

Foreign Intelligence Surveillance Act: Unconstitutional or Bad Idea?

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Introduction

The Foreign Intelligence Surveillance Act (FISA) controls how the U.S. government conducts surveillance of communications (e.g., telephone calls, telefaxes, e-mail, Internet websites, etc.) that physically pass through the USA and either the sender or recipient (or both) is/are a *foreign power*, or agent of a foreign power, as defined in FISA. The initial purpose of the FISA, back in the year 1978, was to use the FISA Court to attempt to prevent abuses by government agencies, which had spied on U.S. citizens during the 1970s. Unfortunately, some of the post-11 Sep 2001 amendments to FISA raise serious concerns about the government infringing on civil liberties of U.S. citizens who are physically in the USA, but communicating with a foreigner.

My initial interest in FISA was sparked by President Bush's urgent demand for amendments to FISA on 28 July 2007, as a result of a secret court ruling, as described in my separate essay at <http://www.rbs0.com/PAA.pdf>. As I read the FISA statute and published cases involving FISA, I saw an incredibly complex and evolving area of law. This essay collects quotations from the

FISA statute, court cases, and articles in law reviews, to make uncommon material more widely available, as a resource for students and U.S. citizens. I discuss in detail the legal issues:

- whether lawful FISA surveillance can be done if “the [sole] purpose”, “primary purpose”, or “a substantial purpose” is the collection of foreign intelligence information.
- whether the secret FISA court issues “warrants” that comply with the Fourth Amendment to the U.S. Constitution.
- whether the approval by the secret FISA court of nearly all applications for a surveillance order during 1979-2002 constitutes meaningless, automatic, and *unconstitutional* “rubber stamp” approvals.

I hope that my legal research will be helpful to attorneys who challenge the FISA statute in court. My essay on FISA concludes with my personal criticisms of the FISA statute.

For simplicity, the scope of this essay is restricted to the first part of FISA, 50 U.S.C. §§ 1801-1811, which covers electronic surveillance. Other parts of FISA cover other kinds of searches, for example, physical searches are in §§ 1821-29.

The amendments to FISA subsequent to 11 Sep 2001 need to be seen in the historical context that the U.S. government has a long history of suppressing civil liberties during national emergencies (e.g., wars).¹

Regular Federal Courts in the USA

When I was in law school in the mid-1990s, I learned about the U.S. federal court system. According to Article III of the U.S. Constitution, there is one U.S. Supreme Court and various “inferior courts” that are established by the U.S. Congress. Currently, the federal courts in the USA are comprised of:

- U.S. Supreme Court (28 U.S.C. §§ 1-5)
- U.S. Courts of Appeal (28 U.S.C. §§ 41-49) The U.S. Courts of Appeal are divided into eleven numbered circuits, plus one for the District of Columbia, and another Court of Appeal for the Federal Circuit, which hears mostly patent cases.
- U.S. District Courts (28 U.S.C. §§ 81-144)
- Bankruptcy Courts (28 U.S.C. §§ 151-160)
- Court of Federal Claims (28 U.S.C. §§ 171-179)
- Court of International Trade (28 U.S.C. §§ 251-258)

That is the complete list of federal courts mentioned in the Judiciary Act.

¹ See, e.g., William C. Banks, M.E. Bowman, “Executive Authority for National Security Surveillance,” 50 AMERICAN UNIVERSITY LAW REVIEW 1, 22-31 (Oct 2000).; Frederic Block, “Civil liberties during national emergencies: The interactions between the three branches of government in coping with past and current threats to the nation's security,” 29 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 459, 481-489 (2005).

There are also courts operated by the federal government to hear cases of misconduct by members of the armed services, for example, the Court of Appeals for the Armed Forces — formerly the Court of Military Appeals — (10 U.S.C. § 866). The military courts are properly separate from the civilian courts, because the judges in the military courts are officers in the armed services and the defendants in the military courts are all members of the armed services.

I was astounded to learn in 2007 that there is another federal court, which is established by the Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. § 1803 (enacted 1978). The FISA Court is *not* included in the U.S. Code for the Judiciary, but is hidden in the part of the U.S. Code for War and National Defense, even though the personnel for the FISA Court are borrowed from regular, civilian federal courts.

FISA Statute in July 2007

While the definition of *foreign power* in FISA is generally carefully limited to exclude *U.S. persons*, subsection (a)(4) on terrorism may include U.S. persons. There may also be a *few* U.S. persons in the groups mentioned in (a)(2), (a)(3), (a)(5), and (a)(6).

As used in this subchapter:

(a) "Foreign power" means —

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.

50 U.S.C. § 1801(a) (current July 2007).

“United States person” means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

50 U.S.C. § 1801(i) (current July 2007).

Note that a *foreign power* is not required by FISA to be hostile to the USA.

Also U.S. Persons can be targets of FISA surveillance if they are suspected of criminal activity:

As Used in this subchapter

(b) "Agent of a foreign power" means —

(1) any person other than a United States person, who —

- (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;
- (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or
- (C) engages in international terrorism or activities in preparation therefore; or

(2) any person who —

- (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve² a **violation of the criminal statutes of the United States**³;
- (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a **violation of the criminal statutes of the United States**;
- (C) knowingly engages in **sabotage**⁴ or **international terrorism**,⁵ or activities that are in preparation therefor, for or on behalf of a foreign power;
- (D) **knowingly enters the United States under a false or fraudulent identity**⁶ for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or
- (E) knowingly **aids or abets**⁷ any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly **conspires**⁸ with any person to engage in activities described in subparagraph (A), (B), or (C).

² The words "or may involve" indicate a standard that is less than "probable cause" in ordinary criminal law. See *In re Sealed Case*, 310 F.3d 717, 738 (For.Intel.Surv.Rev. 2002).

³ Boldface added by Standler to emphasize the criminal activities in this definition.

⁴ Federal statute, 18 U.S.C. §§ 2151-2156, makes the act of sabotage a crime.

⁵ *International terrorism* is defined in 50 U.S.C. § 1801(c) as a crime.

⁶ It is a crime to make a false statement to a federal official. 18 U.S.C. § 1001.

⁷ Aiding and abetting is a crime, 18 U.S.C. § 2.

⁸ Conspiracy is a crime, 18 U.S.C. § 371.

- (c) "International terrorism" means activities that —
- (1) 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**, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
 - (2) appear to be intended —
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
 - (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801 (b) through (c) (current July 2007).

FISA Court

The full text of the U.S. Code section that authorizes the FISA Court is:

(a) Court to hear applications and grant orders; record of denial; transmittal to court of review

The Chief Justice of the United States shall publicly designate 11 district court judges from seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection shall hear the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, **under seal**,⁹ to the court of review established in subsection (b) of this section.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted **under seal**¹⁰ to the Supreme Court, which shall have jurisdiction to review such decision.

⁹ Boldface added by Standler. "Under seal" means that the papers are secret, not for disclosure to the public. Note that this sentence means there is an automatic appeal for any denial of permission to wiretap, without need for the government to make an application for an appeal.

¹⁰ Boldface added by Standler.

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this chapter shall be conducted as expeditiously as possible. **The record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established¹¹** by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.¹²

(d) Tenure

Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the judges first designated under subsection (a) of this section shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) of this section shall be designated for terms of three, five, and seven years.

(e)(1)

Three judges designated under subsection (a) of this section who reside within 20 miles of the District of Columbia, or, if all of such judges are unavailable, other judges of the court established under subsection (a) of this section as may be designated by the presiding judge of such court, shall comprise a petition review pool which shall have jurisdiction to review petitions filed pursuant to section 1861(f)(1) of this title.

(e)(2)

Not later than 60 days after March 9, 2006, the court established under subsection (a) of this section shall adopt and, consistent with the protection of national security, publish procedures for the review of petitions filed pursuant to section 1861(f)(1) of this title by the panel established under paragraph (1). Such procedures shall provide that review of a petition shall be conducted in camera and shall also provide for the designation of an acting presiding judge.

(f)(1)

The courts established pursuant to subsections (a) and (b) of this section may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this chapter.

(f)(2)

The rules and procedures established under paragraph (1), and any modifications of such rules and procedures, shall be recorded, and shall be transmitted to the following:

- (A) All of the judges on the court established pursuant to subsection (a) of this section.
- (B) All of the judges on the court of review established pursuant to subsection (b) of this section.
- (C) The Chief Justice of the United States.
- (D) The Committee on the Judiciary of the Senate.
- (E) The Select Committee on Intelligence of the Senate.

¹¹ Boldface added by Standler. In other words, this is a *secret* court, unlike any other court in the USA.

¹² The exact level of classification is *not* specified in FISA. The classification level is determined in secret by the three individuals named in the statute.

- (F) The Committee on the Judiciary of the House of Representatives.
- (G) The Permanent Select Committee on Intelligence of the House of Representatives.

(f)(3)

The transmissions required by paragraph (2) shall be submitted in unclassified form, but may include a classified annex.

50 U.S.C. § 1803 (current July 2007).

probable cause in FISA

The only mention in FISA of the legal phrase “probable cause”¹³ occurs in the following part of FISA.

(a) Necessary findings

Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that —

- (1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
- (2) the application has been made by a Federal officer and approved by the Attorney General;
- (3) on the basis of the facts submitted by the applicant there is **probable cause**¹⁴ to believe that —
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: Provided, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and
 - (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;
- (4) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and
- (5) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

(b) Determination of probable cause

In determining whether or not probable cause exists for purposes of an order under subsection (a)(3) of this section, a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

50 U.S.C. § 1805(a) and (b) (current July 2007).

¹³ The Fourth Amendment to the U.S. Constitution requires a showing of “probable cause” before issuing a search warrant.

¹⁴ Boldface added by Standler.

Government may ignore FISA Court

Another provision of the FISA statute allows the U.S. Government to engage in surveillance without judicial approval when the targets are “exclusively between or among foreign powers” — and when “there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party”:

- (1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that —
 - (A) the electronic surveillance is solely directed at —
 - (i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or
 - (ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title;
 - (B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and
 - (C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801(h) of this title; and
 - [D] if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.
- (2)
- (3) The Attorney General shall immediately transmit under seal to the court established under section 1803(a) of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless —
 - (A) an application for a court order with respect to the surveillance is made under sections 1801(h)(4) and 1804 of this title; or
 - (B) the certification is necessary to determine the legality of the surveillance under section 1806(f) of this title.

50 U.S.C. § 1802(a) (current July 2007).

This subsection continues the pre-FISA law that the government does *not* need a warrant for surveillance when the primary purpose of the surveillance is acquisition of foreign intelligence information.

Cases about FISA in Regular Courts constitutionality

- *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (C.A.D.C. 27 Dec 1991).

There has been only *one* published case from the FISA courts: *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611 (Foreign Intel.Surv.Ct. 17 May 2002), *rev'd sub nom.*, *In re Sealed Case*, 310 F.3d 717 (For.Intel.Surv.Rev. 18 Nov 2002). This was the first use of the FISA appellate court in the then 24 year history of FISA. Parts of the original opinion were deleted (“redacted”) from the published version.

There are several major cases on the wiretapping of U.S. citizens inside the USA, but these cases do not involve the FISA statute.

- *Berger v. State of N.Y.*, 388 U.S. 41 (U.S. 12 June 1967) (Eavesdropping/bugging case under New York state statute.).
- *Katz v. U.S.*, 389 U.S. 347 (U.S. 18 Dec 1967) (Landmark case in constitutional privacy law that established the constitutional requirement for a judge to issue a warrant authorizing wiretaps inside the USA, before such wiretaps could be legally conducted.)
- *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division*,¹⁵ 407 U.S. 297 (U.S. 19 June 1972) (Wiretap case. Held that the government must obtain a warrant before engaging in electronic surveillance in domestic (i.e., within the USA) security cases. At 308: “Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country.” At 322: “We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime.’ ”).
- *Ellsberg v. Mitchell*, 709 F.2d 51 (C.A.D.C. 10 May 1983) (Civil rights case. Suggests that warrantless surveillance of foreign agents is constitutional.), *cert. den. sub nom.*, *Russo v. Mitchell*, 465 U.S. 1038 (U.S. 21 Feb 1984).

¹⁵ Because the title is not descriptive, this case is commonly called *Keith*, after Damon J. Keith, the judge in the U.S. District Court who ordered the government to disclose conversations that were obtained through unlawful wiretaps. 321 F.Supp. 1074. The government petitioned the U.S. Court of Appeals for a writ of mandamus compelling Judge Keith to vacate his order. The Court of Appeals declined to issue the writ, 444 F.2d 651 (6thCir. 1971). The government appealed to the U.S. Supreme Court, which affirmed the Court of Appeals.

criminal prosecutions

Occasionally, information originally collected during FISA surveillance is used in a criminal prosecution in a regular (i.e., *nonsecret*) federal court in the USA. In those cases, the criminal defense attorney may challenge the admissibility of the evidence. Regular federal courts have repeatedly held that fruits of FISA surveillance may be used as evidence in criminal prosecutions. Some of these criminal cases have incidentally also held the FISA statute to be constitutional. To make it easier to follow the historical development, I list the cases in chronological order.

