Winning the Battle While Losing the War: Ramifications of the Foreign Intelligence Surveillance Court of Review's First Decision

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It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.[1]

Felix Frankfurter, Associate Justice, U. S. Supreme Court

I. INTRODUCTION

Terrorism, a reality of life in many countries, is on the rise in the United States and abroad. One effective tool in the fight against terrorism is the little known, but increasingly publicized, Foreign Intelligence Surveillance Act ("FISA").[2] The secret warrants authorized by this Act are an important source of foreign intelligence information, which pursuant to statute sometimes becomes evidence for use by law enforcement personnel.[3] For example, FISA warrants produced information leading to the capture in 1992 of KGB mole Aldrich H. Ames;[4] information on Aum Shinrikyo, the Japanese religious cult responsible for attacking the Tokyo subway system with sarin gas in 1995; and critical evidence in the 1996 World Trade

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1. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).
2. 50 U.S.C. §§ 1801–1862 (2000).
3. *Id.* § 1806(c)–(d).
4. Brian Duffy, *The Cold War's Last Spy: The Bizarre and Untold Story of How the FBI Caught KGB Mole Aldrich Ames*, U.S. NEWS & WORLD REPORT, Mar. 6, 1995, 1995 WL 3113424.

Center bombing.[5] While the statute is argued by some to be an affront to personal liberties, it recognizes the important need in certain, specified situations, for surreptitious surveillance. However, recent historic decisions by the statutorily created FISA courts may jeopardize both the future of the Act and an effective and necessary weapon in the arsenal against terror.

The cases that are the subject of this Note address coordination between law enforcement and foreign intelligence officials, a practice critical to the war on terrorism and the pursuit of espionage.

> What is at stake is nothing less than our ability to protect this country from foreign spies and terrorists. When we identify a spy or a terrorist, we have to pursue a coordinated, integrated, coherent response. We need all of our best people, intelligence and law enforcement alike, working together to neutralize the threat. In some cases, the best protection is prosecution—like the recent prosecution of Robert Hanssen for espionage. In other cases, prosecution is a bad idea, and another method—such as recruitment—is called for. Sometimes you need to use both methods. But we can't make a rational decision until everyone is allowed to sit down together and brainstorm about what to do. That is what we are seeking.[6]

Such coordination has historically been forbidden under FISA.[7] Prohibiting that interaction is one way in which the statute seeks to balance individual liberties while providing the government the ability to conduct surreptitious surveillances, an invaluable tool in terrorism and espionage investigations.

Following the September 11, 2001, terrorist attacks and the subsequent passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act of 2001 (Patriot Act),[8] U.S. Attorney General John Ashcroft established procedures allowing for greater sharing and coordination between foreign intelligence and law enforcement officials regarding FISA surveillance. This action resulted in the

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5. Vernon Loeb, *Anti-Terrorism Powers Grow; 'Roving' Wiretaps, Secret Court Orders Used to Hunt Suspects*, THE WASHINGTON POST, Jan. 29, 1999, at A23, 1999 WL 2196673.

6. *The USA Patriot Act in Practice: Shedding Light on the FISA Process: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of David S. Kris, Assoc. Deputy Attorney General) (transcript *available at* http://judiciary.senate.gov/testimony.cfm?id=398&wit_id).

7. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1863 (2000).

8. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272. The Act was passed to "deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." *Id.*

Foreign Intelligence Surveillance Act Court of Review (Review Court) convening for the first time in November 2002. This court, first provided for by FISA twenty-five years ago,[9] heard a Justice Department appeal of a ruling by FISA's lower court (Foreign Intelligence Surveillance Court, or FISC) prohibiting the increased coordination between foreign intelligence and law enforcement officials desired by the Attorney General. In its first decision, the Review Court exceeded the scope of review necessary to dispose of the case. The court's overly broad adjudication has opened the door to attacks against FISA and may undermine the statute as an effective tool in the war on terrorism and the protection of national security.

A. The Foreign Intelligence Surveillance Act

Since 1978, U.S. intelligence agencies have utilized FISA as a tool to collect information crucial to national security via clandestine surveillances and searches of spies and terrorists.[10] The FISC is a specialized tribunal established under FISA to review warrant applications for surreptitious electronic surveillance through which the government seeks to obtain foreign intelligence information.[11] FISA warrants are not subject to the traditional probable cause requirement for criminal investigations.[12] Instead, in recognition of the severity of the foreign threat and the difficulty in obtaining foreign intelligence information, a FISA warrant can be obtained where the target of the electronic surveillance is an agent of a foreign power, and the targeted facility is, or is about to be, used by a foreign agent.[13] While the FISC has presided over thousands of such warrant applications, the court never in its history issued a published opinion regarding its highly secretive proceedings until May 2002.[14]

Congress passed FISA to resolve the question of the applicability of the Fourth Amendment warrant requirement to electronic surveillance for foreign intelligence purposes and to provide certainty

9. 50 U.S.C. § 1803(b) (2000).

10. 50 U.S.C. §§ 1801–1862 (1978). FISA, as enacted in 1978, provided for applications and orders pertaining to electronic surveillance. *Id.* §§ 1801–1811. In 1994, the statute was amended to permit applications and orders authorizing physical searches. Pub. L. No. 103-359, 108 Stat. 3423 (Oct. 14, 1994) (codified as amended at 50 U.S.C. §§ 1821–1829). The procedures governing FISA physical searches and electronic surveillance are similar.

11. 50 U.S.C. §§ 1802, 1803(a) (2000).

12. *Id.* § 1805(a)(3)(A)–(B).

13. *Id.* § 1805(a)(3).

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

as to the lawfulness of such surveillance.[15] FISA provides for court orders and other procedural safeguards that, in Congress' judgment, "are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the [F]ourth [A]mendment."[16] The statute was an attempt to devise 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."[17]

Specifically, FISA establishes a statutory procedure whereby a federal officer, if authorized by the President of the United States acting through the Attorney General, may obtain a judicial warrant from the specially created FISC "approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information."[18] The issuance of a warrant under FISA is not governed by traditional probable cause standards; a federal officer acting under the authority of the President need only demonstrate probable cause that the target is a foreign power or a foreign agent.[19] In the case of U.S. citizens and resident aliens, the President, or officials designated by the President, must demonstrate that the government is not clearly erroneous in believing that the information sought is the desired foreign intelligence information, and that the information cannot be reasonably obtained by normal methods.[20]

The statute empowers the Chief Justice of the Supreme Court to designate eleven judges to hear the requests for foreign intelligence warrants and develop expertise in this area of law.[21] The FISA statute also provides for a three-member court with jurisdiction to review the denial of any FISA warrant application.[22] This court of review never convened in FISA's entire history until fall 2002, when the government, pursuant to the FISA statute, moved to have the FISA lower court's May 2002 decision reviewed.

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15. H.R. REP. NO. 1283, pt. I, at 25 (1978); United States v. Duggan, 743 F.2d 59, 73 (2d Cir. 1984).

16. *Duggan*, 743 F.2d at 73 (quoting S. REP. NO. 701, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3982).

17. *Id.* at 73 (quoting S. REP. NO. 604, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916).

18. 50 U.S.C. § 1802(b) (2000).

19. *Id.* § 1804(a)(4)(A).

20. *Id.* §§ 1804(a)(7)(E), 1805(a)(5).

21. *Id.* § 1803(a). This provision was amended in 2001, raising the number of judges from seven to eleven. 50 U.S.C. § 1803(a) (2003).

22. 50 U.S.C. § 1803(b).

Moreover, for more than twenty years, U.S. Circuit Courts of Appeals, when hearing cases reliant on evidence obtained via FISA applications, have repeatedly and unanimously upheld this highly secretive, non-adversarial warrant process.[23] In reaching their decisions, the circuit courts have ruled that FISA provides for a justifiable imposition on private rights where the "primary purpose" of the warrants has been to gather foreign intelligence information in the interest of national security, and not to further a criminal prosecution.[24]

B. The Events Leading to the FISA Review Court's First Opinion

In response to the September 11, 2001, terrorist attack on the World Trade Center, the worst foreign attack against the United States in history, Congress passed the Patriot Act. One provision of the Patriot Act, which provides broad new powers for law enforcement and intelligence personnel in the fight against terrorism, lowered the standard under which a FISA warrant can issue.[25] Under the amendments, a FISA warrant can be obtained if "a significant" purpose of the electronic surveillance is to gather foreign intelligence.[26] Prior to the amendments, a FISA warrant could only issue if "the purpose" of the surveillance was to gather foreign intelligence.[27]

This seemingly small change in wording has potentially great impact. FISA's relaxed probable cause requirement was previously preserved for situations where the *only* purpose was foreign intelligence gathering. The new wording allows the government to avoid the normal probable cause required to obtain a warrant in a criminal investigation and, instead, seek a warrant under FISA if the government is able to show a concurrent foreign intelligence purpose.

Based on the broader powers available under the Patriot Act amendments to FISA, Attorney General Ashcroft promulgated new intelligence sharing procedures, incorporating this lower standard, increasing the sharing of foreign intelligence information with criminal prosecutors, and expanding prosecutors' roles in the FISA process.[28]

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23. *See, e.g.*, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991).

24. *See Duggan*, 743 F.2d at 77; *Badia*, 827 F.2d at 1463–64; *Johnson*, 952 F.2d at 572–73.

25. 50 U.S.C. § 1804.

