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Foreign Intelligence Surveillance Court's May 17 Opinion: Maintaining a Reasonable Balance Between National Security and Privacy Interests

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> *"Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."*[1]

I. INTRODUCTION

On August 22, 2002, the U.S. Senate Judiciary Committee released an extraordinary document.[2] The committee had received a judicial opinion written by the highly secretive Foreign Intelligence Surveillance Court (FISC) and the

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1. Berger v. New York, 388 U.S. 41, 63 (1967).

2. James Bamford, *At Least Kafka Supplied a Lawyer*, SACRAMENTO BEE, Sept. 1, 2002, at E3.

committee made the secret court's opinion public.[3] The disclosure was unprecedented.[4] The FISC's Memorandum Opinion[5] was issued in response to the U.S. Department of Justice's new procedures for conducting electronic surveillance as authorized under the Foreign Intelligence Surveillance Act (FISA).[6] In an en banc decision, the FISC rejected part of the Justice Department's new guidelines for conducting FISA investigations and replaced those guidelines with its own.[7] In doing so, the secret court rejected the government's interpretation of a new law amending the language of the FISA.[8]

Following the FISC's May 17 Opinion, the Justice Department applied for a FISA electronic surveillance order, requesting that the order be granted under the Department's own proposed guidelines.[9] On July 24, 2002, the court granted the government's application but again rejected the new guidelines and modified the order consistent with its May 17 Opinion.[10]

The Department of Justice viewed the FISC's decision as a denial and appealed to the United States Foreign Intelligence Surveillance Court of Review.[11] In its first decision since its inception,[12] the reviewing court reversed the lower court, finding that there was not an adequate basis for the FISC's interpretation of both FISA and the recent amendment to FISA.[13]

This note proposes that the FISC was correct in its interpretation of the Foreign Intelligence Surveillance Act and the amendment created by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (U.S.A. PATRIOT Act). It also offers that the FISC decision, which did not reach a constitutional issue, should have been affirmed in review because it reinforced the individual rights and privacy protections offered by the Fourth Amendment of the U.S. Constitution while still allowing the federal government to use stronger measures to combat foreign espionage and terrorism.

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3. *Id.*

4. *See id.* (stating this was only the second open opinion released by the FISC in twenty-five years).

5. Memorandum Opinion, United States Foreign Intelligence Surveillance Court (May 17, 2002), *at* http://fas.org/irp/agency/doj/fisa [hereinafter May 17 Opinion] (copy on file with the *McGeorge Law Review*); *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 613 (2002), *rev'd per curiam sub nom In re* Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002) (per curiam).

6. Bamford, *supra* note 2.

7. *In re All Matters*, 218 F. Supp. 2d at 625-27; Brief for the United States at 3, 6-9, *In re Sealed Case*, 310 F.3d 717 (No. 02-001) *available at* http://fas. org/irp/agency/doj/fisa/082102appeal.html (last visited June 13, 2003) [hereinafter Government Brief] (copy on file with the *McGeorge Law Review*).

8. *In re All Matters*, 218 F. Supp. 2d at 615 n.2; Government Brief, *supra* note 7, at 6-9.

9. Government Brief, *supra* note 7, at 3, 6-9.

10. *Id.*

11. *Id.* at 3.

12. *In re Sealed Case*, 310 F.3d 26, 719.

13. *Id.* at 721, 746.

II. BACKGROUND

A. *Origin of the FISA*

The scandals and abuses of the Nixon Administration gave birth to the Foreign Intelligence Surveillance Act of 1978.[14] President Richard Nixon interpreted broadly his executive power to conduct domestic surveillance.[15] Under the guise of protecting national security, the President's office authorized surveillance of Reverend Martin Luther King, citing that King had contacts with suspected communists.[16] After the break-in of the Watergate Hotel, the subsequent cover-up, and other White House-related scandals came to light,[17] Congress sought to reign in the Chief Executive's power to conduct surveillance.[18] Congress, seeking to balance the Executive Branch's legitimate duty to protect the nation from foreign threats with the need to uphold important freedoms and individual privacy, passed the Foreign Intelligence Surveillance Act of 1978.[19]

B. *The FISC and the Application Process*

Under Article III, Section 1 of the United States Constitution, Congress has the authority to establish inferior courts.[20] Through the FISA, Congress created the Foreign Intelligence Surveillance Court for the purpose of reviewing the Executive Branch's applications to conduct domestic surveillance for foreign intelligence gathering.[21] The FISA authorizes the Chief Justice of the U.S. Supreme

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14. *See* Robert A. Dawson, *Foreign Intelligence Surveillance Act: Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1382-83, 1386-87 (1993) (discussing how Presidents, prior to FISA, claimed to have the inherent power to conduct warrantless searches if they were conducted in the interest of national security).

