national security threats, has shifted. With the Cold War won and no army in the world able to match traditional U.S. military might, the greatest threat now, ironically, is from stateless terrorists, operating in the shadows. Yet, the terrorists pose as great a threat to U.S. national security as any other adversary ever confronted.

Terrorism is now the major issue for senior U.S. policymakers. It should be no surprise to anyone that preventing terrorism has become a higher priority for the Federal Bureau of Investigation (FBI) than criminal prosecutions. After all, criminals are not seeking the destruc-

* The author is the General Counsel of the National Nuclear Security Administration at the U.S. Department of Energy. The views expressed herein are his own and do not necessarily reflect the official policy or position of the National Nuclear Security Administration, the U.S. Department of Energy or the U.S. Government. This article is dedicated to my mother, Millicent Sall Jonas, for her love of scholarship, reading and writing.

1. Dan Eggen and Susan Schmidt, *Data Show Different Spy Game Since 9/11*, WASH. POST, May 1, 2004, at A1.

tion of our lives, society, culture and government — the end of America, as we know it. As odious as their deeds may be, criminals cause death and destruction on a much smaller scale than terrorists. With the exception of arsonists and a few other mentally disturbed criminals, gratuitous killing and wanton destruction by criminals is the exception and not the rule. Few criminals combine suicide with the perpetration of their crimes, but terrorists value no life — not even their own.

As the opening quote illustrates, the effect of this major policy shift toward pursuing terrorists is now becoming a matter of statistics, analysis and commentary. Many believe that the new preeminent focus on terrorism and the electronic surveillance utilized as one means to fight it raise profound constitutional issues. Those in that camp fear the realization of the Latin dictum: *inter arma silent leges*.² Yet, many in government wish to be unshackled from legal restraints that hamper their ability to fight terrorism. But the debate continues even as the populace grows complacent while the immediacy of 9/11 recedes. The publication of the 9/11 Commission Report³ brings an important bipartisan perspective to this vital debate.

The Foreign Intelligence Surveillance Act⁴ (FISA) was enacted in 1978 when the issue of terrorism was gradually emerging on the domestic and international scene. FISA is important because it codifies the legal basis for foreign intelligence surveillance operations separate and distinct from routine law enforcement surveillance. FISA comes into play in foreign intelligence or counterintelligence⁵ investigations.⁶ The unique aspect of FISA is that, while requiring judicial approval of surveillance, it authorizes such surveillance to be conducted without prior authorization from a traditional probable cause search warrant as in the case of criminal investigations.

2. The Latin is translated as "in time of war, the laws are silent."

3. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (W.W. Norton & Co. 2004) [hereinafter 9/11 REPORT].

4. Foreign Intelligence Surveillance Act of 1978, Pub.L.No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-62).

5. See 50 U.S.C. § 401a(3) (2003) (defining "counterintelligence" as information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities).

6. See Louis A. Chiarella & Michael A. Newton, *So Judge, How Do I Get That FISA Warrant?: The Policy and Procedure for Conducting Electronic Surveillance*, 1997 ARMY LAW. 25 (1997) (for definition of the terms intelligence and counterintelligence and an explanation of the fact that FISA ignores conventional intelligence terminology and uses the term "foreign intelligence information" for what would normally be counterintelligence, in the intelligence community vernacular).

Recently, FISA was amended by the USA PATRIOT Act,⁷ which, *inter alia*, changed the standard for surveillance under FISA. The former FISA standard required that “the purpose” of electronic surveillance must be to obtain foreign intelligence information. The new, amended standard requires that “a significant purpose” of the surveillance must be to obtain such information.

FISA, as amended, and the case that confirms its constitutionality,⁸ have been frequently and severely criticized by academia, the press, and many special interest groups.⁹ The criticism is nearly unanimous, which seems curious and surprising in the context of usually vigorous academic debate. Many are concerned that without the requirement of a primary purpose of foreign intelligence surveillance, the government will utilize FISA in criminal investigations, where judicial deference is not as likely.¹⁰ Few law review articles praised either the PATRIOT Act or the court decision that upheld it.¹¹ This article argues in support of both.

Only the Department of Justice (DOJ), (which includes the FBI), has publicly hailed the decision as a major step forward in the fight against terrorism. DOJ is the executive branch agency which most requires this type of authority. Attorney General John Ashcroft said that the ruling, in confirming DOJ’s “legal authority to integrate fully the functions of law enforcement and intelligence . . . [was] a victory for liberty, safety and the security of the American people.”¹² His assertion is correct and is, if anything, understated.

7. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

8. *In re Sealed Case No. 02-001*, 310 F.3d 717, (Foreign Int. Surv. Ct. Rev. 2002).

9. See generally David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291 (2003); Jeremy D. Mayer, *9-11 and the Secret FISA Court: From Watchdog to Lapdog*, 34 CASE W. RES. J. INT’L L. 249 (2002); Michael P. O’Connor & Celia Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INT’L L.J. 1234 (2003).

10. See, e.g., Alison A. Bradley, *Extremism in the Defense of Liberty?: The Foreign Intelligence Surveillance Act and the Significance of the USA PATRIOT ACT*, 77 TUL. L. REV. 465 (2002).

11. The author found one law review article which was critical of the pre-PATRIOT Act FISA, arguing that it is too protective of U.S. person foreign agents, focusing primarily on the Wen Ho Lee case. See Gerald F. Reimers II, *Foreign Intelligence Surveillance Act*, 4 J. NAT’L SECURITY L. 55 (2000). The Wen Ho Lee case is described at <http://www.washingtonpost.com/wp-dyn/nation/specials/nationalsecurity/chineseespionage/>. Others do view FISA as having hampered effective investigation and prosecution of this case. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

12. Attorney General Ashcroft News Conference Transcript Regarding Decision of Foreign Intelligence Surveillance Court of Review, available at <http://www.usdoj.gov/speeches/2002/111802fisaneewsconference.htm> (last visited February 18, 2005).

The author illustrates that FISA, as amended by the PATRIOT Act, is not only a constitutionally sound statute, but in the post-9/11 environment, is absolutely essential for the President, acting through DOJ and the FBI,¹³ to meet the governmental constitutional obligation to “provide for the common defense”¹⁴ by combating terrorism more aggressively.¹⁵

The U.S. now confronts a new national security landscape with a vastly different geopolitical terrain. Today, a few terrorists, with only tenuous connections to any state, can inflict death and destruction on a massive scale, as terrorists did on 9/11. Imagine what they will do if they are able to obtain weapons of mass destruction (WMD). This threat is the primary reason that the government must have increased authority to conduct surveillances for foreign intelligence purposes. Indeed, as September 11th illustrated, even without WMD, terrorists can wreak vast devastation. How effectively the U.S. is able to defend against the terrorist threat will determine the very future and viability of the U.S. as a nation and as a constitutional democracy. The stakes could not be higher.

While ensuring the protection of constitutional rights is always appropriate, if the terrorists succeed in their objective to kill all Americans, there will be no constitutional rights to protect. The terrorists are “sophisticated, patient, disciplined, and lethal.”¹⁶ The pre-PATRIOT Act FISA allowed terrorists to conduct their unsavory business with much less fear of government intervention. As a prominent Senator has stated, September 11th should be an objective lesson in “the perils of failing to share information promptly and efficiently between (and within) organizations.”¹⁷ To that end, September 11th should therefore be an objective lesson to those who would contemplate revoking the new authorities given to government in the PATRIOT Act.

The national security pendulum historically has swung between the protection of individual rights and the needs of the state to maintain

13. The National Security Agency clearly engages in foreign intelligence surveillance also, but this article will focus on the DOJ/FBI role.

14. U.S. CONST. pmbl.

15. See Joginder S. Dillon & Robert I. Smith, *Defensive Information Operations and Domestic Law: Limitations on Government Investigative Techniques*, 50 A.F. L. Rev. 135, 163 (2001) (noting that “every President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercised that authority”) (citing Robert A. Dawson, *Foreign Intelligence Surveillance Act: Shifting the Balance: the D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1386 (1993)).

16. 9/11 REPORT, *supra* note 3, at xvi.

17. See STAFF OF SENATE COMM. ON INTELLIGENCE, 107TH CONG., SEPTEMBER 11 AND THE IMPERATIVE OF REFORM IN THE U.S. INTELLIGENCE COMMUNITY (Comm. Print 2002) (Additional views of Sen. Richard C. Shelby, Vice Chairman, Sen. Select Comm. on Intelligence), available at <http://intelligence.senate.gov/shelby.pdf> (Dec. 10, 2002).

order and ensure national security. Yet, within the range of the swinging pendulum, constitutional rights must remain assured and protected. FBI Director Robert S. Mueller has stated, “we must work within the framework of the Constitution, protecting our cherished civil liberties as we work to protect the American people.”¹⁸ The 9/11 Report concurs with this assessment:

We must find ways of reconciling security with liberty, since the success of one helps protect the other. **The choice between security and liberty is a false choice, as nothing is more likely to endanger America’s liberties than the success of a terrorist attack at home.** Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.¹⁹

The 9/11 Commission clearly concurs that now is the time for the pendulum to swing towards national security, and it has done just that with the enactment of the PATRIOT Act. The pendulum remains well within constitutional boundaries, contrary to the assertions, fears and accusations of critics.

This article will consider FISA historically and currently, as amended by the PATRIOT Act, along with the two recent key court decisions on the matter. It will also consider arguments for and against FISA as amended along with the *amicus* briefs submitted in court and the DOJ brief in *Sealed Case*. The author will illustrate the complexity and confusion surrounding the pre-existing FISA. The wisdom of the PATRIOT Act amendments to FISA and the conclusive court decision in *Sealed Case*, therefore, was in its clarification of the state of play and in its simplicity. The author concludes that the amended FISA is not only sound constitutionally, but wise policy as well, and appropriate to the dangerous age in which we live. The 9/11 Report supports that conclusion.