26. *Id.* § 1804(a)(7)(B).

27. Pub. L. 107-56, § 218.

28. Memorandum of Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI from the Attorney General, to the FBI Director, Assistant Attorney General, Criminal Division, Counsel for Intelligence Policy, and United States Attorneys (Mar. 6, 2002) (filed Mar. 7, 2002), 2002 WL 1949259 (Foreign Intel. Surv. Ct.) [hereinafter Memorandum of Intelligence Sharing Procedures].

The Attorney General considered the ability of intelligence and law enforcement officials to share a "full and free exchange of information and ideas" critical in light of the "overriding need to protect the national security from foreign threats."[29] In addition to procedures directed at total information sharing, the March 2002 procedures (2002 procedures) also allow prosecutors to advise the FBI regarding a foreign intelligence investigation, including advice on the use of FISA.[30] This type of consultation is justified as "necessary to the ability of the United States to coordinate efforts to investigate and protect against foreign threats to national security."[31] Such sharing was previously limited under FISA, and prosecutors were barred from directing and controlling FISA applications.[32] These new guidelines formed the dispute resulting in the FISC's first-ever published opinion in May 2002.[33]

Prior to the Attorney General's dissemination of the new guidelines, the FISC adopted the Attorney General's 1995 intelligence sharing procedures (1995 procedures) as "minimization" and "wall" procedures in all cases before the FISC.[34] Minimization procedures are designed to limit the gathering, retention, and dissemination of non-public information obtained through FISA surveillance.[35] Wall procedures focus on preserving separation between FISA surveillances and criminal investigations.[36] The FISC's historic opinion addressed

29. Brief for the United States at 15, *In re* Sealed Case, 310 F. 3d 717 (Foreign Intel. Surv. Ct. 2002) (No. 02-001).

30. *Id.*

31. *Id.* at 16.

32. 50 U.S.C. § 1801(h) (2000); *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, Amended Order, 1995 WL 1946628, at *2 (Foreign Intel. Surv. Ct. May 17, 1995).

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

34. *Id.* at 615, 620.

35. A FISC judge may approve electronic surveillance if he finds that proposed minimization procedures meet the requirements of § 1801(h) of the Act. 50 U.S.C. § 1805(a)(4) (2000). The statute defines "minimization procedures" as:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the Unites States to obtain, produce, and disseminate foreign intelligence information; . . . .

Id. § 1801(h)(1).

36. The FISC explained "wall" procedures as follows:

> In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used sub rosa for criminal investigations, the Court routinely approved the use of information screening "walls" proposed by the government in its applications. Under the normal "wall" procedures, where there were separate

the Justice Department's motion before the FISC to vacate the FISC's adoption of the 1995 procedures.[37] Further, the Justice Department sought approval of the new intelligence sharing procedures created after Congress' amendment of the statute in the Patriot Act.[38] The government claimed expanded power to use FISA electronic surveillance in criminal investigations due to amendments of FISA contained in the Patriot Act.[39] The government's drive to implement the proposed procedures evinced its desire for increased intelligence sharing and more consultations between federal law enforcement and intelligence officers conducting electronic surveillance following the post-September 11th Patriot Act amendments to FISA.[40]

Technically, the FISC granted the government's motion. However, the court ordered the proposed 2002 procedures modified in one significant way,[41] amounting to a denial for purposes of establishing an issue for review. The government's FISA warrant application proposed that electronic surveillance of a target be authorized on certain terms, and the FISC's May order rejected the most critical of those terms. The FISC additionally imposed restrictions on the government's investigation:

> [L]aw enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances. Additionally, the FBI and the Criminal Division [of the

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intelligence and criminal investigations, or a single counter-espionage investigation with overlapping intelligence and criminal interests, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney-client intercepts occurred, Justice Department lawyers in OIPR acted as the "wall." In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, this Court became the "wall" so that FISA information could not be disseminated to criminal prosecutors without the Court's approval.

In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 620.

37. *Id.* at 611–27.

38. *Id.* at 613.

39. *Id.* at 622–24.

40. *Id.* at 623; *see also* Brief for the United States at 3, *In re* Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

41. *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 625.

> Department of Justice] shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution, and that advice intended to preserve the option of a criminal prosecution does not inadvertently result in the Criminal Division's directing or controlling the investigation using FISA searches and surveillances toward law enforcement objectives.[42]

In its decision, the court also provided for a "chaperone" requirement consisting of joint meetings to ensure that the Justice Department followed the procedures.[43] Despite the government's motivation to protect the nation from international terrorism by allowing for greater sharing between law enforcement and intelligence officers, the FISC found the proposed policy, which "allows FISA to be used primarily for a *law enforcement purpose*," inconsistent with FISA's mission to "obtain, produce and disseminate *foreign intelligence information* as mandated in [§§] 1801(h) and 1821(4)."[44] The FISC, therefore, ordered the modifications.[45] The principal modification precluded Justice Department prosecutors from directing and controlling the FISA process, while permitting substantial coordination between intelligence and law enforcement officials, reinstating the bright line provided by the 1995 procedures.[46]

Dissatisfied, the Justice Department filed an historic appeal to the FISA Review Court,[47] and this time the Justice Department's guidelines and interpretation of the statute were upheld.[48] The FISA Review Court concluded that FISA, as amended by the Patriot Act,

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42. *Id.* at 625.

43. *Id.* at 626.

44. *Id.* at 623 (first emphasis added; portion of original emphasis omitted). The statutes referenced provide for minimization procedures with respect to electronic surveillance and physical searches. *See* 50 U.S.C. §§ 1801(h), 1821(4) (2000). The FISC clarifies that:

> [T]he Court has long approved, under controlled circumstances, the sharing of FISA information with criminal prosecutors, as well as consultations between intelligence and criminal investigations where FISA surveillances and searches are being conducted. However, the proposed 2002 minimization procedures eliminate the bright line in the 1995 procedures prohibiting direction and control by prosecutors on which the Court has relied to moderate the broad acquisition retention, and dissemination of FISA information in overlapping intelligence and criminal investigations.

In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 621–22.

45. *Id.* at 625.

46. *Id.* at 625–27.

47. FISA provided for a Court of Review when the act was originally passed in 1978. 50 U.S.C. § 1803(b) (2000). However, this tribunal had never convened prior to the appeal that is the subject of this Note.

48. *In re* Sealed Case, 310 F.3d 717, 719–20 (Foreign Intel. Surv. Ct. Rev. 2002).

supports the government's position.[49] The court held that the restrictions imposed by the FISC on intelligence sharing and direction and control by prosecutors are not required by the FISA statutes.[50] Additionally, the court held that the statute as amended is constitutional.[51] The Review Court further concluded that even *prior* to amendment neither the language of FISA nor its legislative history required such restrictions.[52] The Review Court's broad holding has laid the foundation for a defendant to challenge FISA's limited discovery provisions and the statute's constitutionality as amended.

In its first-ever decision since the passage of FISA, the FISA Review Court could have adequately disposed of the appeal by simply finding that the FISC did not have the power to modify the 2002 procedures submitted by the Justice Department. However, the Review Court was not so restrained.[53] Instead, the court unnecessarily disposed of three additional issues and thereby jeopardized FISA's usefulness as a tool to fight terrorism and protect national security.[54] First, the court examined and disposed of an issue not presented to the FISC: whether the government was restricted under FISA before the passage of the Patriot Act in its use of foreign intelligence information in criminal prosecutions.[55] Second, the Review Court addressed whether the Patriot Act amendments eliminated the "primary purpose" test requirement for approving warrants under FISA.[56] Third, the Review Court analyzed the constitutionality of FISA as amended by the Patriot Act, specifically inquiring whether the Fourth Amendment requires the "primary purpose" test.[57]

The ramifications of the broad Review Court opinion are disturbing. First, in needlessly analyzing the verity of the pre-Patriot Act limitation in FISA restricting the government's use of foreign intelligence information in criminal prosecutions, the Review Court undermines consistent U.S. Circuit Courts of Appeals precedent.[58] Inconsistent with the government interpretation of the amended

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 727.

53. While not the subject of this Note, the author wonders whether the broad scope the FISA Review Court took in its disposition of this case was an intentional attempt to garner attention for the first-ever convening of this court and motivated by the court's desire to establish itself as an authoritative tribunal.

54. The Review Court states that it felt it was error for the FISA lower court to not address these issues, but interestingly, does not say why. *Id.* at 732.

55. *Id.* at 721–22.

56. *Id.* at 722.

57. *Id.*

58. *See id.* at 725–27.

statute, this precedent requires that the "primary purpose" of FISA surveillance not be criminal prosecution.[59] Second, the Review Court's opinion, including its negative analysis of existing precedent, identifies a defendant's argument for access to previously undiscoverable FISA application materials.[60] The potential success of such an argument is exacerbated by the copious publicity this sensitive area of law received following the Justice Department's decision to pursue this appeal on such expansive terms, and the FISA Review Court's historic and overbroad opinion.[61] Finally, the Review Court decision makes plain the grounds on which a defendant can attack the constitutionality of FISA as amended; a question that the Review Court, despite its analysis of the issue, admits has no definitive jurisprudential answer.[62]

Part II of this Note will outline the history preceding the passage of FISA, including a discussion of the cases from which the "primary purpose test" arose. The Note will then explore the language of the FISA statute, and the U.S. Circuit Courts of Appeals' continuing reliance on the "primary purpose" test in the analysis of cases decided following the passage of FISA. Following a discussion of the historic FISC and FISA Review Court opinions in Parts III and IV, including an articulation of the Patriot Act amendments to FISA, Part V of the Note will focus on the ramifications of the Review Court's

59. United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458, 1463–64 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565, 572–73 (1st Cir. 1991); United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988).