15. *See id.* at 1386, 1429 n.37 (listing examples of domestic surveillance initiated by President Nixon).

16. *Id.* at 1429 n.37.

17. *See id.* at 1386, 1429 n.37 (noting Nixon's abuse of surveillance during this period).

18. *See Foreign Intelligence Surveillance Act of 1977: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong. (1977) [hereinafter FISA Hearings] (stating that, under the FISA, "[t]he courts, not the executive, ultimately rule on whether the surveillance should occur," and stating that the FISA "prevent[s] the National Security Agency from randomly wiretapping American citizens whose names just happen to be on a watch list of civil rights and antiwar activists").

19. *Id.*

20. U.S. CONST. art. III, § 1.

21. Dawson, *supra* note 14, at 1387-89 (discussing the establishment of the Foreign Intelligence Surveillance Court through the FISA); 50 U.S.C. § 1801(e) (2003) (defining foreign intelligence). Section 1801(e) defines Foreign Intelligence as:

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to,

Court to appoint the eleven-member panel of the FISC from sitting district court judges.[22] The FISC meets in secret and government petitions are heard in secret.[23] In fact, the government is the only party present at a FISA hearing.[24] No opposing attorneys appear before the FISA and the FISC's opinions are almost never published.[25]

When a government agent wishes to conduct a FISA search or surveillance, the agent works with a government lawyer to draft the application.[26] Both the lawyer and the agent sign the application and it is presented to the head of the appropriate intelligence agency.[27] This officer certifies that the order is sought for foreign intelligence purposes only.[28] Before it is presented to the FISC, the application passes to the Attorney General, who also certifies that it meets the requirements of the law.[29]

If the government's application establishes probable cause sufficient to issue a surveillance order, the FISC issues the order.[30] Under the FISA, the "probable cause" threshold the government must meet is probable cause to believe the target of the investigation is a "foreign power or an agent of a foreign power."[31] Under the law as originally enacted, the scope of any FISA surveillance order was limited to investigations where the purpose was the gathering of foreign intelligence.[32]

C. *The U.S.A. PATRIOT Act of 2001*

The horrific acts perpetrated against the United States on September 11, 2001, prompted a swift reaction by the U.S. Congress.[33] Following the attacks on the World Trade Center and the Pentagon, legislators expressed frustration with the failures of intelligence agencies and law enforcement to piece together clues

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and if concerning a United States person is necessary to—(A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.

Id.

22. 50 U.S.C. § 1803(a) (2003).

23. Bamford, *supra* note 2; Helen E. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs*, 12 RUTGERS L.J. 405, 436 (1981) (noting that "[t]he FISA court sits in secret sessions").

24. Bamford, *supra* note 2.

25. Schwartz, *supra* note 23, at 436 (stating that the court "holds no adversary hearings, and publicly issues no opinions or reports").

26. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE 317-18 (Simon & Schuster 1996).

27. *Id.*

28. *Id.*

29. *Id.*

30. 50 U.S.C. § 1805(a) (2003).

31. *Id.*

32. *Id.* § 1804(a)(7)(B) (1991).

33. *See* Michael T. McCarthy, *U.S.A. PATRIOT Act*, 39 HARV. J. ON LEGIS. 435, 438-39 (2002) (noting that the U.S.A. PATRIOT Act was signed less than six weeks after the attacks).

of the danger prior to September 11.[34] U.S. Attorney General John Ashcroft requested that Congress grant the Justice Department greater power to prevent future terrorist acts.[35] Within six weeks of the attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S.A. PATRIOT Act).[36]

The U.S.A. PATRIOT Act is a voluminous document[37] that makes numerous amendments to existing law including the FISA.[38] As originally enacted, a FISA surveillance order stated that "*the* purpose of the surveillance is to obtain foreign intelligence information."[39] The U.S.A. PATRIOT Act changed that requirement by adding the word "significant."[40] A FISA order now requires that a "*significant* purpose of the surveillance" be for obtaining foreign intelligence.[41] Under the new law, a Justice Department official no longer has to demonstrate to the FISC that the primary purpose of the surveillance is to gather foreign intelligence. Rather, the officer need only show that the collection of foreign intelligence is a "significant" purpose for requesting the order.[42]

D. The Justice Department's "Minimization Procedures"

On March 6, 2002, the Attorney General circulated a memorandum promulgating new procedures for the different Justice Department executives to follow in regard to foreign intelligence surveillance.[43] Specifically, the memo dealt with what the FISA refers to as "minimization procedures."[44] The minimization procedures dictate to the Department who may direct a FISA

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34. *See id.* at 437-38 (noting that prior to September 11, the Central Intelligence Agency had intelligence on two of the hijackers, identifying them as suspected terrorists, but the Agency failed to share that information with the Federal Bureau of Investigation or Immigration and Naturalization Service in time for them to prevent the hijackers from entering the country).