- *U.S. v. Falvey*, 540 F.Supp. 1306 (D.C.N.Y. 15 June 1982).
- *U.S. v. Belfield*, 692 F.2d 141 (C.A.D.C. 5 Nov 1982).
- *U.S. v. Duggan*, 743 F.2d 59, 77 (2dCir. 8 Aug 1984) (“Once this certification is made [by a designated official of the executive branch], however, it is, under FISA, subjected to only minimal scrutiny by the courts. Congress deemed it a sufficient check in this regard to require the FISA Judge (1) to find probable cause to believe that the target of the requested surveillance is an agent of a foreign power; (2) to find that the application is complete and in proper form; and (3) when the target is a United States person, to find that the certifications are not “clearly erroneous.” The FISA Judge, in reviewing the application, is not to second-guess the executive branch official’s certification that the objective of the surveillance is foreign intelligence information.”).
- *U.S. v. Torres*, 751 F.2d 875, 892 (7thCir. 19 Dec 1984) (Dicta by Judge Posner on video surveillance in FISA: “The court operates in secret but it is still an Article III court with the authority to deny permission for surveillance.”).
- *In the Matter of Kevork*, 634 F.Supp. 1002 (C.D.Cal. 5 Aug 1985), *aff’d*, 788 F.2d 566 (9thCir. 24 Apr 1986).
- *U.S. v. Cavanagh*, 807 F.2d 787 (9thCir. 5 Jan 1987).
- *U.S. v. Ott*, 637 F.Supp. 62 (E.D.Cal. 23 May 1986), *aff’d*, 827 F.2d 473 (9thCir. 3 Sep 1987).
- *U.S. v. Pelton*, 835 F.2d 1067 (4thCir. 18 Dec 1987), *cert. denied*, 486 U.S. 1010 (1988).
- *U.S. v. Posey*, 864 F.2d 1487, 1490, n. 1 (9thCir. 9 Jan 1989) (“Although courts considering the constitutionality of the FISA have uniformly upheld its standards and procedures, none has directly considered the constitutionality of the ‘foreign agents’ procedures which Posey challenges here. [citations to four cases omitted]”).
- *U.S. v. Spanjol*, 720 F.Supp. 55 (E.D.Pa. 22 Aug 1989).

- *U.S. v. Johnson*, 952 F.2d 565 (1stCir. 19 Dec 1991), *cert. denied*, 506 U.S. 816 (1992).
- *U.S. v. Nicholson*, 955 F.Supp. 582 (E.D.Va. 3 Feb 1997) (Judge who issued FISA surveillance orders affecting a criminal defendant refused to recuse himself from hearing trial of same criminal defendant.).
- *U.S. v. Nicholson*, 955 F.Supp. 588, 590 (E.D.Va. 14 Feb 1997) (“In the twenty years since it was enacted, FISA has been upheld as constitutional by every court to address the issue.” Footnote 3 cites eight cases.).
- *U.S. v. Squillacote*, 221 F.3d 542 (4thCir. 11 Aug 2000), *cert. den.*, 532 U.S. 971 (2001).
- *U.S. v. Hammoud*, 381 F.3d 316, 332-334 (4thCir. 8 Sep 2004), *vacated on other grounds*, 543 U.S. 1097 (24 Jan 2005).
- *U.S. v. Damrah*, 412 F.3d 618, 625 (6thCir. 15 Mar 2005) (“Finally, Damrah suggests that the procedures dictated by FISA violate the Fourth Amendment. This argument also lacks merit, as FISA has uniformly been held to be consistent with the Fourth Amendment. E.g., *In re Sealed Case*, 310 F.3d 717, 742-47 (F.I.S.C.R. 2002); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-92 (9th Cir. 1987); *Duggan*, 743 F.2d at 73, 73 n. 5 [2dCir. 1984]. For the foregoing reasons, we affirm the district court's denial of Damrah's motions to compel FISA materials and suppress FISA evidence.”). In *Damrah*, the date of the FISA surveillance is not stated, but if the date was after the PATRIOT Act amendments in 2001, then citing *Pelton*, *Cavanagh*, and *Duggan* from the 1980s is not relevant to the continuing constitutionality of FISA.
- *U.S. v. Marzook*, 435 F.Supp.2d 778 (N.D.Ill. 22 June 2006).
- *U.S. v. Ning Wen*, 477 F.3d 896, 898-899 (7thCir. 21 Feb 2007).

There is no doubt that the regular federal courts regard the FISA statute, and the FISA courts created therein, as constitutional. Note that most of these decisions involve the pre-11 Sep 2001 version of FISA. From 11 Sep 2001 to 15 Aug 2007, FISA was amended *seven* times.¹⁶ Furthermore, the U.S. Supreme Court has *never* ruled on the issue of constitutional limits on the collection of foreign intelligence information.

¹⁶ See 115 Stat. 282-283, 291, 295, 364, 392 (26 Oct 2001); 115 Stat. 1402-1403 (28 Dec 2001); 116 Stat. 1812 (2 Nov 2002); 116 Stat. 2258 (25 Nov 2002); 118 Stat. 3691, 3742 (17 Dec 2004); 120 Stat. 195, 197, 203-205, 248 (9 Mar 2006); Protect America Act (5 Aug 2007).

**Purpose of FISA:
Collect Foreign Intelligence or Evidence of Crimes?**

There is no doubt that the initial purpose of FISA was to regulate the collection of foreign intelligence by the U.S. government. However, during such collection of intelligence, it is inevitable that some evidence of criminal activity (e.g., U.S. citizens selling U.S. government secrets to foreign governments) will be collected.

There are two ways for the U.S. government to legally monitor communications of a U.S. citizen inside the USA. First, the government can make a showing of probable cause of criminal activity to a judge in U.S. District Court and get a warrant for a wiretap.¹⁷ Second, the government can make a showing that the intended target is a *foreign agent* (as defined in FISA) to a judge on the secret FISA court. These two ways share common ground: the FISA statute generally involves U.S. persons only in the context of criminal activity, see page 5 above.

Because it is easier for the government to get a wiretap order under FISA than to get a warrant from a regular court, the government could use FISA to circumvent civil liberties of U.S. citizens. Perhaps for this reason,¹⁸ there was a tradition in the U.S. Department of Justice (which tradition ended in the year 2002) of keeping separate (1) foreign intelligence and (2) law enforcement activities. This separation is known as a “wall” between foreign intelligence and law enforcement. A former U.S. Justice department official wrote:

... beginning almost immediately after FISA’s enactment, all three branches of the federal government assumed or decided, as a matter of law or policy, that the statute could not or should not be used primarily to support *law enforcement* methods of protecting national security.

David S. Kris, “The Rise and Fall of the FISA Wall,” 17 STANFORD LAW AND POLICY REVIEW 487, 487 (2006).

¹⁷ 18 U.S.C. § 2518 (enacted 1968) and *Katz v. U.S.*, 389 U.S. 347 (U.S. 1967); *Dalia v. U.S.*, 441 U.S. 238, 255 (U.S. 1979). See page 23, below.

¹⁸ The actual reason is *not* disclosed in the law review articles and court cases that I have read.

pre-FISA case law

In his concurring opinion in *Katz*, Justice White suggested that warrantless wiretapping was legal if conducted for “national security” purposes.¹⁹ Justice Douglas, joined by Justice Brennan, wrote a concurring opinion that disagreed with White’s concurring opinion.²⁰

Before FISA was enacted in 1978, federal courts were generally agreed that it was legal for the executive branch to do wiretaps without a search warrant, in order to collect foreign intelligence information.

- *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 22 Aug 1973) (“As *United States District Court* [407 U.S. 297] teaches, in the area of domestic security, the President may not authorize electronic surveillance without some form of prior judicial approval. However, because of the President’s constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in *United States v. Clay*, [430 F.2d 165]²¹ that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.”), *cert. denied*, 415 U.S. 960 (U.S. 1974).
- *United States v. Butenko*, 494 F.2d 593 (3d Cir. 5 Mar 1974) (At 601: “The Attorney General has certified, Ivanov does not deny, and the district court has found, that the surveillances at issue here ‘were conducted and maintained solely for the purpose of gathering foreign intelligence information.’ Therefore, [47 U.S.C.] § 605 does not render them, in and of themselves, accompanied by subsequent disclosure, unlawful.” At 606: “Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, above all, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental.”), *cert. denied sub nom. Ivanov v. U.S.*, 419 U.S. 881 (U.S. 1974).
- *U.S. v. Buck*, 548 F.2d 871, 875 (9th Cir. 22 Feb 1977) (“Foreign security wiretaps are a recognized exception to the general warrant requirement and disclosure of wiretaps not involving illegal surveillance is within the trial court’s discretion.”), *cert. den.*, 434 U.S. 890 (U.S. 1977).

¹⁹ *Katz v. U.S.*, 389 U.S. 347, 362-364 (1967) (White, J., concurring) (“We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”).

²⁰ *Katz*, 389 U.S. at 359-360 (Douglas, J., concurring).

²¹ *Clay* was reversed on other grounds, 403 U.S. 698 (U.S. 1971). *Clay* was later cited by the U.S. Supreme Court for the proposition “that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved”, *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division*, 407 U.S. 297, 322, n. 20 (U.S. 1972).

- *U.S. v. Humphrey*, 456 F.Supp. 51, 60 (D.C.Va. 30 Mar 1978) (“Thus, while the Court finds the Fourth Amendment applicable to this surveillance, it also finds it justified by the same rationale as the telephone and microphone surveillance, and it finds the intrusion reasonable, at least until July 20, [1977] when as found above, the primary focus of the investigation shifted away from foreign intelligence gathering.”), *aff’d sub nom. United States v. Truong*, 629 F.2d 908, 915 (4th Cir. 1980) (“... as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”), *cert. denied*, 454 U.S. 1144 (U.S. 1982).

Although *Truong* was decided about two years after the enactment of FISA, the surveillance in *Truong* was conducted before the enactment of FISA. Nevertheless, the holdings in *Butenko* and *Truong* — admitting in criminal trials evidence from wiretaps primarily for foreign intelligence collection — strongly influenced the later cases involving FISA.

I understand *Butenko* and *Truong* as establishing a standard that warrantless surveillance done primarily for collection of foreign intelligence information is constitutional.

post-FISA case law: “primary purpose” continues

The following court cases held that evidence obtained from FISA surveillance was admissible in criminal prosecutions only if the “primary purpose” of the surveillance was to acquire foreign intelligence information.

- *U.S. v. Falvey*, 540 F.Supp. 1306, 1311 (D.C.N.Y. 15 June 1982) (“When, therefore, the President has, as his primary purpose, the accumulation of foreign intelligence information, his exercise of Article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping. [footnote omitted]”).
- *U.S. v. Megahey*, 553 F.Supp. 1180 (D.C.N.Y. 1 Dec 1982) (At 1189-90: “... surveillance under FISA is appropriate only if foreign intelligence surveillance is the Government's primary purpose. As noted above, FISA surveillance is permitted only when an executive official certifies that the information sought is foreign intelligence information. 50 U.S.C. §§ 1804(a)(7)(A), 1805.” At 1192: “... Congress, as already noted, clearly contemplated the use of the fruits of FISA surveillance in criminal proceedings. While the use of such fruits is indeed permissible only if foreign intelligence surveillance was the Government's primary purpose with respect to the investigation as a whole, under both FISA itself and the *Truong* standards,”), *aff’d sub nom. U.S. v. Duggan*, 743 F.2d 59, 77 (2d Cir. 8 Aug 1984) (“FISA permits federal officials to obtain orders authorizing electronics surveillance ‘for the purpose of obtaining foreign intelligence information.’ 50 U.S.C. § 1802(b). The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain.”).
- *Matter of Kevork*, 634 F.Supp. 1002, 1012 (C.D.Cal. 5 Aug 1985) (“These courts hold that the Fourth Amendment warrant requirement does not apply to electronic surveillances conducted primarily for foreign intelligence purposes, see, e.g., *Butenko*, 494 F.2d at 606, and that these surveillances are inherently reasonable under the Fourth Amendment. Thus FISA, which goes beyond these cases in establishing standards for the issuance of court orders for

electronic surveillance for the purpose of obtaining foreign intelligence information concerning international terrorism, is constitutional.”), *aff’d*, 788 F.2d 566 (9th Cir. 24 Apr 1986).

- *U.S. v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 21 Sep 1987) (“Furthermore, the documents establish that the telephone surveillance of Arocena did not have as its purpose the primary objective of investigating a criminal act. Rather, surveillance was sought for the valid purpose of acquiring foreign intelligence information, as defined by [50 U.S.C.] § 1801(e)(1). We point out that an otherwise valid FISA surveillance is not tainted because the government may later use the information obtained as evidence in a criminal trial. See *Duggan*, 743 F.2d at 78. Indeed, FISA contemplates such use. [footnote omitted] *Id.* § 1806(b).”), *cert. denied*, 485 U.S. 937 (1988).
- *U.S. v. Pelton*, 835 F.2d 1067, 1076 (4th Cir. 18 Dec 1987) (“We agree with the district court that the ‘primary purpose of the surveillance, both initially and throughout, was to gather foreign intelligence information.’ It is clear that ‘otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial.’ [*Duggan*, 743 F.2d] at 78. The FISA evidence in this case was obtained in accordance with the requirements of the statute, and was properly admitted by the district court.”), *cert. denied*, 486 U.S. 1010 (1988).
- *U.S. v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 10 Mar 1988) (“We also decline to decide the issue. We have generally stated that the purpose of the surveillance must be to secure foreign intelligence information. *United States v. Ott*, 827 F.2d 473, 475 (9th Cir. 1987); *Cavanagh*, 807 F.2d at 790-91 (“the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence”); accord *United States v. Badia*, 827 F.2d 1458, 1463-64 (11th Cir. 1987). Regardless of whether the test is one of purpose or primary purpose, our review of the government’s FISA materials convinces us that it is met in this case.”).
- *U.S. v. Johnson*, 952 F.2d 565, 572 (1st Cir. 19 Dec 1991) (“Although evidence obtained under FISA subsequently may be used in criminal prosecutions, see S.Rep. No. 701, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 3973, 3979-85 [hereinafter S.Rep. No. 95-701]; *Duggan*, 743 F.2d at 78, the investigation of criminal activity cannot be the primary purpose of the surveillance. See *Duggan*, 743 F.2d at 77; *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980). The act is not to be used as an end-run around the Fourth Amendment’s prohibition of warrantless searches. We find no evidence of an end-run in this case.”), *cert. denied*, 506 U.S. 816 (1992).
- *U.S. v. Hammoud*, 381 F.3d 316, 334 (4th Cir. 8 Sep 2004) (“However, even if the primary purpose test applies, it is satisfied here.”), *vacated on other grounds*, 543 U.S. 1097 (24 Jan 2005).

