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Statutory Misinterpretation: The Foreign Intelligence Court of Review's Interpretation of the "Significant Purpose" Requirement of the Foreign Intelligence Surveillance Act

On November 18, 2002, the Foreign Intelligence Surveillance Court of Review ("Court of Review") issued an opinion that gave the United States government much broader powers to combat foreign intelligence threats than it had previously.[1] The Court of Review held that search or surveillance applications should be approved under the Foreign Intelligence Surveillance Act of 1978 ("FISA") if the government articulated any "measurable" foreign intelligence purpose for the investigation, even if the primary purpose of the investigation was for a criminal prosecution.[2] The Court of Review further held that criminal prosecutors could be involved in a FISA investigation with foreign intelligence investigators as long as there

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1. *See In re* Sealed Case, 310 F.3d 717, 746 (Foreign Intelligence Surveillance Ct. Review 2002). Recently the Supreme Court summarily denied an American Civil Liberties Union ("ACLU") request to intervene to petition for a writ of certiorari. *See* ACLU v. United States, 123 S. Ct. 1615 (2003). The ACLU (and other interested parties) filed an amicus brief opposing the government's position in the *Sealed Case* litigation and was presumably trying to appeal the Court of Review's decision. *See* Brief on Behalf of Amici Curiae ACLU et al., *In re* Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Ct. Review 2002) (No. 02-001), http://www.epic.org/privacy/terrorism/fisa/FISCR_amicus_brief.pdf (on file with the North Carolina Law Review).

2. *See Sealed Case*, 310 F.3d at 735–36. Congress passed the Foreign Intelligence Surveillance Act ("FISA") in 1978 to regulate government searches and surveillances that are performed for the purpose of seeking foreign intelligence information. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1811 (West 2003 & Supp. 2003)); S. REP. NO. 95-604(1), at 5 (1977). Congress provided for the creation of the Foreign Intelligence Surveillance Court ("FISC") in the Act to oversee this process. The FISC is a special court composed of eleven district court judges who meet secretly to hear applications by the government for searches or surveillances for the purpose of obtaining foreign intelligence information (as opposed to searches and surveillances for general law enforcement purposes, which are governed by different standards). The judges rule on whether the government applications pass the requirements of the Act. *See* 50 U.S.C.A. § 1805(a) (West 2003 & Supp. 2003) (setting out the necessary findings a FISC judge must make before a search order can be issued under FISA). The government can appeal the FISC's decisions to the Foreign Intelligence Surveillance Court of Review ("Court of Review"), a special court also created by FISA. 50 U.S.C.A. § 1803(b) (West 2003) (providing for the designation of three federal judges as members of a "court of review"). The decision discussed in this Recent Development is the first case that the Court of Review has heard. *Sealed Case*, 310 F.3d at 719.

was a "measurable" foreign intelligence purpose behind the investigation.[3]

While the Court of Review was correct in allowing criminal and foreign intelligence investigators to collaborate during FISA investigations, the court's opinion goes too far in eroding restrictions on the government's use of FISA searches to the extent that it invites abuse of those searches. Even though the court recognized the Foreign Intelligence Surveillance Court's ("FISC") role in reviewing the government's purpose in seeking information under FISA,[4] it diminished the FISC's ability to perform its oversight duties by applying a "measurable purpose" standard in reviewing applications for FISA searches and surveillances. This allows the government to more easily obtain a FISA search or surveillance order, even in cases where the government has only a nominal foreign intelligence purpose for the investigation.[5] The Court of Review stressed that the FISC must grant a search application when the government entertains any "realistic option" of dealing with the target of the search other than through criminal prosecution.[6] The court noted that "[t]he

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3. *Sealed Case*, 310 F.3d at 731, 735.

4. *Id.*

5. Until this decision, the FISC and United States Circuit Courts of Appeals restricted the use of FISA searches and surveillances by requiring that the government's primary purpose in seeking a FISA search or surveillance order be the acquisition of foreign intelligence information. *See In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 625 (Foreign Intelligence Surveillance Ct. 2002) (modifying FISA search procedures to disallow law enforcement officials from commandeering FISA searches or surveillances for the purpose of enhancing criminal prosecution); *see also* United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (finding that "purpose" as then stated in 50 U.S.C. § 1804(a)(7)(B) meant "primary purpose" and holding that the primary purpose of a FISC investigation could not be to gather evidence for a criminal trial); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (finding that the statutory language requires the primary purpose of a FISA search be to obtain foreign intelligence information); United States v. Megahey, 553 F. Supp. 1180, 1189–90 (E.D.N.Y. 1982) (finding that "surveillance under FISA is appropriate only if foreign intelligence surveillance is the Government's primary purpose"). Thus, courts have articulated three different standards for reviewing the purpose of a FISA search or surveillance. The "primary purpose" standard was the pre-Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") rule by which the courts operated. *See* cases cited *supra*. The "significant purpose" standard is the standard Congress inserted into FISA by passing the PATRIOT Act. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (codified at 50 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(7)(B) (West 2003)). The "measurable purpose" standard is the Court of Review's interpretation of the "significant purpose" language that is now in FISA. *Sealed Case*, 310 F.3d at 735.

6. *Sealed Case*, 310 F.3d at 735.

addition of the word 'significant' to section 1804(a)(7)(B) [of FISA] imposed a requirement that the government have a *measurable* foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes."[7] Thus, the FISC is required to approve the government's application for a FISA search or surveillance so long as the government contends it has virtually any foreign intelligence purpose for its investigation.[8]

The Court of Review's decision leaves the proverbial fox guarding the henhouse. On the one hand, the FISC must determine whether a significant purpose of the government's investigation is to collect foreign intelligence information before it grants the search or surveillance application.[9] On the other hand, the FISC is required to grant the application if the Justice Department asserts any measurable foreign intelligence purpose for the investigation.[10] A system that applies the measurable purpose standard puts the FISC in a situation where it is almost perfunctorily approving Justice Department applications for FISA searches and surveillances, as opposed to overseeing the FISA search and surveillance application process in the manner that FISA requires.[11] As reflected in the FISA provisions that provide for FISC oversight of the application process, Congress did not envision the FISC as a rubber stamp for the Justice Department.[12] Because searches and surveillances under FISA can be much broader than normal criminal searches, this erosion of judicial oversight raises serious concerns.[13] More stringent oversight

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7. *Id.* (emphasis added).