35. *Id.* at 438-39.

36. *Id.* at 439.

37. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. PATRIOT Act of 2001), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles of U.S.C.).

38. *See* Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The U.S.A. PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 968-74 (2002) (listing some of the amendments created by FISA).

39. 50 U.S.C. § 1804 (a)(7)(B) (1991) (emphasis added).

40. *See* 50 U.S.C. § 1804 (a)(7)(B) (2003).

41. *Id.* (emphasis added).

42. *Id.*

43. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 615-16 (2002).

44. *Id.; see* 50 U.S.C. § 1801(h)(1)(2003) (defining "minimization procedures" as:

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

investigation.[45] The FISC retains authority to approve of measures "affecting the acquisition, retention, and dissemination of information obtained through electronic surveillances and physical searches of U.S. persons to be approved as part of the government's applications" for a FISA surveillance order.[46] Specifically, the "minimization procedures are designed to regulate" such interaction between "FBI counterintelligence and counter terrorism officials on one hand, and FBI criminal investigators, trial attorneys in the Justice Department's Criminal Division, and U.S. Attorney's Offices on the other hand."[47]

The new procedures outlined in the March memorandum reflected the Attorney General's interpretation of the U.S.A. PATRIOT Act's amendment to FISA.[48] According to this interpretation, the Act "allows FISA to be used *primarily* for a law enforcement purpose, as long as a significant foreign intelligence purpose remains."[49] The Justice Department interprets the changes made by the U.S.A. PATRIOT Act as giving federal law enforcement agents the authority to advise or make recommendations to intelligence officials conducting FISA surveillance.[50]

III. THE FISC'S MAY 17 DECISION

The FISC rejected part of the government's new procedures. The court found that allowing criminal prosecutors to advise intelligence officials on FISA surveillances effectively authorized the collection "of *evidence for law enforcement purposes, instead* of" foreign intelligence purposes.[51] The FISC viewed these provisions as a means of substituting Title III surveillance orders with the FISA surveillance orders.[52] The court envisioned criminal prosecutors who are unable to establish probable cause in order to obtain an electronic surveillance order under Title III directing FBI intelligence officials on the initiation, operation, continuation or expansion of FISA surveillances and searches.[53] The FISC emphasized that foreign intelligence gathering is the

45. Brief on Behalf of Amici Curiae American Civil Liberties Union, at 3. *In re* Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002) (No. 02-001), *available at* http://fas.org/irp//agency/doj/fisa/091902FISCRbrief.pdf (last visited June 13, 2003) [hereinafter ACLU Brief] (copy on file with the *McGeorge Law Review*).

46. *In re All Matters*, 218 F. Supp. 2d at 615.

47. *Id.* at 615-16.

48. Government Brief, *supra* note 7.

49. *Id.* at 8.

50. *Id.*

51. *In re All Matters*, 218 F. Supp. 2d at 623.

52. *Id. See* 18 U.S.C. § 2518(3)(a) (2001). The Title III Omnibus Crime Control and Safe Streets Act of 1968 (Title III) is the federal law governing the use of electronic surveillance for the purpose of law enforcement. Under Title III, an order for a wiretap can only be obtained when federal law enforcement can show a federal judge that "there is probable cause to believe that an individual is committing . . . or is about to commit a particular offense . . . ." *Id.*

53. *In re All Matters*, 218 F. Supp. 2d at 624.

"*raison d'etre*" for the FISA as opposed to investigations for the purpose of criminal prosecution.[54]

The court placed limits on the extent to which law enforcement officials may advise foreign intelligence officers. It ruled that "law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances."[55] The FISC also required that FBI and criminal prosecutors "ensure . . . 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."[56]

In its reversal of the memorandum opinion, the Foreign Intelligence Surveillance Court of Review determined that the FISC had no legal basis for requiring a separation between foreign intelligence operations and law enforcement operations.[57] The three-judge appellate panel determined that, because the purpose of the FISA is to guard the nation against foreign spies and terrorists, the Justice Department's guidelines are constitutionally reasonable, even if they do not meet Fourth Amendment warrant standards.[58]

IV. DISCUSSION

The concerns that generated the passage of the U.S.A. PATRIOT Act involved the coordination, consultation and information-sharing between intelligence and law enforcement officials.[59] The Justice Department's minimization procedures beg the question: Did Congress, by amending the FISA, contemplate the authorization of electronic surveillance where the primary or exclusive purpose is la enforcement?[60] The FISC wisely did not interpret the U.S.A. PATRIOT Act as permitting such an expansion of the government's highly intrusive surveillance power.[61] The court did approve the government's proposed procedures allowing the FBI to disseminate to law enforcement officers and prosecutors information collected by intelligence officers.[62] This type of

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54. *Id.* at 613.