II. PRE-FISA BACKGROUND

The President, acting through the DOJ and the FBI, or other executive branch organs, has long had the authority and considerable discretion to conduct wiretapping and/or physical searches with the goal of protecting national security.²⁰ This authority is essential for the President to be able to perform his constitutional duty and function of

18. *FBI Views on Intelligence Reform: Before the Senate Comm. On the Judiciary*, 107th Cong. *Before the United States Senate Committee on Governmental Affairs*, 107th Cong. (testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation). [hereinafter Mueller testimony], available at <http://www.fbi.gov/congress/congress04/mueller052004.htm> (May 20, 2004).

19. 9/11 REPORT, *supra* note 3, at 395, (emphasis added).

20. See generally William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM.U. L.REV. 1 (2000) (providing an excellent historical survey of the development of the law in this area).

preserving, protecting and defending the Constitution of the United States.²¹ The President had this power long before FISA was enacted.

The Supreme Court first considered wiretapping in *Olmstead v. United States*,²² fifty years prior to FISA. The Court held that wiretapping did not violate the Fourth Amendment without a physical invasion of the premises, but invited Congress to enact legislation to protect the privacy of citizens from this type of eavesdropping. Congress did just that in passing the Communications Act of 1934, criminalizing electronic surveillance of interstate telephone conversations.²³ This prohibition did not extend to national security cases.

The Supreme Court next took up the electronic surveillance issue in *Katz v. United States*.²⁴ In *Katz*, the Court recognized that the Fourth Amendment²⁵ "protects people, not places."²⁶ The Court noted that the President had authority to conduct electronic surveillance without a warrant in national security investigations, but overturning *Olmstead*, it held that the Fourth Amendment requirements were generally applicable to such surveillance.²⁷ This transformed the playing field while still recognizing that national security cases were separate and distinct from criminal cases. *Katz* validated Presidential authority in this area but did not consider any applicable limits on this authority.²⁸ Again, in what is a clear pattern, Congress responded to a significant Supreme Court ruling with legislation.

Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 including Title III,²⁹ dealing with wiretaps.³⁰ This major legislation added the requirement of a court order prior to initiating surveillance, yet confirmed Presidential power in this area. Consistent with the Supreme Court's view in *Katz*, Congress noted that nothing

21. U.S. CONST. art. II, § 1, cl. 71. See also *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297 (1972) (reviews the President's obligation to protect the nation).

22. *Olmstead v. United States*, 277 U.S. 438 (1928).

23. Federal Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1103-04 (1934) (codified as amended at 47 U.S.C. 605 (Supp. III 1985)). There was no law enforcement exception to the wiretapping prohibition in this legislation, so law enforcement officers could not utilize such electronic surveillance. See *Nardone v. United States*, 302 U.S. 379 (1937).

24. *Katz v. United States*, 389 U.S. 347 (1967).

25. U.S. CONST. amend. IV protects citizens against "unreasonable searches and seizures."

26. *Katz*, 389 U.S. at 351.

27. See also *Berger v. New York*, 388 U.S. 41 (1967) (finding that probable cause and specificity requirements apply to warrants authorizing electronic surveillance).

28. See *Chagnon v. Bell*, 642 F.2d 1248, 1259-60 (D.C. Cir. 1980). *Chagnon* notes that all Presidents since *Katz* have advocated "a broad exception to the warrant requirement" for foreign intelligence surveillance purposes.

29. The Federal Rules of Criminal Procedure also provide guidance for law enforcement searches and electronic surveillance.

30. Pub. L. No. 90-351, § 2516, 82 Stat. 212, 216 (codified as amended at 18 U.S.C. §§ 2510-2522 (1968)). Title III of this legislation, also known as the "Wiretap Statute," is the law governing traditional warrant based searches for criminal purposes.

in Title III would “limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.”³¹ This language regarding “overthrow” of the government and “clear and present” danger were no doubt, at that point, illustrative of Congress’ intent to somewhat restrict the application of FISA to serious threats to national security. But, under the current terrorist threat environment, regardless of Congressional intent upon enactment, it may now be reasonably construed as providing government with broad authority to seek FISA authorizations.

What is admittedly confusing, however, is that Title III surveillance may be utilized for investigation of espionage and sabotage, which would generally be viewed under the rubric of national security. Yet, the PATRIOT Act added more terrorism-type offenses to Title III.³² Two contrary conclusions may be gleaned from this: that Congress intended to rein in the executive branch and restrict the use of FISA authorizations, or precisely the opposite — that Congress intended to give the President the option of pursuing either Title III or FISA authorizations. Given the context of the passage of the PATRIOT Act — the attacks of 9/11 — it appears likely that Congress intended the latter. Either construction, however, would be constitutionally sufficient.³³ Title III continued to be updated over time.³⁴

Another highly significant case in the development of this area of the law was *United States v. Truong Dinh Hung*.³⁵ In that case, the Attorney General authorized electronic surveillance under the foreign intelligence exception to the Fourth Amendment. The court suppressed that evidence as not in accord with Title III since the “primary

31. *Id.* at § 2511(3). See also *Chagnon*, 642 F.2d at 1260 n.21.

32. See Brief of Amici Curiae American Civil Liberties Union, et. al. at 9-10, *In re Sealed Case No. 02-001*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) [hereinafter ACLU Br.] (noting that § 201 of the PATRIOT Act added seven additional terrorism crimes as predicate offenses under Title III); Lance Davis, *The Foreign Intelligence Surveillance Court's May 17 Opinion: Maintaining a Reasonable Balance Between National Security and Privacy Interests*, 34 *McGEORGE L. REV.* 713 (2003) [hereinafter Davis].

33. See *Harris v. United States*, 536 U.S. 545, 555 (2002) (describing the doctrine of constitutional avoidance, stating that “when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” (quoting *United States ex. rel. Atty. Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)) (quoted in Davis, *supra*, note 32 at n.107).

34. Later, Congress passed the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(a)(1)(B), 100 Stat. 1848 (amending 18 U.S.C. § 2510(1) (1982)). Next came the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4279 (1994) (amending 18 U.S.C. 2510 (1) (1988)). See also Robert A. Pikowsky, *An Overview of the Law of Electronic Surveillance Post September 11, 2001*, 94 *LAW LIBR. J.* 601 (2002).

35. *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

purpose” of the investigation had changed from counterintelligence to a criminal investigation. Thus, the controversial “primary purpose test” was born.

An outgrowth of the primary purpose test was the so-called “wall” that developed between criminal and intelligence investigators, and precluded collaboration between them.³⁶ “This practice led to a critical lack of coordination in investigations, such as international terrorism cases, which have both intelligence and criminal aspects.”³⁷

Truong highlighted the confusion and difficulty created by trying to keep separate the two spheres of criminal and intelligence pursuit noting the rather obvious fact that “almost all foreign intelligence investigations are in part criminal investigations.”³⁸ One must note, however, that *Truong* was not a FISA case and that the wall was created by DOJ and the FISC in response to this case as a matter of policy and not of law. There is no wall required by the statute. The wall proved to be a horribly dysfunctional creation requiring suppression of evidence obtained after an investigation was viewed as having shifted from an intelligence collection mode to a criminal investigation mode. Since such a shift may occur at any time in an investigation and may be ordered for a variety of reasons, under the pre-PATRIOT Act FISA, the government was essentially punished by this severe handicap for properly performing its duties.

Critics of the PATRIOT Act often cite *Truong* as evidence of the manifold deficiencies in the legislation; yet, *Truong* was not a Supreme Court or a FISA case. More importantly, other courts did not follow it. For example, in *United States v. Sarkissian*,³⁹ the court specifically did not decide whether the foreign intelligence purpose standard demanded that foreign intelligence gathering be the primary purpose of FISA surveillance. Most importantly, the court ruled in this manner because it was clear that foreign intelligence surveillance requires “the investigation of activities that constitute crimes.”⁴⁰

In the *Keith* case, the Court distinguished domestic security from national security while expressing concerns about the exercise of the national security power. The Court also returned to the unanswered question in *Katz* concerning limitations on the President’s national se-

36. See generally *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458 (11th Cir. 1987), cert. denied, 485 U.S. 937 (1988). Both cases held that evidence was usually admissible so long as the primary purpose was to obtain foreign intelligence information.

37. Michael J. Bulzoni, *Foreign Intelligence Surveillance Act Before and After the USA PATRIOT Act*, FBI Law Enforcement Bulletin, available at <http://www.fbi.gov/publications/leb/2003/june2003/june03leb.htm> (June 2003) [hereinafter Bulzoni].

38. *Truong Dinh Hung*, 629 F.2d at 915.

39. *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

40. *Id.* at 965.

curity power in this area. While not resolving this issue completely, the Court did recognize the unique interest of the executive branch in protecting national security while expressing concern about the ability of the government to intrude upon its citizen's rights to privacy.⁴¹ This unique interest remains an important concern as noted in a recommendation of the 9/11 Report: "As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared."⁴²

The real importance of this case was to illustrate the difference between electronic surveillance for foreign intelligence and counterintelligence purposes versus surveillance for domestic criminal investigations under Title III. And yet again, the Court invited Congress to weigh in on whether different warrant standards and procedures should apply to national security cases.⁴³ And yet again, Congress legislated — this time with FISA.

III. FISA ENACTED IN 1978

FISA may never have been enacted, were it not for the Watergate scandals, highlighting executive abuse of electronic surveillance and providing the requisite political impetus for this legislation. President Nixon had authorized the use of wiretaps on subversive domestic groups, such as Martin Luther King and the Democratic Party.⁴⁴ Concerned about this clear abuse of executive power, and desiring to limit such power, Congress held hearings which ultimately resulted in FISA.⁴⁵ These hearings were conducted by the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities, more informally known as the "Church Committee."⁴⁶

41. *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 312-13 (1972).