60. *See In re* Sealed Case, 310 F.3d 717, 725–27 (Foreign Intel. Surv. Ct. Rev. 2002); 50 U.S.C. § 1806(f) (2000).

61. For example, since the Justice Department appealed the FISC ruling in August 2002, CNN.com has run at least eight stories on the Foreign Intelligence Surveillance Act and the recent FISC. *See* Kelli Arena, *The Foreign Intelligence Surveillance Court*, CNN.COM, Aug. 23, 2003, *at* http://www.cnn.com/2002/LAW/08/23/inv.fisc.explainer/index.html; Kevin Bohn, *ACLU Asks Supreme Court to Hear Appeal of Wiretap Ruling*, CNN.COM, Feb. 19, 2003, *at* http://www.cnn.com/2003/LAW/02/19/wiretap.appeal/index.html; Kevin Drew, *Balancing Life and Liberty*, CNN.COM, Sept. 11, 2002, http://www.cnn.com/2002/LAW/09/10/ar911.civil.liberties/index.html; Terry Frieden, *Appeals Panel Rejects Secret Court's Limits on Terrorist Wiretaps*, CNN.COM, Nov. 19, 2002, http://www.cnn.com/2002/LAW/11/18.spy.court.ruling/index.html; *Justice Appeals Court Ruling Limiting Information Sharing*, CNN.COM, Aug. 23, 2002, *at* http://www.cnn.com/2002/LAW/08/23/intelligence.ruling/index.html; Anita Ramasastry, *Recent Oregon Ruling on Secret Warrants May Set Troublesome Precedent*, CNN.com, Mar. 18, 2003, *at* http://www.cnn.com/2003/LAW/03/18/findlaw.analysis.ramasastry.warrant/index.html; Anita Ramasastry, *Spy Court Creates Potential End Run Around Fourth Amendment*, CNN.com, Nov. 27, 2002, *at* http://www.cnn.com/2002/LAW/11/27/findlaw.analysis.ramasastry.spycourt/index.html; Elaine Shannon, *No Way to Secure a Homeland?*, CNN.com, Aug. 26, 2002, *at* http://www.cnn.com/2002/LAW/ALL POLITICS/08/26/time.homeland/index.html.

62. *In re Sealed Case*, 310 F.3d at 746.

unnecessarily broad disposition of the appeal, and the potential dangers that decision poses for the future of FISA.

II. THE HISTORY OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

This portion of the Note begins with a review of the judicial decision that provided the groundwork for FISA. Section B reviews the origins of the "primary purpose" standard used to review FISA warrant applications. That standard is compared with the actual statutory language of FISA in Section C. Finally, Part II concludes with a review of the "primary purpose" test, which U.S. Circuit Courts of Appeals continue to rely upon notwithstanding the exact language of the statute.

A. The Birth of FISA: A Rejection of Warrantless Electronic Surveillance

In a practice begun by President Franklin D. Roosevelt prior to World War II, U.S. presidents have exercised warrantless electronic surveillance.[63] Based on the President's power as Chief Executive, role as Commander-in-Chief of the Armed Forces, and responsibility for conducting the nation's foreign affairs,[64] the President delegated to the Attorney General the power to approve electronic surveillance. This warrantless electronic surveillance program came under judicial scrutiny in criminal prosecutions in the early 1970's.[65]

The U.S. Supreme Court initially reviewed the government's program of warrantless electronic surveillance directed against *domestic* organizations.[66] In *United States v. United States District Court (Keith)*, the United States charged three defendants with conspiracy to destroy government property in violation of 18 U.S.C. § 371, including charges against one defendant for the dynamite bombing of an office of the Central Intelligence Agency in Michigan.[67] The U.S. Supreme Court struck down the government's program of warrantless electronic surveillance directed against *domestic* organizations, holding that the Fourth Amendment required a judicial

63. *See* Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1382 (1993); Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843, 843–47 (1992).

64. U.S. CONST. art. II, §§ 1–3.

65. *See* United States v. United States District Court (Keith, J.), 407 U.S. 297 (1972) [hereinafter *Keith*].

66. *Id.* at 299.

67. *Id.*

warrant.[68] However, the Court made no judgment with regard to the President's powers to conduct electronic surveillance of *foreign powers and their agents*.[69] Virtually every court that addressed the issue prior to the enactment of FISA concluded that the President had the inherent power to conduct warrantless electronic surveillance for the purpose of collecting foreign intelligence information, and any such surveillance constituted an exception to the warrant requirement of the Fourth Amendment.[70] The Court's justification for the exception included: (1) the concern that the President would be unduly hampered in the performance of his foreign affairs duties; (2) the strong public interest in the efficient operation of the executive's foreign policy, which largely depends on a continuous flow of foreign intelligence information; and (3) the need of the executive to be able to act with dispatch and secrecy in the area of foreign affairs.[71]

The Court in *Keith* explicitly limited the scope of its decision to domestic aspects of national security.[72] The Court stated that the warrant standards for electronic surveillance contained in the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)[73] were not necessarily applicable to the President's powers to meet domestic threats to the national security.[74] The Court recognized that domestic security surveillance might involve different policy and practical considerations from the surveillance of ordinary crime.[75] The Court suggested that different standards for criminal surveillance and

68. *Id.* at 321.

69. *Id.* at 321–22.

70. *See* United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974), *cert. denied sub nom.*, Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426–27 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

71. *Butenko*, 494 F.2d at 605.

72. *Keith*, 407 U.S. at 321.

73. Omnibus Crime Control and Safe Streets Act (Title III), 18 U.S.C. § 2510–2520 (1968). The Act allows prosecutors to apply to state judges for wiretapping orders. The Act requires that persons be protected against unreasonable searches and seizures in conformity with the Fourth Amendment. Warrants can be issued only with probable cause and a delineation of who, what, and where will be searched. *Id.*

74. *Keith*, 407 U.S. at 322.

75. *Id.* The court goes on to state:

> 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.

Id.

domestic security might be compatible with the Fourth Amendment if they were reasonable in light of the government's legitimate need for intelligence information and the protected rights of citizens.[76] In describing the different standards Congress might employ with regard to sensitive domestic security cases, the Court laid the groundwork for FISA by indicating that a request for prior court authorization could be made to any member of a specially designated court, and that the time and reporting requirements need not be as strict as those in Title III.[77]

While refusing to set the precise standards required for domestic security warrants, the Court in *Keith* held that prior judicial approval was required for the type of domestic security surveillance involved in that case and that Congress could proscribe reasonable standards for such an approval.[78] Thus, the Supreme Court's decision in *Keith* provided the framework for FISA. In 1978, after several years of deliberation with the executive branch, Congress enacted the Foreign Intelligence Surveillance Act of 1978[79] modeled on the *Keith* Court's opinion.

B. *The Truong Decision: The Pre-FISA Requirement of "Primary Purpose"*

Prior to Congress' enactment of FISA, the Fourth Circuit Court of Appeals first articulated the "primary purpose" test, which is still relied on by circuit courts when reviewing the propriety of authorized FISA surveillance.[80] In what has become the seminal case on the subject, the court in *United States v. Truong Dinh Hung* defined the scope of the *foreign intelligence* exception to the Fourth Amendment

76. *Id.* at 322–23.

77. *Id.* To get a warrant under Title III, a law enforcement officer must show that (1) law enforcement officials seeking the warrant demonstrate that the target's activity will, or may, result in a specific criminal violation; (2) if the standard is met, the judge retains discretion to reject an application to conduct electronic surveillance even if the judge determines that probable cause exists; (3) a judge may approve surveillance for only 30 days; and (4) unlike the protection of secrecy of surveillance in FISA, the government may not use surveillance evidence against a criminal defendant unless the defendant has been given a copy of both the application for, and the court order authorizing, the surveillance. These standards differ considerably from FISA warrant requirements. 18 U.S.C. § 2518 (2000); *see also* Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1393–96 (1993) (Part 2 compares FISA and Title III).

78. *Keith*, 407 U.S. at 323.

79. 50 U.S.C. §§ 1801–1862 (2000).

80. *See* United States v. Truong Dinh Hung, 629 F.2d 908, 912–13 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982). The surveillance at issue in the *Truong* case pre-dated the enactment of the FISA statute. Thus, the decision relies on the foreign intelligence exception to the Fourth Amendment warrant requirement, not the FISA statute. *Id.* at 914–15 n.4.

warrant requirement.[81] The defendants were convicted of various espionage-related offenses for transmitting classified United States government information to representatives of the government of the Socialist Republic of Vietnam.[82] The defendants appealed, seeking reversal of their convictions in part due to warrantless surveillance and searches conducted against them.[83]

The court in *Truong*, using the analytical approach presented in *Keith*, held that the government was relieved of seeking a warrant under the foreign intelligence exception to the Fourth Amendment only in those situations in which the interests of the executive are paramount.[84] Such situations include: (1) when the object of the search or surveillance is a foreign power, its agent or collaborators; and (2) only when the surveillance is conducted "primarily" for foreign intelligence reasons.[85]

The court in *Truong* specifically rejected the government's assertion that if surveillance is *to any degree* directed at gathering foreign intelligence, the executive is not subject to the warrant requirement of the Fourth Amendment.[86] The "any degree" test was not the proper test, according to the court, because:

> [O]nce surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and . . . individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution."[87]

The court similarly rejected the defendant's argument that in order to protect privacy interests the government should be able to avoid the warrant requirement only when the surveillance is conducted "*solely*" for foreign policy reasons.[88] The court stated that the "solely" test would "fail to give adequate consideration to the needs and responsibilities of the executive in the foreign intelligence area."[89]

Thus, the "primarily" test articulated in *Truong* defined the scope of the foreign intelligence exception to the Fourth Amendment.