8. *See id.*

9. *See id.* at 735–36; USA PATRIOT Act, § 218, 115 Stat. at 291.

10. *Sealed Case*, 310 F.3d at 736.

11. *See id.*

12. *See* Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (codified as amended at 50 U.S.C.A. § 1861 (West 2003)); 147 CONG. REC. S10,990, 11,003–04 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

13. Searches conducted under FISA can be more intrusive than criminal investigatory searches conducted under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 237, 262 (codified as amended at 18 U.S.C. § 2518(3)(a) (2000)). For example, investigators may leave a phone tap of someone who speaks a foreign language on continuously because an interpreter may not always be available to listen to the phone conversations. Surveillance of foreign intelligence targets is more intrusive than normal criminal surveillances due to the "no-holds-barred" methods of investigation and also because surveillance of someone for being a part of a specific group of people, as opposed to being a person that is about to commit a crime, violates the freedom of association protected by the First Amendment. *See* U.S. CONST. amend. I; 147 CONG. REC. S10,993 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy). Still, courts have given the government extensive foreign intelligence surveillance power because of the different practical and policy considerations inherent in foreign intelligence investigations. United States v. United States Dist. Court, 407 U.S. 297, 322–23 (1971) (holding that while

is needed to prevent the abuse of FISA searches. In order to balance the constitutional liberties implicated by FISA searches with the government's interest in protecting national security, the FISC must play a more active role than the "measurable purpose" standard will allow in determining whether the Justice Department actually has a "significant [foreign intelligence] purpose" for its FISA searches.

In analyzing the Court of Review's opinion, this Recent Development first discusses FISA as originally passed in 1978 and its interpretations by the judiciary and the Justice Department. This Recent Development then addresses the changes made to FISA by the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act")[14] and the subsequent interpretations of the newly amended FISA by the FISC and the Court of Review. It then analyzes the Court of Review's interpretation of "significant purpose" to mean "measurable purpose." Finally, this Recent Development argues that the "measurable purpose" standard for obtaining FISA search orders is an incorrect interpretation of FISA in light of legislative intent and the possibility of abuse of FISA for criminal investigations, and thus suggests that the "significant purpose"

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the Fourth Amendment requires the government to obtain a warrant for searches whose purpose is uncovering domestic national security information, different policy and practical considerations inherent in investigating foreign intelligence operations require a more flexible standard in evaluating whether a Fourth Amendment violation has occurred). Thus, FISA limits the government's ability to keep information that is uncovered by FISA surveillances to prevent abuse of the information acquired through these surveillances. *See* 50 U.S.C.A. §§ 1801(h)(1), 1821(4)(A) (West 2003). The Act sets out "minimization procedures" whereby information acquired by FISA searches is sorted and discarded if the information is irrelevant to the foreign intelligence purpose of the investigation. *Id.* Justice Department officials conducting a search or surveillance under FISA must use minimization procedures in their investigations, and their procedures must be approved by the FISC before they can take effect. *See id.* §§ 1801(h), 1804(a)(5), 1821(a)(4), 1823(a)(5). Foreign intelligence searches and surveillances were conducted pursuant to minimization procedures approved by the FISC in 1995 until March 2002, when Attorney General John Ashcroft submitted to the FISC his recommended changes to the minimization procedures. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 615 (Foreign Intelligence Surveillance Ct. 2002). These recommended changes in the minimization procedures, as well as the proposals for more information sharing between criminal and foreign intelligence investigators, led to the *Sealed Case* litigation. *See In re* Sealed Case, 310 F.3d 717, 720–21 (Foreign Intelligence Surveillance Ct. Review 2002). For further discussion of "minimization procedures," see *infra* notes 25–27 and accompanying text.

14. *See generally* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.A.) (enacted to punish national and international terrorism and to enhance law enforcement tools, among other purposes).

requirement in FISA be interpreted as requiring more than a measurable foreign intelligence purpose.

Congress passed FISA in response to intelligence abuses by the government.[15] The FISA created the FISC and gave it authority to rule on government applications for electronic and physical searches[16] whose goal was to uncover foreign intelligence information.[17] FISA

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15. Congress passed FISA in reaction to intelligence abuses uncovered by the Church Committee investigation into executive branch intelligence operations. *See* FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, BK. II, at 1 (1976) (examining intelligence abuses and finding that "targets of intelligence activity have ranged far beyond persons who could properly be characterized as enemies of freedom and have extended to a wide array of citizens engaging in lawful activity"); *see also* 147 CONG. REC. S10,992–93 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (detailing the long history of surveillance abuses by the United States government on prominent political and civil rights leaders, among others). *See generally* Katz v. United States, 389 U.S. 347, 350–53 (1967) (finding that electronically monitoring and recording a defendant's words spoken into a telephone receiver in a public phone booth violated the privacy upon which the defendant justifiably relied and thus constituted a "search and seizure" under the Fourth Amendment); Arthur S. Lowry, Note, *Who's Listening: Proposals for Amending the Foreign Intelligence Surveillance Act*, 70 VA. L. REV. 297, 311–13 (1984) (describing the "legacy of abuse" of intelligence services for partisan political purposes that preceded the passage of FISA).

16. FISA originally permitted applications and orders that authorized electronic surveillances, but did not mention physical searches. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1811 (West 2003 & Supp. 2003)). The Act was amended in 1994 to allow for the authorization of physical searches pursuant to FISA. *See* Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423, 3443 (1994) (codified as amended at 50 U.S.C.A. §§ 1821–1829 (West 2003 & Supp. 2003)). The rules governing electronic surveillances and physical searches are similar. *Compare* 50 U.S.C.A. §§ 1821–1829 (West 2003 & Supp. 2003), *with id.* §§ 1801–1811 (demonstrating that §§ 1801–1811 establish rules governing electronic surveillance whereas §§ 1821–1829 establish rules governing physical surveillance).

