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The Constitutionality of the Foreign Intelligence Surveillance Act of 1978

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RECENT DEVELOPMENT

THE CONSTITUTIONALITY OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

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I. INTRODUCTION

The passage of the Foreign Intelligence Surveillance Act of 1978 (FISA)[1] marked the first occasion in which Congress mandated procedures for the Executive to follow while conducting electronic surveillance of foreign powers or their agents for foreign intelligence purposes.[2] From 1940[3] until the Watergate scan-

1. 50 U.S.C. §§ 1801-1811 (Supp. IV. 1980).

2. FISA was several years in the making. The 1978 hearings were the sixth attempt in as many years to limit the Executive's power to conduct surveillance for foreign intelligence purposes. *See* S. REP. No. 604, 95th Cong., 1st Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3908. The court in United States v. Falvey, 540 F. Supp. 1306, 1311 & n.12 (E.D.N.Y. 1982), listed four of these pre-FISA legislative efforts. In 1941 Congress considered prohibiting exec-

dal, Presidents actively conducted warrantless national security surveillance for nonevidentiary purposes in a controversial exercise of their foreign affairs power.[4] FISA was created to protect individual rights by requiring judicial approval prior to initiation of foreign intelligence surveillance while at the same time allowing enough procedural flexibility for effective intelligence gathering.[5] Procedures were also built into FISA for the evidentiary use of information gathered and for nondisclosure of information which threatens national security.[6]

Although FISA for the first time subjects the Executive to statutory restraints in conducting domestic national security surveillance,[7] defendants in *United States v. Falvey*[8] and *United States v. Belfield*[9] argued that FISA's requirements do not provide the minimum protection afforded individuals by the Constitution. The *Falvey* and *Belfield* opinions, the first in which FISA's constitutionality is considered, uphold FISA against fifth and sixth amendment challenges. The court in *Falvey* also upholds FISA against challenges under the first and fourth amendments.

II. LEGAL BACKGROUND

A. Electronic Surveillance by the Executive—The National Security Exception

Since 1940 United States presidents have exercised their executive power to authorize electronic surveillance in the interest of national security.[10] Although Congress declared electronic surveil-

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utive surveillance for nonevidentiary purposes but did not do so. Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. ON LEGIS. 119, 129 (1977); *see also infra* note 10 (prior legislative effort to prohibit wiretapping) and note 15 (Congress' refusal to amend the Federal Communications Act of 1934).

3. *See infra* note 15 and accompanying text.

4. *See infra* note 10 and accompanying text.

5. *See infra* text accompanying notes 30-38.

6. *See infra* text accompanying notes 108-112.

7. FISA does not subject any surveillances outside of the United States to prior judicial review. *See* 50 U.S.C. § 1801(f).

8. 540 F. Supp. 1306 (E.D.N.Y. 1982).

9. 692 F.2d 141 (D.C. Cir. 1982).

10. Electronic surveillance reportedly has existed since the invention of the telegraph. *See* Berger v. New York, 388 U.S. 45 (1967).

Federal agents from the Bureau of Prohibition used electronic eavesdropping during the 1920s as a means of policing the National Prohibition Act. *See* Olm-

lance illegal in the Federal Communications Act of 1934 (FCA),[11] fourth amendment restraints were not considered applicable to electronic surveillance[12] until 1967.[13] Even though the Supreme Court in 1937 held that the FCA applied to federal officers[14] as well as to private individuals, President Franklin D. Roosevelt in 1940 issued a memorandum to his Attorney General[15] authorizing electronic surveillance of persons suspected of subversive activities, stating his belief that such surveillance would be constitutional in "grave matters involving the defense of the nation."[16] Roosevelt, however, requested the Attorney General to keep the surveillances to a minimum and to limit them "insofar as possible to aliens."[17] Subsequent Presidents have followed Roosevelt's pre-

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stead v. United States, 227 U.S. 438, 483 & n.15 (1928)(Brandeis, J., dissenting) (agents' wiretapping upheld although the Attorney General disclaimed responsibility for its authorization).

The Executive's power is derived from article II of the Constitution, which has been interpreted as giving the President broad power over the conduct of foreign affairs. *E.g.*, United States v. Butenko, 494 F.2d 593, 602-03 & nn.35-40 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974). *See generally* Shapiro, *supra* note 2, at 122-23 n.11, 142-43; Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116, 1137-39 (1980). *But see* Zweibon v. Mitchell, 516 F.2d 594, 619-27 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

11. Pub. L. No. 19-416, 48 Stat. 1064 (codified as amended in scattered sections of 15 and 47 U.S.C.). Section 605 of 47 U.S.C. provides that no person not authorized by the sender shall intercept or divulge the contents of an electronic message.

12. Olmstead v. United States, 277 U.S. 438 (1928) (holding fourth amendment protections do not extend to wiretapping when no physical trespass has occurred).

13. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court overruled *Olmstead* and held that electronic surveillance was subject to fourth amendment standards. *Id.* at 358.