I understand these cases, beginning with *Falvey*, as establishing a standard that approval of the FISA court is constitutional only if the surveillance is done with the primary purpose of collection of foreign intelligence information. However, this is *not* the way the FISA appellate court reads these cases.

“purpose” in FISA statute

The FISA statute originally required that FISA surveillance be for “the purpose” of obtaining “foreign intelligence information”. After the 11 Sep 2001 terrorists attacks on the USA, Congress amended FISA so that collection of foreign intelligence information was now a “significant purpose” — but perhaps only a secondary purpose. In July 2007, the current FISA statute says:

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include —

....

a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate —

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a **significant purpose**²² of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

....

50 U.S.C. § 1804 (a)(7) (current July 2007).

The original FISA in the year 1978 said “that the purpose of the surveillance ...” in 50 U.S.C. § 1804(a)(7)(B). “The purpose” in FISA may have meant “sole purpose”, instead of having at least two purposes (e.g., foreign intelligence and law enforcement), with one of them the primary purpose. If “the purpose” meant “sole purpose”, then the original FISA statute was more restrictive than the case law, because the case law (e.g., *Butenko, Truong*) permitted warrantless surveillance if the “primary purpose” was collection of foreign intelligence information.

In the year 2001, the executive branch proposed, in a draft of the PATRIOT Act,²³ to change “the purpose” to “a purpose”.²⁴ Such a change clearly broadens the government’s authority to do surveillance. During testimony by Attorney General John Ashcroft before the U.S. Senate

²² Boldface added by Standler.

²³ The name, “USA PATRIOT Act”, is actually an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”. If Representatives and Senators gave as much care to protection of civil liberties as they do to creating spiffy names for objectionable statutes, we would have a better nation.

²⁴ David S. Kris, “The Rise and Fall of the FISA Wall,” 17 STANFORD LAW AND POLICY REVIEW 487, 508 (2006).

Judiciary Committee, Senator Dianne Feinstein suggested changing “the/a purpose” to “a significant purpose”.²⁵ This amendment is included in the Patriot Act, Public Law 107-56, § 218, Subsec. (a)(7)(B). Feinstein’s change is more restrictive than Ashcroft’s “a purpose”, but Feinstein’s change is less restrictive than either “the purpose” or “primary purpose”. Furthermore, Feinstein’s change *may* be *unconstitutional*, because “a significant purpose” is less restrictive than “primary purpose” in the case law (e.g., *Butenko*, *Truong*, *Duggan*, ..., and *Johnson*).

The consideration of a single word modifying “purpose” shows the great importance of what might appear to be a small, insignificant change in FISA. To appreciate the significance of each word, one must be familiar with dozens of court opinions on surveillance for foreign intelligence purposes. Few people in the U.S. Congress, and certainly not a nonlawyer like Senator Feinstein, would have an adequate technical legal understanding of what each word meant to a judge.

There is a second mention of “purpose” in the FISA statute, which says in a run-on sentence:

Applications for a court order under this subchapter are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under section 1803 of this title, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 1805 of this title, approving electronic surveillance of a foreign power or an agent of a foreign power for **the purpose**²⁶ of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) of this section unless such surveillance may involve the acquisition of communications of any United States person.
50 U.S.C. § 1802(b) (enacted 1978 and not amended).

²⁵ Richard Henry Seamon and William Dylan Gardner, “The Patriot Act and the wall between foreign intelligence and law enforcement,” 28 *HARVARD JOURNAL LAW & PUBLIC POLICY* 319, 378, nn. 296-298 (Spring 2005); David S. Kris, “The Rise and Fall of the FISA Wall,” 17 *STANFORD LAW AND POLICY REVIEW* 487, 508, n. 121 (2006).

²⁶ Boldface added by Standler.

FISA appellate court

In 2001, the U.S. Department of Justice decided to dismantle the wall between foreign intelligence and law enforcement activities, so that the fruits of surveillance under FISA would be freely available to law enforcement personnel.²⁷ The FISA court refused and, for the first time in the 24 year history of FISA, the FISA appellate court met. For simplicity, I will focus on the appellate court's opinion.

The FISA appellate court mentioned the government's position:

The government does recognize that several courts of appeals, while upholding the use of FISA surveillances, have opined that FISA may be used only if the government's primary purpose in pursuing foreign intelligence information is not criminal prosecution, but the government argues that those decisions, which did not carefully analyze the statute, were incorrect in their statements, if not incorrect in their holdings.

Alternatively, the government contends that even if the primary purpose test was a legitimate construction of FISA prior to the passage of the Patriot Act, that Act's amendments to FISA eliminate that concept.

In re Sealed Case, 310 F.3d 717, 722 (For.Intel.Surv.Rev. 18 Nov 2002).

The FISA appellate court reviewed the FISA statute and said:

In light of these definitions, it is quite puzzling that the Justice Department, at some point during the 1980s, began to read the statute as limiting the Department's ability to obtain FISA orders if it intended to prosecute the targeted agents — even for foreign intelligence crimes.²⁸ To be sure, section 1804, which sets forth the elements of an application for an order, required a national security official in the Executive Branch — typically the Director of the FBI — to certify that “the purpose” of the surveillance is to obtain foreign intelligence information (amended by the Patriot Act to read “a significant purpose”). But as the government now argues, the definition of foreign intelligence information includes evidence of crimes such as espionage, sabotage or terrorism. Indeed, it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes, most importantly because, as we have noted, the definition of an agent of a foreign power — if he or she is a U.S. person — is grounded on criminal conduct.

In re Sealed Case, 310 F.3d 717, 723 (For.Intel.Surv.Rev. 18 Nov 2002).

The FISA appellate court noted the legislative history supported prosecution of foreign intelligence crimes with evidence obtained from FISA surveillance.

²⁷ William C. Banks, “And the Wall Came Tumbling Down: Secret Surveillance After the Terror,” 57 *University of Miami Law Review* 1147 (July 2003); Richard Henry Seamon and William Dylan Gardner, “The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement,” 28 *HARVARD JOURNAL LAW & PUBLIC POLICY* 319 (Spring 2005); David S. Kris, “The Rise and Fall of the FISA Wall,” 17 *STANFORD LAW AND POLICY REVIEW* 487 (2006).

²⁸ “Foreign intelligence crimes” are those mentioned in 50 U.S.C. § 1801(a) to (e). 310 F.3d at 723.

The appellate FISA court noted the intentions of Congress in writing FISA:

Congress was concerned about the government's use of FISA surveillance to obtain information not truly intertwined with the government's efforts to protect against threats from foreign powers. Accordingly, the certification of purpose under section 1804(a)(7)(B) served to

prevent the practice of targeting, for example, a foreign power for electronic surveillance when the true purpose of the surveillance is to gather information about an individual for other than foreign intelligence purposes. It is also designed to make explicit that the **sole purpose**²⁹ of such surveillance is to secure "foreign intelligence information," as defined, and not to obtain some other type of information.

H. Rep. at 76; see also S. Rep. at 51. But Congress did not impose any restrictions on the government's use of the foreign intelligence information to prosecute agents of foreign powers for foreign intelligence crimes. Admittedly, the House, at least in one statement, noted that FISA surveillances "are not primarily for the purpose of gathering evidence of a crime. They are to obtain foreign intelligence information, which when it concerns United States persons must be necessary to important national concerns." H. Rep. at 36. That, however, was an observation, not a proscription. And the House as well as the Senate made clear that prosecution is one way to combat foreign intelligence crimes. See *id.*; S. Rep. at 10-11. *In re Sealed Case*, 310 F.3d 717, 725 (For.Intel.Surv.Rev. 18 Nov 2002).

The appellate FISA court rejected consideration of whether the purpose of using information was (1) foreign intelligence or (2) criminal prosecution in the USA.

In sum, we think that the FISA as passed by Congress in 1978 clearly did not preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution. In order to understand the FISA court's decision, however, it is necessary to trace developments and understandings within the Justice Department post-*Truong* as well as after the passage of the Patriot Act. As we have noted, some time in the 1980s — the exact moment is shrouded in historical mist — the Department applied the *Truong* analysis to an interpretation of the FISA statute. What is clear is that in 1995 the Attorney General adopted "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations."

Apparently to avoid running afoul of the primary purpose test used by some courts, the 1995 Procedures limited contacts between the FBI and the Criminal Division in cases where FISA surveillance or searches were being conducted by the FBI for foreign intelligence (FI) or foreign counterintelligence (FCI) purposes.

In re Sealed Case, 310 F.3d 717, 727 (For.Intel.Surv.Rev. 18 Nov 2002).

As shown above, beginning at page 15, it is not just that the Justice Department applied the *Truong* analysis, but a long series of federal courts applied the *Truong* analysis. In this way, there is a consistent understanding that approval of the FISA court is constitutional only if the surveillance is done with the primary purpose of collection of foreign intelligence information.

²⁹ Boldface added by Standler.

Ironically, the amendment of 50 U.S.C. § 1804(a)(7)(B) in the PATRIOT Act to change “the purpose” to “a significant purpose” significantly altered the statute.

The government heroically tries to give the amended section 1804(a)(7)(B) a wholly benign interpretation. It concedes that “the ‘significant purpose’ amendment recognizes the existence of the dichotomy between foreign intelligence and law enforcement,” but it contends that “it cannot be said to recognize (or approve) its legitimacy.” Supp. Br. of U.S. at 25 (emphasis in original). We are not persuaded. The very letter the Justice Department sent to the Judiciary Committee in 2001 defending the constitutionality of the significant purpose language implicitly accepted as legitimate the dichotomy in FISA that the government now claims (and we agree) was false. It said, “it is also clear that while FISA states that ‘the’ purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, so long as the surveillance also has a legitimate foreign intelligence purpose.” The senatorial statements explaining the significant purpose amendments which we described above are all based on the same understanding of FISA which the Justice Department accepted — at least until this appeal. In short, even though we agree that the original FISA did not contemplate the “false dichotomy,” the Patriot Act actually did — which makes it no longer false. The addition of the word “significant” to section 1804(a)(7)(B) imposed a requirement that the government have a measurable foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes. Although section 1805(a)(5), as we discussed above, may well have been intended to authorize the FISA court to review only the question whether the information sought was a type of foreign intelligence information, in light of the significant purpose amendment of section 1804 it seems section 1805 must be interpreted as giving the FISA court the authority to review the government's purpose in seeking the information.

That leaves us with something of an analytic conundrum. On the one hand, Congress did not amend the definition of foreign intelligence information which, we have explained, includes evidence of foreign intelligence crimes. On the other hand, Congress accepted the dichotomy between foreign intelligence and law enforcement by adopting the significant purpose test. Nevertheless, it is our task to do our best to read the statute to honor congressional intent. The better reading, it seems to us, excludes from the purpose of gaining foreign intelligence information a sole objective of criminal prosecution. We therefore reject the government's argument to the contrary. Yet this may not make much practical difference. Because, as the government points out, when it commences an electronic surveillance of a foreign agent, typically it will not have decided whether to prosecute the agent (whatever may be the subjective intent of the investigators or lawyers who initiate an investigation). So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test.

The important point is — and here we agree with the government — the Patriot Act amendment, by using the word “significant,” eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses. If the certification of the application's purpose articulates a broader objective than criminal prosecution — such as stopping an ongoing conspiracy — and includes other potential non-prosecutorial responses, the government meets the statutory test. Of course, 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.

In re Sealed Case, 310 F.3d 717, 734-735 (For.Intel.Surv.Rev. 18 Nov 2002).

A former U.S. Justice Department official said that this amendment to FISA in the PATRIOT Act “affirmatively codified into law the historical *misreading* of the 1978 version of the statute.”³⁰

A strange feature of the decision by the Foreign Intelligence Surveillance Court of Review was that the one of the three judges, Judge Silberman, suggested during oral arguments that the FISA statute never contained any restriction on the *use* of information. This novel argument by Silberman was not presented by any party, and was not considered by the court below.³¹ Silberman’s argument leads to a difficult-to-understand opinion at 310 F.3d at 723-727, in which the judges appear to confuse the government’s *purpose* in seeking foreign intelligence information with the government’s later *use* of that information. Professor William Banks was particularly critical of this Court of Review decision:

Applying this argument would mean that the dozens of courts of appeal decisions that employed some kind of “primary purpose” analysis were, according to Judge Silberman, simply wrong.

William C. Banks, “And the Wall Came Tumbling Down: Secret Surveillance After the Terror,” 57 University of Miami Law Review 1147, 1174 (July 2003).

In reversing the FISC decision, the FISCRC simply missed the mark when it conflated the way FISA information is *used* with *the purpose* for using FISA.

Ibid. at 1176.

Although “foreign intelligence information” has always included information that could be evidence of a crime, seeking that information *in order to prosecute* is not the same as seeking that information to prevent possible terrorist activities.

Ibid. at 1179.

... the FISCRC ... was amateurish in its characterization of FISA and its aims, and heavy-handed in its disregard for twenty-five years of FISA history. All of this came from an appeals court that had never before met and that reversed an *en banc* FISC, where all seven members had considerable experience in administering FISA.