17. "Foreign intelligence information" is information that relates to (or, if concerning a "United States person," is *necessary* to) the ability of the United States to protect against grave hostile acts of a foreign power or an agent of a foreign power, sabotage or international terrorism by a foreign power or an agent of a foreign power, or clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. 50 U.S.C.A. § 1801(e) (West 2003). A "United States person" is

> a citizen of the United States, an alien lawfully admitted for permanent residence[,] . . . an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power . . . .

Id. § 1801(i). Due to the different nature of domestic security surveillance as opposed to normal Title III criminal surveillance, the Supreme Court in *United States v. United States District Court* held that while the government had to obtain a warrant to conduct searches for *domestic* security reasons, the Court refused to decide whether the government is required by the Fourth Amendment to obtain a warrant for intelligence surveillances or

also created specific procedures by which the government could apply for and obtain a search or surveillance order under the authority of the Act.[18] When the government submits an application for a search or surveillance to the FISC for approval, the application must state the identity of the target of the search, the facts establishing the applicant's belief that the target of the search or surveillance is a "foreign power"[19] or "agent of a foreign power,"[20] and the facts establishing that the place where the surveillance or search takes place is being used or is about to be used by a foreign power or agent of a foreign power.[21] The application must also contain a description of the nature of the information sought, certification that the information sought is foreign intelligence information,[22] and certification that "a significant purpose"[23] of the surveillance is to obtain foreign intelligence information.[24]

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searches of *foreign* governments or their agents. *United States Dist. Court*, 407 U.S. at 322 (finding that the standards and procedures set out by Title III do not necessarily apply in foreign intelligence investigations).

18. *See* 50 U.S.C.A. § 1804 (West 2003). If the government cannot demonstrate it has fulfilled the requirements of § 1804, it likely will attempt to obtain a search warrant through the more traditional Title III process. *See supra* note 13; *infra* note 43.

19. FISA defines "foreign power" as

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

Id. § 1801(a).

20. Under FISA, an "agent of a foreign power" is any person who knowingly engages in any clandestine intelligence activities for or on behalf of a foreign power or who knowingly engages in sabotage or international terrorism or activities that are in preparation therefore. *Id.* § 1801(b). An agent of a foreign power is also someone who knowingly enters the United States under a false or fraudulent identity or who assumes a false or fraudulent identity while in the United States for or on behalf of a foreign power or knowingly aids or abets any person in the conduct of these activities. *Id.*

"International terrorism" is defined as activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State. *Id.* § 1801(c). Terrorist acts are acts that "appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping." *Id.*

21. *See id.* § 1804(a)(4)(B).

22. For the definition of foreign intelligence information, see *supra* note 17.

23. The USA PATRIOT Act added this language to FISA. The statute originally read "the purpose," which some courts interpreted as "the primary purpose," but after the September 11 attacks Congress amended the statute to read "a significant purpose" in order to facilitate more foreign intelligence information sharing. *Compare* United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (finding that "purpose" as then stated in 50

The FISA application also requires a statement that details the minimization procedures investigators will use to prevent the improper dissemination of information acquired through the FISA search or surveillance. "Minimization procedures" are procedures designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning targets of FISA searches and surveillances. The procedures do not apply to foreign intelligence information, information relevant to a foreign intelligence investigation, or information that is evidence of a

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U.S.C. § 1804(a)(7)(B) meant "primary purpose" and holding that the primary purpose of a FISC investigation could not be to gather evidence for a criminal trial), *and* United States v. Troung Dinh Hung, 629 F.2d 908, 915–16 (4th Cir. 1980) (holding that evidence obtained through a search under the President's executive power to conduct searches for national security is not admissible when the surveillance is conducted primarily for criminal reasons), *with* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (codified at 50 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(7)(B)) (striking "a purpose" and inserting "a significant purpose" into FISA). The change was based in part on assertions that the intelligence failures that helped lead to the September 11 terrorist attacks were caused in part by the "wall" that the Justice Department created to prevent information acquired pursuant to FISA searches and surveillances from reaching criminal investigators; Justice Department officials were afraid that FISA information would taint criminal proceedings against a target of a FISA surveillance or search. *See* H.R. REP. NO. 107-236, pt. 1, at 60 (2001). Before September 11, 2001, the FBI was reluctant to use FISA searches in several high profile cases, including incidents involving Wen Ho Lee, the alleged Los Alamos laboratory scientist spy, and Zacarias Moussaoui, the alleged twentieth September 11 hijacker. *See* James V. Grimaldi, *With Perfect Hindsight, Some Question Decision Not to Seek Surveillance of Curious Flight Student*, WASH. POST, Oct. 8, 2001, at E13. *See generally* GEN. ACCOUNTING OFFICE, FBI INTELLIGENCE INVESTIGATIONS: COORDINATION WITHIN JUSTICE ON COUNTERINTELLIGENCE CRIMINAL MATTERS IS LIMITED, July 16, 2001, 2001 WL 948308 (reviewing the coordination efforts involved in foreign intelligence investigations where FISA has been or may be employed). In both instances, the FBI decided not to go to the FISC to apply for a surveillance order because it did not think its evidence would pass the FISC's strict standard. *See* Grimaldi, *supra*. The FBI was also concerned that evidence uncovered by the surveillance would be inadmissible in a criminal trial due to the primary purpose doctrine. *Id.*

The Aldrich Ames spy case is even more compelling. Ames, whom investigators observed through a FISA surveillance, was convicted of spying against the United States. *Id.* Ames's lawyer argued that evidence obtained from the FISA surveillance should be thrown out. He alleged that FISA surveillances were only legal when conducted primarily for foreign intelligence reasons and Ames's surveillance was conducted in order to criminally prosecute him. *Id.* The parties never litigated this issue because the Ames case settled out of court, but the incident rattled the FBI and caused it to interpret "primary purpose" as "exclusive purpose." *Id.* This hesitancy to use FISA searches and surveillances due to the "primary purpose" requirement is one reason Congress used the USA PATRIOT Act to amend FISA. *See* H.R. REP. NO. 107-236, pt. 1, at 60 (2001).