14. Nardone v. United States, 302 U.S. 379, 384 (1937) (47 U.S.C. § 605 applied to federal agents and evidence obtained from the interception of electronic communications was inadmissable in court).

15. Memorandum from President Franklin Roosevelt for the Attorney General (May 21, 1940) [hereinafter cited as F.D.R. Memo] *reprinted in Zweibon*, 516 F.2d at 673-74. Roosevelt's memorandum was written in reaction to *Nardone*. Interpreting 47 U.S.C. § 605 as not prohibiting dissemination within the government for law enforcement ends, the Justice Department decided to continue electronic surveillance for nonevidentiary purposes. Congress' subsequent decision not to amend § 605 became a part of the justification for continued electronic surveillance by the government. *See* Shapiro, *supra* note 2, at 128-29.

16. S. REP. No. 604, *supra* note 2, at 10, *reprinted* at 3911.

17. F.D.R. Memo, *supra* note 15, *reprinted in Zweibon*, 516 F.2d at 673-74.

cedent,[18] using the resulting information for nonevidentiary purposes, but steadily expanding the scope of information gathered.[19] In 1966 President Johnson's Solicitor General revealed that surveillances had extended to concerns generated by domestic as well as foreign threats to national security.[20] One year later in *Katz v. United States,*[21] the Supreme Court held that fourth amendment protections did apply to electronic surveillance,[22] but left unsettled whether the warrant requirement extended to national security wiretappings.[23]

In the same year as *Katz,* the first attempt by a state to establish statutory procedures for electronic surveillance was held unconstitutional by the Supreme Court. In *Berger v. New York*[24] the Court found the broad language of the New York statute violative of fourth and fourteenth amendment rights.[25] Adhering carefully

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18. The only known break in continued electronic surveillance occurred from February 1952 to May 1954 when Attorney General J. Howard McGrath told the Federal Bureau of Investigation (FBI) that he would not authorize the installation of surveillance microphones by trespass. S. REP. No. 604, *supra* note 2, at 11, *reprinted* at 3912; *see* Shapiro, *supra* note 2, at 131.

19. President Truman expanded the scope of electronic surveillance to include allegedly subversive domestic activities after a memorandum from Attorney General Tom Clark quoted the F.D.R. Memo, *supra* note 15, but omitted President Roosevelt's "insofar as possible to aliens" limitation. Memorandum from Attorney General Tom Clark to President Harry Truman (July 17, 1946), *reprinted in Zweibon,* 516 F.2d at 674. Under Herbert Hoover, the FBI expanded its surveillances during the 1950s and early 1960s to encompass any activity considered against the "national interest," including activities of suspected communists and suspected organized crime figures. S. REP. No. 604, *supra* note 2, at 11, *reprinted* at 3912-13.

20. These revelations were made in an *amicus curiae* brief to the Supreme Court in Black v. United States, 385 U.S. 26 (1966), *quoted in* S. REP. No. 604, *supra* note 2, at 11-12, *reprinted* at 3913. President Johnson earlier had moved to restrict broad surveillance practices. Memorandum from Lyndon B. Johnson for the Heads of Executive Departments and Agencies (June 30, 1965), *reprinted in Zweibon,* 516 F.2d at 674-75.

21. 389 U.S. 347 (1967).

22. *Id.* at 512.

23. *Id.* at 358 n.23. Justice White's concurrence expressly agreed with the majority's refusal to include national security wiretapping within its holding. *Id.* at 363-64 (White, J., concurring). Justice Douglas in his concurrence speaks against a national security exception. *Id.* at 359-60.

24. 388 U.S. 41 (1967).

25. *Id.* at 44. The Court found that the statutory language did not articulate with sufficient particularity the place to be searched and the things to be seized. *Id.* at 55-56. In an amicus curiae brief, the American Civil Liberties Union

to standards articulated by the Court in *Katz* and *Berger*, Congress one year later passed the Omnibus Crime Control and Safe Streets Act;[26] Title III[27] of that act establishes procedures for obtaining warrants for electronic surveillance in the course of criminal investigations.[28] Title III, however, also avoided the issue of national security wiretapping and specifically excluded from its warrant requirement surveillance undertaken by the Executive to protect the Government from domestic and foreign threats.[29] For the next decade courts struggled to define the scope of the "national security exception."

During the decade between Title III and FISA the Supreme Court addressed the issue of the national security exception only once, in *United States v. United States District Court (Keith)*,[30] holding that electronic surveillance of domestic organizations, even when conducted in the interest of national security, was subject to the fourth amendment warrant requirement.[31] The Court refused to interpret Title III's national security exception as granting the Executive the power to conduct warrantless wiretaps.[32] The Court recognized, however, the need for standards and procedures more flexible than those of Title III, which would be appropriate for domestic intelligence surveillance aimed at preventing activities dangerous to the Government.[33] The Court then suggested that Congress develop such standards as "may be

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(ACLU) raised first and fifth amendment arguments. *See* Goldsmith, *Supreme Court and Title III: Rejecting the Law of Electronic Surveillance*, section IV, *to be published in* 74 J. CRIM. L. & CRIMINOLOGY 1 (1983).