55. *Id.* at 625.

56. *Id.*

57. *In re* Sealed Case, 310 F.3d 717, 721 (Foreign Intelligence Surveillance Court of Review 2002) (per curiam).

58. *Id.* at 746.

59. *See* McCarthy, *supra* note 33, at 437-39 (discussing the circumstances leading to the passage of the Act).

60. *See* ACLU Brief, *supra* note 45, at 25-26 (asserting that investigations primarily or exclusively conducted for law enforcement purposes must comply with the Fourth Amendment); Government Brief, *supra* note 7, at 10 (claiming that only a "significant non-law enforcement purpose" is required to conduct an investigation).

61. *See In re All Matters*, 218 F. Supp. 2d at 615 n.2 (declining to determine if the amendment authorizes investigations "primarily for law enforcement purposes").

62. *Id.* at 625.

information-sharing would be in keeping with the spirit of the U.S.A. PATRIOT Act. The Act contemplates "essentially unlimited sharing of information between intelligence and law enforcement" officials.[63] However, Congress did not necessarily alter the probable cause standard controlling when criminal investigators may use electronic surveillance.[64]

A. *The Government's Interpretation of the U.S.A. PATRIOT Act Amendment*

The federal government argues that its March 2002 procedures conform to the new statutory language of the FISA as provided by the U.S.A. PATRIOT Act.[65] The government points out that the U.S.A. PATRIOT Act allows FISA surveillance where the FISC determines that foreign intelligence gathering is a "significant purpose."[66] It interprets this amendment as allowing the "FISA to be used *primarily* for a law enforcement purpose, as long as a significant foreign intelligence purpose remains."[67]

The government states that under the FISA's definition of "[f]oreign intelligence information,"[68] any information "relevant or necessary to help the United States protect against certain specified threats, including attack, sabotage, terrorism, and espionage committee [sic] by foreign powers or their agents" would qualify under FISA.[69] It further argues that information gathered for the purpose of *prosecuting* a foreign spy or terrorist would fall within the definition if such a prosecution "[p]rotects against espionage or terrorism."[70] The Fourth Amendment of the U.S. Constitution would not be implicated, the government stresses, if the government's purpose is to protect national security.[71]

The most persuasive argument offered by the government supporting the idea that protecting national security includes criminal prosecution is that prosecutions can lead to the gathering of more critical foreign intelligence information.[72] Such prosecutions are best exemplified by the cases of Ahmed Ressam and Robert Hanssen.[73] After he was arrested entering the country from Canada, the government

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63. ACLU Brief, *supra* note 45, at 5.

64. *Cf. id.* (suggesting the "distinction between surveillance authorization for criminal . . . and intelligence investigations" had been preserved).

65. *See generally* Government Brief, *supra* note 7 (arguing against the FISC's rejection of the new guidelines).

66. *Id.* at 6.

67. *Id.*

68. 50 U.S.C. § 1801(e) (2003).

69. *See* Government Brief, *supra* note 7, at 12 (distinguishing foreign intelligence information from "information concerning purely *domestic* threats," like that posed by Timothy McVeigh's plan to blow up the federal building in Oklahoma City).

70. *See id.* at 13 (stating that "[p]rosecution is often a most effective means of protecting national security").

71. *Id.* at 10.

72. *Id.* at 13.

73. *Id.*

charged Ressam, the so-called "millennium bomber," with attempting to destroy Los Angeles International Airport.[74] Subsequent to his conviction and sentencing, Ressam provided the government with information regarding his training at an overseas al-Qaeda training camp.[75]

Hanssen, a 27-year veteran agent of the Federal Bureau of Investigation, was arrested and charged with passing intelligence information to the former Soviet Union.[76] His prosecution, the government argues, led to the acquisition of vital information about his years of espionage activities and vulnerabilities within the Bureau.[77]

The Justice Department concedes that it may not use the FISA for the exclusive purpose of obtaining evidence for the prosecution of a domestic crime, such as homicide, because such information is not "foreign intelligence information."[78] However, if the investigation aims to acquire evidence to prosecute the target for espionage or terrorism, the purpose would be classified as gathering foreign intelligence information and should be allowed under the FISA.[79]

B. Electronic Surveillance: The Fourth Amendment, Title III and the FISA

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[80]

In short, "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[81] Since the drafting of the Constitution, the U.S. Supreme Court has struggled to determine what government actions do and do not constitute a search, triggering

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74. *See* Victor Ostrowidzki, *Anti-Terrorist Program Criticized as Incoherent*, SEATTLE POST-INTELLIGENCER, Dec. 26, 2000, at A1 (stating that Ressam, an Algerian national, was accused of smuggling a bomb into a Washington State port and of being part of a conspiracy to violently disrupt millennium celebrations across the United States).