24. 50 U.S.C.A. § 1804(a)(1)–(11). *See generally* Brian H. Redmond, Annotation, *Validity, Construction, and Application of Foreign Intelligence Surveillance Act of 1978 Authorizing Electronic Surveillance of Foreign Powers and Their Agents*, 86 A.L.R. FED. 782 (1988) (providing a summary of FISA's validity, construction, and application).

crime that has been, is being, or is about to be committed.[25] Also, with respect to any physical search, the procedures require that no information, material, or property of a United States person be disclosed, disseminated, or used for any purpose or retained for longer than seventy-two hours unless a court order is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.[26] The FISC must approve these minimization procedures before they are implemented.[27]

After reviewing the information and application, the FISC judge must make specific findings, including that the Attorney General has approved the application,[28] that there is probable cause to believe that the target of the surveillance is a foreign power or agent of a foreign power,[29] that there is probable cause to believe that each of the facilities where the surveillance or search is taking place is being used or about to be used by a foreign power or an agent of a foreign power,[30] and that the proposed minimization procedures meet the definition of minimization procedures under 50 U.S.C. § 1801(h).[31] As the statute is currently written, the court also must find that a "significant purpose" of the investigation be to obtain foreign intelligence information,[32] but the Court of Review has modified this "significant purpose" requirement.

FISA, as originally written, required that "the purpose" of a FISA search or surveillance be to obtain foreign intelligence information.[33] Courts that applied FISA interpreted "the purpose" to

25. *See* 50 U.S.C.A. §§ 1801(h), 1821(4).

26. *See id.* The proposed minimization procedures that were rejected by the FISC but reinstated by the Court of Review can be found in the Memorandum Concerning "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI" (Mar. 6, 2002), *at* http://fas.org/irp/agency/doj/fisa/ag030602.html (on file with the North Carolina Law Review) (setting out rules for the sharing of information between FISA investigators and criminal investigators); *see In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 616–17 (Foreign Intelligence Surveillance Ct. 2002) (describing the Attorney General's proposed minimization procedures).

27. 50 U.S.C.A. § 1805(a)(4) (West 2003 & Supp. 2003).

28. *Id.* § 1805(a)(2).

29. *Id.* § 1805(a)(3). If the target is a United States person, the FISC judge must ensure that she is not being considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment. *Id.* § 1805(a)(3)(A).

30. *Id.* § 1805(a)(3)(B).

31. *Id.* § 1805(a)(4); *see supra* notes 13, 25–27 and accompanying text.

32. 50 U.S.C.A. § 1804(a)(7)(B) (West 2003).

33. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 104(a)(7)(B), 92 Stat. 1783, 1789 (codified as amended at 50 U.S.C.A. § 1804(a)(7)(B)).

mean the "primary purpose."[34] Consequently, Justice Department investigators were reluctant to taint criminal investigations with information obtained through a FISA search because at trial the court might find that the information was illegally obtained and throw out the evidence along with any subsequent conviction.[35] In response, Attorney General Janet Reno designed new minimization procedures in 1995 that had the practical effect of preventing criminal investigators from exerting any influence on FISA investigations.[36]

The distance that Attorney General Reno sought to place between criminal and foreign intelligence investigators was short lived due to the newly realized threat of terrorism. In response to the September 11 attacks and the perceived intelligence failures that contributed to them, Congress passed the USA PATRIOT Act.[37] Section 218 of the USA PATRIOT Act amended FISA to require only that a "significant purpose" of the surveillance or search be to

34. *See, e.g.*, United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (holding that the primary purpose of a FISC investigation could not be to gather evidence for a criminal trial as required by former 50 U.S.C. § 1804(a)(7)(B)); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (finding that obtaining foreign intelligence information is the primary objective of a search under the language of FISA); *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 623 (Foreign Intelligence Surveillance Ct. 2002) (finding that the government had interpreted FISA to be "used primarily for a law enforcement purpose"); *see also* FINAL REPORT OF THE ATTORNEY GENERAL'S REVIEW TEAM ON THE HANDLING OF THE LOS ALAMOS NATIONAL LABORATORY INVESTIGATION (May 2000) [hereinafter BELLOWS REPORT] (analyzing the FBI's investigation of Wen Ho Lee and criticizing the reluctance of foreign intelligence investigators to share evidence with criminal investigators), http://www.usdoj.gov/ag/readingroom/bellows.htm (on file with the North Carolina Law Review).

35. *See* BELLOWS REPORT, *supra* note 34; *see also supra* note 13 & *infra* note 43 (discussing Title III).

36. *See* BELLOWS REPORT, *supra* note 34 (concluding that "[t]he Criminal Division is not being notified when [foreign counterintelligence] investigations have developed evidence of significant federal crimes"); *see also In re* Sealed Case, 310 F.3d 717, 727–28 (Foreign Intelligence Surveillance Ct. Review 2002) (finding that "procedures state that 'the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's *directing or controlling* the ... investigation toward law enforcement objectives' " (quoting Memorandum Concerning "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" (July 19, 1995), at 2, ¶ 6)). These procedures were unpopular with criminal investigators. *See* BELLOWS REPORT, *supra* note 34; *see also supra* note 23 (discussing problems that arise from limiting coordination and information sharing between criminal and foreign intelligence investigators).

37. *See generally* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.A.) (enacted to punish national and international terrorism and to enhance law enforcement tools, among other purposes).

obtain foreign intelligence information.[38] In light of these changes, the government formulated new minimization procedures designed to implement the amended language of the statute. Attorney General John Ashcroft submitted these new procedures ("proposed procedures"[39]) to the FISC on March 6, 2002, for the FISC's approval.[40] The FISC, however, effectively denied the government's application.[41] It based its decision on FISA's required minimization procedures that prevent the dissemination of information acquired through a FISA search that is unrelated to the foreign intelligence purpose of the search.[42] Concerned that criminal investigators' influence on FISC searches or surveillances would lead to the use of the FISC as a means around the stricter requirements of Title III,[43] the FISC's opinion reestablished a "wall" between FISA investigators and criminal investigators[44] by preventing FISA investigators from sharing information with criminal investigators.[45] As a result, the government appealed the FISC's decision.[46]

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38. *Id.* § 218, 115 Stat. at 291 (codified at 50 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(7)(B) (West 2003)).