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81. *See id.* at 913–16.
82. *Id.* at 911.
83. *Id.*
84. *Id.* at 915.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 916.

The court's reliance on this test reflects the judiciary's view that it adequately balances the protection of personal privacy with the need to safeguard a nation.

C. The Language of the FISA Statute: "The Purpose"

Prior to its amendment by the Patriot Act, FISA stated in part:

> 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 —
>
> . . . .
>
> (7) 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 —
>
> . . . .
>
> (B) that *the purpose* of the surveillance is to obtain foreign intelligence information;[90]

Thus, contrary to the test set out in *Truong*, Congress used "the purpose" language in drafting FISA. On its face, this language appears to correspond to the "solely" test argued for by the defendant in *Truong* and specifically rejected by that court. However, despite the explicit text of the FISA statute, and the fact that *Truong* was a pre-FISA decision, U.S. Circuit Courts of Appeals continued to follow *Truong*'s rationale and apply the "primary purpose" test when deciding challenges to FISA searches.[91] In essence, the circuit courts were applying a "primary purpose" test, where the FISA statute on its face required the higher standard of "the purpose."

D. U.S. Circuit Courts' Continuing Reliance on the "Primary Purpose"

90. 50 U.S.C. § 1804(a)(7)(B) (2000) (emphasis added). In 2001, the Patriot Act amended this provision to read: "(B) that *a significant purpose* of the surveillance is to obtain foreign intelligence information." Pub. L. No. 107-56, 115 Stat. 272, 291 (2001).

91. *See* United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458, 1463–64 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565, 572–73 (1st Cir. 1991).

Test

U.S. Circuit Courts of Appeals continued to rely on the pre-FISA "primary purpose" test articulated by *Truong* in cases challenging FISA searches despite the statutory language, stating "the purpose." This section examines opinions issued from the First, Second, Ninth, and Eleventh Circuits, which illustrate the importance of this requirement to the courts in evaluating the propriety of FISA surveillance.[92]

United States v. Megahey,[93] a case from the Second Circuit consolidated on appeal into *United States v. Duggan*,[94] involved defendants working clandestinely on behalf of the Provisional Irish Republican Army to acquire explosives, weapons, ammunition, and remote-controlled detonation devices in the United States to export to Northern Ireland for use in terrorist activities.[95] The district court acknowledged that even though the FISA statute recognizes arrest and prosecution as one of the possible outcomes of a FISA investigation, surveillance under FISA would nevertheless be appropriate only if foreign intelligence surveillance was the government's primary purpose.[96] In affirming the conviction in *Megahey*, the Second Circuit emphasized that *the purpose* of the surveillance in the case was not directed towards criminal investigation or prosecution, but from the outset and throughout was to secure foreign intelligence information.[97] The court stated that the "requirement that foreign intelligence information be the *primary* objective of the surveillance is plain."[98]

Similarly, in *United States v. Badia*,[99] the Eleventh Circuit Court of Appeals found that the government had fully complied with the requirements under FISA where the surveillance "did not have as its *purpose the primary objective* of investigating a criminal act" but was

92. Both the government and the FISC agree that the electronic surveillance underlying the case on appeal was proper. The FISC found that the government had shown probable cause to believe that the target is an agent of a foreign power and otherwise met the basic requirements of FISA. The author does not discuss the facts underlying the case on appeal as they have been redacted from the opinions in the interest of national security. However, the opinion does state that information contained in the application for surveillance supports the contention that the target, a U.S. Citizen, is aiding, abetting, or conspiring with others in international terrorism. *In re* Sealed Case, 310 F.3d 717, 720 (Foreign Intel. Surv. Ct. Rev. 2002).

93. 553 F. Supp. 1180 (E.D.N.Y. 1982).

94. 743 F.2d 59 (2d Cir. 1984).

95. *Id.* at 65.

96. *Megahey*, 553 F. Supp. at 1189–90.

97. *Duggan*, 743 F.2d. at 79.

98. *Id.* at 77 (emphasis added). However, the court did state that a valid FISA surveillance was not tainted simply because the government could anticipate that the fruits of such surveillance may *later* be used, as allowed by § 1806(b), as evidence in a criminal trial. *Id.*

99. 827 F.2d 1458 (11th Cir. 1987).

used for the valid purpose of gathering foreign intelligence information.[100] The defendant in *Badia* was prosecuted for conspiracy to manufacture firearms without the approval of the Secretary of the Treasury stemming from a federal investigation of the militant anti-Castro organization known as "Omega-7."[101]

Finally, in *United States v. Johnson*,[102] the court interpreted the language of FISA in § 1804(a)(7)(B)[103] to extend one step further.[104] The court stated that while evidence obtained under FISA *subsequently* may be used in criminal prosecutions, the investigation of criminal activity *cannot be the primary purpose* of the surveillance.[105] *Johnson* concerned the prosecution of an American citizen who was engaged in the research and development of explosives including remote-control bombs for export to the Republic of Ireland and use by the Provisional Irish Republican Army.[106] The court's review of the government's FISA applications indicated that the government's *primary purpose* was to obtain foreign intelligence information and not to collect evidence for criminal prosecution of the defendants.[107]

Additionally, a Ninth Circuit opinion, *United States v. Sarkissian*,[108] further supports the proposition that the purpose of surveillance must be to secure foreign intelligence information. *Sarkissian* involved a prosecution stemming from attempts by the FBI to prevent Armenian terrorists from bombing the Honorary Turkish Consulate in Philadelphia.[109] While declining to decide if the proper test was that of "purpose" or "primary purpose," the court in *Sarkissian* stated that the case at issue was "[a]t no point . . . an ordinary criminal investigation" and upheld the surveillance.[110] The court determined that regardless of whether FISA required the "purpose" or the "primary purpose" of the surveillance to be foreign intelligence gathering, either standard had been met in this case.[111] While refusing "to draw too fine a distinction between criminal and intelligence investigations," the court stated that the government, as

100. *Id.* at 1464 (emphasis added).
101. *Id.* at 1460–61.
102. 952 F.2d 565 (1st Cir. 1991).
103. 50 U.S.C. § 1804(a)(7)(B).
104. *Johnson*, 952 F.2d at 572.
105. *Id.* at 572.
106. *Id.* at 569–70.
107. *Id.* at 572.
108. 841 F.2d 959 (9th Cir. 1988).
109. *Id.* at 961.
110. *Id.* at 965.
111. *Id.* at 964.

provided for in § 1806, may later choose to prosecute, and that such action would be consistent with FISA.[112]

As the Ninth Circuit Court of Appeals' reasoning illustrates, *Sarkissian* supports the principle that an ordinary criminal investigation purpose would be insufficient to uphold FISA surveillance.[113] While not distinguishing the "purpose" from the "primary purpose," this case makes clear that if ferreting out criminal activity, rather than gathering intelligence, were the focus, such a goal would not suffice for a warrant under FISA but would instead be subject to Title III's warrant requirements.

What these cases reflect is that existing precedent upholding the issuance of FISA warrants for electronic surveillance in the area of foreign intelligence gathering specifically supports the proposition that gathering evidence for criminal investigations and prosecutions cannot be the primary purpose of such surveillance. However, such information, if resulting from valid FISA surveillance, can be used in subsequent criminal proceedings consistent with FISA. These courts' reliance on the "primary purpose" test despite the fact that the statute uses the language "the purpose" merits two explanations. Either the various circuit court judges deciding these cases were misreading the FISA statute to include the "primary purpose" language or, as seems infinitely more likely, the courts were implying that the "primary purpose" test was the constitutional minimum required for a FISA warrant to issue. These courts are clear: the primary purpose of FISA surveillance cannot be the investigation of criminal activity.[114]

E. Executive Response to the Judicial Interpretation of "Purpose"

It is apparent that the government recognized the importance the judiciary placed on the distinction between foreign intelligence gathering and criminal investigations when determining the purpose of FISA surveillance. The government's awareness of the "primary purpose" standard was evidenced by the Attorney General's adoption of "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" in 1995.[115] These procedures limited contact between the FBI and the Criminal Division in cases in which FISA surveillance or searches were being conducted by the FBI

112. *Id.* at 965.

113. *See id.*

114. United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458, 1463–64 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565, 572–73 (1st Cir. 1991); *Sarkissian*, 841 F.2d at 965 (9th Cir. 1988).