26. Pub. L. No. 90-351 (1968) (codified as amended in scattered sections of U.S.C.).

27. 18 U.S.C. § 2515-20 (1976 & Supp. V 1981). For a comprehensive discussion of Title III, see Goldsmith, *supra* note 25.

28. 18 U.S.C. § 2516 (authorization for interception); *id.* § 2518 (procedure for interception). Title III was upheld as meeting the constitutional standards established in *Berger* and *Katz* in *United States v. Tortorello*, 480 F.2d 764, *cert. denied*, 414 U.S. 866 (1973).

29. 18 U.S.C. § 2511(3) (repealed 1978) (nothing contained in Title III or 47 U.S.C. § 605 shall limit the constitutional power of the President to conduct electronic surveillance if the surveillance is deemed essential to national security). S. REP. No. 604, *supra* note 2, at 7, *reprinted* at 3908.

30. 407 U.S. 297 (1972) ("Weathermen" charged with conspiring to dynamite Ann Arbor office of the Central Intelligence Agency).

31. *Id.* at 409.

32. *Id.* at 321-22.

33. *Id.* at 322.

compatible with the fourth amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens."[34] Although *Keith* specifically excepted intelligence surveillance involving foreign powers from its discussion,[35] Congress eventually used *Keith's* directives in FISA[36] to mandate "less precise" warrant procedures[37] for foreign intelligence surveillance carried out in this country.[38]

After *Keith* but before FISA, four circuit courts of appeals considered the constitutionality of the national security exception and its application to foreign intelligence surveillance. The Ninth Circuit in *United States v. Buck*[39] accepted without analysis that "[f]oreign security wiretaps are a recognized exception to the general warrant requirement."[40] The Fifth Circuit in *United States v. Brown*[41] recognized the President's "inherent power to protect national security in the context of foreign affairs"[42] and held legal a warrantless wiretap authorized by the President.[43] The Third Circuit in *United States v. Butenko,*[44] although rejecting the Supreme Court's abandonment of traditional fourth amendment analysis for intelligence surveillance,[45] concluded that warrants were not an absolute prerequisite in the foreign intelligence field.[46] The Butenko court held legal a warrantless surveillance on the grounds that it was "solely for the purpose" of gathering foreign intelligence information.[47] At the peak of the post-Watergate

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34. *Id.* at 322-23.
35. *Id.* at 321-22.
36. *Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence,* 94th Cong., 2d Sess., 77-78 (1976) (statement by Attorney General Edward H. Levi) [hereinafter cited as *Hearings on S. 3197*].
37. *Keith,* 407 U.S. at 322.
38. *Hearings on S. 3197, supra* note 36, at 77-78.
39. 548 F.2d 871 (9th Cir.), *cert. denied,* 434 U.S. 890 (1977).
40. *Id.* at 875.
41. 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974).
42. *Id.* at 426.
43. *Id.*
44. 494 F.2d 593.
45. *Id.* at 603.
46. *Id.* at 605.
47. *Id.* at 606.

controversy,[48] the court in *Zweibon v. Mitchell*[49] clearly rejected the national security exception. After discussing four rationales for exempting the Executive from the traditional fourth amendment warrant requirement,[50] Judge J. Skelly Wright held none sufficiently compelling to entitle the Executive to surveil domestic organizations without a Title III warrant, even when foreign affairs are involved.[51] Although he indicated strong reservations, Wright did not entirely rule out warrantless wiretapping if the target was a foreign agent or was collaborating with a foreign power.[52]

In a decision rendered since FISA but not governed by it, *United States v. Truong*,[53] the Fourth Circuit upheld the power of the Executive to conduct warrantless electronic surveillance so long as the purpose of the surveillance remained *primarily* foreign intelligence information.[54] Because the surveillance in *Truong* developed into a primarily criminal investigation,[55] the Court held inadmissable the evidence seized after that shift.[56] The Court reasoned that judges have the expertise to make probable cause determinations in criminal cases but do not have the same expertise in military and diplomatic matters.[57] In a footnote

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48. In the aftermath of Watergate, other abuses of the national security exception were exposed. *See Foreign Intelligence Surveillance and the Rights of Americans, the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. 183-315 (1978) (appendices D & E, findings of the Church Committee) [hereinafter cited as *Hearings on S. 1566*].

49. 516 F.2d 594 (D.C. Cir. 1975). *Zweibon* was a damage action brought by 16 members of the Jewish Defense League against the Attorney General and nine FBI agents for bugging the organization's New York headquarters. *Id.* at 600. Judge Wright's monumental opinion is written in the atmosphere of public concern about possible Executive violations of the fourth amendment.

50. The four rationales for the exception were lack of judicial competence, security leaks, delay, and the administrative burden imposed. *Id.* at 641-51.

51. *Id.* at 655.

52. *Id.* at 614. Judge Wilkey's part concurrence, part dissent also allowed for a possible "foreign affairs exemption" in a "narrow category of wiretaps." *Id.* at 689.