Ibid. at 1191.

³⁰ David S. Kris, “The Rise and Fall of the FISA Wall,” 17 STANFORD LAW AND POLICY REVIEW 487, 510, n. 125 (2006).

³¹ *In re Sealed Case*, 310 F.3d 717, 721-722 and n. 6 (For.Intel.Surv.Rev. 18 Nov 2002).

The FISA appellate court cited some of the post-FISA cases (e.g., *Falvey, Duggan, Badia, Pelton, Johnson*),³² showing that the appellate judges were aware of these cases. But later in the same opinion, during consideration of the constitutional standard,³³ the appellate court cited only *Truong*, and noted — correctly — that “*Truong* dealt with a pre-FISA surveillance”.³⁴ The FISA appellate court thus ignored that there was a long line of cases that held that approval of the FISA court is constitutional only if the surveillance is done with the primary purpose of collection of foreign intelligence information.

Does the FISA court issue warrants?

Requirement in Ordinary Criminal Law

The Fourth Amendment to the U.S. Constitution says:

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

The meaning of this terse sentence has been explained in dozens of opinions of the U.S. Supreme Court. Fundamentally, a warrant must be issued by a “neutral and detached magistrate”:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. [footnote omitted] Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. [footnote omitted] Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent. *Johnson v. U.S.*, 333 U.S. 10, 13-14 (U.S. 1948).

In 1967, the U.S. Supreme Court made the landmark holding that a judge issue a search warrant before the government could legally install a wiretap. *Katz v. United States*, 389 U.S. 347 (1967). The following year, the U.S. Congress passed the Omnibus Crime Control and Safe Streets Act, which included criteria for wiretaps at 18 U.S.C. § 2518.

³² 310 F.3d at 726-727.

³³ 310 F.3d at 742-744.

³⁴ 310 F.3d at 742.

In 1979, the U.S. Supreme Court considered an early electronic surveillance case and wrote:

The Fourth Amendment requires that search warrants be issued only “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Finding these words to be “precise and clear,” *Stanford v. Texas*, 379 U.S. 476, 481, 85 S.Ct. 506, 509, 13 L.Ed.2d 431 (1965), this Court has interpreted them to require only three things. First, warrants must be issued by neutral, disinterested magistrates. See, e. g., *Connally v. Georgia*, 429 U.S. 245, 250-251, 97 S.Ct. 546, 548-549, 50 L.Ed.2d 444 (1977) (per curiam); *Shadwick v. Tampa*, 407 U.S. 345, 350, 92 S.Ct. 2119, 2122, 32 L.Ed.2d 783 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that “the evidence sought will aid in a particular apprehension or conviction” for a particular offense. *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967). Finally, “warrants must particularly describe the ‘things to be seized,’ ” as well as the place to be searched. *Stanford v. Texas*, [379 U.S.] at 485, 85 S.Ct. at 511 [(1965)].
Dalia v. U.S., 441 U.S. 238, 255 (U.S. 1979).

no “rubber stamp”

In 1984, the U.S. Supreme Court held that the requirement for review by a “neutral and detached magistrate” meant that the magistrate or judge should do more than automatically approve applications for warrants. In 1964, the U.S. Supreme Court held:

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.
Aguilar v. State of Tex., 378 U.S. 108, 111 (U.S. 1964), *overruled on other grounds in Illinois v. Gates*, 462 U.S. 213 (1983).

In 1984, the U.S. Supreme Court reaffirmed this holding in *Aguilar*:

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate’s finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). [footnote omitted] Second, the courts must also insist that the magistrate purport to “perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” *Aguilar v. Texas*, supra, 378 U.S., at 111, 84 S.Ct., at 1512. See *Illinois v. Gates*, supra, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to “manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application” and who acts instead as “an adjunct law enforcement officer” cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327, 99 S.Ct. 2319, 2324-2325, 60 L.Ed.2d 920 (1979). Third, reviewing courts will not defer to a warrant based on an affidavit that does not “provide the magistrate with a substantial basis for determining the existence of probable cause.” *Illinois v. Gates*, 462 U.S., at 239, 103 S.Ct., at 2332. “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” *Ibid.* See *Aguilar v. Texas*, supra 378 U.S., at 114-115, 84 S.Ct., at 1513-1514; *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Nathanson v. United*

States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). [footnote omitted] Even if the warrant application was supported by more than a “bare bones” affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates*, supra, 462 U.S., at 238-239, 103 S.Ct., at 2332-2333, or because the form of the warrant was improper in some respect. *U.S. v. Leon*, 468 U.S. 897, 914-915 (U.S. 1984).

The concern about a judge acting as a “rubber stamp” is still valid law.³⁵ I mention these “rubber stamp” cases, because, during 1979-1996, the government made 9651 applications to the FISA court. Astoundingly, the FISA court approved *all* of these applications, with *zero* modifications by the court.³⁶ I argue below that such automatic approval does *not* satisfy the Fourth Amendment protections for U.S. persons inside the USA.

FISA

As explained below, regular courts are divided as to whether the judicial order of the FISA court is a warrant that satisfies the Fourth Amendment. The word *warrant* does not appear in 50 U.S.C. §§ 1801-1811, except as quoted in the following paragraph, below. Instead of warrants, according to the statute, the FISA court issues *orders* for surveillance. Furthermore, there is no need for a warrant, because the executive branch has the constitutional authority (see *Butenko, Truong*, above) to conduct warrantless surveillance when the purpose is primarily to collect foreign intelligence information. The problem arises when the government conducts surveillance on U.S. persons who are inside the USA, when those U.S. persons communicate with someone in a foreign country. Although the constitutional rights are uncertain, the government may need a warrant to do surveillance on U.S. persons inside the USA.

One mention of *warrant* in FISA occurs in connection with the definition of *electronic surveillance*:

"Electronic surveillance" means — the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy³⁷ and a **warrant**³⁸ would be required for law enforcement purposes;

³⁵ See, e.g., *U.S. v. Gaston*, 16 Fed.Appx. 375, 380 (6thCir. 2001); *U.S. v. Martin*, 297 F.3d 1308, 1316-1317 (11thCir. 2002).

³⁶ See statistical evidence, beginning at page 40, below.

³⁷ “Reasonable expectation of privacy” is a phrase from *Katz*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) and cited in numerous subsequent majority opinions of the U.S. Supreme Court.

³⁸ Boldface added by Standler.

50 U.S.C. § 1801(f)(1) (current July 2007).

Another mention of *warrant* in FISA occurs in the section on uses of information, specifically the destruction of unintentionally acquired information:

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a **warrant**³⁹ would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

50 U.S.C. § 1806(i) (current July 2007).

Neither of these two mentions of *warrant* in FISA refer to judicial orders from the FISA court.

It is well established in law that the name the parties give something is *not* determinative of what that something is. Therefore, it is possible that a surveillance order from the FISA court is actually a warrant. Several opinions of regular courts quoted below have discussed whether an order from the FISA court is acceptable as a warrant from a regular court.

Falvey

Back in 1982, a U.S. District Court in New York was ahead of its time in recognizing that an order of the FISA court authorizing surveillance automatically made the fruits of that surveillance admissible in criminal proceedings.

The bottom line of *Truong* is that evidence derived from warrantless foreign intelligence searches will be admissible in a criminal proceeding only so long as the primary purpose of the surveillance is to obtain foreign intelligence information.

What the defendants steadfastly ignore, however, is that in this case — unlike *Truong* — a court order was obtained authorizing the surveillance. After the surveillance was conducted in *Truong* (without a warrant), Congress enacted FISA, imposing a warrant requirement to obtain foreign intelligence information. An order authorizing the surveillance in this case was lawfully obtained pursuant to FISA. Accordingly, all the relevant evidence derived therefrom will be admissible at trial. [two citations and one footnote omitted from this paragraph]

In enacting FISA, Congress expected that evidence derived from FISA surveillances could then be used in a criminal proceeding. See S.Rep.No.95-604, Legislative History, supra at 3940-41; 3979-80. Indeed, by affording mechanisms for suppression (50 U.S.C. § 1806(f)), and by providing for “retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed” (50 U.S.C. § 1801(h)(3)), FISA itself clearly contemplates that evidence will be used at trials.

In conclusion, it was proper for the FISA judge to issue the order in this case because of the on-going nature of the foreign intelligence investigation. [citation omitted] The fact that evidence of criminal activity was thereafter uncovered during the investigation does not render the evidence inadmissible. There is no question in my mind that the purpose of the surveillance, pursuant to the order, was the acquisition of foreign intelligence information. Accordingly, I find that the FISA procedures on their face satisfy the Fourth Amendment warrant requirement, and that FISA was properly implemented in this case.

³⁹ Boldface added by Standler.

U.S. v. Falvey, 540 F.Supp. 1306, 1313-1314 (D.C.N.Y. 15 June 1982).

Incidentally, a U.S. District Court in California said that “In *Falvey*, supra, the court held that the *Truong* ‘primary purpose’ test no longer applied, since a FISA surveillance is authorized by court order. 540 F.Supp. at 1314.”⁴⁰ I think this reading of *Falvey* is incorrect: *Falvey* did not hold that the “primary purpose” test was obsolete, furthermore the FISA statute⁴¹ then contained the even stronger requirement that “the purpose” of the surveillance be the collection of foreign intelligence.

On 16 August 2007, I made a search of U.S. Courts of Appeals cases that contained the word *FISA* in the same paragraph as the word *warrant(s)*. Pertinent parts of those relevant cases are quoted below, in chronological order.

Duggan

The Fourth Amendment provides that “no warrants shall issue, but upon probable cause” Defendants argue principally (1) that the Amendment applies to all proposed surveillances, including those in national security cases, and (2) that even if there were an exception for national security matters, it would not apply to terrorism cases where the objects of the terrorism are entirely outside of the United States. We reject these contentions.

Prior to the enactment of FISA, 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. See *United States v. Truong Dinh Hung*, 629 F.2d 908, 912-14 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890, 98 S.Ct. 263, 54 L.Ed.2d 175 (1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974). But see *Zweibon v. Mitchell*, 516 F.2d 594, 633-51 (D.C.Cir. 1975) (dictum), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 187 (1976). The Supreme Court specifically declined to address this issue in *United States v. United States District Court [Keith, J.]*, 407 U.S. 297, 308, 321-22, 92 S.Ct. 2125, 2132, 2138-39, 32 L.Ed.2d 752 (1972) (hereinafter referred to as “Keith”), but it had made clear that the requirements of the Fourth Amendment may change when differing governmental interests are at stake, see *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and it observed in *Keith* that the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations. 407 U.S. at 321-24, 92 S.Ct. at 2138-40.

In *Keith*, the government argued that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 et seq. (“Title III”), recognized the constitutional authority of the President to conduct domestic security surveillances without a warrant. The Court rejected this argument, noting that the legislative history made clear that Title III was not intended to legislate with respect to national security surveillances. The Court went on to hold that a

⁴⁰ *Matter of Kevork*, 634 F.Supp. 1002, 1015 (C.D.Cal. 5 Aug 1985), *aff’d without mentioning Falvey*, 788 F.2d 566 (9th Cir. 1986).

⁴¹ 50 U.S.C. § 1804 (a)(7).

warrant was required in *Keith* under the Fourth Amendment; but the implication of its discussion was that the warrant requirement is flexible and that different standards may be compatible with the Fourth Amendment in light of the different purposes and practical considerations of domestic national security surveillances. 407 U.S. at 321-24, 92 S.Ct. at 2138-40. Thus, the Court observed

that domestic security surveillance may involve different policy and practical considerations from the surveillance of “ordinary crime.” The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

... Different standards [for surveillance involving domestic security] 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. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.

[*Keith*, 407 U.S.] at 322-23, 92 S.Ct. at 2139-40.

Against this background, Congress passed FISA to settle what it believed to be the unresolved question of the applicability of the Fourth Amendment warrant requirement to electronic surveillance for foreign intelligence purposes, and to “remove any doubt as to the lawfulness of such surveillance.” H.R.Rep. 1283, pt. I, 95th Cong., 2d Sess. 25 (1978) (“House Report”). FISA reflects both Congress's “legislative judgment” that the court orders and other procedural safeguards laid out in the Act “are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment,” S.Rep. No. 701, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S.Code Cong. & Ad.News 3973, 3982 (“Senate Report 95-701”), and its attempt to fashion a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights.” S.Rep. No. 604, 95th Cong., 1st Sess. 15, reprinted in 1978 U.S.Code Cong. & Ad.News 3904, 3916 (“Senate Report 95-604”). In constructing this framework, Congress gave close scrutiny to departures from those Fourth Amendment doctrines applicable in the criminal-investigation context in order

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

Senate Report 95-701, at 14-15, reprinted in 1978 U.S.Code Cong. & Ad.News 3973, 3983.

We regard the procedures fashioned in FISA as a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information. The governmental concerns are detailed in the passages quoted above from *Keith* and the legislative history of FISA, and those concerns make reasonable the

adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation. See generally *United States v. Belfield*, 692 F.2d 141, 148 (D.C.Cir. 1982) (examining in camera review procedures of FISA (see Part II. B. 2., *infra*)). Against this background, the Act requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the electronic surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of the Act. These requirements make it reasonable to dispense with a requirement that the FISA Judge find probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information. [FN5] Further, if the target is a United States person, the Act requires the FISA Judge to determine that the executive branch's certifications pursuant to § 1804(a)(7) are not clearly erroneous in light of the application as a whole, and to find that the application properly proposes, as required by § 1801(h), to minimize the intrusion upon the target's privacy.