75. Government Brief, *supra* note 7, at 13.

76. *Good Morning America: FBI Veteran Arrested for Spying for Russia* (ABC television broadcast, Feb. 20, 2001) (transcript on file with the *McGeorge Law Review*).

77. *See* Government Brief, *supra* note 7, at 13 (stating that Hanssen himself was the best source of intelligence information on his spying and that it was only attained through his prosecution and conviction).

78. *See id.* at 17 (stating that if such information concerning domestic crimes is uncovered while gathering foreign intelligence, it may be disseminated to prosecutors under existing minimization procedures).

79. *Id.*

80. U.S. CONST. amend. IV.

81. Schmerber v. California, 384 U.S. 757, 767 (1966); *see also* Illinois v. McArthur, 531 U.S. 326, 330 (2001) (stating that the Fourth Amendment was "designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests").

the protection of the Fourth Amendment. The seminal case regarding the use of electronic listening devices is *Katz v. United States.*[82] In *Katz*, the Supreme Court recognized that the use of electronic surveillance does indeed constitute a search and is subject to the Fourth Amendment's inherent privacy protection.[83] The government is required to show probable cause before a warrant to conduct electronic surveillance can be issued.[84]

After *Katz* was decided, the U.S. Congress passed Title III, the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Act).[85] Title III dictates the requirements the federal government must follow when it conducts electronic surveillance for the purposes of criminal investigation.[86] Under the Omnibus Act, a federal judge must first find that there is probable cause to believe a crime has been or is about to be committed before an electronic surveillance order may be issued.[87] This requirement of probable cause adheres to Fourth Amendment dictates.[88] The purpose of Title III is to allow the government to engage in more effective crime fighting measures while maintaining the constitutionally mandated privacy protection of innocent citizens.[89]

The government can acquire a Title III electronic surveillance order to investigate such crimes as espionage, sabotage, treason, aircraft hijacking and piracy, crimes related to the destruction of aircraft, hostage taking, sabotage of a nuclear facility or fuel facility, crimes relating to the use of biological weapons, and even visa and passport violations.[90] Most acts of terrorism are included within the scope of Title III.[91] In fact, the U.S.A. PATRIOT Act added seven additional terrorism-type offenses under which a Title III electronic surveillance order may be issued.[92] The fact that the U.S.A. PATRIOT Act added more terrorism-related offenses to Title III would indicate that Congress intended for the Omnibus Act to continue to control law enforcement's use of electronic surveillance for the purposes of investigating terrorism and espionage offenses for criminal prosecution.[93]

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82. 389 U.S. 347 (1967); ACLU Brief, *supra* note 45, at 7.

83. *Katz*, 389 U.S. at 353, ACLU Brief, *supra* note 45, at 7.

84. *Katz*, 389 U.S. at 358-59.

85. ACLU Brief, *supra* note 45, at 7-8.

86. *Id.* at 8.

87. 18 U.S.C. § 2518(3)(a) (2000); ACLU Brief, *supra* note 45, at 8.

88. ACLU Brief, *supra* note 45, at 8.

89. *Id.* at 8; United States v. United States Dist. Court, 407 U.S. 297, 302 (1972).

90. ACLU Brief, *supra* note 41-45, at 8-9.

91. *Id.*

92. *Id.* at 9; *see* United and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism (U.S.A. PATRIOT) Act of 2001, Pub L. 107-56, § 201, 115 Stat. 272, 278 (2001) (adding "any criminal violation of section 229 [of Title 18] (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2339A, or 2339B . . . (relating to terrorism)").

93. ACLU Brief, *supra* note 45, at 10.

The FISC, in its May 17 opinion, anticipated that under the Department of Justice's March 2002 memorandum, federal law enforcement officers and criminal prosecutors would avoid the stricter probable cause requirements of Title III and instead use the FISA in order to conduct criminal investigations.[94] Thus, law enforcement officers would be able to conduct electronic surveillance for criminal prosecutions while avoiding having to show that there is probable cause of criminal conduct.[95] Under the government's interpretation, law enforcement officers would simply show the FISC that there is *some* foreign intelligence gathering purpose to what would otherwise be a criminal investigation.[96] Such an interpretation of the FISA is not only antithetical to the purposes behind Title III, FISA and the U.S.A. PATRIOT Act, but it also implicates the Fourth Amendment of the U.S. Constitution.[97] Title III's higher threshold for probable cause must dictate the government's use of electronic surveillance for the purpose of criminal prosecution.