53. 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982). Truong and Ronald Humphrey were convicted of conspiracy and espionage for transmitting classified government information to the Socialist Republic of Vietnam. *Hearings on S.* 3197, *supra* note 36 at 911.

54. *Id.* at 916.

55. *Id.* Specific memoranda indicated the shift in emphasis. *Id.*

56. *Id.*

57. *Id.* at 915.

the Court commented approvingly on FISA's attempt to balance the roles of the judiciary and the executive in order to accommodate the different expertise of each and the different nature of foreign intelligence surveillance.[58]

The *Falvey* court considers both the national security exception and the constitutionality of FISA's warrant requirement. *Falvey* also considers whether FISA's language is overbroad and a violation of the defendants' first amendment rights.

B. *In Camera, Ex Parte* Proceedings

Both Title III and FISA provide for the use of surveillance evidence in criminal proceedings.[59] Title III requires disclosure of the surveillance application and order before the evidence may be used;[60] FISA makes disclosure discretionary.[61] If the legality of the surveillance is challenged, Title III provides for an adversary hearing,[62] while FISA dictates an *in camera, ex parte* determination when national security interests are declared in danger.[63]

The Supreme Court held that the proceeding in *United States v. Alderman*[64] inadequately protected the defendants' rights because determining the *relevance* of an illegal surveillance was too complex a task for an *in camera, ex parte* determination.[65] In *United States v. Giordano,*[66] however, the Court stated that the *legality* of an electronic surveillance may be determined in an *in camera, ex parte* proceeding.[67] In *United States v. Taglianetti*[68] the Court held that a simple task, the verification of a voice identification,[69] may be performed by a judge in a closed, nonadversary proceeding because the defendant's fourth amendment rights

58. *Id.* at 914 n.4.
59. 18 U.S.C. §§ 2517, 2518 (9)(10); 50 U.S.C. § 1806.
60. 18 U.S.C. § 2518(9).
61. 50 U.S.C. § 1806(f).
62. 18 U.S.C. § 2518(10).
63. 50 U.S.C. § 1806(f).
64. 394 U.S. 165 (1969).
65. *Id.* at 192.
66. 394 U.S. 310 (1969).
67. *Id.* at 314. "We have nowhere stated that [the preliminary determination of legality] cannot appropriately be made in *ex parte, in camera* proceedings." *Id.*
68. 394 U.S. 316 (1969).
69. *Id.* at 317.

were not jeopardized.[70] The Third Circuit upheld an *in camera, ex parte* determination of the legality of an electronic surveillance in *Butenko*,[71] but refused disclosure after weighing the necessity of an adversary proceeding to protect the defendant's rights against the Government's strong national security interest in preventing disclosure.[72] Closed pretrial admissibility proceedings generally have been upheld[73] when (1) there is a strong Government interest in doing so,[74] (2) the matter to be decided is relatively uncomplicated,[75] and (3) the judge's determination affects the outcome of the trial only indirectly or remotely.[76] Conversely, *in camera, ex parte* proceedings have not been upheld when (1) the complexity of a trial judge's determination requires an adversary presence to promote its accuracy[77] and (2) the trial

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70. *Id.* "Adversary proceedings were required only because *in camera* proceedings in those cases would have been an inadequate means to safeguard [f]ourth [a]mendment rights." *Id.*

71. 494 F.2d at 607.

72. *Id.*

73. *E.g.*, United States v. Agurs, 427 U.S. 97, 106 (1976) (trial judge may make *in camera, ex parte* determination after a specific request from the defense whether information withheld by the prosecution was material); Palermo v. United States, 360 U.S. 343, 354 (1959) (trial judge may make *in camera, ex parte* determination of whether Government may withhold documents under the "Jencks" Act). United States v. Manley, 632 F.2d 978, 986 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112 (19) (*in camera, ex parte* determination of the reliability of informants upheld); United States v. Pelton, 578 F.2d 701, 707 (8th Cir. 1978), *cert. denied*, 439 U.S. 964 (1978) (trial court may make an *in camera, ex parte* determination of whether disclosing tape recordings of defendant's voice was required under FED. R. CRIM. P. 16(a)(1)(A)).

74. *E.g., Palermo*, 360 U.S. at 354 (Government may withhold defendant's access to internal documents); *Pelton*, 578 F.2d at 709 (Government concerned with informants' safety; *Butenko*, 494 F.2d at 607 (Government seeks to protect information on the Strategic Air Command).

75. *E.g., Taglianetti*, 394 U.S. at 318 (trial court asked to identify defendant's voice); *Butenko*, 494 F.2d at 607 (determining legality of wiretap was not so complex as to require adversary hearing).

76. *E.g., Manley*, 632 F.2d at 985 (question of reliability of informants "light years" away from question on guilt or innocence); *Pelton*, 578 F.2d at 707 (upheld *in camera, ex parte* determination in part because no showing by defendant that her substantial rights were prejudiced); *Brown*, 484 F.2d at 425 (upheld *in camera, ex parte* determination of legality of wiretaps because conversations contained nothing relevant to the defendant's case); United States v. Bell, 464 F.2d 667, 671 (2d Cir. 1972) (testimony in *in camera, ex parte* hearing on hijacker profile bore no relationship to defendant's guilt or innocence).