FN5. A fortiori we reject defendants' argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target has committed a crime.

We conclude that these requirements provide an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information, and that FISA does not violate the probable cause requirement of the Fourth Amendment.

U.S. v. Duggan, 743 F.2d 59, 72-74 (2dCir. 1984).

Cavanagh

In 1987, Judge Kennedy — later Justice Kennedy on the U.S. Supreme Court — on the Ninth Circuit grappled with the troublesome issue of whether the FISA court issued warrants:

We conclude also that the surveillance satisfied the statutory requirements for issuance of a warrant by the district court. The Attorney General submitted to the district court an affidavit under 50 U.S.C. § 1806(f) asserting that disclosure of the materials relating to the surveillance would harm the national security of the United States. We have reviewed the sealed materials, which include the government's application for the wiretap and the order authorizing it. The application and the order complied with the statute. *Id.* §§ 1804 (application), 1805 (order). We agree with the district court's findings that the application established probable cause to believe that the target of the surveillance was a foreign power, and included proposed minimization procedures consistent with the statute. The district court correctly concluded that the surveillance was properly authorized and conducted. *Id.* § 1806(e)-(g).

Appellant's main contention in support of his suppression motion is that FISA is deficient under the Fourth Amendment. He argues that the statute does not provide for sufficient judicial scrutiny of the government's surveillance activities. He contends further that FISA's requirement of probable cause that the surveillance target be a foreign power and that the court order approving the surveillance “generally” describe the information sought and the communications to be intercepted are not sufficient under the Fourth Amendment.

The case is presented to us as one in which FISA, and its conformity to the Fourth Amendment, control the outcome; and as such we need determine only whether the statutory requirements are sufficient to satisfy the “general Fourth Amendment standard of

reasonableness.” See *v. City of Seattle*, 387 U.S. 541, 546, 87 S.Ct. 1737, 1741, 18 L.Ed.2d 943 (1967).

By enacting a statutory framework under which the government may seek and obtain approval of foreign intelligence surveillance, Congress granted explicit authorization of such activity, which it viewed as vital to national security. S.Rep. No. 604 (Part I), 95th Cong., 2d Sess. 7-9, reprinted in 1978 U.S.Code Cong. & Ad.News 3904, 3908-10. Congress sought to accommodate and advance both the government's interest in pursuing legitimate intelligence activity and the individual's interest in freedom from improper government intrusion. *Id.* As we will discuss, appellant fails to persuade us that Congress did not give sufficient weight to the latter. FISA satisfies the constraints the Fourth Amendment places on foreign intelligence surveillance conducted by the government. See *United States v. Duggan*, 743 F.2d 59, 72-74 (2d Cir. 1984) (holding that FISA does not violate Fourth Amendment); *In re Kevork*, 634 F.Supp. 1002, 1010-14 (C.D.Cal. 1985) (same), *aff'd*, 788 F.2d 566 (9th Cir. 1986); *United States v. Megahey*, 553 F.Supp. 1180, 1185-92 (E.D.N.Y. 1982) (same); *United States v. Falvey*, 540 F.Supp. 1306, 1311-14 (E.D.N.Y. 1982) (same).

Appellant argues that the prior judicial scrutiny afforded by FISA is insufficient to satisfy the warrant requirement of the Fourth Amendment because the FISA court is not a detached and neutral body, but functions instead as a compliant arm of the government. Appellant cites a statistical study showing that the FISA court rarely if ever denies the government's applications. See Schwartz, Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs, 12 RUTGERS L. J. 405, 445 n. 235A, 446 n. 239 (1981).⁴² The court's infrequent denial of applications is equally consistent with a practice of careful compliance with the statutory requirements on the part of the government. See H.R.Rep. 974, 97th Cong., 2d Sess. 3 (1982) (report of the House Permanent Select Committee on Intelligence acting in its oversight capacity under FISA, 50 U.S.C. § 1808, noting the government's careful compliance with the Act); see also S.Rep. 660, 98th Cong., 2d Sess. 23 (1984) (report of the Senate Select Committee on Intelligence, also acting in its oversight capacity under FISA, noting same). The argument by appellant on this aspect of the case is not persuasive for the overriding consideration is that issuance of the warrant is by a detached judicial officer. We conclude that appellant has failed to show that the FISA court provides anything other than neutral and responsible oversight of the government's activities in foreign intelligence surveillance.

In arguing that FISA does not satisfy the Fourth Amendment's requirements of probable cause and particularity, appellant ignores the Supreme Court's admonition that the showing necessary under the Fourth Amendment to justify a surveillance conducted for national security purposes is not necessarily analogous to the standard of probable cause applicable to criminal investigations. *United States v. United States District Court*, 407 U.S. 297, 322, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). The Court explained that “a [d]ifferent standard[] [of probable cause] may be compatible with the Fourth Amendment if [it is] reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.” *Id.* at 322-23, 92 S.Ct. at 2139. The Court reiterated that the probable cause requirement is to be construed

⁴² When Prof. Schwartz wrote her article, only the results for the FISA court during 1979-1980 were publicly available. There were a total of 518 applications for a surveillance order. As Prof. Schwartz says in her footnote 182 and again on page 441, *zero* applications were denied and the court modified *one* application to include approval of an activity not requested by the government. On page 448, Prof. Schwartz says about judicial assessment of minimization compliance, “If this is an accurate description of what the judges are or are not doing, there is a serious problem.”

against the Fourth Amendment's reasonableness standard: "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." *Id.* at 323, 92 S.Ct. at 2139. (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 390 (1967)). The question is whether the showing of probable cause required by FISA passes muster under the reasonableness standard.

We find that the probable cause showing required by FISA is reasonable. The application must state that the target of the electronic surveillance is a foreign power or an agent of a foreign power, and must certify that the purpose of the surveillance is to obtain foreign intelligence information and that the information cannot reasonably be obtained by normal investigative techniques. 50 U.S.C. § 1804(a). It is true, as appellant points out in his brief, that the application need not state that the surveillance is likely to uncover evidence of a crime; but as the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence, such a requirement would be illogical. See *United States District Court*, 407 U.S. at 322, 92 S.Ct. at 2139 (recognizing distinction between surveillance for national security purposes and surveillance of "ordinary crime"); *Belfield*, 692 F.2d at 144 n. 8 ("[m]uch valuable intelligence information ... has nothing to do with the contemplated commission of a crime"). And as appellant all but conceded at oral argument before us, there is no merit to the contention that he is entitled to suppression simply because evidence of his criminal conduct was discovered incidentally as the result of an intelligence surveillance not supported by probable cause of criminal activity. See *Duggan*, 743 F.2d at 73 n. 5.

....

Appellant suggested at oral argument that FISA does not allow for sufficient judicial scrutiny of the government's need for the intelligence information. We believe that the probable cause requirements of the statute provide ample scrutiny on this issue. The certifications required by the statute are sufficient to ensure that the approved surveillance will fit within the category of foreign intelligence surveillance.

We reject appellant's suggestion that FISA violates the Fourth Amendment's particularity requirement by allowing a general description of the information sought. Foreign intelligence gathering is often intended simply to "enhance[] ... the Government's preparedness for some possible future crisis...." *United States District Court*, 407 U.S. at 322, 92 S.Ct. at 2139. Where, as here, surveillance is directed at a "facilit[y] ... owned, leased, or exclusively used by [a] foreign power," 50 U.S.C. § 1805(c), the government may be unable to provide "a detailed description of the nature of the information sought...." *Id.* § 1804(a)(6) (criteria in section 1804(a)(6) exempted by sections 1804(b) and 1805(c) in the case of foreign power targets). The requirement that in the case of a foreign power target, the court order "shall generally describe the information sought," *id.* § 1805(c), is sufficiently precise in this context.

U.S. v. Cavanagh, 807 F.2d 787, 789-791 (9th Cir. 1987).

Cavanagh was one of a few cases in which the judges made a thoughtful analysis of Fourth Amendment law. *Cavanagh* concluded that a surveillance order of the FISA court satisfied the Fourth Amendment.

Pelton

In 1987, the Fourth Circuit said:

Pelton asserts that allowing electronic surveillance on anything less than the traditional probable cause standard for the issuance of a search warrant violates the Fourth Amendment. He contends that the need for foreign intelligence does not justify any exception to the warrant requirement. We disagree. Although the Supreme Court has yet to address this issue, it has suggested that a more flexible standard may be appropriate in the context of foreign intelligence and that the warrant requirement “may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.” *United States v. United States District Court*, 407 U.S. 297, 322-23, 92 S.Ct. 2125, 2139, 32 L.Ed.2d 752 (1972). Prior to the enactment of FISA, this court joined all save one of the circuits to have addressed the question in holding that the President has the inherent power to conduct warrantless electronic surveillance for foreign intelligence purposes. *United States v. Truong*, 629 F.2d 908, 912-14 (4th Cir. 1980).

We now join the other courts of appeal that have reviewed FISA and held that the statute meets constitutional requirements. See *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). FISA’s numerous safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities. The governmental interests in gathering foreign intelligence are of paramount importance to national security, and may differ substantially from those presented in the normal criminal investigation. See *United States District Court*, 407 U.S. at 321-24, 92 S.Ct. at 2138-40. FISA requires judicial review prior to the initiation of the type of surveillance conducted here and sets careful limitations on its exercise. 50 U.S.C. §§ 1803-1805. The reviewing judge must find probable cause to believe that a target such as Pelton is an agent of a foreign power. *Id.* The Act also requires the use of “minimization procedures” for the protection of the targets of surveillance, see *id.* § 1801, and limits the duration of surveillance of an agent of a foreign power to no more than ninety days, *id.* § 1805. We find the provisions of FISA to be “reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens,” *United States District Court*, 407 U.S. at 323, 92 S.Ct. at 2139, and therefore compatible with the Fourth Amendment.

....

Where, as here, the statutory application was properly made and earlier approved by a FISA judge, it carries a strong presumption of veracity and regularity in a reviewing court. See *Duggan*, 743 F.2d at 77.
U.S. v. Pelton, 835 F.2d 1067, 1075-1076 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988).

Posey

In a 1989 case, the Ninth Circuit seems to have assumed, without deciding the issue, that the FISA court orders were a warrant.

The FISA authorizes electronic surveillance of foreign powers and their agents for foreign intelligence purposes, specifying a number of standards and procedures for the issuance of surveillance warrants. With certain exceptions not relevant here, FISA requires judicial approval before the government may engage in such surveillance.

Appellant contends that these provisions of the FISA violate the Fourth Amendment's requirement that the government conduct searches only upon the issuance of a warrant supported by probable cause. [footnote omitted] Appellant argues that the standards enunciated in the FISA are so broad and vague that they fail to provide a "discernible probable cause standard" for the issuance of warrants.

As an initial matter, we think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance against him violated the Fourth Amendment. Much of appellant's argument is a combined "vagueness" and "overbreadth" argument analogous to those found in the First Amendment context, in which he urges that some possible applications of the FISA might violate the Fourth Amendment. Even if he is correct that the FISA's language might be applied in ways that violate the Fourth Amendment, he must show that the particular search in his case violated the Fourth Amendment. Appellant cannot invalidate his own conviction on the argument that others' rights are threatened by FISA.

Appellant has not persuaded us that his Fourth Amendment rights were violated by the surveillance in this case. Our independent review of the materials submitted by the government in support of its warrant application persuades us that the government in fact had satisfied the standard of probable cause. The record shows that the government demonstrated an adequate foundation to establish probable cause to believe that appellant was violating the export control laws. It is thus unnecessary for us to decide whether the standards set forth in the FISA satisfy the requirements of the Fourth Amendment. Whether or not the FISA's standards do, as appellant urges, fall short of the Fourth Amendment because they do not force the government to make the constitutionally requisite showing of probable cause, the government did in fact make such a showing in this case.

U.S. v. Posey, 864 F.2d 1487, 1490-1491 (9thCir. 1989).

other cases

U.S. v. Johnson, 952 F.2d 565, 571 (1stCir. 1991) ("Enacted in 1978, FISA establishes a statutory procedure whereby a federal officer, acting through the Attorney General, may obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." The court gives no explanation of *why* the order of the FISA court is a warrant.), *cert. denied*, 506 U.S. 816 (1992).

In 1991, the U.S. Court of Appeal for the District of Columbia explained:

Before recounting the remaining background of this case, it will be helpful to describe the Foreign Intelligence Surveillance Act. Enacted in 1978, FISA sought to put to rest a troubling constitutional issue. For decades Presidents had claimed inherent power to conduct warrantless electronic surveillance in order to gather foreign intelligence in the interests of national security. When the Supreme Court, in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), overruled *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), and held that the warrant requirement of the Fourth Amendment applied to electronic surveillance, the constitutionality of this long-standing executive practice was called into question. In the *Keith* case (*United States v. United States District Court*, 407 U.S. 297, 321-22, 92 S.Ct. 2125, 2138-39, 32 L.Ed.2d 752 (1972)), the Court explicitly reserved judgment on the issue. Thereafter, the Fifth Circuit in *United States v. Brown*, 484 F.2d 418 (1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974), and the Third Circuit in *United States v. Butenko*, 494 F.2d 593 (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974), sustained the President's power to conduct warrantless electronic surveillance for the primary purpose of gathering foreign intelligence information. See also *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982). In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C.Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976), however, the plurality opinion held that allegations of warrantless electronic surveillance in a complaint seeking damages stated a cause of action under the Fourth Amendment, at least insofar as the targets were not foreign powers or their agents, even though the Attorney General had authorized the surveillance for the purpose of obtaining foreign intelligence information.