115. 1995 WL 1946627 (Foreign Intel. Surv. Ct. July 19, 1995).

for foreign intelligence (FI) or foreign counterintelligence (FCI) purposes.[116] According to the 1995 procedures, the Criminal Division should not direct or control the FI or FCI investigations toward law enforcement objectives in fact or appearance.[117] While providing for significant sharing and coordination between criminal and FI or FCI investigations, these procedures increasingly became more narrowly interpreted within the Department of Justice. This led to the requirement that the Office of Intelligence and Policy Review (OIPR) act as a "wall" to stop FBI intelligence officials from communicating with the Criminal Division about ongoing FI or FCI investigations.[118]

The Attorney General issued additional, interim procedures in January 2000.[119] In August 2001, the Deputy Attorney General issued a memorandum further clarifying the 1995 procedures and Department of Justice policy governing intelligence sharing, and establishing additional requirements.[120] Finally, in March 2002, the Attorney General issued additional procedures intended to supersede the preceding guidelines.[121] The 2002 procedures reflect the government's position that greater intelligence sharing is necessary for the effective use of FISA, and the procedures are consistent with Patriot Act amendments to the statute. In contrast, the FISC's position is that FISA surveillances and searches require minimization procedures designed to "obtain, produce, and disseminate foreign intelligence information," and not "to enhance the acquisition, retention and dissemination of evidence for law enforcement purposes."[122] These conflicting views are at the heart of the issue underlying the FISC's May 2002 opinion and the government's November 2002 appeal.

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116. *Id.*

117. *See id.* at *2, ¶ 6.

118. *In re* Sealed Case, 310 F.3d 717, 728 (Foreign Intel. Surv. Ct. Rev. 2002).

119. A May 2000 report by the Attorney General and a July 2001 report by the General Accounting Office both concluded that concern over federal courts' and the FISC interpretation of the "primary purpose" test had inhibited necessary coordination between intelligence and law enforcement officials. *Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* (AGRT Report), ch. 20 at 721–34, http://www.fas.org/irp/ops/ci/bellows/index.html (May 2000). In response to the AGRT Report, the Attorney General in January 2000 issued additional interim procedures designed to address coordination problems identified in the report and augment the 1995 Procedures. *Id.*; Memorandum to Recommend that the Attorney General Authorize Certain Measures Regarding Intelligence Matters in Response to the Interim Recommendations Provided by Special Litigation Counsel Randy Bellows from Gary G. Grindler, to the Attorney General (Jan. 21, 2000), 2000 WL 33912680 (Foreign Intel. Surv. Ct. Jan. 21, 2000).

120. 2002 WL 1949259, at *1 (Foreign Intel. Surv. Ct. Mar. 6, 2002).

121. *Id.*

122. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 623–24 (Foreign Intel. Surv. Ct. 2002) (emphasis omitted).

III. THE PATRIOT ACT AMENDS FISA LEADING TO THE FISC'S MAY 2002 OPINION

The Patriot Act, passed in October 2001, lowered the standard required to obtain a FISA warrant by amending the language in § 1804(a)(7)(B) from requiring foreign intelligence collection as the "primary purpose" to only a "significant purpose."[123] This amendment meant that the primary purpose no longer needed to be foreign intelligence gathering, but could now be criminal prosecution as long as foreign intelligence gathering was still a significant purpose. From the government's perspective, this change removes the need for judicial review of the various purposes for gaining a FISA warrant as long as the court can determine that a significant purpose for the warrant was foreign intelligence gathering.[124] The government contended, and the FISA Review Court agreed, that the Patriot Act amendments specifically altered FISA to make clear that a warrant application could be obtained even if criminal prosecution was the primary goal of the surveillance.[125]

The Patriot Act also added a provision to FISA allowing those "federal officers who conduct electronic surveillance to acquire foreign intelligence information" to "consult with Federal law enforcement officers [in order] to coordinate efforts to investigate or protect against" attack or other grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities, by foreign powers or their agents.[126] Further, such coordination "shall not preclude" either the government's certification that a significant purpose of the surveillance is to obtain foreign intelligence information, or the issuance of an order authorizing the surveillance.[127]

In November 2001, in response to the first applications filed under FISA as amended by the Patriot Act, the FISC adopted the Attorney General's 1995 procedures as augmented by the January 2000 and August 2001 procedures as minimization procedures[128] to

123. Pub. L. No. 107-56, 115 Stat. 272, 291 (2001).

124. *See also* Brief for the United States at 49–56, *In re* Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

125. *In re* Sealed Case, 310 F.3d 717, 728–29 (Foreign Intel. Surv. Ct. Rev. 2002); Brief for the United States at 30–56, *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

126. 50 U.S.C. § 1806(k)(1) (2000).

127. *Id.* § 1806(k)(2).

128. Minimization procedures are designed to limit the acquisition of information that is not otherwise subject to collection under the statute in light of the needs of the government to collect foreign intelligence information. 50 U.S.C. § 1801(h) (2000).

apply in all cases before the Review Court.[129] The court adopted these guidelines despite the Patriot Act amendments to FISA expressly sanctioning consultation and coordination between intelligence and law enforcement officials.[130]

The Attorney General's differing interpretation of the Patriot Act led to his approval of new "Intelligence Sharing Procedures," intended to implement the Acts's amendments to FISA.[131] The 2002 procedures were to supersede the prior procedures, permit the complete exchange of information and advice between intelligence and law enforcement officials, eliminate the "direction and control" test, and allow the exchange of advice between the FBI, the OIPR, and the Criminal Division regarding "the initiation, operation, continuation or expansion of FISA searches or surveillance."[132] In March 2002, the government filed a motion with the FISC informing it of the Justice Department's adoption of the 2002 procedures, proposing those procedures be followed in all matters before the FISC, and asking the FISC to vacate its orders adopting the prior procedures as minimization procedures in all cases and imposing special "wall" procedures[133] in certain cases to prevent consultation and coordination between intelligence and law enforcement personnel.[134]

Again, the FISC was not persuaded by the Attorney General's interpretation of the Patriot Act and ordered the 2002 procedures adopted with modifications.[135] Those modifications were essentially a denial of the government's motion, the appeal of which is the subject of the FISA Review Court opinion discussed below.[136] Importantly, the FISC expressly limited its disposition of this case to addressing the proposed 2002 procedures and did not address potential constitutional issues raised by the Patriot Act amendment of the significant purpose language.[137]

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129. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 613 (Foreign Intel. Surv. Ct. 2002).

130. *Id.*; Pub. L. No. 107-56, 115 Stat. 272, 291 (2001).

131. *In re Sealed Case*, 310 F.3d at 729; Memorandum of Intelligence Sharing Procedures, *supra* note 27.

132. 2002 WL 1949259, at *1–3 (Foreign Intel. Surv. Ct. Rev. Mar. 6, 2002).

133. *In re Sealed Case*, 310 F.3d at 729.

134. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 615–16.

135. *Id.* at 625.

136. *See In re Sealed Case*, 310 F.3d at 721.

137. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 614. This is consistent with the general principle that courts should not address constitutional issues when unnecessary. Jean v. Nelson, 472 U.S. 846 (1985) (A fundamental rule of judicial restraint requires that federal courts, prior to reaching any constitutional question, must consider nonconstitutional grounds for decision.).

IV. THE FISA REVIEW COURT'S NOVEMBER 2002 OPINION

The FISA Review Court convened for the first time in its twenty-five-year history to hear the government's appeal of the FISC's May 2002 ruling.[138] As provided for in FISA, the government is the only party to a FISA proceeding (the defendant is not present nor represented at a FISA hearing).[139] The government made two arguments in its appeal. First, the government argued that the supposed pre-Patriot Act limitation in FISA restricting the government's intention to use foreign intelligence information in criminal prosecutions was an illusion unsupported by both the language of FISA and its legislative history.[140] In making this argument, the government claimed that the several appellate court decisions upholding FISA surveillance only if the government's primary purpose in pursuing foreign intelligence information was not for criminal prosecution were incorrect in that contention, if not incorrect in their holdings.[141] Second, and alternatively, the government contended 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 eliminated that concept,[142] leaving the "significant purpose" test as the standard. Additionally, the government's brief set forth the view that the "primary purpose" test is not required by the Fourth Amendment, while the American Civil Liberties Union (ACLU) and National Association of Criminal Defense Lawyers (NACDL) amici briefs argued the contrary—that the FISA statute is unconstitutional unless government surveillance applications under FISA are denied if the primary purpose of the surveillance is criminal prosecution.[143]

The Review Court, after analyzing several of the circuit court cases mentioned above, determined that these courts adopted the "primary purpose" test without any tie to statutory language in FISA

138. The FISA Review Court is provided for by statute. 50 U.S.C. § 1803(b) (2000).

139. *Id.* § 1804 (2000).

140. *In re Sealed Case*, 310 F.3d at 721–22. This argument was raised for the first time in this appeal. Because proceedings before the FISC and the Review Court are ex parte—not adversary—the Review Court can entertain arguments supporting the government's position not presented to the lower court. *Id.* at 722 n.6.

141. *Id.* at 722.