77. *E.g., Alderman*, 394 U.S. at 192; Dennis v. United States, 384 U.S. 855,

judge's determination could be crucial to the outcome of the case.[78]

Underlying each decision upholding an *in camera, ex parte* determination are constitutional concerns about the defendant's sixth amendment right to confront the witnesses testifying against him and his right to counsel—essential components of the fifth amendment right to due process. Implicit in the FISA provision is congressional recognition that if the Government refuses to allow enough disclosure "to make an accurate determination of legality," the Government must forego using the evidence or cease to prosecute the defendant.[79] The Second Circuit Court of Appeals in *United States v. Ajlouny,*[80] noting the conflict among courts concerning the adequacy of *in camera, ex parte* proceedings,[81] held lawful a closed pretrial surveillance suppression hearing because its scope was limited and neither disclosure nor an adversary hearing would have materially advanced the accurate resolution of the factual issues.[82] *In camera, ex parte* hearings may also run counter to the sixth amendment right to a public trial,[83] but because that right exists primarily for the purpose of

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873-75 (1966) (reversing a decision allowing the trial judge to examine *in camera, ex parte* grand jury testimony to determine what material could be used to impeach Government witnesses); United States v. Manuszak, 438 F. Supp. 613, 624-25 (E.D. Pa. 1977).

78. *E.g., Manley,* 632 F.2d at 985 (disclosure of informers' identities would be deemed appropriate if the information supplied by them constitutes the bulk of the evidence and is uncorroborated); United States v. Clark, 475 F.2d 240, 245 (1973) (pretrial decision to suppress is often as important as trial itself, thus defendant should have been present); United States v. Lopez, 328 F. Supp. 1077, 1088-89 (E.D.N.Y. 1971) (not only defendant's attorney but defendant must be present during *in camera, ex parte* suppression hearings if his presence could have been helpful).

79. S. REP. No. 701, 95th Cong., 2d Sess. 46-47, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3973, 4015-16.

80. 629 F.2d 830 (2d Cir. 1980), *cert. denied,* 449 U.S. 1111 (1982). Defendant was convicted of transporting stolen property in foreign commerce, after defrauding the phone company in making overseas phone calls to the Palestine Liberation Organization. *Id.* at 832-33. In the course of the investigation, his phone calls were intercepted. *Id.*

81. *Id.* at 839 & n.12.

82. *Id.* The hearing was closed in the interests of national security and the surveillance statements were not directly related to the indictment, nor had they been used to initiate the criminal proceedings. *Id.* at 838.

83. Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Justice Marshall dissented from the majority's ruling that the public could be excluded from a

protecting the defendant from prosecutorial and judicial abuses,[84] courts have traditionally allowed closed trials if publicity would adversely affect the defendant[85] or is against the public interest.[86] Courts have also held that the right to a public trial does not necessarily extend to pretrial proceedings.[87] Public disclosure in FISA suppression hearings could be detrimental to the Government and to the public interest by revealing national security information and could also adversely affect the defendant by publicizing extensive incriminating conversations.

Both the *Falvey* and the *Belfield* decisions consider the constitutionality of FISA's *in camera, ex parte* procedures. In *Falvey* defendants were provided limited disclosure of the surveillances used by the prosecution; in *Belfield* defendants were refused any disclosure of conversations used not as evidence against them, but as part of an *in camera* exhibit.

C. The Foreign Intelligence Surveillance Act of 1978

FISA eliminates the national security exception of Title III[88] by providing statutory procedures for all foreign intelligence electronic surveillance carried on within the United States.[89] FISA recognizes no "inherent power" of the President to conduct national security surveillance and is based on the proposition that even if such a power exists, Congress may regulate its use.[90]

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pretrial suppression hearing after the defendants claimed that the adverse publicity would keep them from receiving a fair trial); *see also* United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978).

84. *Gannett*, 443 U.S. at 379; *Cianfrani*, 573 F.2d at 850.

85. *Gannett*, 443 U.S. at 376-78.

86. *Id.* at 378; *Bell*, 464 F.2d at 669 (upholding exclusion of the defendant and the public from that portion of a hearing dealing with a hijacker's profile); *Lopez*, 328 F. Supp. at 1088 (danger to public in revealing hijacker profile justifies exclusion of public from suppression hearing).

87. *Gannett*, 443 U.S. at 394-96 (Burger, C.J., concurring). *But see id.* at 436-37 (Marshall, J., Blackmun, J., Brennan, J., and White, J., dissenting); *Cianfrani*, 573 F.2d at 848-50.

88. *See supra* note 29 and accompanying text. Section 2511(3), title 18 of the United States Code was repealed and replaced with § 2511(2)(d)-(f) to eliminate completely the national security exception. *See* 18 U.S.C. § 2511(d)-(f); *see also* S. REP. No. 604, *supra* note 2, at 63, *reprinted* at 3965.