42. 9/11 REPORT *supra* note 3, at 394.

43. *Keith* 407 U.S. at 322-23.

44. Jeffrey L. Baker, *Domestic and National Security Wiretaps: A Fourth Amendment Perspective*, 12 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 1 (1999).

45. Congress created FISA pursuant to its power in U.S. CONST. art. III, § 1, authorizing Congress to create inferior courts.

46. See Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843, 848 (1992). See also SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, 94TH CONG., FINAL REPORT WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE (2d Sess. 1976) available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm>. The FBI COINTELPRO operation authorized illegal wiretapping of anti-war protesters. See Ward Churchill and Jim Vanderwall, *The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Dissent in the United States* (1990) available at <http://www.icdc.com/~paulwolf/cointelpro/cointel.htm> (quoted in Jessica M. Bungard, *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*, 1 U. PITT. J. TECH. L. AND POL'Y 9 (2004) [hereinafter Bungard]). The Church Committee was named after its chairman.

FISA was initially somewhat controversial. As with the amendments to FISA, there were challenges to FISA's constitutionality.⁴⁷ FISA survived them all, as should the PATRIOT Act amendments. The 9/11 Report provides much needed support for this assertion: "The provisions in the [PATRIOT] act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial."⁴⁸

FISA seeks a balance on the continuum between executive authority, required to protect the nation from legitimate national security threats, and individual constitutional rights. The statute authorizes electronic surveillance not only of aliens, but also of U.S. citizens, so long as the government shows the existence of probable cause that the suspect is a "foreign power" or an "agent of a foreign power."⁴⁹

FISA defines electronic surveillance as acquiring communications, by electronic or other means, under circumstances in which a person has a reasonable expectation of privacy and where a warrant would be required for law enforcement purposes.⁵⁰ The statute does not require that traditional warrants be obtained for intelligence purposes, although it establishes specific guidelines⁵¹ and a probable cause requirement for when such surveillance is permissible and vests authority to approve surveillance in an Article III judge.⁵²

FISA accomplished this by establishing the Foreign Intelligence Surveillance Court (FISC), by comprising seven sitting U.S. District Court judges.⁵³ The PATRIOT Act expanded the number of FISA judges to eleven, three of whom must reside in the Washington, DC

47. See *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). That court held that FISA had properly balanced the need to obtain foreign intelligence information with Fourth Amendment rights. FISA has also survived all types of other challenges including equal protection, political question, and separation of powers challenges. See Robert A. Dawson, *Foreign Intelligence Surveillance Act: Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380 (1993); see also Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 816-17, n.126 (1989) (provides a list of each case challenging FISA's constitutionality, none of which were successful).

48. 9/11 REPORT, *supra* note 3, at 394.

49. 50 U.S.C. § 1805(a)(3) (2004). See also *United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987) (discussing Congressional intent in FISA of seeking to balance the government's need for foreign intelligence information versus the interest of citizens to be free from government intrusion).

50. 50 U.S.C. § 1801(f) (2004).

51. For example, FISA applications must be initially presented to DOJ's Office of Intelligence Policy and Review (OIPR), which independently reviews such applications, and, if legally sufficient, forwards them to the FISC. See U.S. DEP'T. OF JUSTICE, OFFICE OF INTELLIGENCE AND POLICY REVIEW ORGANIZATION, MISSION AND FUNCTIONS MANUAL (Sept. 2004) available at <http://www.usdoj.gov/jmd/mps/mission.htm>.

52. 50 U.S.C. § 1803(a) (2004).

53. *Id.*

environs.⁵⁴ The Chief Justice of the U.S. Supreme Court appoints these judges. The main purpose of the FISC is to consider government applications for electronic surveillance, which is precisely the same type of function performed by judges considering Title III warrants. By design, the FISC, however, would hear all FISA surveillance applications so that the FISC judges would gain currency in the arcane world of foreign intelligence.

In criminal investigations, courts view interception of communications as an intrusion on the rights of privacy and speech. The Supreme Court stated that:

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.⁵⁵

FISA then, provides necessarily and intentionally a separate regime for foreign intelligence investigations. Initially, FISA was limited to electronic eavesdropping and wiretapping, but in 1994, it was expanded to permit covert physical intrusion in connection with security investigations.⁵⁶ Fourth Amendment surveillance and searches are based upon probable cause to believe that a crime has been committed. FISA surveillance, however, is based on a finding of probable cause that the surveillance target is an agent of a foreign power, regardless of whether the suspect is engaged in criminal activity. If the target happens to be a "U.S. person," then there must be probable cause to believe that the person's activities involve espionage or related conduct.

The PATRIOT Act, passed one month after 9/11, enhances the ability of the government to fight the war against terrorism by, *inter alia*, expanding its surveillance powers. Section 218 of the PATRIOT Act reads as follows: "Sections 104(a)(7)(B) and section 303(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each **amended by striking 'the purpose' and inserting 'a significant purpose.'**"⁵⁷

54. USA PATRIOT Act § 208, 115 Stat. at 283 (amending 50 U.S.C. sec. 1803 (2000)). See also Robert A. Pikowsky, *An Overview of the Law of Electronic Surveillance Post September 11, 2001*, 94 LAW LIBR. J. 601 (2002).

55. *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 322-23 (1972).

56. This article will only consider electronic surveillance and will not discuss physical searches.

57. USA PATRIOT Act § 218 (emphasis added).

Now, the government need only show that a significant purpose, rather than the only purpose of such surveillance, is to obtain foreign intelligence information. This alteration makes it easier for the government to obtain a FISA authorization than a Title III warrant. But surely FISA authorization should be easier to obtain than a Title III warrant, given that the object of FISA surveillance — terrorists — pose a much greater threat than criminals. This legislation was the death knell of the primary purpose test and has raised concerns that the DOJ/FBI would abuse this authority by seeking exclusively FISA authorizations. It has also, most importantly, obliterated the wall which had been created between intelligence and criminal investigations.

But, as is readily apparent in the opening quote of this article, the government is hardly abandoning traditional Title III warrants, (which are still apparently nearly half of all surveillances),⁵⁸ although opponents of FISA as amended argue otherwise. Because counterterrorism has replaced crime fighting as the top priority of the FBI, it is only logical that FISA authorizations would at some point overtake Title III warrants.⁵⁹

On March 6, 2002, the Attorney General implemented the PATRIOT Act by promulgating a new Justice Department policy on information sharing procedures allowing full exchange of information between intelligence and criminal investigations officials regarding FISA surveillance.⁶⁰ This new policy dealt with “minimization” procedures regarding who may authorize FISA surveillance and regulate the interplay between counterintelligence officials and criminal investigators.⁶¹ These procedures, which required FISC approval, would allow law enforcement personnel to request and direct FISA surveillance.

On May 17, 2002, the FISC rejected the Attorney General’s policy, and ruled in pertinent part, that law enforcement officers may not direct or control an investigation using FISA surveillance for criminal prosecution purposes or make recommendations to intelligence officers regarding FISA surveillance.⁶² This decision was historic be-

58. Eggen, *supra* note 1.

59. The FBI website lists the ten top priorities of the agency. Counterterrorism is now the number one priority, noted on the website as “[p]rotect the United States from terrorist attack,” at <http://www.fbi.gov/libref/factsfigure/counterterrorism.htm>. Thus, “further evidence” of a “shift in focus,” as noted in the opening quote, is hardly required. Counterterrorism is now the FBI’s top priority and it is to be expected that the data would confirm that shift.

60. Bulzomi, *supra*, note 37.

61. 50 U.S.C. § 1804 (a)(7)(B) (2003).

62. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court of Review*, 218 F. Supp.2d 611 (Foreign Int. Surv. Ct. 2002).

cause it led to the very first appeal to the Foreign Intelligence Surveillance Court of Review (FISCR).

IV. ARGUMENTS AGAINST FISA AS AMENDED

One need not look very far to find vociferous denunciations of FISA before or after 9/11. But the “significant purpose test” seems to have struck a particular chord of concern with civil libertarians and academics. Representative of the complaints about FISA and the PATRIOT Act is that the powers enumerated therein are “broad and vague, and the secrecy of FISA proceedings makes FISA powers susceptible to abuse.”⁶³ The Electronic Frontier Foundation (EFF) argues that the authority of FISA extends beyond the intended spies and terrorists and could potentially be utilized in ordinary criminal investigations involving U.S. citizens.⁶⁴ While that argument is all well and good, it almost humorously assumes a wall, in practice, on the part of the terrorists and criminals.

In fact, terrorist and criminal activity are very closely related. For example, consider the hypothetical of terrorists planning to destabilize our economy by flooding the market with counterfeit currency. Counterfeiting is a traditional crime, but the usual purpose of counterfeiting is to make money. These terrorists, however, have a far more sinister motive and goal with the potentially enormous consequence of weakening the U.S. economy. Therefore, in many respects, criminal and terrorist activities are so closely intertwined as to be inseparable for all practical purposes. The imposition of an artificial wall to keep separate foreign intelligence and criminal prosecution was hopelessly idealistic and misguided *ab initio*.

Another paper offered by EFF argues that the “USA PATRIOT Act broadly expands law enforcement’s surveillance and investigative powers and represents one of the most significant threats to civil liberties, privacy and democratic traditions in U.S. history.”⁶⁵ The EFF claims that FISA powers have been so broadened and FISA standards have been so lowered that the government is free to spy on anyone at anytime, while eliminating government accountability.⁶⁶

Again, EFF offers bold assertions and allegations but does little to buttress them. How exactly is the FBI, for example, able to “spy on anyone” when they require the authorization of the FISC or a tradi-

63. Lee Tien, *Foreign Intelligence Surveillance Act, Frequently Asked Questions*, at http://www.eff.org/Censorship/Terrorism_militias/fisa_faq.html (Sept. 27, 2001).