142. *Id.*

143. *Id.* While this view is contended in the government's brief, it is not an actual argument raised on appeal. *Id.* The FISA Review Court accepted a brief filed by the ACLU and joined by the Center for Democracy and Technology, Center for National Security Studies, Electronic Privacy Information Center, and Electronic Frontier Foundation, and a brief filed by the NACDL as amici curiae, in addition to the government's brief. *See id.* at 719.

requiring such a test.[144] Further, the Review Court pointed out that the FISC did not refer to any specific statutory language requiring the "primary purpose" test.[145] The Review Court thereby concluded that the version of FISA passed in 1978 did not prohibit or limit the government's use or proposed use of foreign intelligence information in a criminal prosecution.[146] Continuing its analysis, the Review Court stated that the FISC erred in failing to consider the legal significance of the Patriot Act amendments to FISA specifically designed to make clear that an application could be obtained even if criminal prosecution was the primary goal.[147]

The FISC instead imposed the disputed restrictions on FISA's use in criminal prosecutions using its statutory authority to approve "minimization procedures," procedures designed "to prevent the acquisition, retention, and dissemination within the government of material gathered in an electronic surveillance that is unnecessary to the government's need for foreign intelligence information."[148] A FISA judge may approve electronic surveillance if he finds that proposed minimization procedures meet the definition of minimization procedures contained in § 1801(h) of FISA.[149] The Review Court concluded that the FISC, in adopting portions of the Attorney General's augmented 1995 procedures, "misinterpreted and misapplied" the minimization procedures it is entitled to impose.[150] The Review Court went on to say that this action by the FISC may have exceeded the constitutional limits of an Article III court.[151]

Next, the Review Court determined that FISA as amended by the Patriot Act does not oblige the government to demonstrate to the FISC that its primary purpose in conducting electronic surveillance is not criminal prosecution.[152] To support this holding, the Review Court relied on Congress' clear legislative intent to relax the requirement that the government show that its primary purpose was something other than criminal prosecution.[153]

144. *See id.* at 725–27.

145. *See id.* at 721.

146. *Id.* at 727.

147. *See id.* at 730–32.

148. *Id.* at 721.

149. 50 U.S.C. § 1805(a)(4).

150. *In re Sealed Case*, 310 F.3d at 731.

151. *Id.* Under Article III, federal courts have original jurisdiction in cases based on diversity of citizenship, and in cases that involve domestic or maritime federal law or treaties between the United States and other nations. U.S. CONST. art. III, § 2.

152. *In re Sealed Case*, 310 F.3d at 736.

153. *See id.* at 732.

However, the Review Court makes clear that the Patriot Act, by using the term "significant purpose," implies that another purpose is to be distinguished from a foreign intelligence purpose.[154] In other words, the Review Court stated that when Congress passed the "significant purpose" language, it accepted the dichotomy between foreign intelligence and law enforcement that the government contended was false in its appeal, a dichotomy that began in *Truong*.[155] Thus, the Review Court held that the "significant purpose" test excludes a *sole* objective of criminal prosecution, but is satisfied if the government has a realistic option of dealing with the target other than through criminal prosecution even if the primary purpose was criminal prosecution.[156] In sum, the Review Court agreed with both of the government's arguments on appeal.

Finally, the Review Court considered whether the statute as amended is consistent with the Fourth Amendment provisions regarding search and seizure.[157] It is clear that Congress intended the Patriot Act amendments to FISA to allow authorities to proceed with surveillance under FISA if a significant purpose of the investigation is to collect foreign intelligence.[158] This significant purpose language is intended to make it easier for law enforcement to obtain a FISA search or surveillance warrant for those cases in which the subject of the surveillance is both a potential source of foreign intelligence information and the potential target of criminal prosecution.[159] While Congress' purpose behind this amendment is clear, the constitutionality of the "significant purpose" language remains uncertain.

In analyzing this issue, the Review Court compared the Supreme Court's special needs cases involving random stops (seizures) as the closest available analogy to the electronic searches covered under FISA.[160] Similar to the rationale behind FISA, the Supreme Court's approval of warrantless and suspicionless special needs searches is based on the distinction between ordinary criminal prosecutions and

154. *Id.* at 734.

155. *See id.* at 734–35; *see also supra* Part II.B.

156. *In re Sealed Case*, 310 F.3d at 735.

157. *Id.* at 736–46.

158. 147 CONG. REC. S11004, S10992 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy); 147 CONG. REC. S10591 (daily ed. Oct. 11, 2001) (statement of Sen. Feinstein).

159. 147 CONG. REC. S10591 (daily ed. Oct. 11, 2001) (statement of Sen. Feinstein).

160. The Review Court found that because a random stop is not based on particular suspicion such stops could be seen as greater encroachments into personal privacy than FISA electronic surveillance. However, the Review Court also acknowledged that wire-tapping is more intrusive than an automobile stop accompanied by questioning. *In re Sealed Case*, 310 F.3d at 746.

extraordinary situations.[161] Examples of extraordinary situations include border security and apprehension of drunk drivers.[162]

The Review Court analyzed *City of Indianapolis v. Edmond*,[163] a recent special needs case relied on by both amici and the government. In *Edmond*, the Supreme Court held that the special needs exception did not include a highway checkpoint designed to catch drug dealers because the government's "primary purpose" was merely "to uncover evidence of ordinary criminal wrongdoing."[164] The "severe and intractable nature of the drug problem" was not sufficient justification for a warrantless, suspicionless search, and the Court stated that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to a pursue a given purpose."[165] However, the Court did acknowledge that an appropriately tailored roadblock could be used "to thwart an imminent terrorist attack."[166] Of critical importance to the Court in *Edmond* was that the nature of the emergency or threat could remove the matter from the realm of ordinary crime control, thereby entitling it to the special needs exception of a warrantless, suspicionless search.[167]

Analogous to the distinction drawn in *Edmond*, the Review Court stated that FISA's purpose has been distinct from "ordinary crime control" since its inception. The court concluded that the standards under FISA either meet or "certainly come close" to meeting the minimum Fourth Amendment warrant standards.[168] While the Supreme Court in *Edmond* stated that the threat to society was not dispositive in determining the reasonableness of a search or seizure, it established that it was a critical factor.[169] The Review Court stated that, in light of terrorism, the threat FISA addresses is certainly serious—if not the most serious the country faces.[170] Thus, the Review Court believes that FISA, as amended by the Patriot Act, is constitutional when applying the balancing test from *Keith* because

161. *Id.* at 745.

162. *Id.*

163. 531 U.S. 32 (2000).

164. *Id.* at 41–42.

165. *Id.* at 42. The Review Court was careful to distinguish that the "purpose" to which the court in *Edmond* was referring was not a subjective intent, which is not relevant in ordinary Fourth Amendment probable cause analysis, but instead to a programmatic purpose (i.e. whether the purpose of the checkpoint was ordinary law enforcement or an extraordinary situation like border security). *See In re Sealed Case*, 310 F.3d at 745.

166. *Edmond*, 531 U.S. at 44.

167. *See id.*

168. *In re Sealed Case*, 310 F.3d at 746.

169. *Edmond*, 531 U.S. at 42.

170. *In re Sealed Case*, 310 F.3d at 746.

the surveillances it authorizes are reasonable.[171] However, the Review Court admitted "the constitutional question presented by this case—whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer."[172]

As the preceding discussion illustrates, the Review Court analyzed a broad range of issues in disposing of this case. The court addressed both issues raised on appeal by the government: (1) whether the pre-Patriot Act restrictions on FISA's use in criminal prosecutions were required; and (2) whether the Patriot Act amendments eliminated the "primary purpose" test requirement for upholding warrants under FISA. Additionally, the court addressed the constitutionality of FISA as amended by the Patriot Act, a view addressed in the briefs but not raised as an issue on appeal. The Review Court's extensive scope of review may prove detrimental to FISA's future.

V. RAMIFICATIONS OF THE REVIEW COURT OPINION

The Review Court's broad opinion differs from circuit court precedent and effectively provides a roadmap and ammunition for a defendant's challenge of FISA, in turn endangering national security by putting FISA in jeopardy and increasing the possibility that sensitive national security information will be released to defendants.

A. The FISA Review Court Exceeded the Necessary Scope of Review

The Review Court exceeded well-accepted principles of judicial restraint when deciding this case, excessiveness that in the long run may prove very damaging for FISA. First, it is a well-accepted principle of judicial action that reviewing courts should limit their determinations to issues essential to the decision of the case at hand.[173] Second, a fundamental rule of judicial restraint requires that federal courts must consider nonconstitutional grounds for a decision prior to reaching any constitutional question.[174]

Admittedly, the constitutionality of the "significant purpose" language is an open question. This would be true regardless of the

171. *Id.*

172. *Id.*

173. United States v. Alaska S.S. Co., 253 U.S. 113 (1920) (The U.S. Supreme Court will determine only actual matters in controversy essential to the decision of the particular case before it, and where by an act of the parties or a subsequent law the existing controversy has come to an end the case becomes moot, and will be treated accordingly, however convenient it might be to have the questions decided for the government of future cases.).

174. *See* Jean v. Nelson, 472 U.S. 846 (1985).

FISC's prudent choice to limit its decision to amending the proposed 2002 procedures and the Review Court's inconclusive analysis of that issue on appeal. Even if the Review Court limited its holding to the decision that the FISC lacked the power to amend the 2002 procedures, thereby overruling the lower court's decision, the "significant purpose" test enacted by Congress and the 2002 procedures would nevertheless be in effect. However, precedent would still be intact, at least to the extent that the cases had not been formally addressed by a court as being inconsistent with the "significant purpose" test, and the entire review would likely have been subjected to much less media scrutiny and coverage. Thus, a limited holding could have adequately disposed of this appeal without the negative effects resulting from the court's broader disposition. The Review Court's expansive decision provided an outcome that was no different substantively than a narrower disposition of the case would have achieved, but needlessly created substantial hurdles to FISA's future use.