By enacting FISA, Congress sought to resolve doubts about the constitutionality of warrantless, foreign security surveillance and yet protect the interests of the United States in obtaining vital intelligence about foreign powers.

ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 461 (C.A.D.C. 1991).

The remainder of *Barr* does not mention the word *warrant*.

U.S. v. Squillacote, 221 F.3d 542 (4th Cir. 11 Aug 2000) (The appellate court refers to the surveillance order from the FISA court as a "warrant", but without any explanation of *why* it was a warrant.), *cert. den.*, 532 U.S. 971 (2001).

FISA appellate court

Twenty years after *Falvey*, the FISA appellate court compared surveillance orders issued by the FISA court with warrants from a regular court under Title III of the Omnibus Crime Control and Safe Streets Act (i.e., 18 U.S.C. § 2518):

The statutes differ to some extent in their probable cause showings. Title III allows a court to enter an ex parte order authorizing electronic surveillance if it determines on the basis of the facts submitted in the government's application that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" a specified predicate offense. 18 U.S.C. § 2518(3)(a). FISA by contrast requires a showing of probable cause that the target is a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a)(3). We have noted, however, that where a U.S. person is involved, an "agent of a foreign power" is

defined in terms of criminal activity. [footnote omitted] Admittedly, the definition of one category of U.S.-person agents of foreign powers — that is, persons engaged in espionage and clandestine intelligence activities for a foreign power — does not necessarily require a showing of an imminent violation of criminal law. See 50 U.S.C. § 1801(b)(2)(A) (defining such activities as those which “involve” or “may involve” a violation of criminal statutes of the United States). Congress clearly intended a lesser showing of probable cause for these activities than that applicable to ordinary criminal cases. See H. Rep. at 39-40, 79. And with good reason — these activities present the type of threats contemplated by the Supreme Court in *Keith* when it recognized that the focus of security surveillance “may be less precise than that directed against more conventional types of crime” even in the area of domestic threats to national security. *Keith*, 407 U.S. at 322, 92 S.Ct. at 2139. Congress was aware of *Keith's* reasoning, and recognized that it applies a fortiori to foreign threats. See S. Rep. at 15. As the House Report notes with respect to clandestine intelligence activities:

The term “may involve” not only requires less information regarding the crime involved, but also permits electronic surveillance at some point prior to the time when a crime sought to be prevented, as for example, the transfer of classified documents, actually occurs.

H. Rep. at 40. Congress allowed this lesser showing for clandestine intelligence activities — but not, notably, for other activities, including terrorism — because it was fully aware that such foreign intelligence crimes may be particularly difficult to detect. [footnote omitted] At the same time, however, it provided another safeguard not present in Title III — that is, the requirement that there be probable cause to believe the target is acting “for or on behalf of a foreign power.”

In re Sealed Case, 310 F.3d 717, 738-739 (For.Intel.Surv.Rev. 18 Nov 2002).

After a long analysis, the FISA appellate court concluded that the surveillance order of the FISA court *may not* be a warrant, but declined to resolve the issue.

Based on the foregoing, it should be evident 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. [footnote omitted] Still, to the extent the two statutes diverge in constitutionally relevant areas — in particular, in their probable cause and particularity showings — a FISA order may not be a “warrant” contemplated by the Fourth Amendment. The government itself does not actually claim that it is, instead noting only that there is authority for the proposition that a FISA order is a warrant in the constitutional sense. See *Cavanagh*, 807 F.2d at 790 (concluding that FISA order can be considered a warrant since it is issued by a detached judicial officer and is based on a reasonable showing of probable cause); see also *Pelton*, 835 F.2d at 1075 (joining *Cavanagh* in holding that FISA procedures meet constitutional requirements); *Falvey*, 540 F.Supp. at 1314 (holding that unlike in *Truong*, a congressionally crafted warrant that met Fourth Amendment standards was obtained authorizing the surveillance). We do not decide the issue but note that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment.

In re Sealed Case, 310 F.3d 717, 741-742 (For.Intel.Surv.Rev. 18 Nov 2002).

Echoing the last sentence quoted above, the conclusion of the opinion says:

... we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.

In re Sealed Case, 310 F.3d 717, 746 (For.Intel.Surv.Rev. 18 Nov 2002).

That is like a physician saying “if she’s not pregnant, she is certainly close to pregnant.” One would expect three judges from the U.S. Court of Appeals to give a straightforward answer — yes or no — to whether a statutory procedure is constitutional.

One law review article criticized the FISA appellate court, because it focused on the reasonableness of the surveillance order and “undervalued the concerns that impelled the early courts to develop the primary purpose standard.”⁴³

See my remark above, at page 23, that the FISA appellate court ignored that there was a long line of cases (e.g., *Falvey*, *Duggan*, *Badia*, *Pelton*, *Johnson*) that held that approval of the FISA court is constitutional only if the surveillance is done with the primary purpose of collection of foreign intelligence information.

Hammoud

U.S. v. Hammoud, 381 F.3d 316, 333 (4th Cir. 8 Sep 2004) (Majority opinion of the appellate court four times called the surveillance order from the FISA court a “warrant”, but without any explanation of *why* it was a warrant.), *vacated on other grounds*, 543 U.S. 1097 (24 Jan 2005).

Ning Wen

In February 2007, Judge Easterbrook, Chief Judge of the Seventh Circuit, wrote:

The fourth amendment does not supply a better footing for exclusion. FISA requires each intercept to be authorized by a warrant from a federal district judge. See 50 U.S.C. § 1803(a). This brings into play the rule of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), that the exclusionary rule must not be applied to evidence seized on the authority of a warrant, even if the warrant turns out to be defective, unless the affidavit supporting the warrant was false or misleading, or probable cause was so transparently missing that “no reasonably well trained officer [would] rely on the warrant.” *Id.* at 923, 104 S.Ct. 3405.

At one time it was seriously questioned whether an intercept order is a “warrant” for constitutional purposes, see Telford Taylor, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 79-88 (1969), but characterization was settled in favor of “warrant” status by *Dalia v. United States*, 441 U.S. 238, 256 n. 18, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). And our in camera review reveals that well-trained officers were entitled to rely on this warrant. The Executive Branch did the right thing in asking for a warrant. Suppose that FISA were the wrong source of authority and that the judge should have turned the request down because the investigation's domestic component overshadowed its international aspect. Then the Executive Branch could have obtained a domestic intercept order under Title III. The evidence narrated in the affidavit establishes probable cause to believe that phone lines were being used to discuss or plan violations of 50 U.S.C. § 1705(b). An error about which court should have issued a warrant, under which statute, does not support exclusion.

⁴³ Matthew R. Hall, “Constitutional regulation of national security investigation: Minimizing the use of unrelated evidence,” 41 *WAKE FOREST LAW REVIEW* 61, 98 (2006).

The only plausible constitutional objection to the warrant actually issued would be that FISA uses a definition of “probable cause” that does not depend on whether a domestic crime has been committed. Under 50 U.S.C. § 1805(a)(3), an order may be based on probable cause to believe that the target is an agent of a foreign power and that the conversations to be intercepted concern the agent's dealings with that foreign power; the judge need not find probable cause to believe that the foreign agent probably is violating the law of this nation (although this may be implied by the findings that FISA does require).

Yet we know from the administrative-search cases that the “probable cause” of which the fourth amendment speaks is not necessarily probable cause to believe that any law is being violated. The Court held in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1741, 18 L.Ed.2d 930 (1967), that municipal officials may not barge into homes or businesses to look for violations of the housing code; they must have warrants, which may issue on probable cause to believe that the city has adopted a reasonable system of inspections and is not targeting citizens for irregular or malicious reasons. Similarly, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), holds that, although federal inspectors need warrants to inspect business premises for violations of the Occupational Safety and Health Act, these warrants may issue on probable cause to believe that the agency is implementing a reasonable system of inspections that includes the business in question. Inspectors lawfully on the premises under such warrants may report any violations of law that they find; evidence in plain view need not be overlooked, even if that evidence concerns a different statute.

These principles carry over to FISA. Probable cause to believe that a foreign agent is communicating with his controllers outside our borders makes an interception reasonable. If, while conducting this surveillance, agents discover evidence of a domestic crime, they may use it to prosecute for that offense. That the agents may have known that they were likely to hear evidence of domestic crime does not make the interception less reasonable than if they were ignorant of this possibility. Justice Stewart's position that the plain-view doctrine is limited to “inadvertent” discoveries, see *Coolidge v. New Hampshire*, 403 U.S. 443, 469-71, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), has not carried the day. In *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Court held that evidence in plain view may be seized without a warrant even though the police expected to find it. Likewise evidence of a domestic crime, acquired during an intercept that is reasonable because it concerns traffic between a foreign state and one of its agents in the United States, may be used in a domestic prosecution whether or not the agents expected to learn about the domestic offense. It is enough that the intercept be adequately justified without regard to the possibility that evidence of domestic offenses will turn up. Interception of Wen's conversations was adequately justified under FISA's terms, so there is no constitutional obstacle to using evidence of any domestic crimes he committed.

U.S. v. Ning Wen, 477 F.3d 896, 897-899 (7th Cir. 2007).

conclusion

Does the FISA court issues warrants that comply with the requirements of the Fourth Amendment to the U.S. Constitution? *Falvey, Duggan, Cavanagh, and Pelton* give reasons for why the surveillance orders from a FISA court are acceptable as warrants. However, note that those cases were decided under the 1978 version of the FISA statute. The numerous amendments to FISA since 2001 may make these old cases irrelevant to the current FISA statute.

One law review article criticized *Falvey* and *Megahey/Duggan*, and said that a surveillance order from a FISA court might be a “constitutionally adequate substitute for the traditional warrant and probable cause formula, but only in the defined category of national security investigation.”⁴⁴ Another law review article said:

Although it is common to refer to what the FISC⁴⁵ issues as “warrants,” they have that label not because they are Fourth Amendment warrants, but rather because the FISC permits the type of surveillance associated with at Title III warrant.

William C. Banks, “And the Wall Came Tumbling Down: Secret Surveillance After the Terror,” 57 *University of Miami Law Review* 1147, 1181-82 (July 2003).

Several U.S. Court of Appeals (e.g., *Posey, Johnson, Squillacote, Hammoud*) have simply assumed that the FISA court issues warrants, without any legal analysis and without citation to cases. These courts engaged in shoddy reasoning to make an assumption on such an important issue.

I wish that attorneys and judges — especially opponents of FISA — would stop referring to surveillance orders from the FISA court as “warrants”. While I believe that surveillance orders from the FISA court are constitutional when the surveillance is done for the primary purpose of acquiring foreign intelligence information, such surveillance is outside the warrant requirement of the Fourth Amendment to the U.S. Constitution, so such a surveillance order is *not* equivalent to a warrant, in my opinion.

The best reason to believe that the FISA court does *not* issue warrants comes from the opinion of the FISA appellate court, quoted above.

⁴⁴ Matthew R. Hall, “Constitutional regulation of national security investigation: Minimizing the use of unrelated evidence,” 41 *WAKE FOREST LAW REVIEW* 61, 91-92 (2006).

⁴⁵ Foreign Intelligence Surveillance Court (FISC), what I call a “FISA Court”.

Government Lied to FISA Court

It is particularly horrifying that the FISA court opinion explicitly accuses some FBI agents of making false statements in affidavits to that court:

Beginning in March 2000, the government notified the Court that there had been disseminations of FISA information to criminal squads in the FBI's New York field office, and to the U.S. Attorney's Office for the Southern District of New York, without the required authorization of the Court as the "wall" in four or five FISA cases. Subsequently, the government filed a notice with the Court about its unauthorized disseminations.

In September 2000, the government came forward to confess error in some 75 FISA applications related to major terrorist attacks directed against the United States. The errors related to misstatements and omissions of material facts, including:

- a. an erroneous statement in the FBI Director's FISA certification that the target of the FISA was not under criminal investigation;
- b. erroneous statements in the FISA affidavits of FBI agents concerning the separation of the overlapping intelligence and criminal investigations, and the unauthorized sharing of FISA information with FBI criminal investigators and assistant U.S. attorneys;
- c. omissions of material facts from FBI FISA affidavits relating to a prior relationship between the FBI and a FISA target, and the interview of a FISA target by an assistant U.S. attorney.

In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications. After receiving a more detailed explanation from the Department of Justice about what went wrong, but not why, the Court decided not to accept inaccurate affidavits from FBI agents whether or not intentionally false. One FBI agent was barred from appearing before the Court as a FISA affiant. The Court decided to await the results of the investigation by the Justice Department's Office of Professional Responsibility before taking further action.

In March of 2001, the government reported similar misstatements in another series of FISA applications in which there was supposedly a "wall" between separate intelligence and criminal squads in FBI field offices to screen FISA intercepts, when in fact all of the FBI agents were on the same squad and all of the screening was done by the one supervisor overseeing both investigations.

To come to grips with this problem, in April of 2001, the FBI promulgated detailed procedures governing the submission of requests to conduct FISA surveillances and searches, and to review draft affidavits in FISA applications, to ensure their accuracy. These procedures are currently in use and require careful review of draft affidavits by the FBI agents in the field offices who are conducting the FISA case investigations, as well as the supervising agents at FBI headquarters who appear before the Court and swear to the affidavits.

In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors. These incidents have been under investigation by the FBI's and the Justice Department's Offices of Professional Responsibility for more than one year to determine how the violations occurred in the field offices, and how the misinformation found its way into the FISA applications and remained uncorrected for more than one year despite procedures to verify the accuracy of FISA

pleadings. As of this date, no report has been published, and how these misrepresentations occurred remains unexplained to the Court.

In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F.Supp.2d 611, 620-621 (For.Intel.Surv.Ct. 17 May 2002).