Congress has provided two separate statutory means by which the government may conduct electronic surveillance: Title III for prosecuting crimes and the FISA for maintaining national security.[98] Recognizing that the use of electronic surveillance for the purpose of prosecuting crimes triggers Fourth Amendment protections,[99] Congress required judicial oversight as well as a showing of probable cause of criminal activity before a Title III surveillance order could be issued.[100] The Department of Justice's interpretation of the FISA as amended by the U.S.A. PATRIOT Act has the effect of allowing the government to gather criminal evidence using electronic surveillance while bypassing the probable cause demands of Title III and the protections flowing from the Fourth Amendment.[101]

Although a FISA surveillance order still requires judicial oversight,[102] it is unclear what would constitute the requisite showing of probable cause that a surveillance target is an agent of a foreign power.[103] The FISC almost never publishes its decisions, so there is no publicly accessible record to help in understanding precedent.[104] Would it be adequate probable cause if the subject were an immigrant or entered the country with a visa? What if he or she were a

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94. *See supra* Part III (reviewing the court's concerns).

95. *See supra* Part III.

96. *Supra* Part II.C.

97. ACLU Brief, *supra* note 45, at 6, 37.

98. ACLU Brief, *supra* note 45, at 12.

99. Katz v. United States, 389 U.S. 347, 358-59 (1967).

100. 18 U.S.C. § 2518(3) (2000).

101. *See supra* Part IV.A (discussing the Department of Justice's interpretation of the FISA as amended by the U.S.A. PATRIOT Act).

102. 50 U.S.C. § 1803(2) (2003).

103. *See id.* § 1805(b) (stating that, in determining whether probable cause exists, "a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities.").

104. *Supra* Part II.B.

citizen holding a foreign passport or if his or her business involved importing or exporting goods? Would there be sufficient probable cause if the target had placed or received a number of overseas phone calls? Under the government's interpretation of the FISA amendments, the Justice Department would be able to conduct criminal investigations as long as some element involving foreign intelligence existed, and without any showing of criminal behavior.[105]

The government's interpretation of the FISA amendment poses serious Fourth Amendment problems and the FISC rightly took a more narrow approach to the new language, thus steering clear of the constitutional questions posed by the U.S.A. PATRIOT Act.[106] When a court chooses between two possible interpretations of a statute, it must adopt the interpretation that avoids a constitutional issue.[107]

C. *The Significance of "Significant"*

As discussed above, the FISA was enacted as a compromise between the inherent power of the Executive Branch to conduct surveillance of a person in the interest of national security and the constitutional rights of that individual.[108] As originally enacted, the FISA required that *the* purpose of such an investigation be the collection of foreign intelligence.[109] This was an important safeguard to ensure that the proper balance was struck between national security and civil liberties.[110]

However, the U.S.A. PATRIOT Act allows for FISA electronic surveillance orders when a *significant* purpose of the investigation is related to gathering foreign intelligence.[111] This change should not necessarily expand the scope of the FISA to include investigations in which criminal prosecution is the primary purpose, and the FISC correctly refused to adopt such a broad interpretation of the amendment.[112]

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105. *Supra* Part IV.A.

106. *Supra* Part III, IV; *see also* ACLU Brief, *supra* note 45 at 3, 24, 36-37 (highlighting constitutional shortcomings of the government's U.S.A. PATRIOT Act interpretation).

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

108. *Supra* Part II.A.

109. *See supra* notes 39-42 and accompanying text (reviewing the original FISA legislation).

110. *See* Dawson, *supra* note 14, at 1380 (quoting President Jimmy Carter concerning the FISA saying, "one of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our nation's security on the one hand, and the preservation of basic human rights on the other.").

111. *Supra* Part II.C.

112. *See supra* notes 64, 68, 69 and accompanying text (discussing concerns regarding the government's interpretation of the U.S.A. PATRIOT Act and the FISC's corresponding response).

Congress amended the FISA in order to address two concerns: FISA authorizations and the coordination and cooperation between intelligence officials and law enforcement officials.[113] The U.S. General Accounting Office (GAO) addressed these concerns in a report issued in July of 2001.[114] The GAO report describes the confusion and conflicting concerns between intelligence and law enforcement.[115] Law enforcement officers were very interested in getting criminal evidence discovered during FISA electronic surveillance operations.[116] However, intelligence officers were wary of providing such evidence to law enforcement.[117] They feared that if intelligence officials turned over criminal evidence to law enforcement officers, the FISC would reject an application for renewal of the surveillance order because the purpose for the order was no longer primarily for foreign intelligence gathering.[118] Law enforcement officials stated that the FBI and the Office of Intelligence Policy Review had interpreted the "primary purpose" test of a FISA application to mean foreign intelligence gathering should be the "exclusive" purpose for a FISA order.[119]