64. Electronic Frontier Foundation, *The USA PATRIOT Act*, available at <http://www.eff.org/Privacy/Surveillance/Terrorism/Patriot.html> (last visited February 15, 2005).

65. *Id.*

66. *Id.*

tional Title III warrant to do so? This assertion is as unfounded as ridiculous, taking paranoia to the extreme. The FISC has clearly shown that it takes its oversight obligations seriously as an Article III court. So, unless EFF is claiming that FBI agents will lie in order to convince the FISC of the need for foreign intelligence surveillance, then their argument has no merit, or is equally applicable to Title III surveillance.

The American Civil Liberties Union (ACLU) takes an equally dim view of this legislation.⁶⁷ They argue that the PATRIOT Act was passed with virtually no debate, with little oversight or review, and that this was only accomplished due to the heightened fear of terrorism due to the recent 9/11 attacks.⁶⁸ The ACLU complains, *inter alia*, that this legislation “expands a narrow exception to the Fourth Amendment that had been created for the collection of foreign intelligence information.”⁶⁹ The ACLU does a better job than EFF of enunciating specific concerns about the legislation:

A 1978 law called FISA created an exception to the Fourth Amendment’s requirement for probable cause when the purpose of a wiretap or search was to gather foreign intelligence. The rationale was that since the search was not conducted for the purpose of gathering evidence to put someone on trial, the standards could be loosened. In a stark demonstration of why it can be dangerous to create exceptions to fundamental rights, however, the PATRIOT Act expanded this once-narrow exception to cover wiretaps and searches that DO collect evidence for regular domestic criminal cases. FISA previously allowed searches only if the primary purpose was to gather foreign intelligence. But the PATRIOT Act changes the law to allow searches when “a significant purpose” is intelligence. That lets the government circumvent the Constitution’s probable cause requirement even when its main goal is ordinary law enforcement.⁷⁰

Once again, like the EFF, the ACLU assumes that the criminals and terrorists themselves will conveniently ensure that their activities remain in separate spheres. But reality is never so neat. Even the ACLU fails to explain how the government will “circumvent” a probable cause determination when the FISC must approve all authorizations for FISA surveillance.

Other groups and websites echo the complaints of EFF and ACLU and argue that many of the PATRIOT Act provisions had been proposed prior to 9/11, going back as far as the Reagan Administration.

67. A more detailed discussion of the ACLU view is provided, *infra*, pp. 30-33.

68. <http://www.aclu.org/safeandfree/SafeandFree.cfm?ID=12126&c=207> (hard copy on file with author).

69. *Surveillance Under the “USA/Patriot” Act*, at http://archive.aclu.org/issues/privacy/USA_PA_surveillance.html, (updated 2002) (hard copy on file with author).

70. *Id.* Emphasis in original.

At that time, they assert, Congress rejected the proposed provisions on constitutional grounds.⁷¹ This critique, of course, is not a substantive argument against the PATRIOT Act amendments to FISA, but rather an attempt to paint this legislation with a darkly conspiratorial gloss.

Other groups, such as the Electronic Privacy Information Center (EPIC), complain about the lack of specificity in the new “significant purpose test.” Since the key term “significant” is undefined and vague, it could “lead to inconsistent determinations and potential overuse of the FISA standards.”⁷²

The more lenient standards that the government must meet under FISA (as opposed to the stringent requirements of Title III) are justified by the fact that FISA’s provisions facilitate the collection of foreign intelligence information, not criminal evidence. This traditional justification is eliminated where the lax FISA provisions are applicable to the interception of information relating to a domestic criminal investigation. The change is a serious alteration to the delicate constitutional balance reflected in the prior legal regime governing electronic surveillance.⁷³

The author finds it interesting to note that in the above quote the pre-PATRIOT Act FISA now appears to be the gold standard, even though before the PATRIOT Act amendments similar groups complained vigorously about it and challenged its constitutionality.⁷⁴ But what legislation is crystal clear? What legislation provides precise definitions for every operative term? Much legislation abounds with vagueness and the courts are frequently called upon to determine intent and meaning in application. Thus, for this reason, treatises on statutory construction and interpretation are often consulted.⁷⁵

Regardless, civil libertarians have a valid concern, even if overstated, which must be taken seriously. The U.S. government must protect liberty and constitutional rights even in the face of potential terrorist attacks. All government officials, from street agents to the Attorney General, must take their obligations seriously and should never compromise the rules for political or personal purposes.

71. Jennifer Van Bergen, *The USA PATRIOT Act Was Planned Before 9/11*, at http://www.truthout.org/docs_02/05.21B.jvb.usapa.911.htm (May 20, 2002).

72. Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act (FISA)*, at <http://www.epic.org/privacy/terrorism/fisa> (last modified May 7, 2004).

73. *Id.*

74. See *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297 (1972).

75. See, e.g., SUTHERLAND’S STATUTORY CONSTRUCTION (3d ed. 1975).

V. ARGUMENTS FOR FISA AS AMENDED

Constitutional rights versus national security may be seen as being at two ends of a continuum, or at opposite ends of a swinging pendulum. Wartime rightfully elevates national security concerns to a position of primacy, and the Supreme Court has played a major role in this.⁷⁶ Chief Justice Rehnquist has written that “[I]t is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.”⁷⁷ That assertion is as obvious as it is eminently reasonable. The greater the threat to a nation’s survival, the less prominent all other issues besides national security will become. Seeking similar treatment of terrorists in wartime or peacetime is a worthy goal. In a perfect world, the government could proceed without regard to circumstance. Regrettably, the perfect world scenario will not likely arrive in our lifetimes.

Under the PATRIOT Act, the primary purpose of electronic surveillance may be a criminal investigation/prosecution, so long as a significant purpose of such investigation/prosecution is the collection of foreign intelligence information. This purpose is completely and objectively reasonable since it is beyond dispute that those who are proper targets of foreign intelligence gathering might also be involved in criminal activity. Since both criminal prosecutions and foreign intelligence/counterintelligence are essential and vital functions of government, it is unreasonable to require government to elect pursuit of only one or the other and to require that these two functions of government not communicate with each other. In fact, many such investigations likely swerve back and forth from a criminal focus to a foreign intelligence focus as the investigation continues. Now, government is free to pursue both without the onus of having to declare the primary purpose in advance. The freedom to serve back and forth between criminal and foreign intelligence investigations is a practical, reasonable and efficient use of scarce government resources. The *status quo* is far superior to the confusion which reigned prior to this clarification.

Even though critics of the amended FISA claim that there is now no oversight whatsoever, that claim is utterly unfounded. Federal law enforcement activities always remain subject to legislative and judicial review, not to mention commentary by the press. After all, the FISC was created by FISA in 1978 to provide judicial oversight of government surveillance in foreign intelligence investigations. Each application for FISA surveillance is reviewed by an Article III judge — the same ones who wrote the FISA court opinion so beloved by the crit-

76. See *Korematsu v. United States*, 323 U.S. 214 (1944). This decision proved to be an overreaction to national security concerns.

77. William H. Rehnquist, *ALL THE LAWS BUT ONE* 224 (Alfred A. Knopf 1998).

ics. That court still exists and is staffed by the same judges. Similar to the standards used in criminal cases, the government is required to tender an affidavit specifically describing the probable cause to believe that a target of such investigation is an agent of a foreign power. Also, critics never mention that “no provision of the USA PATRIOT Act has been held unconstitutional by any court in the country.”⁷⁸ If it were truly the abomination the critics claim it to be, how likely is it that it could survive such intense judicial scrutiny? Section 203 is one of the most helpful and reasonable provisions of the PATRIOT Act:

Section 203 [of the PATRIOT Act] permits the sharing of foreign intelligence or grand jury information to federal law enforcement, intelligence, national security, national defense, protective or immigration personnel “to assist the official receiving that information in the performance of his official duties.” This provision is an effort to let the right hand know what the left hand knows. For example, if federal law enforcement authorities learn through a grand jury proceeding or foreign intelligence surveillance that a group is planning to blow up Joe Louis Arena during a Red Wings game, this provision permits them to tell criminal investigators, who can then act on that information in an attempt to prevent the attack. Under previous law, disclosure was prohibited.⁷⁹

Imagining the views of ordinary citizens regarding the hypothetical above is not difficult. Citizens want effective government protection. They understand that there must be limits to governmental powers, but such limits must be reasonable, or the government will be crippled in its ability to fight terrorism. Now is not the time for such restriction. In fact, the critics would be wise to consider the implications of the next terrorist attack, which is surely being planned now. What if they successfully detonate a nuclear weapon in an American city? “Imagine what such an attack would do to American public opinion. Imagine the pressure Americans would put on our government to protect them at all costs. The freedom and civil liberties we now enjoy would be under a terrible strain.”⁸⁰

Stewart Baker, the former general counsel of the National Security Agency, stated, “barriers to information sharing between intelligence and law enforcement agencies have already cost us dearly in the fight against terror.”⁸¹ The PATRIOT Act, therefore, with good reason,

78. Charles S. Morford, U.S. Attorney, Eastern District of Michigan, *Questions and Answers about the USA PATRIOT Act*, available at http://www.usdoj.gov/usao/mie/ctu/FAQ_Patriot.htm (August 23, 2004).

79. *Id.*

80. Mortimer B. Zuckerman, *The Way to Make us Safer*, U.S. NEWS AND WORLD REP., Aug. 9, 2004, at 64.

81. Stewart Baker, *Grand Jury Secrecy Rules Help the Terrorists*, WALL ST. J., Oct. 5, 2001, at A14.

breaks down the wall between foreign intelligence and criminal investigations.