This extraordinary statement, joined by all seven judges on the FISA court, speaks for itself.

For a recent case in which FBI agents suborned perjury in prosecuting a man who they knew was innocent, see *Limone v. U.S.*, 271 F.Supp.2d 345 (D.Mass. 2003), *aff'd sub nom.*, *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004), *Limone v. U.S.*, --- F.Supp.2d ---- (D.Mass. 26 July 2007). This case alerts us to the possibility that rogue — or overzealous — agents may betray the principles that we expect from government agents.

In any court proceeding, it is essential that witnesses tell the truth. Making a false statement under oath is perjury, a felony. However, in a regular court proceeding there are witnesses for each side of the controversy, so the judge is aware of disputed facts.

It is absolutely essential that government agents tell the truth when the government makes a motion to a court in an ex parte proceeding, such as a surveillance application in FISA court. In an ex parte proceeding, by definition, only one side of the controversy is present in court, so there is no one to contradict erroneous testimony and to alert the judge to disputed facts.

FISA Court is a Rubber Stamp?

Most of what we know about the operation of the FISA court comes from the annual reports required in 50 U.S.C. § 1807. These reports are publicly available from the fas.org website that is mentioned in the Bibliography at the end of this essay.

During the years 1979-1991, the government applied to the FISA court for a total of 6546 orders for electronic surveillance. Astoundingly, the annual reports repeatedly say: “No orders were entered which modified or denied the requested authority.”

The following table gives the number of applications to the FISA court for either electronic surveillance or physical search. The next two columns give the number of orders for which the FISA court made “substantive modifications” or denied. Note that the number of applications increased during the years 1992-2006.

calendar year	applications	modified	denied	
1992	484	0	0	
1993	509	0	0	
1994	576	0	0	
1995	697	0	0	
1996	839	0	0	
1997	749	0	1 ⁴⁶	
1998	796	0	0	
1999	886	0	0	
2000	1005	1	0	
2001	932	2	0	
2002	1228	* ⁴⁷	0	
2003	1727	79	4	
2004	1758	94	0	
2005	2074	61	0	
2006	2181	73	1	
1992-2006	16441	310	6	total

During the ten years 1992-2001, the FISA court considered 7473 applications, modified three (0.04%), denied one (0.01%), and approved without modification 7469 orders (99.95%).

Beginning in the year 2002, the FISA court began to assert itself.⁴⁸ During the five years from 2002 to 2006, the FISA court considered 8968 applications, modified 307 applications (3.4%), denied five (0.05%), and approved without modification 8656 orders (96.5%).

A graph of the annual number of FISA surveillance orders during 1979-2006 is available at http://www.epic.org/privacy/wiretap/stats/fisa_graphs.html
For comparison, a graph of the annual number of wiretaps under Title III is available at http://www.epic.org/privacy/wiretap/stats/wiretapping_graphs.html

⁴⁶ The government withdrew the application after it was denied, because the case became moot.

⁴⁷ The FISA court modified two orders during 2002. The FISA appellate court reversed the FISA court, with the final result that no orders were modified in the year 2002.

⁴⁸ The higher rate of modifications beginning in 2003 may be a response to the post-11 Sep 2001 amendments to FISA, including the PATRIOT Act.

possible explanations

There are five possible interpretations for the high rate of approval of surveillance applications by the FISA court.

First, the court was apparently functioning as a “rubber stamp”, giving approval to *all* 9651 applications from 1979 through 1996, and approving without substantial modification nearly every application from 1997 to 2002. Above, at page 24, the *Aguilar* and *Leon* cases at the U.S. Supreme Court were cited to show that it is *not* constitutionally permissible for a judge to function as a rubber stamp when issuing warrants.

Second, the FISA statute essentially entitles the government to a surveillance order if the government’s application makes the certifications required by the FISA statute.⁴⁹ Therefore, the statute gives the judge little discretion, the judge only checks paperwork for completeness.

Third, judges are instructed to defer to the executive branch in matters of foreign policy or national security.⁵⁰

⁴⁹ 50 U.S.C. § 1805(a) (“Upon an application made pursuant to section 1804 of this title, the judge **shall** enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that [list of five items omitted].”) (current July 2007). Boldface added by Standler, to emphasize the command.

⁵⁰ *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (U.S. 1936) (“... plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”); *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (U.S. 1948) (Waterman was denied permission by executive branch to operate an overseas air route and the courts refused to review the decision, because it involved foreign policy. “... executive decisions as to foreign policy are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. [citations omitted]”); *U.S. v. Nixon*, 418 U.S. 683, 710 (U.S. 1974) (“He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”); *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (U.S. 1982) (“Courts traditionally have recognized the President’s constitutional responsibilities and status as factors counseling judicial deference and restraint. [footnote omitted]”); *C.I.A. v. Sims*, 471 U.S. 159, 179 (U.S. 1985) (“The decisions of the Director [of the CIA], who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.”); *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (U.S. 2005) (“... would run counter to our customary policy of deference to the President in matters of foreign affairs.”).

Fourth, when the FISA court indicates some difficulty, the government may withdraw the application, repair any defect, and resubmit the application, thus avoiding denial or modification by the FISA court.⁵¹

Fifth, it is possible that the government takes great care to prepare applications properly.⁵² I think one would need to be gullible to believe this fifth possible explanation.

cases in regular courts

Above, at page 24, two U.S. Supreme Court opinions were quoted to show that the judge must be more than a “rubber stamp” that automatically approves requests for warrants. Criminal defense attorneys have used the “rubber stamp” argument in only four reported cases involving FISA surveillance orders:

1. *U.S. v. Falvey*, 540 F.Supp. 1306, 1313, n. 16 (D.C.N.Y. 15 June 1982) (“The defendants have not persuaded me that a federal district court judge would become the Government's rubber stamp while acting as a FISA judge, or that a FISA judge would be any less neutral than a magistrate considering a Title III wiretap, or an application for a search warrant.”).
2. *U.S. v. Megahey*, 553 F.Supp. 1180, 1196-1197 (D.C.N.Y. 1 Dec 1982) (“In addition, defendants contend that the structure of FISC robs the judges who sit on it of their judicial independence, making FISC a ‘rubber stamp.’ In the case of each application, the FISC judge is statutorily obliged to ensure that each statutory prerequisite is met by the application before he may enter a surveillance order. The FISC judge who is faced with a surveillance application is not faced with an abstract issue of law or called upon to issue an advisory opinion, but is, instead, called upon to ensure that the individuals who are targeted do not have their privacy interests invaded, except in compliance with the detailed requirements of the statute.”), *aff'd sub nom. U.S. v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984).
3. *In the Matter of Kevork*, 634 F.Supp. 1002 (C.D.Cal. 5 Aug 1985) (“In addition, the defendants argue that the structure of the FISA court denies its judges their judicial independence, making the Court a rubber stamp. These arguments were raised and rejected in *Falvey*, supra, 540 F.Supp. at 1313 n. 16, and *Megahey*, supra, 553 F.Supp. at 1197 and, for

⁵¹ Benjamin Wittes, “Inside America’s Most Secretive Court,” *Legal Times*, pp. 22, 24 (19 Feb 1996); Daniel J. Malooly, “Physical Searches Under FISA: A Constitutional Analysis,” 35 *AMERICAN CRIMINAL LAW REVIEW* 411, 416 (Winter 1998) (citing Jim McGee and Brian Duffy, *MAIN JUSTICE* at 318 (1996)).

⁵² *U.S. v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987) (“The court's infrequent denial of applications is equally consistent with a practice of careful compliance with the statutory requirements on the part of the government.” [citations to two Congressional reports omitted]). 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 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 793, 815 (Jan 1989) (“Proponents of FISA argue that the lack of a denial demonstrates the careful consideration and judgement exercised by the executive branch”).

the reasons there set forth, I also reject these contentions.”), *aff’d*, 788 F.2d 566 (9th Cir. 1986).

4. *U.S. v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987) (“Appellant argues that the prior judicial scrutiny afforded by FISA is insufficient to satisfy the warrant requirement of the Fourth Amendment because the FISA court is not a detached and neutral body, but functions instead as a compliant arm of the government. Appellant cites a statistical study showing that the FISA court rarely if ever denies the government's applications. See Schwartz, Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs, 12 RUTGERS L.J. 405, 445 n. 235A, 446 n. 239 (1981). The court's infrequent denial of applications is equally consistent with a practice of careful compliance with the statutory requirements on the part of the government. [citation to two Congressional reports omitted] The argument by appellant on this aspect of the case is not persuasive for the overriding consideration is that issuance of the warrant is by a detached judicial officer. We conclude that appellant has failed to show that the FISA court provides anything other than neutral and responsible oversight of the government's activities in foreign intelligence surveillance.”).

In the first three cases (*Falvey, Megahey, Kevork*), the phrase “rubber stamp” was used by the defense lawyers to indicate a lack of impartiality, but apparently without presenting any evidence that the FISA court judges were then approving *every* application for surveillance. In *Cavanagh* there was some evidence in the law review article, but the U.S. Court of Appeals rejected that evidence. Actually, the court in *Cavanagh* mischaracterized the evidence as “FISA court rarely if ever denies the government's applications”, when the FISA court’s reports show *zero* denials and *zero* modifications of the government’s requests in several thousand applications.

A 1996 article about the FISA court was critical of the lack of oversight by FISA judges:

“The FISA court is ripe for abuse,” declares Jonathan Turley, a professor at George Washington University Law School who observed the court as an NSA staffer in the mid-1980s. “There is little question that these judges exercise virtually no judicial review.” Benjamin Wittes, “Inside America’s Most Secretive Court,” *Legal Times*, p. 1, (19 Feb 1996).

This legal newspaper article later quotes Prof. Turley as saying:

“If the FISA court ever turned down one of your warrants, it would be like a notary refusing to sign off on a lease agreement.”

Ibid., at p. 24.

Sunlight is Best Disinfectant

There seems to be a natural human tendency to gain an advantage in competition by using secrecy. However, history shows that secrecy, when combined with power or authority, conceals abuses. In many contexts, secrecy weakens society, by not only corrupting society, but also making it more difficult to fight that corruption. The design of the Bill of Rights, with the First Amendment protection for freedom of the press and freedom of speech, is a fundamental legal expression that disclosure and discussion is more valuable than secrecy. In his book, Louis

Brandeis, who was later a justice of the U.S. Supreme Court, wrote his famous words about sunlight being the best disinfectant:

- Louis D. Brandeis, *OTHER PEOPLE'S MONEY* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants;”).

There is a long string of judicial opinions in the USA that assert the value of open disclosure, instead of secrecy:

- *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (“Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. [two citations omitted]”) (Brennan, J., concurring).
- *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (“Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”).
- *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (hearing should be open to public).
- *U.S. v. Canady*, 126 F.3d 352, 362-363 (2nd Cir. 1997) (trial court mailed verdict instead of announcing it in open court, held to violate defendant’s constitutional rights, explained why nonpublic trials were unacceptable), *cert. den.*, 522 U.S. 1134 (1998).
- *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 732 (Ky. 2002) (“Access provides the means through which the citizenry monitor the courts. And monitoring provides judges with critical views of their work. It casts the disinfectant of sunshine brightly on the courts, and thereby acts as a check on arbitrary judicial behavior and diminishes the possibilities for injustice, incompetence, perjury, and fraud.” [citations omitted]).

Wisdom from U.S. Supreme Court

U.S. v. Robel

During times of war, national emergencies, hysteria about alleged subversives, and now: terrorism, politicians often allow acts by government that violate civil liberties, allegedly to protect the USA from threats. Back in the year 1967, Chief Justice Warren, writing the majority opinion for a U.S. Supreme Court case, declared:

Yet, this concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties — the freedom of association — which makes the defense of the Nation worthwhile.

U.S. v. Robel, 389 U.S. 258, 264 (1967).

Quoted with approval in:

- *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (U.S. 2004);
- *Greer v. Spock*, 424 U.S. 828, 853, n. 4 (U.S. 1976);
- *Zweibon v. Mitchell*, 516 F.2d 594, 604, n. 5 (C.A.D.C. 1975) (plurality), *cert. den.*, 425 U.S. 944 (1976);
- *Kiiskila v. Nichols*, 433 F.2d 745, 750 (7th Cir. 1970);
- *American Civil Liberties Union v. National Sec. American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 782 (E.D.Mich. 2006), *order vacated*, 493 F.3d 644 (6th Cir. 2007);
- *U.S. v. Al-Arian*, 329 F.Supp.2d 1294, 1297 (M.D.Fla. 2004);
- *U.S. v. Bin Laden*, 126 F.Supp.2d 264, 273 (S.D.N.Y. 2000).

Milligan

More than 140 years ago, the U.S. Supreme Court declared that the protections of the U.S. Constitution were available at *all* times, both “in war and in peace”:

The Constitution of the United States is law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Ex parte Milligan, 71 U.S. 2, 120-121 (U.S. 1866).

The first sentence has been quoted with approval in many subsequent U.S. Supreme Court decisions:

- *Com. of Massachusetts v. Laird*, 400 U.S. 886, 893, n. 2 (U.S. 1970) (Douglas, J., dissenting from decision to deny leave to file a bill of complaint);
- *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (U.S. 1963) (majority opinion);

- *Reid v. Covert*, 354 U.S. 1, 35, n. 62 (U.S. 1957) (majority opinion);
- *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (U.S. 1946) (Murphy, J., concurring);
- *Nebbia v. People of New York*, 291 U.S. 502, 545 (U.S. 1934) (McReynolds, separately);
- *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 450 (U.S. 1934) (Sutherland, J., dissenting);
- *Block v. Hirsh*, 256 U.S. 135, 165-166 (U.S. 1921) (McKenna, J., dissenting);
- *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 307 (U.S. 1920) (McReynolds, J., dissenting);
- *Wilson v. New*, 243 U.S. 332, 371 (U.S. 1917) (Day, J., dissenting).