39. *See* 50 U.S.C.A. §§ 1804(a)(5), 1823(a)(5) (West 2003).

40. *See Sealed Case*, 310 F.3d at 731.

41. The FISC actually granted the application "as modified," but, as the Court of Review pointed out, the amendments to the procedures effectively denied the application. *Sealed Case*, 310 F.3d at 721.

42. *See In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 622 (Foreign Intelligence Surveillance Ct. 2002).

43. *See id.* at 623 (suggesting that the proposed procedures could not meet the substantive requirements of Title III). A different standard governs the issuance of warrants for criminal surveillances. That standard is spelled out in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title III, § 802, 82 Stat. 237, 254 (codified as amended at 18 U.S.C.A. §§ 2510–2520 (West 2003 & Supp. 2003)). Title III's standard for criminal surveillances is higher than the standard for foreign intelligence searches and surveillances under FISA, requiring probable cause that an individual is committing, has committed, or is about to commit a particular offense listed in the statute. *See* Title III, § 802, 82 Stat. at 262 (codified as amended at 18 U.S.C. § 2518(3)(a) (2000)). In contrast, FISA requires probable cause to believe that the target of the search or surveillance be a foreign power or agent of a foreign power and the place(s) to be searched or the target of the surveillance be owned, used, possessed by, or in transit to or from an agent of a foreign power or a foreign power. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 105(a)(3), 92 Stat. 1783, 1790 (codified as amended at 50 U.S.C.A. § 1805(a)(3) (West 2003)); Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, Title VIII, § 304(a)(3), 108 Stat. 3423, 3447 (1994) (codified as amended at 50 U.S.C.A. § 1824(a)(3) (West 2003 & Supp. 2003)).

44. The FISC intended this "wall" to create a barrier between foreign intelligence investigators and criminal investigators. *See Sealed Case*, 310 F.3d at 721.

45. *See id.*

46. *Id.* at 719. The government argued two main points on appeal. First, it asserted that the supposed pre-USA PATRIOT Act limitation in FISA that restricts the government's intention to use foreign intelligence information in criminal prosecutions by

On November 18, 2002, the Court of Review released its first decision overturning the FISC.[47] The court found that the minimization procedures contained in FISA allow foreign intelligence investigators to disseminate to criminal investigators FISA-acquired information that is evidence of ordinary crimes for preventative or prosecutorial purposes.[48] Furthermore, because such dissemination is exactly what the statute allows, foreign intelligence investigators' collection of evidence of crimes such as espionage was, in effect, "foreign intelligence information" that could be shared with criminal investigators.[49] Thus, the Court of Review struck down the wall that the FISC resurrected between criminal and foreign intelligence investigators.[50]

The Court of Review then discussed the requirement that the government have a significant foreign intelligence purpose for its investigation to conduct a FISA search or surveillance.[51] The Court of Review addressed the distinction courts implicitly drew between foreign intelligence investigations and criminal investigations. It then evaluated that dichotomy in light of the USA PATRIOT Act's insertion of the "significant purpose" test into FISA.[52] The court found that while the original FISA did not contemplate a difference between foreign intelligence and criminal investigations,[53] Congress had that distinction in mind when it amended FISA through the USA PATRIOT Act.[54] Thus, the Court of Review recognized that a line had to be drawn between foreign intelligence and criminal investigations to effectuate congressional intent. Although the Court of Review noted that searches conducted solely for criminal purposes

differentiating between foreign intelligence investigations conducted for foreign intelligence purposes and those conducted for criminal purposes has no support in either the FISA's language or its legislative history. Thus, this difference should not be used as the basis for the FISC's decision. *See id.* at 722. The government also argued that the USA PATRIOT Act's amendment of FISA that articulated the "significant purpose" standard eliminated the necessity to differentiate between foreign intelligence investigations conducted for foreign intelligence purposes and those conducted for criminal purposes. *Id.*

47. *Id.* at 731.

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.* at 732–36.

52. *Id.*

53. *See id.* at 723.

54. *Id.* at 735; *see also supra* notes 13, 43 (discussing the difference between foreign intelligence searches conducted under FISA and criminal searches conducted under Title III).

would be illegal under FISA,[55] it contended that this dichotomy between foreign intelligence and criminal investigation may not make much practical difference.[56] The court stated that "[s]o long as the government entertains a realistic option"[57] of dealing with the target of the FISA search or surveillance through means other than criminal prosecution, it satisfies the significant purpose test.[58] Thus, while the court recognized the difference between foreign intelligence and criminal investigations and the necessity of preventing FISA searches and surveillances from being abused for criminal purposes, it refused to give the FISC the necessary authority to prevent potential abuse because any measurable foreign intelligence interest would satisfy the significant purpose test.

The Court of Review ended its opinion with a discussion of the constitutional issues implicated in the case.[59] It examined the argument raised by the amici curiae[60] that the "primary purpose" test is constitutionally mandated, even if specifically repudiated by Congress. After the court compared FISA to Title III,[61] considered Supreme Court precedent in *United States v. United States District Court*,[62] and discussed the Supreme Court's special needs cases,[63] the

55. *See Sealed Case*, 310 F.3d at 735–36.

56. *Id.* at 735.