But, there is additional accountability under FISA. For example, certain named officials, such as the Attorney General, must personally certify that there is a foreign intelligence purpose to the surveillance.⁸² This rule puts the authority/responsibility for certification on the shoulders of a senior administration official who is politically accountable for his actions. There need be no fear, as critics assert, of anonymous mid-level bureaucrats running amok with newfound power. In fact, there has been no abuse of the PATRIOT Act.

Perhaps nothing concentrated the mind on this so much as Bill Clinton's Attorney General, Janet Reno, telling the 9/11 Commission, just a couple of weeks ago that "Everything that's been done in the Patriot Act has been helpful." And just last October, Senator Joseph Biden called the criticism of the Patriot Act "ill-informed and overblown." Not only Joe Biden, Senator Dianne Feinstein said and I quote again, "I have never had a single abuse of the Patriot Act reported to me." And when she asked the ACLU for examples of violations of civil liberties under the Patriot Act, Senator Feinstein came back and said, "They had none."⁸³

While it is certainly erroneous to assert that FISA may now be used with abandon for criminal investigations, it is equally mistaken to argue that criminal investigators cannot be exposed to any aspect of intelligence matters. In the current terrorist threat environment, the wall must come down. All of this finally came to a head when the FISC decided to settle the matter. And they settled it in a manner applauded by groups such as the ACLU and EFF. Therefore, how can these groups plausibly argue that there is no oversight when the FISC not only exists but has recently shown a willingness to flex its judicial muscle?

FBI Director Mueller testified to the U.S. Senate that the PATRIOT Act amendments are vital to national security and that without them, "the FBI could be forced back into pre-September 11 practices, attempting to fight the war on terrorism with one hand tied behind our backs."⁸⁴ Director Mueller presented cogent testimony regarding the difficulties the wall presented:

Prior to September 11, an Agent investigating the intelligence side of a terrorism case was barred from discussing the case with an Agent

82. Foreign Intelligence Surveillance Act of 1978, Pub.L.No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1802 as amended by Pub. L. 108-458 § 1701(e) (2004)).

83. William Bennett, *Protecting Civil Liberties and the Patriot Act*, AMERICANS FOR VICTORY OVER TERRORISM (2004), available at <http://www.avot.org/article/20040908005900.html>; See also U.S. DEP'T. OF JUST. OFF. OF INSPECTOR GEN. SEMIANNUAL REP. TO CONG. ON IMPLEMENTATION OF SEC. 1001 OF THE U.S.A. PATRIOT ACT (2004).

84. Mueller testimony, *supra* note 18.

across the hall who was working the criminal side of that same investigation. For instance, if a court-ordered criminal wiretap turned up intelligence information, the criminal investigator could not share that information with the intelligence investigator – he could not even suggest that the intelligence investigator should seek a wiretap to collect the information for himself. If the criminal investigator served a grand jury subpoena to a suspect's bank, he could not divulge any information found in those bank records to the intelligence investigator. Instead, the intelligence investigator would have to issue a National Security Letter in order to procure that same information.⁸⁵

Director Mueller's testimony clearly illustrates how ludicrous the situation had become. Simply from the perspective of a taxpayer, the lack of communication between the criminal investigators and the intelligence investigators was a ridiculously wasteful and inefficient way to conduct business. Objectively, it appears quite an inane manner in which to proceed since it maximizes inefficiency. It resulted in criminal and intelligence investigators "attempting to put together a complex jigsaw puzzle at separate tables."⁸⁶ Why in the world would we wish such disadvantage upon those who seek to protect us from terrorism? If the terrorists obtain WMD and are able to succeed in future attacks, we will rue the day that we sought to handicap our defenders.

VI. OPINION OF THE FISC

On May 17, 2002, the FISC, which operates in secret, issued its first ruling on this matter. The opinion was obtained only after a request from three senators written directly to the presiding judge.⁸⁷ The upshot of the opinion was that the Attorney General's procedures had effectively lowered the wall too far between foreign intelligence gathering and criminal investigations, and that the provisions for sharing information between the two sides "were not reasonably designed."⁸⁸ The opinion required that, in the future, in the event of a meeting between law enforcement officers and intelligence officials, that a representative of the Department of Justice's Office of Intelligence Policy

85. *Id.*

86. *Id.*

87. Letter from Senators Patrick Leahy, Charles E. Grassley, and Arlen Specter, members of the Senate Select Committee on Intelligence, to Colleen Kollar-Kotelly, Presiding Judge, Foreign Intelligence Surveillance Court, available at <http://www.fas.org/irp/agency/doj/fisa/leahy073102.html> (July 30, 2002).

88. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court of Review*, 218 F. Supp. 2d 611, 625 (Foreign Int. Surv. Ct. 2002).

and Review (OIPR) be present, or at least be notified of the proceedings.⁸⁹

An Article III court directing the executive branch regarding how to conduct its internal business is highly unusual, but that is precisely what the FISC did. And they did it with gusto and flourish, given that the opinion, which would normally be signed by one judge, was signed by seven judges. Most scholarly articles supported the FISC decision:

The FISC's May 17 opinion strikes a proper balance between the nation's increased need for security against foreign terrorists and the privacy protections guaranteed by the Fourth Amendment of the United States Constitution. Congress passed the USA PATRIOT Act in response to the lack of coordination between intelligence officers and law enforcement personnel. The FISC's minimization procedures allow for greater coordination and evidence sharing, as contemplated by Congress. At the same time, the secret court's ruling recognizes that the *raison d'être* for the FISA is foreign intelligence gathering and not criminal evidence gathering. The government can always rely on Title III orders to conduct surveillance where the primary purpose is criminal prosecution. **Crimes such as occurred on September 11, 2001 are contemplated within the scope of Title III surveillance orders**, evidencing that Congress did not contemplate the FISA as a law enforcement investigation mechanism for the purpose of prosecuting foreign terrorism. Furthermore, the Supreme Court has not acknowledged that the investigation of certain categories of crimes justifies the government's use of a more relaxed standard than that of Fourth Amendment probable cause. By prohibiting prosecutors and law enforcement officers from directing FISA electronic surveillances, the FISC decision reinforced the difference between law enforcement and foreign intelligence gathering and avoided the constitutional issues regarding the Fourth Amendment.⁹⁰

It is quite remarkable that anyone could view September 11th as a "crime" to be prosecuted via normal criminal justice channels. If September 11th is to be viewed in that light, then there is simply no need for FISA at all. This confused logic is typical of those who oppose the PATRIOT Act amendments and the decision of the FISC. Yet, that approach is not novel. "From the outset, the Bush Administration has chosen to view the attacks as acts of war by foreign aggressors, rather than as criminal acts that require redress by the justice system."⁹¹ Indeed they have. If 3,000 dead Americans is not the result of an act of

89. *Id.* at 625-27. The OIPR is the office that gained power and repute under the reign of the fabled Mary Lawton. The office works most closely with the FISA court and presents the court with all applications for surveillance authorization.

90. Davis, *supra* note 32 (emphasis added).

91. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1086 (2002).

war, then we have significantly raised the bar on what it takes to rouse us from our collective slumber.

Pursuant to FISA, all of the judges of the FISC are appointed by the Chief Justice of the U.S. Supreme Court. FISC is the same court so often accused of rubber-stamping the Justice Department's requests for FISA authorizations. FISA critics chant like a mantra that approximately 99.9% of requests for surveillance are granted.⁹² Yet, no one ever considers that this may be due to the fact that the government has exercised its authority in a judicious manner and acted in good faith. The critics loved the FISC's opinion here, but hated the FISC's decision even though those judges are appointed by the same Chief Justice.

VII. ARGUMENT BY THE UNITED STATES IN THE FISC

DOJ's appeal was another first. It had two main goals in the historic appeal to the FISC.⁹³ The first was to eviscerate the wall between intelligence and criminal activities arguing that it was a false dichotomy. The second was to reverse the FISC imposition of a requirement of the presence of a representative from OIPR.

DOJ argued that electronic surveillance without warrants had been conducted by the executive branch, before FISA, to protect the nation from foreign threats.⁹⁴ DOJ noted that although the Supreme Court had never addressed the legality of such surveillance, "virtually every court that had addressed the issue had concluded that the President had the inherent power to conduct warrantless electronic surveillance to collect foreign intelligence information, and that such surveillances constituted an exception to the warrant requirement of the Fourth Amendment."⁹⁵ In fact, no court has ever held that a warrant is required for such surveillance.⁹⁶

DOJ next reviewed the bidding. Once FISA was enacted in 1978, Congress noted that the purpose of FISA surveillance must be to ob-

92. See, e.g., John E. Branch III, *Statutory Misinterpretation: The Foreign Intelligence Court of Review's Interpretation of the "Significant Purpose" Requirement of the Foreign Intelligence Surveillance Act*, 81 N.C. L. REV. 2075, 2081 (2003) [hereinafter Branch]. The author of this article notes that "out of the 14,019 total applications for searches and surveillances under FISA, only one has been denied." A report is submitted annually to the Administrative Office of the U.S. Courts reviewing the number of FISA applications, along with the numbers of approvals, modifications and denials. This report is required by FISA, available at <http://fas.org/irp/agency/doj/fisa/>.

93. Supplemental Brief for the United States, *In re Sealed Case No. 02-001*, 310 F. 3d 717 (Foreign Int. Surv. Ct. Rev. 2002)[hereinafter DOJ Br.], available at <http://fas.org/irp/agency/doj/fisa/092502sup.html>.

94. H.R. REP. NO. 95-1283, pt. 1, at 15-22 (1978).

95. *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984).

96. See *Zweibon v. Mitchell*, 516 F.2d 594, 633-51 (D.C. Cir. 1975).

tain "foreign intelligence information," but defined it in a way so as not to discriminate between law enforcement and other methods of protecting against espionage, terrorism and the other threats noted in 50 U.S.C. sec. 1801(e)(1).