Congress responded to these problems of information sharing by enacting the U.S.A. PATRIOT Act.[120] The amended language—changing *"the* purpose" to *"significant* purpose"—clarifies that an application to renew a surveillance order does not have to be rejected simply because criminal prosecution becomes *one* of the government's purposes during an ongoing investigation.[121] However, in a hearing of the Senate Judiciary Committee, senators confirmed that the amendments to the FISA were not intended to allow law enforcement to become the *primary* purpose of FISA orders.[122]

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113. *See In re* Sealed Case, 310 F.3d 717, 728-29, 732 (Foreign Intelligence Surveillance Court of Review 2002) (per curiam) (explaining that changes Congress made relaxed the requirements for FISA authorization).

114. U.S. GEN. ACCOUNTING OFFICE, FBI INTELLIGENCE INVESTIGATIONS: COORDINATION WITHIN JUSTICE ON COUNTERINTELLIGENCE CRIMINAL MATTERS IS LIMITED, GAO-01-780 (2001), *at* http://www.gao.gov/new.items.do1780.pdf (last visited June 13, 2003) (copy on file with the *McGeorge Law Review*).

115. *Id.* at 4, 23, 30-31.

116. ACLU Brief, *supra* note 45, at 17.

117. U.S. GEN. ACCOUNTING OFFICE, *supra* note 114, at 11-12.

118. *Id.*

119. *Id.* at 14.

120. *Supra* Part II.C.

121. ACLU Brief, *supra* note 45, at 18.

122. *See id.* at 19 (gathering quotes from members of the U.S. Senate Judiciary Committee, 2002 FISA Hearings—statement of Sen. Patrick Lehey: "[I]t was not the intent of these amendments to fundamentally change FISA from a foreign intelligence tool into a criminal law enforcement tool"; statement of Sen. Diane Feinstein: "I don't believe any of us ever thought that the answer to the problem was to merge Title III and FISA"; Statement of Sen. Arlen Specter: "The word 'significant' was added to make it a little easier for law enforcement to have access to FISA material, but not to make law enforcement the primary purpose").

The "significant purpose" language was not the only amendment to the FISA created by the U.S.A. PATRIOT Act. The U.S.A. PATRIOT Act also authorizes increased coordination and information sharing between criminal law investigators and intelligence personnel.[123] This FISA Amendment, entitled "Coordination with Law Enforcement," (coordination amendment) provides as follows:

> (1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.
>
> (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 1104(a)(7)(B) of this title or the entry of an order under section 1105 of this title.[124]

This language suggests that intelligence officers, not law enforcement officers, are directing the FISA electronic surveillance investigations.[125] It is federal officers conducting surveillance "to acquire foreign intelligence information" who are to consult and coordinate with law enforcement personnel.[126] This amendment would not appear to suggest that law enforcement officers would be allowed to direct FISA investigations for the purposes of criminal prosecutions. The FISC reached a similar conclusion by interpreting the minimization procedures of the FISA.[127] It stated that "law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances."[128] This is "consistent with FISA's new 'significant purpose' language . . . and the entire statutory scheme for surveillance authorization under Title III and FISA."[129]

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123. *Id.* at 20.

124. 50 U.S.C. § 1806(k) (2003) (added by the U.S.A. PATRIOT Act).

125. *Id.* § 1806(k)(1) (per curiam). *But see In re* Sealed Case, 310 F.3d 717, 734 (Foreign Intelligence Surveillance Court of Review 2002) (claiming that Congress has not specified who may direct and control a FISA investigation).

126. 50 U.S.C. § 1806(k)(1).

127. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Ct., 218 F. Supp. 2d 611, 625-26 (Foreign Intelligence Surveillance Court 2002).

128. *Id.* at 625 (revising the Justice Department's minimization procedures).

129. ACLU Brief, *supra* note 45, at 5 (reviewing the FISC's decision). *But see In re Sealed Case*, 310

D. The "Special Needs" Argument

The Department of Justice argued that it may depart from ordinary Fourth Amendment standards when there is "a 'special' interest concerning a particular type of crime," and "crimes such as espionage and international terrorism" qualify under the Constitution as "special."[130] The government relied on recent U.S. Supreme Court cases to support the proposition that law enforcement may fall under a "special needs" exception.[131] It argued that in *City of Indianapolis v. Edmond,*[132] the Court made clear that there are "special" law enforcement needs that would allow for a more relaxed Fourth Amendment standard.[133] The government arrived at this conclusion by noting that "the Court in *Edmond* reviewed and approved prior decisions upholding special needs seizures conducted for the purposes of capturing illegal immigrants and stopping intoxicated motorists."[134] The Court in *Edmond* approved of these warrantless and suspicionless searches and seizures, despite the fact that "[s]ecuring the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit of these goals."[135] Thus, the government concluded that a "general interest in crime control"[136] does not justify such searches and seizures, but that the prosecution of spies and foreign terrorists may "justify a departure from ordinary Fourth Amendment standards."[137]