Remarkably, this sentence has been quoted only three times by the U.S. Courts of Appeals:

- *Olvera v. U.S.*, 223 F.2d 880, n. 5 (5thCir 1955);
- *Ward v. U.S.*, 96 F.2d 189 (5thCir. 1938);
- *Casserly v. Wheeler*, 282 F. 389, (9thCir. 1922).

It is true that most of the citations by the U.S. Supreme Court to this sentence in *Milligan* have been in dissenting opinions. However, I argue that, if the majority of justices had recognized the wisdom in *Milligan*, then some of the governmental overreaction during wars and national emergencies could have been avoided. Repeatedly the government overreacts. Years later, historians condemn the overreaction. In my opinion, the judiciary — with its lifetime appointments — must oppose overreaction by the political branches of government.

Hasty Passage of PATRIOT Act

The FISA statute was amended many times after the terrorist attacks of 11 Sep 2001, to make it easier for the government to conduct surveillance with the hope of preventing future terrorist attacks. The first post-11 Sep 2001 amendment of FISA was contained in the so-called USA PATRIOT Act.⁵³ In this Act, the executive branch proposed a long⁵⁴ series of amendments to statute and Congress passed the requested amendments quickly,⁵⁵ with little deliberation. Unlike a typical statute, neither the House of Representatives nor the Senate issued a report on the

⁵³ The name, “USA PATRIOT Act”, is actually an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism”. As I said above in this essay, if Representatives and Senators gave as much care to protection of civil liberties as they do to creating spiffy names for objectionable statutes, we would have a better nation.

⁵⁴ The official version in STATUTES-AT-LARGE has a length of 131 pages. 115 Stat. 272-402.

⁵⁵ H.R. 2975 was introduced on 2 Oct 2001 and passed by the House on 12 Oct 2001. S. 1510 was introduced on 4 Oct 2001 and passed the Senate on 11 Oct 2001 by a vote of 96 to 1.

PATRIOT Act.⁵⁶ Most of the legislative history for the PATRIOT Act is in speeches on the floor, as recorded in the CONGRESSIONAL RECORD.

Above, at page 17, I remarked on the change in the PATRIOT Act to the FISA statute from “the purpose” to “a significant purpose”. In my opinion, this change made the FISA statute’s surveillance of U.S. citizens in the USA *unconstitutional*, because such surveillance is no longer conducted for the “primary purpose” of acquiring foreign intelligence information, as required by numerous opinions of the U.S. Courts of Appeals.

To shorten this essay, I have posted a history of the PATRIOT Act at <http://www.rbs0.com/patriot.pdf>. That essay describes *why* Congress would hastily pass a poorly drafted and *unconstitutional* statute. That essay also quotes from newspaper articles and speeches in September/October 2001, to reflect the mood at that time.

Protect America Act of 2007

Congress did *not* learn from its mistakes in hastily passing the PATRIOT Act. In August 2007, Congress hastily passed the Protect America Act of 2007, which history is described in my essay at <http://www.rbs0.com/PAA.pdf>.

My Criticism of FISA

The hasty passage of the amendments to FISA — both in the PATRIOT Act in October 2001 and in the Protect America Act of 2007 — were mistakes. There should have been a clear public explanation of precisely what freedom U.S. citizens lost in these amendments to FISA. Rushing to amend FISA contributes to the cynical public perception that President Bush was sacrificing civil liberties in an attempt to prevent terrorism. Having the executive branch dictate amendments to statutes and expecting the legislative branch to pass those amendments in a matter of days is *not* consistent with either democracy or the checks-and-balances between the executive and legislative branches of government. To be clear, I am criticizing the hasty passage by Congress, *not* the substance of the amendments. We don’t know all that is wrong with the substance of the amendments because of the secret court, lack of congressional hearings, and lack of public discussion.

⁵⁶ See, e.g., *In re Sealed Case*, 310 F.3d 717, 734 (For.Intel.Surv.Rev. 2002) (“... the ACLU relies on a September 10, 2002 hearing of the Judiciary Committee (the day after the government’s oral presentation to this court) at which certain senators made statements — somewhat at odds with their floor statements prior to the passage of the Patriot Act — as to what they had intended the year before.”); *U.S. v. Talebnejad*, 342 F.Supp.2d 346, 349 (D.Md. 2004) (“Legislative history behind the amendment is scant, ...”); *In re Search Warrant*, 362 F.Supp.2d 1298, 1304 (M.D.Fla. 2003) (“What little legislative history exists behind the quickly-enacted USA PATRIOT Act does not suggest ...”).

After spending more than forty hours reading the FISA statute, court cases about FISA, and some law review articles about FISA, I am increasingly impressed with the complexity of this subject. The FISA statute — like much writing by lawyers — is prolix, which serves as a barrier to understanding the statute. But after carefully considering the FISA statute, most of the substantive content in 1978 (with the exception of the secret court and consultations with the Chief Justice) makes sense to me. One of the best features of the FISA statute is that it includes criteria for acceptable conditions for surveillance, but the current criteria need to be rewritten to make them difficult to misunderstand.

A law review article by David Kris, a former U.S. Department of Justice Official, gives some good reasons for permitting the sharing information between foreign intelligence and law enforcement agents.⁵⁷ One can argue that electronic surveillance is a greater invasion of privacy of U.S. persons when there is a criminal prosecution, since the formerly secret foreign intelligence information will be made public at a trial. On the other hand, one can argue that a person forfeits his privacy when he plans or engages in violent crimes (e.g., terrorism, sabotage) or engages in espionage.

However, I still believe that collection of foreign intelligence information should be at least the “primary purpose”⁵⁸ of the use of FISA. If collecting foreign intelligence information is only “a purpose” or “a substantial purpose”, then FISA becomes a way to circumvent the rigorous requirements for legal surveillance in U.S. criminal law, with erosion of civil liberties for U.S. persons.

I am concerned by the requirements of 50 U.S.C. § 1803, that the Chief Justice of the U.S. Supreme Court is routinely working with two members of the executive branch (i.e., the Attorney General and the Director of National Intelligence) to coordinate and approve wiretaps — I think such a role for the Chief Justice erodes, if not destroys, the independence of the Supreme Court. The U.S. Government is a frequent litigant before the Supreme Court and the Attorney General (and his deputy, the Solicitor General) represents the U.S. Government at the Supreme Court. To have adversarial parties working together on matters of foreign surveillance at least erodes the independence of the judiciary from the executive branch, and weakens the checks and balances in our system of government. Because of the conflict of interest of the Chief Justice, the Chief Justice should recuse himself when any FISA matter comes before the U.S. Supreme Court for review.

⁵⁷ David S. Kris, “The Rise and Fall of the FISA Wall,” 17 *STANFORD LAW AND POLICY REVIEW* 487, 518-528 (2006).

⁵⁸ See court cases, beginning on page 15 above.

Judicial oversight, such as *ex parte* approval of surveillance orders, is inherently weak, because the judge can not verify the so-called facts contained in the government's application. Furthermore, beginning at page 40 above, it was shown that the FISA court approved nearly every application that the government made during the years 1979-2001, making the FISA court a mere "rubber stamp" that was ineffective to protect civil liberties. In my opinion, the best way to deter government abuses in surveillance of U.S. persons is to have criminal prosecution of government employees who violate statutory requirements for foreign intelligence, as well as civil prosecution by victims of illegal surveillance. Since the Department of Justice is apparently reluctant to prosecute its own personnel,⁵⁹ the FISA statute needs to create an independent prosecutor. Furthermore, the FISA statute needs to have some kind of automatic expiration of secrecy for surveillance of U.S. persons inside the USA (e.g., post at a website the names of U.S. persons whose communications were intercepted and not immediately destroyed ten or more years ago), so that those persons can know of past surveillance, file a FOIA request, and then perhaps file civil litigation against the government for any violation of their civil rights.

An early law review article on FISA suggested that the judges on the FISA court choose a random sample of approved surveillance orders and investigate the government's compliance with the minimization.⁶⁰

my criticism of secret court

Most of all, I am offended by the notion of a court that operates in secrecy. But there is a legitimate need for secrecy in matters of foreign intelligence by the U.S. government. It is easy to criticize any secret court as anathema — repugnant to justice, freedom, openness, and accountability. But it is more difficult to suggest something practical that is better than the current secret FISA courts. I can think of three possibilities.

One possibility is for the supervision of foreign intelligence to be done solely by members of the executive branch of the government, *not* by judges borrowed from the judicial branch and installed in a secret court. That was the way foreign intelligence was operated before FISA appeared in 1978. We know that having foreign intelligence supervised and conducted solely by the executive branch invites abuses, as we learned in the 1970s. I suggest above that the abuses could be controlled by criminal and civil prosecutions of government employees.

⁵⁹ See remarks of the FISA court, quoted above, at page 39.

⁶⁰ Helene E. Schwartz, "Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs," 12 RUTGERS LAW JOURNAL 405, 447-452 (Spring 1981).

A second possibility is to abolish the secret FISA court. In its place, we could use regular judges from the U.S. District Court in the District of Columbia, who have a top-secret clearance and who sit in a secure courtroom. These judges would do an in camera, ex parte review of foreign intelligence wiretap applications, as envisioned in FISA, but without creating a secret court. This proposed change is largely symbolic, since the selection and function of the judges in this proposal is similar to 50 U.S.C. § 1803. However, it is an important symbolism for idealists. I greatly prefer (1) a regular court that sometimes holds secret sessions to (2) a secret court.

Regular courts have, for many years, held sessions that are closed to the public (e.g., to consider search warrants, in camera review of trade secrets, etc.). There is nothing wrong with nonpublic proceedings when the subject matter requires it. Actually, the approval of surveillance in FISA is legally akin to approval of search warrants: both are done in nonpublic, ex parte proceedings. The concept of an *ex parte* application for a wiretap is *not* remarkable, as that is the only practical way to get a search warrant or wiretap authorization.

A third possibility is to have the FISA court issue redacted opinions that are published in the FEDERAL SUPPLEMENT reporter and posted on the Internet.⁶¹ On 8 Aug 2007, the ACLU filed a motion with the FISA court seeking public release of redacted court opinions.

I suggest abolishing the automatic appeal in § 1803(a) and (b), because it is too deferential to the executive branch, and because it requires the creation of a written secret opinion by a judge. If the government wishes to appeal a denial of a surveillance order, I suggest using a panel of three judges from the U.S. Court of Appeals for the District of Columbia, who have a top-secret clearance and who sit in a secure courtroom. Review should be de novo, with the judge of the court below making oral arguments against the government's application, so that there is an adversarial proceeding. I see no need for review of denial of surveillance orders by the U.S. Supreme Court, but if there is an appeal to the Supreme Court then it should be open and *unclassified* (which means the executive branch will rarely use it).

I would welcome the Supreme Court hearing civil rights cases involving surveillance for any reason, to give both the executive and legislative branches clear guidance about constitutional requirements.

⁶¹ Helene E. Schwartz, "Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs," 12 RUTGERS LAW JOURNAL 405, 453-454 (Spring 1981) (Calling for "properly redacted reports" from the court.).

Conclusion

It is said that the price of freedom is eternal vigilance. That slogan may explain the urge to wiretap hostile foreigners and/or terrorists. In my opinion, that slogan also describes the need of U.S. citizens to constantly scrutinize their government and to protest encroachments on the freedoms of U.S. citizens.

It is *not* surprising that there are abuses in secret surveillance programs. But I am dismayed that there is so little public protest about FISA during the almost thirty-year history of this secret court.⁶² In my opinion, having a secret court supervise surveillance was a bad idea in 1978 and is no better now.

Part of the problem is that criminal law (e.g., see page 23 above) reacts to a past crime, while the government now wants to prevent future terrorist attacks. It is not clear to me that constitutional law developed for investigating and prosecuting past crimes is appropriate for prevention of future crimes. Society needs to seriously consider how much privacy should be relinquished for a *possible* prevention of some future terrorist attacks.

Because the threat of attacks by Muslim terrorists is likely to persist for tens of years, we should *not* tolerate so-called “temporary” restrictions of civil liberties, to make it easier to prevent terrorist attacks.

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⁶² There are dozens of law review articles that contain scholarly reasons why a few parts of the 1978 FISA, and especially the post-11 Sep 2001 amendments to FISA, are objectionable. However, it seems that only authors of other law review articles — and an occasional trial lawyer who is desperately seeking support for some argument — read these articles. I hope my citations to law review articles, and my bibliography below, encourage students to read these articles.

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Advocacy Websites

The following organizations support litigation to protect privacy rights of U.S. citizens against warrantless surveillance:

American Civil Liberties Organization (ACLU) <http://www.aclu.org/safefree/spying/index.html>

Electronic Frontier Foundation (EFF) <http://www.eff.org/Privacy/Surveillance/>

Electronic Privacy Information Center <http://www.epic.org/privacy/terrorism/fisa/>

Center for Democracy and Technology <http://www.cdt.org/security/>

See also the links section at the end of my companion essay at <http://www.rbs0.com/TSP.pdf>

This document is at **www.rbs0.com/FISA.pdf**

My most recent search for court cases on this topic was in August 2007.

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go to my December 2004 essay, *Legal Aspects of Searches of Airline Passengers in the USA*, at <http://www.rbs2.com/travel.pdf> , which argues that searches violate the Fourth Amendment.

return to my homepage at <http://www.rbs0.com/>