Truong upheld the use of such surveillance, excusing the executive branch from obtaining a warrant only when the surveillance is conducted primarily for foreign intelligence reasons.⁹⁷ However, this case opened up the issue of what exactly was a foreign intelligence purpose since most of those investigations involve some sort of crime.⁹⁸ *In re Sealed Case*, DOJ argued that FISA contemplated the use in criminal cases of information obtained from foreign intelligence electronic surveillance.⁹⁹

DOJ then argued that the PATRIOT Act did not codify this dichotomy between intelligence and law enforcement and that the amendments were designed to facilitate "greater coordination between intelligence and law enforcement officials, and to overturn prior standards restricting that coordination."¹⁰⁰ DOJ cited the President's Remarks on Signing the USA PATRIOT Act of 2001,¹⁰¹ wherein he made clear that intelligence and law enforcement must work together to protect against international terrorism.

DOJ concluded arguing that the FISA significant purpose test is constitutional:

FISA orders are issued pursuant to individualized suspicion by an Article III judge. The statute requires certifications from high-ranking Executive Branch officials. It provides for intricate minimization procedures and extensive congressional oversight. And it requires a finding of probable cause – albeit not always the same probable cause that is required in ordinary criminal cases.¹⁰²

The second DOJ argument concerns the "chaperon" requirement of the FISC decision in *All Matters*. DOJ claims that this requirement "improperly micromanages the Executive Branch in violation of Articles II and III of the Constitution."¹⁰³ The problem is so obvious that it is surprising that the FISC would impose such a requirement. The hubris of this court is stunning. Fortunately, there was a higher authority to set matters right:

No Supreme Court opinion has ever recognized the authority of a federal court to impose such structural requirements on the Executive, let

97. *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980).

98. *See Id.*

99. *In re Sealed Case*, 310 F.3d 717, 731 (Foreign. Int. Surv. Ct. Rev. 2002).

100. DOJ Br., *supra* note 93.

101. DOJ Br., *supra* note 93.

102. DOJ Br., *supra* note 93.

103. DOJ Br., *supra* note 93.

alone with respect to such core executive functions. The reasons for this are clear: Article III simply does not grant federal courts any power to order the *internal* workings of the Executive Branch, particularly in the area of foreign intelligence. But even if federal courts had some power to micromanage the Executive Branch, separation of powers prohibits the use of that power to the extent it interferes with core functions of the Executive.¹⁰⁴

VIII. ARGUMENT OF THE ACLU AND NACDL

Amicus briefs in this case were filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL). The FISC permitted this since the government is the only party to FISA proceedings. They argued that FISA, as amended, is unconstitutional if applied exclusively for criminal purposes and that it does “not authorize surveillance whose primary or exclusive purpose is law enforcement.”¹⁰⁵ The philosophical thrust of the brief could be summed up in a quote from the opening of the brief: “[I]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the Nation worthwhile.”¹⁰⁶

The ACLU views the amended FISA as “an end-run” around the Fourth Amendment¹⁰⁷ since FISA would be available to it in “any criminal investigation related to national security.”¹⁰⁸ In the view of the ACLU, this made the PATRIOT Act amendment to FISA unconstitutional, leaning heavily on the uniqueness of electronic surveillance as discussed in *Katz*.¹⁰⁹ They also made much of the fact that Title III has governed criminal investigations involving national security matters, and that espionage, sabotage, and treason were initially included in the statute, which has only been expanded as the years passed to include additions from the PATRIOT Act.¹¹⁰

The ACLU also argues that the procedures in FISA and Title III are quite different and that FISA was never meant to be an alternative to Title III.¹¹¹ While this is certainly true, the ACLU fails to adequately explain how government officials should handle problematic cases where the initial direction of the investigation is unclear. Also, if indeed “Title III’s strong standards should govern electronic surveil-

104. DOJ Br., *supra* note 93 (emphasis in original).

105. ACLU Br., *supra* note 32 at 1 (emphasis removed).

106. ACLU Br., *supra* note 32 at 2 (citing *United States v. Robel*, 389 U.S. 258, 264 (1967)).

107. ACLU Br., *supra* note 32 at 3.

108. ACLU Br., *supra* note 32 at 3.

109. ACLU Br., *supra* note 32 at 7.

110. ACLU Br., *supra* note 32 at 8.

111. ACLU Br., *supra* note 32 at 12.

lance whose purpose is to protect national security through criminal prosecutions,”¹¹² then why is FISA needed at all?

The ACLU makes much of the internal battles within DOJ regarding the proper application of FISA’s authorization requirements and the extent of cooperation between law enforcement and intelligence officials:

While law enforcement officers wanted intelligence officers to provide them with criminal evidence uncovered in the course of FISA surveillances, intelligence officers had become concerned that providing such information to law enforcement officers would lead the FISC to reject applications to renew surveillance orders on the grounds that foreign intelligence was no longer the primary purpose.¹¹³

There is no mention, of course, of the fact that individuals and agencies seeking to subvert the law do not have such disagreements. This friction was caused by DOJ officials trying to follow a confusing law to the best of their ability.

While it is appealing to argue that the Fourth Amendment should apply where law enforcement is the primary or exclusive purpose of the investigation, it simply does not work in practice as the FBI can attest. No one knows exactly the twists and turns an investigation will take. Terrorists do not advertise what they are doing, and what may initially appear to be a criminal enterprise may well develop into a terrorist plot with national security implications. These types of national security cases are precisely where the government needs more leeway — and should have it until the terrorist threat subsides. Assuming that governmental assertion of a national security basis for FISA surveillance is made in good faith, then even if the case otherwise appears to be criminal, FISA should still apply.

The general rule, “an informed public is the most potent of all restraints upon misgovernment”¹¹⁴ is true. But the ACLU concludes with an interesting argument: “Even accepting for the moment the necessity of the heavy veil of secrecy that has cloaked FISA proceedings over the past two decades, it must be acknowledged that if secrecy serves the nation, it does so at the expense of democracy.”¹¹⁵ But what is this an argument for? Should all classified documents be declassified? Should the press be able to cover secret war planning? That secrecy is anti-democratic is axiomatic. But all governance simply cannot be conducted under the constant glare of cameras — particularly that aspect of governance related to national security. To the

112. ACLU Br., *supra* note 32 at 14.

113. ACLU Br., *supra* note 32 at 17 (quoting the GAO report). See *infra* at note 134.

114. *Id.* at 39 (citing *Detroit Free Press v. Ashcroft*, No. 02-1437, 2002 WL 1972919 at 1 (6th Cir. Aug. 26, 2002)).

115. *Id.*

extent that we turn national security into an open book, we give our enemies the keys to the kingdom.

The NACDL brief takes a somewhat different tack.¹¹⁶ They captioned the issue as constitutional: “Does the Fourth Amendment require a warrant and probable cause to conduct electronic surveillance or a physical search of an **American citizen**, where the primary purpose or the surveillance or search is criminal investigation and the collection of foreign intelligence information is a “significant” secondary purpose?”¹¹⁷

In NACDL’s view, electronic surveillance or physical search without a warrant where the collection of foreign intelligence is a significant purpose of the investigation, is simply unconstitutional. But they tip their hand a bit too far in revealing that their primary issue is distrust of secret, non-adversarial proceedings, and they focus on the issue of U.S. citizens as opposed to the average terrorist who almost surely is an alien illegally in the U.S. While our system generally demands openness, and has it in nearly every context, terrorist investigation is simply an area where the light of day could be far more harmful than helpful. No one disputes the efficacy of adversarial proceedings as a general proposition. Senator Leahy acknowledged that his committee was “administering a system that rightfully must operate under a shroud of secrecy.”¹¹⁸ He continued:

It is tempting to suggest further weakening of the FISA statute to respond to specific cases, but the truth is that the more difficult systemic problems must be properly addressed in order to effectively combat terrorism. . . . FISA is even more important to the nation today than it was a year ago, before September 11, and we need it to work well. It ensures that our domestic surveillance is aimed at true national security targets and does not simply serve as an excuse to violate the constitutional rights of our own citizens. We must first exercise the utmost care and diligence in understanding and overseeing its use. Only then can we act in the nation’s best interest.¹¹⁹

116. Brief on Behalf of Amicus Curiae National Association of Criminal Defense Lawyers, *In re Sealed Case No. 02-001*, 310 F.2d 717 (For. Int. Surv. Ct. Rev. 2002) [hereinafter NACDL Br.], available at <http://www.nacdl.org/BriefBank.nsf/Briefs/8CF115770.htm>. (hard copy on file with author).

117. *Id.* at 1 (emphasis added).

118. *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process, Before the Senate Comm. on the Judiciary* (Sept. 10, 2002) (statement of Patrick Leahy, Senator), available at http://www.fas.org/irp/congress/2002_hr/091002leahy.html.

119. *Id.*

IX. OPINION OF THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

On August 23, 2002, DOJ appealed the decision of the FISC. On November 18, 2002, the U.S. Foreign Intelligence Surveillance Court of Review (FISCR) rendered its very first opinion, reversing the FISC decision in the most relevant areas.¹²⁰ It was the first appeal ever filed since the passage of FISA in 1978. The FISCR concluded that FISA, as amended by the PATRIOT Act, supported the DOJ's position, and that the restrictions imposed by the FISC were not required by the Constitution, the legislative history or by FISA itself.¹²¹ The case was remanded to the FISC for further proceedings in accordance with the FISCR opinion.