However, Justice O'Connor wrote, concerning the checkpoints in *Edmond,* "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[138] The Fourth Amendment still prohibits the government from conducting searches without probable cause when the "primary purpose [is] to detect evidence of ordinary criminal wrongdoing."[139] Therefore, the Fourth Amendment's constraints on the government are greatest when the government is primarily pursuing a general interest in crime control.[140] Crimes such as espionage and terrorism do not

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F.3d at 721 (stating that the FISC failed to support its conclusion with any reference to FISA language or U.S.A. PATRIOT Act amendments).

130. *See* Government Brief, *supra* note 7, at 25-26 (claiming that espionage and foreign terrorism are "special" crimes under the Constitution).

131. *Id.* at 25.

132. 531 U.S. 32 (2002).

133. Government Brief, *supra* note 7, at 25.

134. *Id.* (quoting *Edmond*, 531 U.S. at 42).

135. *Edmond*, 531 U.S. 32, 42.

136. *Id.* at 44.

137. Government Brief, *supra* note 7, at 26.

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

139. *Id.* at 38; *but see id.* at 44 (stating in dicta, "the Fourth Amendment would almost certainly permit an appropriately tailored road block set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.").

140. *Id.* at 38, 42.

necessarily demand differing Fourth Amendment standards; the government's primary purpose for investigation controls.[141]

In *Vernonia School District 47J v. Acton*,[142] Justice Scalia explained that "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[143] More recently, in *Ferguson v. City of Charleston*,[144] the Supreme Court reviewed a public hospital's policy of testing pregnant patients for drug use.[145] The hospital's policy included threats of criminal prosecution as a means of coercing women into receiving treatment for substance abuse.[146] The Court, striking down the hospital's policy, wrote in response to a "special needs" argument, "[i]n other special needs cases, we . . . tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement."[147] Concurring in the opinion, Justice Kennedy further explained, "[t]he traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that *the evidence obtained in the search is not intended to be used for law enforcement purposes.*"[148]

V. CONCLUSION

The FISC's May 17 opinion strikes a proper balance between the nation's increased need for security against foreign terrorists and the privacy protections guaranteed by the Fourth Amendment of the United States Constitution. Congress passed the U.S.A. PATRIOT Act in response to the lack of coordination between intelligence officers and law enforcement personnel.[149] The FISC's minimization procedures allow for greater cooperation and evidence sharing, as contemplated by Congress.[150] At the same time, the secret court's ruling recognizes that the *raison d'etre* for the FISA is foreign intelligence gathering and not criminal evidence gathering.[151] The government can always rely

141. *Id.*; *see* Abel v. United States, 362, U.S. 217, 219-20, 230-232, 234, 237-38, 241 (1960) (noting that an espionage prosecution did not alter the legal considerations of the government's actions and investigations preceding the prosecution); *cf. In re* Sealed Case, 310 F.3d 717, 734 (Foreign Intelligence Surveillance Court of Review 2002) (per curiam) (distinguishing protection against terrorism and espionage directed by foreign powers from general crime control).

142. 515 U.S. 646 (1995).

143. *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

144. 532 U.S. 67 (2001).

145. *Id.* at 69-70.

146. *Id.* at 72.

147. *Id.* at 79 n.15.

148. *Id.* at 88 (Kennedy, J., concurring) (emphasis added).

149. *Supra* Part IV.C.

150. *Supra* Part IV.C.

151. *Supra* Part III.

on Title III orders to conduct surveillance where the primary purpose is criminal prosecution.[152] Crimes such as occurred on September 11, 2001 are contemplated within the scope of Title III surveillance orders, evidencing that Congress did not contemplate the FISA as a law enforcement investigation mechanism for the purpose of prosecuting foreign terrorism.[153] Furthermore, the Supreme Court has not acknowledged that the investigation of certain categories of crimes justifies the government's use of a more relaxed standard than that of Fourth Amendment probable cause.[154] By prohibiting prosecutors and law enforcement officers from directing FISA electronic surveillances, the FISC decision reinforced the difference between law enforcement and foreign intelligence gathering and avoided the constitutional issues regarding the Fourth Amendment.

152. *Supra* Part IV.B.
153. *Supra* Part IV.B.
154. *Supra* Part IV.D.

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