57. *Id.*

58. *Id.*

59. *Id.* at 746. While this Recent Development does not address the constitutional issues inherent in FISA, it notes that the Court of Review itself does not seem sure how to handle them. For instance, while the Court of Review posits that FISA searches and surveillances are constitutional because they are reasonable, the court also implies that the answer is still unclear. *Id.* The court seems to be aware of the constitutional issues raised with respect to the lower standard for FISA searches and surveillances, but it justifies holding that the lower standards are constitutional based on exigent circumstances, noting that "[o]ur case may involve the most serious threat the country faces." *Id.*

60. The ACLU (and other interested parties) and the National Association of Criminal Defense Lawyers ("NACDL") filed amicus briefs arguing that the FISC's opinion should be upheld because the proceedings in front of the Court of Review are ex parte and because the Constitution requires the primary purpose test. *See id.* at 734; Brief on Behalf of Amici Curiae ACLU et al. at 24, *In re Sealed Case* (No. 02-001), http://www.epic.org/privacy/terrorism/fisa/FISCR_amicus_brief.pdf (on file with the North Carolina Law Review); Brief of Amici Curiae NACDL at 5, *In re Sealed Case*, 310 F.3d 717 (Foreign Intelligence Surveillance Ct. Review 2002), *available at* http://www.eff.org/Privacy/Surveillance/FISCR/pdf/nacdl_fisa_amicus.pdf (on file with the North Carolina Law Review).

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

62. *Id.* at 746.

63. *Id.* at 745–46. In certain cases, the Supreme Court has approved warrantless and suspicionless searches designed to serve the government's "special needs," or interests that lie beyond the normal need for law enforcement. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (finding that warrantless drug screenings for pregnant

Court of Review found that "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."[64] Applying the balancing test from *United States v. United States District Court*,[65] it concluded that the threat to society was serious enough to make the searches and surveillances FISA authorized reasonable. Thus, the court found that interpreting FISA to require a "measurable purpose" was constitutional under the Fourth Amendment.[66]

By interpreting the FISA to allow the government to conduct a search or surveillance when it has any measurable foreign intelligence purpose, the Court of Review does not conform its opinion with the plain text of the statute. In fact, the Court of Review interpreted FISA as if the word "significant" were not present.[67] "Significant" is defined as "[h]aving or likely to have a major effect; important."[68] A significant purpose of a foreign intelligence investigation, then, is a purpose that is important to that investigation. Thus, in order for the FISC to issue a FISA search or surveillance order, it must find that an important purpose of the investigation is to obtain foreign intelligence information.[69] The Court of Review, however, read the statute merely to require that "the government have a *measurable* foreign intelligence purpose."[70]

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mothers were valid because the special need to curtail pregnancy complications outweighed the privacy interests); Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989) (stating that warrantless searches may be authorized if the government can demonstrate a "special need" beyond the ordinary need for law enforcement). In order to get "special needs" status, the government's action must demonstrate that law enforcement will prevent a specific harm. *See Sealed Case*, 310 F.3d at 746 n.33.

64. *Sealed Case*, 310 F.3d at 745–46.

65. *United States v. United States District Court*, 407 U.S. 297 (1972), articulated the balancing test by saying that because the Fourth Amendment is not absolute in its terms, the Court's job is to balance the basic values at stake. *Id.* at 314. Those values are the duty of the United States to protect the domestic security of its citizens and to prevent the potential danger posed by unreasonable surveillance to individual privacy and free expression. *Id.* at 315. "If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken." *Id.* at 314–15.

66. *Sealed Case*, 310 F.3d at 746.

67. *See id.* at 735–36.

68. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1290 (4th ed. 2002) [hereinafter AMERICAN HERITAGE DICTIONARY].

69. *See* 50 U.S.C.A. § 1804(a)(7)(B) (West 2003).

70. *Sealed Case*, 310 F.3d at 735.

"Measurable" is defined as "that [which] can be measured,"[71] a definition that is inconsistent with the "important" or "major" aspects of the definition of "significant." "Measurable" is also not listed as a synonym of "significant."[72] The requirement for a measurable foreign intelligence purpose for the investigation could therefore mean that *any* purpose that can be measured by the FISC will pass the statutory test, even if the purpose is not significant.[73] How stringent is this standard? Will the FISC grant an application for a search where the target of the search is a suspected murderer but the government has reason to believe that he is a member of a radical, militant, Islamic religious group? Will the FISC grant an application for a search where the target is a drug dealer but once held a job at the Russian embassy? Interpreting FISA to allow these searches and surveillances contradicts the statute's plain meaning. By allowing a search or surveillance application to pass the significant purpose test if there is any foreign intelligence purpose for the investigation, the Court of Review is interpreting "significant" to mean "insignificant."

The decision also contradicts Congress's express intent in enacting FISA.[74] As evidenced by the congressional history of the USA PATRIOT Act, Congress intended FISA to require more than just a measurable foreign intelligence purpose before a FISA search order could be issued.[75] Three different interpretations of "purpose" were proposed when Congress debated the USA PATRIOT Act amendments to FISA: "a purpose"; "a significant purpose"; and "a substantial purpose."[76] "A purpose," the language advanced by the Bush Administration,[77] represented the lowest threshold.[78] Congress

71. AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 859.

72. ROGET'S II, THE NEW THESAURUS 904 (3d ed. 2003).

73. The Court of Review itself refutes this, however, by saying that "[s]o long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test." *Sealed Case*, 310 F.3d at 735.

74. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1811 (West 2003 & Supp. 2003)); 147 CONG. REC. S11,003–04 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

75. *See infra* notes 79–90 and accompanying text.

76. 148 CONG. REC. S9109–10 (daily ed. Sept. 24, 2002) (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act) (discussing the various "purpose" standards in light of the USA PATRIOT Act).

77. *Id.* (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act).

78. *See* 147 CONG. REC. S11,003–04 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy); *see also* 148 CONG. REC. S9109–10 (daily ed. Sept. 24, 2002) (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act).

did not adopt this standard because it was concerned that the FISC would be used *sub rosa* for criminal investigations.[79]

Congress also refused to adopt the "substantial purpose" standard because it wanted to allow criminal and foreign intelligence investigators to consult more frequently than the interpretation of that language might have permitted.[80] Congress eventually settled on the compromise term "significant purpose" to make sure that the criminal and foreign intelligence investigators could consult with each other and to ensure that criminal prosecutors would not abuse FISA searches for criminal investigations.[81] Congress changed the statute to reflect this view.[82] It did not intend that FISA searches and surveillances be permitted when the government merely asserted that it had any foreign intelligence purpose for the investigation. Otherwise, Congress would have adopted the "a purpose" standard rather than "a significant purpose."[83]

Congress was concerned about the government's abuse of FISA searches and surveillances, specifically in regard to criminal investigators obtaining FISA search orders in lieu of making the more stringent showing needed to obtain a criminal search warrant.[84] In addressing the changes the USA PATRIOT Act made to FISA, Senator Patrick Leahy recounted the government's past intelligence abuses for political reasons.[85] He noted that while the USA PATRIOT Act expanded the power of the government to investigate foreign intelligence crimes, "methods of domestic political

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79. *See* 148 CONG. REC. S9109–10 (daily ed. Sept. 24, 2002) (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act).