In fact, the Review Court did dispose of the narrower issue. As discussed above in Part IV, the Review Court held that the FISC incorrectly applied minimization procedures it was entitled to impose in amending the 2002 procedures.[175] Further, the court goes on to say that in doing so "the FISA court may well have exceeded the constitutional bounds that restrict an Article III court."[176] This holding would have adequately disposed of the appeal, resulting in the same substantive outcome as the Review Court's broad review (the "significant purpose" language would be in effect and the 2002 procedures would be intact).[177] Because addressing additional issues did not change the substantive outcome of the case, the broad scope of the Review Court's decision was unnecessary.

Furthermore, there was absolutely no need to address the government's first argument, whether FISA *before* the Patriot Act amendment required the "primary purpose" test. It is confusing why the government even wanted to raise this argument. Whether the "primary purpose" test was a legitimate requirement under FISA *before* it was amended by the Patriot Act seems completely irrelevant to the question of what FISA requires *as amended*. Thus, if the Review Court was intent on addressing any issue beyond a strict overruling of the lower court opinion, it should have at least limited its

175. *In re Sealed Case*, 310 F.3d at 731.

176. *Id.*

177. While the Review Court does state that it was error for the lower court to refuse to consider the legal significance of the Patriot Act amendments to FISA, it gives no reason *why* this exercise of judicial restraint was erroneous. *See id.* at 732.

analysis to an exploration of the government's second issue, whether FISA as amended requires the "primary purpose" test.

Finally, the Review Court's decision to discuss the additional matter of the constitutionality of FISA as amended by the Patriot Act seems particularly unsound given that the Review Court admits it is a question without a definitive answer.[178] This admission amplifies the Court's violation of the principle that federal courts should consider non-constitutional grounds for a decision prior to reaching any constitutional questions, particularly where, as here, the Court had ample other grounds on which to resolve the case. The Review Court should have resolved this appeal without addressing the constitutional question presented.

B. The Broad Scope of Review Undermined Consistent Precedent Upholding FISA Warrants

The Review Court's failure to limit its holding to merely overturning the FISC's May 2002 ruling unnecessarily discredited consistent U.S. Circuit Courts of Appeals precedent in disposing of this case. This precedent consistently upheld warrants under FISA when the primary purpose of the surveillance was foreign intelligence gathering, not primarily criminal investigation.[179] As discussed above in Part II.D, circuit court opinions upholding FISA warrants implied that the surveillance was constitutional only where the primary purpose was foreign intelligence gathering and not criminal investigation. This implied requirement for constitutionality stemmed from the courts' reliance on the "primary purpose" test despite the fact that the test was not explicitly required in the statute or legislative history.

In contrast, the Review Court agreed with the government's argument in holding that the pre-Patriot Act limitation in FISA restricting the government's intention to use foreign intelligence information in criminal prosecutions has no basis in the FISA statute or legislative history. The court specifically states that the circuit courts' reliance on this concept is incorrect and unfounded. The Review Court concluded that the circuit court precedent relying on the "primary purpose" test did not tie that test to any statutory language.[180] According to the court, "FISA as passed by Congress in

178. *Id.* at 746.

179. United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458, 1463–64 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565, 572–73 (1st Cir. 1991).

180. *In re Sealed Case*, 310 F.3d at 726.

1978 clearly did not preclude or limit the government's use or proposed use of foreign intelligence information . . . in a criminal prosecution."[181] This finding clearly undercuts existing circuit court precedent establishing that the investigation of criminal activity cannot be the primary purpose of FISA surveillance.

The Review Court holding disregards the importance, even if implied, that the circuit courts placed on the "primary purpose" test. The courts implied the test was critical to the justification for, and constitutionality of, a FISA warrant by continuing to require that test be met even though it was not specifically provided for in the statute. Further, in making this argument the Justice Department undermined precedent it may well need in future cases in order to prohibit both a defendant's review of FISA warrant application materials and a defendant's attack against FISA's constitutionality.

The Justice Department could have attempted to argue that while a significant purpose was foreign intelligence gathering, another significant purpose was criminal prosecution, which would imply that neither purpose was primary. This characterization may have allowed the government to argue that such surveillance was justified even under the amended "significant purpose" requirement because the "primary purpose" was not criminal prosecution. This "dual significant purpose" characterization is arguably consistent with circuit court precedent, particularly *Johnson*.[182] However, this argument would likely appear disingenuous following the FISA Review Court appeal because the Justice Department specifically contends in its brief that "FISA may be used primarily, or exclusively, to obtain evidence for a prosecution designed to protect the United States against foreign spies and terrorists," and that "FISA may be used primarily to obtain evidence for a prosecution if the government also has a significant non-law enforcement foreign intelligence purpose."[183] Additionally, the government argued specifically that the circuit courts' reliance on the "primary purpose" test was misplaced.[184]

Thus, the Review Court opinion has highlighted the potential inconsistency between the "primary purpose" and "significant purpose" tests for a defendant and removed any chance the Department may have had of arguing that the precedent was

181. *Id.* at 727 (emphasis omitted).

182. 952 F.2d at 572–73 (holding that evidence obtained under FISA may subsequently be used in criminal prosecutions, but that the investigation of criminal activity cannot be the primary purpose of the surveillance).

183. Brief for the United States at 30, 49, *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

184. *In re Sealed Case*, 310 F.3d at 722.

nonetheless consistent with the "significant purpose" language of FISA, as amended.

C. *The Review Court's Decision Identifies a Defendant's Argument for Access to FISA Application Materials*

Even if FISA as amended is ultimately upheld, the defendant could do considerable damage to the Justice Department's counterintelligence program merely by challenging the sufficiency of a FISA application. The Review Court's analysis, in particular its discrediting of precedent and the publicity surrounding the opinion, increases a defendant's chance for success in making such a challenge.

A defendant in a criminal proceeding can, as provided for in FISA, challenge the legitimacy of FISA-warranted surveillance and the admissibility of evidence obtained under that surveillance.[185] The court may then conduct an in camera ex parte review, a process which, to date, has denied defendants access to documentation supporting a FISA application.[186] Where the Attorney General claims that national security interests are at stake, such an in camera ex parte review has been held sufficient to determine the legality of the surveillance.[187] In that review, the court determines whether the surveillance was warranted. The court has historically based this determination on whether or not the primary purpose was foreign intelligence investigation and, at a minimum, has required that the primary purpose *not* be criminal investigation.[188] These reviews have consistently led to refusals to turn over FISA application materials to defendants.[189]

Following its successful appeal, the Justice Department will pursue surveillance warrants under FISA as amended by the Patriot Act: primarily to obtain evidence for criminal prosecution where the

185. 50 U.S.C. § 1806(e) (2000).

186. *Id.* § 1806(f).

187. United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987).

188. *Duggan*, 743 F.2d at 77; *Badia*, 827 F.2d at 1463–64; *Johnson*, 952 F.2d at 572–73; United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988).

189. *Duggan*, 743 F.2d at 78 (holding that the district court did not err in refusing to disclose the substance of FISA warrant applications where the purpose of the surveillance was to obtain information on the defendant, who played a leadership role in a known international terrorist organization, even if fruits of the surveillance might later be used as criminal evidence); *Badia*, 827 F.2d at 1464 (otherwise valid FISA surveillance is not tainted and does not need to be disclosed to the defendant merely because the government may later use the information obtained as evidence in a criminal trial; here, where the defendant was an agent of a foreign power who had participated in terrorist attacks on behalf of a known international terrorism group, the district court did not err in refusing to disclose the FISA warrant application to the defendant in order to determine the legality of the surveillance).

government also has a significant foreign intelligence purpose.[190] Despite the Review Court's contrary holding, controlling circuit court precedent still requires the "primary purpose" test.[191] Thus, the Justice Department's reliance as a result of the Review Court opinion on the "significant purpose" test provides a defendant in such a case a potentially valid challenge to the justification for FISA surveillance and the admissibility of resulting evidence because the warrant application's primary purpose was criminal investigation, while foreign intelligence gathering was merely a secondary purpose. A district court judge may find a defendant's request for access to FISA application materials to determine whether the primary purpose was in fact criminal investigation more deserving of merit following the Review Court opinion for several reasons.

First, the Review Court opinion, as discussed in Part IV above, highlights the disparity between the "significant purpose" test and the "primary purpose" test. It also indicates the Justice Department's view that the "primary purpose" test is not required and criminal prosecution can be a primary purpose of FISA surveillance. Further, the Review Court opinion highlights the circuit courts' reliance on the "primary purpose" test. A district court judge, therefore, may feel a defendant is more likely to prevail in a showing that the surveillance had criminal prosecution as its primary purpose and deserves access to FISA application materials to prove that allegation; a result for which no precedent exists under current circuit court case law.[192]

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190. In fact, these prosecutions, which rely on FISA warrants issued after the Patriot Act amendments took effect, are presently coming up for adjudication. In a case involving what has become known as the "Portland Seven," a group of U.S. citizens charged with attempting to travel to Afghanistan in order to serve the Taliban and Al-Qaida, the court in *United States v. Battle*, 2003 WL 751155 (D. Or. Feb. 25, 2003), has been asked to review the constitutionality of evidence obtained under FISA as amended by the Patriot Act to allow for the gathering of evidence of criminal activity, not just foreign intelligence information. Press Release, American Civil Liberties Union, Government Is Illegally Using Evidence from Secret Court Wiretaps in Criminal Cases, ACLU Charges (Sept. 19, 2003), *at* http://www.aclu-or.org/litigation/FISARelease091903.htm; *see also, e.g.*, Associated Press, *Oregon Case Challenges "Spy Court," Patriot Act*, NORTHWEST CABLE NEWS, *at* http://www.nwcn.com/topstories/NW_022503ORNterrorarrests.57b468a.html (Feb. 25, 2003); Anita Ramasastry, *Recent Oregon Ruling on Secret Warrants May Set Troublesome Precedent*, FINDLAW, *at* http://www.cnn.com/2003/LAW/03/18/findlaw.analysis.ramasastry.warrant/index.html (March 18, 2003) (referring to *Battle*, 2003 WL 751155).