The opinion of the court illustrates that much of the confusion in this area may be traced to FISA itself. For example, the definition of an agent of a foreign power is intimately tied to criminal enterprise since the term includes any person who knowingly engages in clandestine intelligence gathering activities . . . which activities involve or may involve a violation of the *criminal statutes* of the United States . . . [or] knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore. . . ."¹²² International terrorism refers to activities that "involve violent acts or acts dangerous to human life that are a violation of the *criminal laws* of the United States or of any State"¹²³

How then is Title III to be neatly severable? While the FISCR notes that it is "quite puzzling"¹²⁴ that DOJ began to read FISA as limiting their ability to obtain FISA orders even where they did intend to prosecute for foreign intelligence crimes, in another sense, the DOJ's reading of FISA is not surprising at all. DOJ does not like to see their prosecutions overturned, and their actions seem eminently reasonable in hindsight as evidence of their abundance of caution and doing their best to stay within the bounds of an ambiguous statute. The DOJ's reaction is typical of government agencies acting in good faith.

This very problem was identified in the House Report, which noted that "[I]nformation about a spy's espionage activities obviously is within this definition, and it is most likely at the same time evidence of criminal activities."¹²⁵ The Senate Report noted the very same thing:

120. *In re Sealed Case*, 310 F.3d 717, 746 (Foreign Int. Surv. Rev 2002).

121. *Id.* at 721-22.

122. 50 U.S.C. § 1801(b)(2)(A), (C) (2004) (emphasis added).

123. 50 U.S.C. § 1801(c)(1) (2004) (emphasis added).

124. *Sealed Case*, 310 F.3d at 724.

125. H. R. REP. NO. 95-1283, at 49 (1978) (quoted in *Sealed Case*).

"Intelligence and criminal law enforcement tend to merge in this area."¹²⁶ Since both the House and the Senate understood that "prosecution is one way to combat foreign intelligence crimes,"¹²⁷ one wonders how this tangle was to be unraveled without the fortuitous intervention of the FISC.

Interestingly, the FISC found that the FISC has assumed "that FISA constructed a barrier between counterintelligence/intelligence officials and law enforcement officers in the Executive Branch . . . [y]et the opinion does not support that assumption with any relevant language from the statute."¹²⁸ In fact, the FISC relied on its statutory authority to approve "minimization procedures" for its imposition of the disputed restrictions.¹²⁹

This new argument was considered on appeal — that the "supposed pre-PATRIOT Act limitation in FISA that restricts the government's intention to use foreign intelligence information in criminal prosecutions is an illusion - it finds no support in either the language of FISA or its legislative history."¹³⁰ The FISC found that courts had failed to tie the primary purpose test to "actual statutory language."¹³¹ The court noted how the wall had also caused problems. DOJ, and in particular OIPR, viewed court decisions as requiring OIPR to act as the wall preventing FBI intelligence personnel from communicating with DOJ Criminal Division personnel regarding foreign intelligence investigations.¹³² The FISC concluded that the FISC found the existence of the wall only through an implicit (and erroneous) reading of FISA and not in FISA itself.¹³³ Even the impartial General Accounting Office noted that the DOJ's concern over how the FISC or other federal courts might view the primary purpose test "has inhibited necessary coordination between intelligence and law enforcement officials."¹³⁴

The FISC reviewed the PATRIOT Act amendments regarding the significant purpose test and noted that DOJ had made perfectly clear to Congress why they wanted the revisions. "Congress was keenly aware that this amendment relaxed a requirement that the government show that its primary purpose was other than criminal prosecu-

126. S. REP. NO. 95-701, at 10-11 (1978) (quoted in *Sealed Case*).

127. *Sealed Case*, 310 F.3d at 725.

128. *Id.* at 721.

129. *See Id.*

130. *Id.* at 722.

131. *Id.* at 726.

132. *See* Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation, 2000 ATT'Y GEN. FINAL REP. 721-34. Many blame the wall for the problems in the Wen Ho Lee investigation.

133. *Id.*

134. *Sealed Case*, 310 F.3d at 728 (citing General Accounting Office, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters is Limited* (July 2001) (GAO-01-780) at 3).

tion.”¹³⁵ Only one dissenting vote was cast against the PATRIOT Act legislation.¹³⁶ The FISCER found that the PATRIOT Act amendments “clearly disapprove the primary purpose test.”¹³⁷ Thus, foreign intelligence purposes need not be primary, so long as it is a significant purpose of the investigation and surveillance.

The FISCER’s finding that foreign intelligence constitute a significant purpose of the investigation is wise since when the government initiates electronic surveillance it may not yet have decided to prosecute. This ultimately means that the FISC had no justification for balancing the relative weight the government placed on counterintelligence versus criminal prosecution.¹³⁸ But importantly, in a clearly overlooked statement, the FISCER noted that “if the court concluded that the government’s **sole** objective was merely to gain evidence of past criminal conduct – even foreign intelligence crimes – to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied.”¹³⁹ Given this, why should the ACLU and NACDL fear that DOJ would abuse this authority and pursue criminals with FISA authorized electronic surveillance where there exists no counterintelligence basis whatsoever? This argument is never adequately explained.

Given that FISA authorizations must still be reviewed by Article III judges, what is the basis for the fear of abuse? If those judges who review FISA applications have any doubt that there is no foreign intelligence purpose whatsoever in the surveillance, they may demand further inquiry into the rationale for approval, or simply disapprove the request.

The FISCER concluded that:

The FISA court’s decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an Article III court. The FISA court asserted authority to govern the internal organization and investigative procedures of the Department of Justice, which are the province of the Executive Branch (Article II) and Congress (Article I).¹⁴⁰

The FISCER finally considered the issue of FISA’s consistency with the Fourth Amendment, thus by implication reviewing the constitu-

135. *Id.* at 732.

136. *For the Record: Senate Votes*, 59 CONG. QUARTERLY (WKLY.) 39, Oct. 13, 2001, at 2425. That vote was cast by Senator Feingold.

137. *Sealed Case*, 310 F.3d at 734.

138. *Id.*

139. *Id.* at 735 (emphasis added).

140. *Id.* at 731.

tionality of FISA as amended. The court compared FISA to Title III, noting that the closer the two were, the less their constitutional concerns would be. This issue was important for the court to address since it had been raised in so many contexts in addition to this case, via the *amicus* briefs. The court convincingly demonstrated the similarity between Title III and FISA requirements by detailing that they both require a determination by a neutral magistrate, a determination of probable cause, and a particularity requirement implicitly limiting the scope of the authorization.¹⁴¹

While a Title III warrant will issue upon probable cause that a suspect has committed a predicate offense,¹⁴² FISA requires probable cause that the target of the surveillance is a foreign power or agent of a foreign power.¹⁴³ This requirement alone will ensure that the DOJ will not and cannot abuse FISA since an Article III judge will always have to find a genuine foreign connection. What remains confusing, though, is that where a U.S. person is involved, “agent of a foreign power” is defined, at least in part, in terms of criminal activity. But since terrorism usually involves criminal activity, the analysis quickly becomes circular.

Regardless, the court notes that FISA surveillance would 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.”¹⁴⁴ The court makes clear that FISA applies only to “carefully delineated, and particularly serious, foreign threats to national security.”¹⁴⁵ The FISC resolves this important issue by determining that “while Title III contains some protections that are not in FISA, in many significant respects the two statutes are equivalent, and in some, FISA contains additional protections.”¹⁴⁶ The court did not specifically decide this issue, but stated that since it does come so close to Title III, that certainly bears on its reasonableness in the Fourth Amendment context.¹⁴⁷ This equates to a determination of constitutionality.

A very important point made by this court was that all courts that have examined this issue have concluded that the President has “inherent authority to conduct warrantless searches to obtain foreign in-

141. *Id.* 737-38 (citing *Dalia v. United States*, 441 U.S. 238 (1979)).

142. 18 U.S.C. § 2518(3)(a) (2004).

143. 50 U.S.C. § 1805(a)(3) (2004).

144. *Sealed Case*, 310 F.3d at 739.

145. *Id.*

146. *Id.* at 741. (In footnote 25, the court refers to FISA’s more extensive reporting requirements compared to Title III and Congressional oversight to prevent Executive Branch abuse.).

147. *See Id.*

telligence information.”¹⁴⁸ Assuming that to be the case, “FISA could not encroach on the President’s constitutional power.”¹⁴⁹

X. CRITICISM OF THE FISCR DECISION

Perhaps, the key criticism of the FISCR decision is that it “leaves the proverbial fox guarding the henhouse.”¹⁵⁰ The point this critic makes is that since “significant” may be defined as any “measurable” foreign intelligence purpose of the investigation, the FISC must approve government applications for FISA surveillance “so long as the government contends it has virtually any foreign intelligence purpose for its investigation.”¹⁵¹ This “measurable purpose standard” would force the FISC into “almost perfunctorily” approving DOJ FISA surveillance applications.¹⁵² The thrust of this criticism is that by approving FISA surveillance, where there is any foreign intelligence purpose, “the Court of Review is interpreting ‘significant’ to mean ‘insignificant.’”¹⁵³

That argument is very interesting and not only circular but seems to place a greater emphasis on the potential hurt feelings of the FISC judges than on national security concerns. That point overlooks, of course, the concerns of the very same group of critics, who prior to the PATRIOT Act amendments, mocked the system and FISC judges they now defend, even though these same FISC judges approved almost all FISA surveillance applications. Indeed, this very same critic points out, blithely unaware of the contradictions in his argument, that this case “was the first time the FISC denied a government application for a search since the court’s creation in 1978.”¹⁵⁴

Furthermore, no one discusses the converse of this criticism. If significant means measurable, then measurable must mean significant. The government must articulate a cognizable, distinct foreign intelligence issue in the case before seeking the FISA application. If significant means “important,” this meaning is reasonable since the pursuit of any legitimate or potential terrorist in the current threat environment is by definition important.