89. *See supra* note 7. FISA and title III together now mandate warrant procedures for all domestic wiretapping. S. REP. No. 604, *supra* note 2, at 6, *reprinted* at 3907.

90. *Id.* at 16, *reprinted* at 3917.

FISA's authorization procedure[91] is three-tiered. First, the President must authorize the Attorney General to approve applications for electronic surveillance.[92] Second, the application by a federal officer must be approved by the Attorney General.[93] Last, a specially appointed FISA judge[94] must find, on the basis of facts submitted by the applicant,[95] that there is probable cause to believe that the proposed target of the surveillance is a foreign power or an agent of a foreign power.[96] The FISA definition of an "agent of a foreign power" includes a person who knowingly engages in or prepares for engaging in international terrorist activities on behalf of a foreign power.[97] Those activities must involve dangerous or violent acts which are or which would be a violation of state or federal criminal law.[98] If the application meets the above-stated requirements, contains all of the necessary statements and certifications,[99] and if the proposed minimization procedures are satisfactory,[100] then the FISA judge must authorize the surveillance.[101] If the target of the surveillance is a "United States person,"[102]

91. 50 U.S.C. § 1805.

92. *Id.* at § 1805(a)(1).

93. *Id.* at 1805(a)(2).

94. *Id.* at § 1803. Under FISA the Chief Justice of the Supreme Court is directed to designate seven district court judges to act as a FISA court to hear applications and grant orders under that act. *Id.*

95. *See id.* § 1804(a)(3)-(11) (explaining the information required).

96. *Id.* § 1805(a)(3)(A). The FISA judge must also find probable cause to believe that the proposed site of the surveillance is presently being used or is about to be used by a foreign power or an agent of a foreign power. *Id.* § 1805(a)(3)(B).

97. *Id.* § 1801(b)(2)(C). The knowledge requirement was added in response to concern that the FISA surveillance could be authorized for someone who unknowingly aided those involved in terrorist activities. S. REP. No. 701, *supra* note 79, at 26-27, *reprinted* at 3995-96; S. REP. No. 604, *supra* note 22, at 22, *reprinted* at 3923. *See generally Hearings on S. 3197, supra* note 36, at 212-13 (Memorandum to Hope Eastman, Associate Director, Washington Office ACLU, from Robert Borosage, Director, Center for National Security Studies (June 4, 1976)). The aforementioned memorandum expressed concern about a noncriminal standard allowing surveillance of United States citizens engaged in lawful activities.

98. 50 U.S.C. § 1801(c)(1); *see* S. REP. No. 701, *supra* note 79, at 30, *reprinted* at 3999.

99. 50 U.S.C. § 1805(a)(5).

100. *Id.* § 1805(a)(4).

101. *Id.*

102. "United States persons" includes United States citizens and resident aliens. 50 U.S.C. § 1801(i); *see* S. REP. No. 701, *supra* note 79, *reprinted* at 4015-

however, FISA contains two additional safeguards: the probable cause finding may not be based solely upon activities which are protected by the first amendment[103] and the required certifications must not be "clearly erroneous."[104] FISA also requires yearly statistical reports to Congress[105] and semiannual reports to congressional committees on surveillance activities carried out under FISA.[106]

Although the primary purpose of FISA surveillance is the gathering of foreign intelligence information,[107] Congress foresaw the possible evidentiary use in criminal proceedings of FISA surveillances.[108] FISA requires the Government to notify both the person against whom the evidence will be used[109] and the court in which it intends to introduce the evidence.[110] The court must then make a determination of the legality of the surveillance, even if no motion to suppress has been made.[111] If the Attorney General files an affidavit stating that an adversary hearing or disclosure of the evidence would jeopardize national security, then the court must make an *in camera, ex parte* determination of the legality of the surveillance, disclosing portions of the application, order, and other materials "only where such disclosure is necessary to make an accurate determination of the legality of surveillance."[112] The closed proceedings with discretionary disclosure are Congress' attempts to strike a reasonable balance between a de-

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103. 50 U.S.C. § 1805(a)(3)(A).

104. *Id.* § 1805 (a)(5). If the target of the surveillance is not a United States person, the application must simply contain all the required statements and certifications. *Id.* The certifications establish that the information sought is foreign intelligence information and that the information cannot reasonably be obtained by normal investigative techniques. *Id.* § 1804 (a)(7)(E)(i)-(ii). If the target of the surveillance is a "United States person," the FISA judge may also use as a basis for concluding that the application is not "clearly erroneous" any other information that he has required the applicant to furnish. *Id.* §§ 1804(1), (5), 1806(d).

105. *Id.* § 1807.

106. *Id.* § 1808.

107. S. REP. No. 701, *supra* note 79, at 9, *reprinted* at 3977-78.

108. 50 U.S.C. § 1806; *see* S. REP. No. 701, *supra* note 79, at 62, *reprinted* at 4031.

109. 50 U.S.C. § 1806(c).