80. *See id.* (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act).

81. *See id.* (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act).

82. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (codified at 18 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(7)(B) (West 2003)); 148 CONG. REC. S9109–10 (daily ed. Sept. 24, 2002) (joint statement of Sens. Hatch, Thurmond, Kyl, DeWine, Sessions, and McConnell regarding USA PATRIOT Act); 147 CONG. REC. S10,990, 11,003–04 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

83. *See supra* notes 78–79 and accompanying text.

84. *See* 147 CONG. REC. S10,990, 11,022 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold) (contending that due to the lowered standard, the FBI will try to "use the FISA as much as it can"); *see also id.* at S11,029 (statement of Sen. Cantwell) (expressing skepticism over whether the new powers granted to the government under FISA will be abused); *supra* note 13 (detailing the broad surveillance powers available under FISA that are not available to criminal investigators under Title III).

85. *See* 147 CONG. REC. S10,993–94 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

surveillance and covert manipulation and disruption have no place in a free society."[86] He reminded Congress of FBI and Army Intelligence monitoring of government critics, including J. Edgar Hoover's "vendetta" against Dr. Martin Luther King, Jr.[87] Thus, while the Court of Review may gloss over the potential for abuse of FISA searches and surveillances, Congress undoubtedly was concerned with the potential for abuse and stressed that the new powers granted under the USA PATRIOT Act must be exercised under judicial oversight.[88] Senator Leahy's statement that "it will be up to the courts to determine how far law enforcement agencies may use FISA for criminal investigation and prosecution beyond the scope of the statutory definition of 'foreign intelligence information' "[89] demonstrates that Congress envisioned active judicial oversight of the amendments to FISA.[90] Because the FISC is the only court that directly deals with FISA searches and surveillances, the court needs to ensure it adequately oversees the FISA process to prevent governmental abuse at the expense of the constitutional rights of American citizens.

The significant purpose standard would prevent abuse of FISA searches and surveillances more completely than the measurable purpose standard. The significant purpose standard requires the government to meet a higher burden of proof that the investigation is being conducted for foreign intelligence purposes than does the measurable purpose standard.[91] Thus, it will be more difficult for investigators conducting nonforeign intelligence investigations to obtain a FISA search or surveillance order. Because it is more difficult for criminal investigators to obtain FISA search orders under the significant purpose standard when they do not have an actual significant foreign intelligence purpose for their investigation, targets of criminal investigations without significant foreign intelligence issues will be better protected from invasions of their privacy.[92]

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86. *See id.* (statement of Sen. Leahy).

87. The FBI attempted to discredit Dr. King by disclosing confidential information obtained by wiretap under the pretense that some of Dr. King's advisors were Communists. *See* 147 CONG. REC. S10,993 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

88. *See id.* at S11,004 (statement of Sen. Leahy).

89. For the definition of "foreign intelligence information," see *supra* note 17.

90. *See* 147 CONG. REC. S11,029 (daily ed. Oct. 25, 2001) (statement of Sen. Cantwell) (expressing "the need to maintain strict oversight of the law enforcement community's use of new authorit[y]" enumerated in the USA PATRIOT Act).

91. *See* 50 U.S.C.A. § 1804(a)(7)(B) (West 2003).

92. *See id.*

One could argue, however, that the government's national security interest is sufficient to overcome the Fourth Amendment protection provided to targets of FISA searches. The United States Supreme Court addressed this question in *United States v. United States District Court*.[93] In examining privacy concerns raised in the context of domestic security operations, the Supreme Court found that the Fourth Amendment should be flexible in its application.[94] The government interest in protecting national security is to be balanced against the danger to individual privacy and free expression posed by unreasonable surveillance.[95] Thus, the Court found that neither the national security interest of the government nor the privacy interest of individual citizens is absolute.[96] Both interests must be balanced to afford individuals sufficient constitutional protection and to give the government the ability to protect national security. The significant purpose test attempts to correctly balance these issues by ensuring that the government has a significant foreign intelligence interest in its investigation before it is granted a search under FISA. National security is not a sufficient interest to overcome Fourth Amendment protections due to the historic abuses of the search and surveillance power purportedly exercised for national security reasons.[97]

The Court of Review's decision is also misguided when viewed against the FISC's historical pattern of unwillingness to deny FISA applications. This case was the first time the FISC denied a government application for a search since the court's creation in 1978.[98] The FISC's opinion was also the first opinion from the court

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93. 407 U.S. 297 (1972).

94. *Id.* at 314–15

95. *Id.*

96. *Id.* at 314.

97. *See supra* notes 85–87 and accompanying text.