Another interesting criticism of the FISCR decision is its internal inconsistency. “The court first concluded that FISA never limited the use of foreign intelligence for law enforcement purposes. Then, the court maintained that the PATRIOT Act amendments impose such a

148. *Id.* at 742.

149. *Id.*

150. Branch, *supra* note 92, at 2077.

151. *Id.*

152. *Id.*

153. *Id.* at 2088.

154. *Id.* at 2091.

limit, albeit a lesser one than the court says never existed!”¹⁵⁵ Actually, this analysis misconstrues the court’s ruling. While the court did indeed conclude that FISA never really imposed a limit on the use of foreign intelligence for law enforcement purposes, the court’s whole point was that virtually everyone acted as though it did, albeit in error. Therefore, to refer to limits imposed by the PATRIOT Act, which are less than those that existed before, is not internally inconsistent since everyone acted as though those limits applied. Thus, addressing these limits is only reasonable and responsible.

Yet, another criticism of the FISC opinion is that their analysis is predicated on two faulty premises:

First, because FISA did not forbid investigators from pursuing evidence of certain crimes that fit within the definitions of “agent of a foreign power” and “foreign intelligence information,” it is appropriate for a criminal investigation to be the purpose behind a FISA surveillance. Second, the primary purpose requirement behind FISA is not constitutionally significant. The second of these arguments is the more important for if the primary purpose requirement is constitutionally significant, it matters not at all whether the definition of “foreign intelligence information” includes evidence of enumerated crimes.¹⁵⁶

In fact, neither premise is faulty. The FISC held that the significant purpose test does not permit a sole objective of criminal prosecution, but so long as there is an articulable foreign intelligence purpose for the FISA authorization, then the government has met its burden. What logically flows from this holding is: the primary purpose test is gone and now of no constitutional significance whatsoever.

Another criticism is that the FISC “exceeded the necessary scope of review” and failed to exercise judicial restraint.¹⁵⁷ Given the levels of confusion that this issue has generated, both in the public, academia and in government, and the importance of the issue, some authority needed to step in and provide resolution and guidance. The issue is far too important to linger. The FISC wisely rose to the challenge and has provided desperately needed clarity.

Another commentator argues that the FISC leans too heavily on the threat of a terrorist attack as the basis for their holding,¹⁵⁸ re-

155. William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1167 (2003).

156. Michael P. O’Connor & Celia Rudman, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INT’L L. J. 1234, 1244 (2003).

157. Stephanie Kornblum, *Winning the Battle While Losing the War: Ramifications of the Foreign Intelligence Surveillance Court of Review’s First Decision*, 27 SEATTLE UNIV. L. R. 623, 640 (2003).

158. Bungard, *supra* note 46 at 35.

turning to the impossible circularity of the peacetime versus wartime argument and whether the current events context should be relevant to this determination. Realists will argue that context must be considered while idealists will argue the converse. When the terrorists attack again, surely it would be preferable for the realists to be ascendant.

A final novel challenge to the FISCER decision is that the “executive power endorsed by the Review Court extends beyond the flexibility permitted under the Fourth Amendment’s test of reasonableness.”¹⁵⁹ While the author is unaware of any such reasonableness test, merely doing away with the primary purpose test cannot in and of itself be considered unconstitutional. The national security interest is so heavy in the aftermath of 9/11, that doing away with the primary purpose test is surely reasonable, and even if it were somewhat unreasonable, that would not make it unconstitutional.

XI. CONCLUSION

A key question implicitly presented here is whether the law should respond to real world threats.¹⁶⁰ The answer must be affirmative. If the answer is negative, then the proverbial head of the U.S. will be stuck in the sand, like an ostrich, as our enemies gather strength and resources while preparing to destroy us. The law is flexible enough to respond to these grave threats without a declaration of martial law, which is clearly the ultimate fear of the critics.

One of the favorite quotations cited by those who argue against the amended FISA and the FISCER decision is by Benjamin Franklin: “Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.”¹⁶¹ This philosophy is all well and good in the context of the 18th century when the most effective weapons available could only inflict casualties on perhaps a dozen citizens. Mr. Franklin surely never contemplated the specter of suicidal terrorists armed with nuclear weapons. If he were to contemplate this scenario, how likely is it that he would believe the circumstances to be irrelevant? Since we indeed face this scenario, the time is now for the pendulum to swing in the direction of national security so long as constitutional guarantees are maintained. Making it easier

159. David Hardin, *The Fuss Over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 335 (2003).

160. See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (3rd ed. 2002) (discusses how security concerns affect U.S. law).

161. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755) (quoted in BENJAMIN FRANKLIN, THE PAPERS OF BENJAMIN FRANKLIN, VOLUME 6: APRIL 1, 1755 THROUGH SEPTEMBER 24, 1756 242 (Leonard W. Labaree, ed., 1963)).

for the government to conduct electronic monitoring on terrorists is a far cry from turning the U.S. into a police state.

The answer is not curtailing executive authority and making the war on terrorism harder to fight for those who seek to protect us from its ravages. The wise and appropriate course is to legislate very severe penalties for those in the executive branch who wield this power and therefore have the ability to abuse it. Any agent who fabricates a foreign intelligence connection to obtain a FISA surveillance authorization should be relieved of duty and prosecuted.

Given the extent of debate regarding the wisdom of the PATRIOT Act amendments, there need be no worry. The PATRIOT Act contains a “sunset” provision, which will cause the significant purpose standard and the information sharing functions to expire on December 31, 2005.¹⁶² At that point, the Congress will have had the benefit of observing their legislation in action and will then have the option of making it permanent or revising it. The real worrying should begin if Congress allows the PATRIOT Act to fade away.

One hopes that Congress, having had the opportunity to see the efficiencies provided to both law enforcement and intelligence personnel, having heard the testimony of the Attorney General and the FBI Director, and having seen that the Constitution still stands and that FISA is not being abused, will understand the wisdom of making the PATRIOT Act amendments to FISA permanent. The nation will be better off for it.

But make no mistake about it: if a nuclear weapon is detonated in the U.S., martial law, or some variant thereof, is a distinct possibility. In some sense, then, this may well be a case of “pay me now or pay me later,” although it appears that we would pay much less if we pay now. In fact, General Tommy Franks, former commander of the U.S. Central Command, has predicted that if the U.S. is attacked with a weapon of mass destruction, which inflicts mass casualties, that the Constitution would likely be discarded in favor of a military form of government.¹⁶³ In fact, the populace would likely demand such measures. Martial law is not military government, but the “maintenance of order and the protections of persons and property by and through military authorities and agencies under circumstances wherein the civilian courts and other agencies normally serving that purpose are unable to function for the time being.”¹⁶⁴

162. USA PATRIOT Act, § 224(a); see H.R. REP. NO. 107-236, pt. 1, at 60 (2001).

163. John O. Edwards, *Gen. Franks Doubts Constitution Will Survive WMD Attack*, at <http://www.newsmax.com/archives/articles/2003/11/20/185048.shtml> (Nov. 21, 2003).

164. *Houghton Mifflin Reader's Companion to Military History: Martial Law*, available at http://college.hcmo.com/history/readerscomp/mil/html/ml_032900_martiallaw.htm (last visited February 18, 2005) (citing CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943)).

The point is that effective intelligence and counterintelligence are, in the current national security environment, the key measures that will ensure our survival in the face of the current threat. "A standard which punishes such cooperation could well be thought dangerous to national security."¹⁶⁵

The FISCRC wisely concluded that "FISA as amended is constitutional because the surveillances it authorizes are reasonable."¹⁶⁶ In concluding, the full footnote 29 from the opinion of the FISCRC is worth quoting:

An FBI agent recently testified that efforts to conduct a criminal investigation of two of the alleged hijackers were blocked by senior FBI officials – understandably concerned about prior FISA court criticism – who interpreted that court's decisions as precluding a criminal investigator's role. One agent, frustrated at encountering the "wall," wrote to headquarters: "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.' Let's hope the National Security Law Unit will stand behind their decisions then, especially since the biggest threat to us now, [Usama Bin Laden], is getting the most 'protection.'" The agent was told in response that headquarters was frustrated with the issue, but that those were the rules, and the National Security Law Unit does not make them up.¹⁶⁷

If ever there were compelling testimony to convince us that we need to err on the side of national security, the testimony stated above is it. The government, now in possession of this authority, must never abuse it and has not to this day. The government must not seek to use FISA for cases in which it has exclusively a criminal interest, or it risks losing this authority. In other words, there must always be a cognizable, tangible, articulable foreign intelligence interest for the government to seek FISA¹⁶⁸ surveillance authorization. Former Attorney General Ashcroft surely understands that. He has implemented "regular mandatory training for all agents on national security and counterterrorism matters, including FISA"¹⁶⁹ Perhaps now we can get back to business. We must grant government the leeway it requires to fulfill its most important duty — protecting its citizens. After all, "no governmental interest is more compelling than the security of the Nation."¹⁷⁰ Indeed.

165. *In re Sealed Case No. 02-001*, 310 F.3d 717, 743 (Foreign Int. Surv. Ct. Rev. 2002).

166. *Id.* at 746.

167. *Id.* at 744 n.29 (quoting *The Malaysia Hijacking and September 11th: Joint Hearing Before the Senate and House Select Intelligence Committees* (2002) (written statement of a New York special agent of the FBI)).

168. Attorney General Ashcroft News Conference, *supra* note 12.

169. *Id.*

170. *Haig v. Agee*, 453 U.S. 280, 307 (1981).

Capitulating to hysteria is pandering, not leadership. Government's obligation is a dual one: to protect civil safety and security against violence and to preserve civil liberty. This is not a zero-sum game – we can achieve both goals if we empower government to do sensible things while exercising oversight to prevent any real abuses of authority.¹⁷¹

171. Edwin Meese, *Patriot Act's Bum Rap*, WASH. TIMES, July 8, 2004, at A17.