110. *Id.*

111. *Id.* § 1806(f).

112. *Id.*

fendant's constitutional right to defend himself and the government's need to keep secret sensitive foreign intelligence information.[113]

III. THE CASES

A. *United States v. Falvey*

Charged with smuggling arms and equipment[114] to the Provisional Irish Republican Army (IRA) in Ireland, defendants[115] moved to suppress the fruits of electronic surveillance[116] authorized under FISA after the Government moved for an order declaring the surveillance lawful.[117] As part of a foreign counter-intelligence investigation into suspected international terrorist activities in the New York area,[118] the Federal Bureau of Investigation (FBI) tapped[119] the telephones of two of the defendants.[120] Following that surveillance, the Government, as required by FISA,[121] obtained the Attorney General's approval to use the information in a criminal proceeding and notified both the defendants and the instant court of its intent to use relevant tapes at trial.[122] After the Attorney General filed an affidavit alleging that

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113. S. REP. No. 701, *supra* note 79, at 64, *reprinted* at 4033.

114. Defendants were charged with violations of 19 U.S.C. § 371 (1980)(conspiracy); 26 U.S.C. §§ 5841-42, 5861, 5971 (purchase and use of firearms); and 22 U.S.C. § 2778 (1979)(control of arms exports and imports). *Falvey*, 540 F. Supp. at 1307. On November 5, 1982, all defendants were acquitted on all charges.

115. Defendants were Thomas Falvey, George Harrison, Michael Flannery, Patrick Mullin, and Daniel Gormley, all of Irish descent and all "active in the cause of Irish unity." *Falvey*, 540 F. Supp. at 1307. For additional background on these individuals, *see* Alexander, *The Patriot Game*, NEW YORK, Nov. 22, 1982, at 58-59; *see also* Capeci, *Turning Tables on the CIA*, NAT'L L.J., Oct. 18, 1982, at 6.

116. Defendants moved under 50 U.S.C. § 1806(e) to suppress the evidence. *Falvey*, 540 F. Supp. at 1308. The surveillance was applied for and approved under 50 U.S.C. §§ 1804-05.

117. *Falvey*, 540 F. Supp. at 1308; *see supra* text accompanying note 111.

118. *Falvey*, 540 F. Supp. at 1308.

119. The surveillance was authorized on Apr. 3, 1981, and continued until June 19 or 20, 1981. *Id.*

120. The telephones of Falvey and Harrison were tapped, intercepting conversations with Flannery and Gormley. *Id.* at 1310 n.10. All of the defendants are United States citizens.

121. 50 U.S.C. § 1806(c).

122. *Falvey*, 540 F. Supp. at 1308. The Government provided defendants with logs of all the wiretaps but transcripts of only those conversations it

disclosure of this information would "harm the national security,"[123] the instant court granted an *in camera, ex parte* review of the legality of the surveillance.[124] Defendants contended that the surveillance was illegal because FISA is unconstitutional both on its face and as applied.[125] Defendants argued that FISA does not satisfy minimum fourth amendment standards[126] and that FISA was misused to obtain evidence in a routine criminal investigation.[127] Defendants also maintained that FISA does not adequately protect their first amendment rights because it is overbroad and allows politically motivated surveillance.[128] Defendants further claimed that the secrecy of the *in camera, ex parte* review violated their fifth amendment right to due process and their sixth amendment rights to counsel, to confront witnesses, and to a public trial.[129] The United States District Court for the Eastern District of New York granted the Government's motion to review the legality of the surveillance, determined the surveillance legal, and denied the motion to suppress.[130] The district court acknowledged the instant case as one of first impression on the issue of the FISA's constitutionality.[131]

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deemed relevant. *Id.; see* 50 U.S.C. § 1806(f).

123. *Falvey,* 540 F. Supp. at 1311; *see* 50 U.S.C. § 1806(f).

124. *Falvey,* 540 F. Supp. at 1311.

125. *Id.* at 1308.

126. *Id.* at 1312. Defendants contend that the criminal probable cause standard of the Omnibus Crime Control and Safe Streets Act, Title III, is the constitutional minimum to which they are entitled. *Falvey,* 540 F. Supp. at 1313. Title III requires "probable cause" for belief that an individual is committing, has committed, or is about to commit a particular offense. 18 U.S.C. § 2518(3)(a). *See supra* text accompanying notes 26-27.

127. *Falvey,* 540 F. Supp. at 1313.

128. *Id.* at 1314-15.

129. *Id.* at 1315. Defendants also argued that the FISA violates the ninth amendment and articles I and III of the Constitution, *id.* at 1308, but the court dismissed those arguments in a footnote. *See id.* at 1313 n.16.

130. *Id.* at 1316.