191. While the precedential value of the FISA Review Court's opinion is unknown, it is unlikely that it will prove to be controlling authority in U.S. circuit court cases. Brooklyn Law School Professor Susan Herman stated that the FISA Review Court opinion "doesn't have precedent-setting authority . . . . But a district judge considering this question would look at this opinion." Jay Weaver, *Tampa Trial Will Test Antiterrorism Law*, MIAMI HERALD, March 17, 2003, at B1.

192. *See, e.g.*, *Duggan*, 743 F.2d at 77; *Badia*, 827 F.2d at 1463–64; *Johnson*, 952 F.2d at 572–73; *Sarkissian*, 841 F.2d at 965.

Second, the government, as discussed above in Part V.B, is in effect precluded from arguing any common ground between the two tests given its position in the FISA appeal that the circuit courts were incorrect to ever require the "primary purpose" test. In pursuing that argument on appeal, the government would appear disingenuous changing its story once it is in front of a federal district court.

Third, the district court judge may have heightened concern over the forthrightness of U.S. intelligence agencies in seeking FISA warrants. The FISC and Review Court opinions brought to light seventy-five instances of inaccurate FBI affidavits in FISA applications.[193] These misrepresentations involved assertions regarding information shared with criminal investigators and prosecutors.[194] One FBI agent was barred from appearing before the FISC as an affiant,[195] and as of November 2002, FBI agent or agents involved were still under investigation by the Department of Justice's Office of Professional Responsibility.[196] Publicity of these mistakes may increase a district court judge's resolve to allow defendants access to FISA application papers and evidentiary hearings, a practice that while provided for in FISA, has never been found necessary. Finally, the district court judge may feel bound to err on the side of the defendant given the intense publicity currently surrounding the FISC and the Review Court's historic opinions. For example, a district court judge may decide that in fairness to the defendant, an in camera ex parte review is not sufficient, and the defendant should have the ability to review the application materials himself.

This disclosure would be a critical loss for the government. The release of such information to defendants could profoundly impact national security. The applications would reveal counterintelligence information, including secret sources and methods relied on by intelligence officers, which could severely compromise the future use of those methods and informants. Further, if the disclosure of FISA application materials to defendants becomes commonplace, the underlying purpose behind FISA cannot be achieved.[197] If enough

193. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620–21 (Foreign Intel. Surv. Ct. 2002); *In re* Sealed Case, 310 F.3d 717, 729–30 n.18 (Foreign Intel. Surv. Ct. Rev. 2002).

194. *In re Sealed Case*, 310 F.3d at 729–30 n.18.

195. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 621.

196. *In re Sealed Case*, 310 F.3d at 729–30 n.18.

197. The FISC opinion states:

> Examination of the . . . [FISA] statute leaves little doubt that the collection of foreign intelligence information is the raison d'etre for the FISA . . . . Clearly this court's jurisdiction is limited to granting orders for electronic surveillances and physical

methods and sources are revealed to defendants, intelligence officers will no longer be able to collect foreign intelligence information through clandestine surveillance, a key purpose of FISA.

D. The Review Court Opinion Provides Grounds on which FISA's Constitutionality Can Be Challenged

The Review Court opinion provides a roadmap for a constitutional challenge of FISA as amended by the Patriot Act. It achieves this dubious accomplishment by highlighting and disagreeing with case law on which a defendant may rely in challenging FISA's constitutionality and in admitting the question is one without a definitive jurisprudential answer.

Within its analysis, the Review Court opinion identifies the precedent and argument on which a defendant should premise his or her constitutional attack of FISA. In disagreeing with long-standing, consistent, circuit court precedent, the opinion makes clear the distinctions between the "significant purpose" test and the "primary purpose" test. The court says that the circuit courts were wrong to require the "primary purpose" test when it was not explicitly provided for in the legislative history behind the passage of FISA or the language of the statute itself.[198] The Review Court opinion analyzes circuit court holdings premised on the "primary purpose" test, making clear that those courts did in fact require the "primary purpose" test despite the Review Court's determination that the test was not explicitly required. This analysis highlights for a defendant the potential argument, including precedent supporting that argument, that FISA as amended by the Patriot Act may be inconsistent with circuit court precedent and unconstitutional because it fails to require the "primary purpose" test: FISA as amended allows criminal prosecution to be the primary purpose of the surveillance.

After determining that FISA as amended does not oblige the government to prove that its primary purpose in conducting electronic surveillance is not criminal prosecution when applying to the FISC (in contrast to existing precedent), the Review Court states it is "obliged to consider whether the statute as amended is consistent with the Fourth Amendment."[199] This entire section of the Review Court

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searches for the collection of foreign intelligence information under the standards and procedures prescribed in the Act.

In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 613–14.

198. *In re Sealed Case*, 310 F.3d at 725–27.

199. *Id.* at 736.

opinion is an unnecessary foray into the disposition of a constitutional question that was not specifically raised by the appellant in this case.[200] Furthermore, it is inconsistent with fundamental principles of judicial review as discussed above in Part V.A.[201] In this gratuitous analysis, the Review Court admits that it is an open question whether Congress' amendment to FISA removing the "primary purpose" test is constitutional.[202] The court concludes that in its opinion the amended statute likely does not violate the Fourth Amendment.[203]

However, the Review Court admits that congresspersons like Senator Leahy, a drafter of the Patriot Act amendment, recognized that "no matter what statutory change is made . . . the court may impose a constitutional requirement of 'primary purpose' based on the appellate court decisions upholding FISA against constitutional challenges over the past 20 years."[204] Therefore, critical questions in such a challenge are whether the circuit courts would find the FISA Review Court opinion persuasive or whether the circuit courts would reach a similar conclusion on their own.[205] This outcome seems doubtful given the circuit courts' consistent reliance on the "primary purpose" test despite the fact it was not explicitly provided for in the statute; a fact emphasized in the Review Court opinion. Regardless, the Review Court's explicit statement that the constitutionality of FISA as amended is unknown has encouraged an attack of the amended statute's constitutionality.

VI. CONCLUSION: IN WINNING THE BATTLE THE JUSTICE DEPARTMENT MAY HAVE LOST THE WAR

The Justice Department fought for expanded powers under FISA to fight terrorism. Congress, through Patriot Act amendments, explicitly sought to expand powers granted under FISA through its use of the "significant purpose" language. However, U.S. Circuit Courts of Appeals have upheld FISA only when the narrower "primary purpose" test is applied, which requires that the primary

200. While the government and amicus briefs address their respective views regarding the constitutionality of FISA as amended by the Patriot Act, this was not one of the government's two issues on appeal. *In re Sealed Case*, 310 F.3d at 721–22. Therefore, the Review Court could have disposed of the case without addressing this matter, and should have under accepted principles of judicial review.

201. United States v. Jean, 472 U.S. 846 (1985).

202. *In re Sealed Case*, 310 F.3d at 746.

203. *See id.*

204. *Id.* at 737 (alteration in original) (citing 147 CONG. REC. S11003 (Oct. 25, 2001)).

205. *See* David L. Hudson, Jr., *Unusual Appeals Process in Wiretap Case*, ABA J. E-Report, Nov. 22, 2002, *at* WL 1 No. 45 ABAJEREP 1 (stating that the Review Court's constitutional holding may not be binding in ordinary federal courts).

purpose of FISA surveillance not be criminal investigation. The Justice Department successfully convinced the FISA Review Court that FISA never required the "primary purpose" test, that the Patriot Act amendments to FISA eliminate the "primary purpose" test, and that FISA as amended by the Patriot Act is constitutional. The Review Court agreed with the government, and in its disposition of the case the court exceeded the scope of review necessary to effectively resolve the government's appeal.

This broad scope of review directly undermined precedent on which the government has historically relied for upholding warrants issued under FISA. Further, the Review Court's decision, including its disagreement with existing precedent, makes plain a defendant's argument for access to FISA application materials. The strength of this argument is exacerbated by the publicity this decision received, including publicity of abuse by FBI officers in seeking FISA warrants, and the renewed strength of a defendant's challenge of a FISA warrant under the "significant purpose" test. This publicity and new test may coalesce to make a district court judge more sympathetic to a defendant's need to see FISA application materials. The decision also makes plain grounds on which FISA's constitutionality can be challenged.

Certainly, the government's motivation for broadening its abilities to use FISA, the prevention of terrorism, is a laudable goal. However, the government's choice to argue broad and constitutional issues on appeal combined with the Review Court's expansive scope of review may ultimately lead to attacks that will undermine the statute. While the government at present has won the battle for the use of FISA where a significant purpose of the desired surveillance is a criminal investigation, the government may have lost the war by jeopardizing the FISA statute itself, an effective and important tool in the war on terrorism and the protection of national security.