98. Senators Patrick Leahy, Charles E. Grassley, and Arlen Specter, members of the Senate Select Committee on Intelligence, wrote a letter to Judge Colleen Kollar-Kotelly, Presiding Judge of the FISC, explaining that they had discovered the court's order that revised the Attorney General's March 2002 proposed procedures. They asked the court to "[p]lease provide, or authorize the Justice Department to provide, copies of those procedures as submitted and as revised, any memorandum opinion(s) of the court that explain the rationale for those revisions, and any legal memoranda submitted on this matter by the Department of Justice." Letter from Senators Patrick Leahy, Charles E. Grassley, and Arlen Specter, to Colleen Kollar-Kotelly, Presiding Judge, Foreign Intelligence Surveillance Court (July 31, 2001), http://www.fas.org/irp/agency/doj/fisa/leahy073102.html (on file with the North Carolina Law Review). In response, Judge Kollar-Kotelly conferred with the other ten judges on the FISC and the past presiding judge of the FISC and decided to provide the unclassified opinion and orders to the Senate committees with the responsibility for overseeing the court and to publish them to

that has been published for release to the general public.[99] Thus, out of the 14,019 total applications for searches and surveillances under FISA, only one has been denied.[100] Though the court's reluctance to deny the government's applications for searches could be an indicator of the government's compliance with FISA's requirements, such reluctance may in fact indicate that the FISC is hesitant to require the government to do more in the application process.[101] This attitude would prevent the FISC from effectively performing its oversight duties. While the Supreme Court has not considered foreign intelligence investigations in this context, in *United States v. United States District Court* the Court stated that post-surveillance judicial review of both domestic security and criminal searches was not enough review to allow the search to pass Fourth Amendment scrutiny.[102] Indeed, it noted that in those cases the only time that surveillances would come under judicial review would be when the target of the surveillance was prosecuted.[103] This type of review would open the door for abuse, for so long as the target was not

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the general public. Letter from Colleen Kollar-Kotelly, Presiding Judge, Foreign Intelligence Surveillance Court, to Senators Patrick Leahy, Charles E. Grassley, and Arlen Specter (Aug. 20, 2002), http://www.fas.org/irp/agency/doj/fisa/1995procs.html (on file with the North Carolina Law Review). Judge Kollar-Kotelly stated that the court has never issued an unclassified opinion and order, though in the early 1980s then-presiding Judge George Hart issued a brief unclassified memorandum opinion affirming that the FISC had no jurisdiction to approve physical searches under FISA. *Id.* In response to this memorandum opinion, Congress amended FISA by adding 50 U.S.C. §§ 1821-1829 (Subchapter II), which gave the FISC jurisdiction over physical searches. *See* Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3423 (1994) (codified as amended at 50 U.S.C. §§ 1821-1829 (West 2003 & Supp. 2003)). This is the first time the FISC has publicly issued an opinion since Judge Hart's memorandum opinion.

99. In accordance with 50 U.S.C. § 1807 (2000), the Attorney General must submit to Congress a list of the total number of applications made for search or surveillances made pursuant to FISA, as well as the total number of orders granted, modified, or denied by the FISC.

100. The figures cited above are compiled from the reports sent to Congress by the Attorneys General as required by § 1807. *See* Office of Intelligence Policy and Review: FOIA Reading Room Records, http://www.usdoj.gov/04foia/readingrooms/oipr_records.htm (last visited May 6, 2003) (reports on file with the North Carolina Law Review) (containing the 1996-2002 FISA reports); Federation of American Scientists: Foreign Intelligence Surveillance Act, http://www.fas.org/irp/agency/doj/fisa/index.html#rept (last visited May 6, 2003) (reports on file with the North Carolina Law Review) (containing the 1979-2002 FISA reports).

101. While it is possible, it is difficult to believe that only one out of more than 14,000 search applications was improper.

102. United States v. United States Dist. Court, 407 U.S. 297, 317-18 (1972).

103. *Id.* at 318.

prosecuted, investigators could harass the target at will.[104] Further addressing this issue, the Court asserted, "Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights."[105] Even though the Court was not addressing its comments to foreign intelligence surveillances or searches, the necessity for a neutral check on the executive's power to conduct searches also applies in the context of foreign intelligence investigations.[106] Thus, the FISC must act as an objective check on the government to protect the proposed targets of FISA searches and surveillances from unreasonable searches and seizures. Rubber-stamping government applications for searches and surveillances will not accomplish this goal. The FISC should not be deterred by its past reluctance to deny the government's applications for a search or surveillance. Rather, the FISC must use its authority to ensure that the government does not abuse its expansive search and surveillance powers granted under FISA. Without such a check, the careful balance between the government's interest in protecting national security and the individual's interest in being free from unreasonable searches could be upset.

In sum, the minimization procedures that the FISC attempted to adopt in its May 2002 opinion were too constraining because of the restrictions the procedures put on the sharing of information obtained by a FISA investigation between foreign intelligence and criminal investigators. The Court of Review, however, went too far in its interpretation of FISA when it lowered the standard for obtaining a FISA search or surveillance order from a significant purpose to a measurable purpose. This new standard effectively allows a search or surveillance if the government asserts almost any foreign intelligence purpose for its investigation. The appropriate interpretation of the "significant purpose" requirement in FISA lies in between the two courts' decisions. While it is sometimes necessary to disseminate information properly acquired through FISA searches and

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104. *See id.* The USA PATRIOT Act did, however, create penalties for the abuse of information acquired through FISA searches and surveillances by amending 18 U.S.C. § 2712(a) to allow any person aggrieved by willful violation of criminal or foreign intelligence interception of wire, electronic, or oral communications to commence an action against the United States to recover money damages, including actual damages not less than $10,000 and litigation costs. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 223, 115 Stat. 272, 293–94 (codified at 18 U.S.C.A. § 2712(a) (West Supp. 2003)); *see* 147 CONG. REC. S10,994 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy).

105. *United States Dist. Court*, 407 U.S. at 317.

106. *In re* Sealed Case, 310 F.3d 717, 746 (Foreign Intelligence Surveillance Ct. Review 2002); *see United States Dist. Court*, 407 U.S. at 314–15.

surveillances to criminal investigators, a watchful FISC is necessary to prevent abuse of the expansive surveillance powers granted under FISA. Past abuses of searches under the guise of "national security" have been well documented,[107] and one of the main reasons Congress created the FISC was to prevent those abuses from happening again.[108] Thus, the FISC should be vigilant in requiring that the government have an actual, significant foreign intelligence interest in the investigation for which the government has applied for a search or surveillance. The FISC does not need to back away from its role as the arbiter of whether the government has a significant (and thus sufficient) foreign intelligence purpose for its investigation. The balance between the government's interest in protecting its citizens from foreign threats and the need to protect those citizens' constitutional freedoms will be upset if the FISC does not fulfill its oversight duty.

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107. *See supra* notes 15, 85–87 and accompanying text.
108. *See supra* note 15.