131. *Id.* at 1309. On November 29, 1982, Judge Charles Sifton of the Eastern District of New York issued a comprehensive opinion upholding FISA's constitutionality, both on its face and as applied. United States v. Megahey, CR-82-00327 (E.D.N.Y. Nov. 29, 1982). The opinion was in the process of being published at the time of this writing. The defendants in *Megahey,* United States citizens and nonresident aliens charged with various firearms offenses as well as conspiring to ship, and the transportation of, arms and munitions to the Irish Republican Army, challenged FISA as unconstitutional under the first, fourth, fifth, and sixth amendments as well as under article III of the Constitution, the

The court divided defendants' constitutional arguments into three groups. First, the court addressed the defendants' fourth amendment arguments. Citing case law[132] which supported the validity of warrantless wiretapping for foreign intelligence purposes under the Executive's foreign affairs power,[133] the court agreed with the three circuits that have accepted warrantless electronic surveillance for foreign intelligence purposes.[134] The court held, however, that the President is not entirely free of the reasonableness requirement of the fourth amendment and looked to *Keith*[135] to define that reasonableness requirement in the context of national security surveillance.[136] Defendants argued that they were entitled to Title III warrant procedures as a constitutional minimum.[137] The district court responded that the Supreme Court in *Keith* recognized as appropriate for national security surveillances a probable cause standard "less precise" than Title III's criminal standard, if the lesser standard was reasonable both in relation to the Government's needs and the citizens' rights.[138] The court found that because the Government has a clearly defined obligation to combat international terrorism[139] and because individual liberties are effectively protected by a judicial, rather than an executive, probable cause determination,[140] FISA met *Keith's* reasonableness standards. The Court next responded to

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separation of powers doctrine, and the political question doctrine. *Id.* at 2, 9-10. The defendants also charged that FISA was unconstitutional as applied. *Id. See infra* notes 186, 200, 203, 219 & 221.

See also In re Flanagan, 533 F. Supp. 957 (E.D.N.Y. 1982) (challenging the definition of "aggrieved party").

132. *Falvey,* 540 F. Supp. at 1311; *see supra* text acompanying notes 39-47.

133. *Id.*

134. *Id.* "When, therefore, the President has, as his primary purpose, the accumulation of foreign intelligence information, his exercise of article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping." *Id.; see supra* notes 39-47 and accompanying text.

135. 407 U.S. 297; *see supra* text accompanying notes 30-38.

136. *Falvey,* 540 F. Supp. at 1311.

137. *Id.; supra* note 126.

138. *Falvey,* 540 F. Supp. at 1312; *see also supra* text accompanying notes 30-38.

139. *Falvey,* 540 F. Supp. at 1312-14. The court cites United States treaty obligations to combat international terrorism. *Id.*

140. *Id.* at 1313; *see supra* text accompanying notes 94-103. The court dismissed two of the defendants' arguments questioning the function and effectiveness of the FISA judges. *Falvey,* 540 F. Supp. at 1313 n.16; *see supra* note 129.

defendants' argument that FISA was misused to obtain evidence in a routine criminal investigation.[141] After reviewing *Truong's*[142] holding that in order for evidence resulting from warrantless executive wiretapping to be admissible in a criminal proceeding, the primary purpose of the surveillance must have been the acquisition of foreign intelligence information, the court distinguished *Truong* because it involved a warrantless search.[143] The court then held the wiretapping evidence admissible because the FISA warrant in the instant case had been lawfully obtained and because Congress in promulgating FISA anticipated the use of evidence seized pursuant to FISA at criminal proceedings.[144] Not only was the authorization proper because of the on-going nature of the foreign intelligence investigation but, the Court concluded, the purpose of the surveillance was unquestionably to acquire foreign intelligence information.[145]

Second, the court responded to defendants' first amendment arguments. Answering defendants' charge that FISA allows politically motivated surveillance, the court held that FISA adequately protects first amendment rights by (1) requiring a judge, not the Executive, to make the probable cause finding that the target is an agent of a foreign power, and (2) by providing that activities protected by the first amendment cannot form the sole basis for that determination.[146] The court found that the defendants' first amendment rights were not violated because defendants' IRA activities were not protected by the first amendment.[147] The court also found FISA's provisions not overbroad because FISA's probable cause determination includes a finding that a target is involved in acts of international terrorism.[148]

Last, the court answered defendants' charge that the *in camera, ex parte* review to determine the legality of the surveillance violated their fifth amendment right to due process and their sixth amendment rights to counsel, to confront witnesses, and to

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141. *Falvey*, 540 F. Supp. at 1313.
142. 629 F.2d 908; *see supra* note 53 and accompanying text.
143. *Falvey*, 540 F. Supp. at 1314.
144. *Id.*
145. *Id.*
146. *Id.* at 1314-15; *see supra* note 103 and accompanying text.
147. *Falvey*, 540 F. Supp. at 1314-15. The court took judicial notice of the IRA's political purpose, then cited authority on its dual status as an international terrorist organization. *Id.*
148. *Id.* at 1313; *see supra* text at notes 96-98.

a public trial.[149] The court cited the "massive body" of case law, including *Giordano*,[150] *Taglianetti*,[151] and *Ajlouny*,[152] as supporting the proposition that the legality of electronic surveillance should be determined on an *in camera, ex parte* basis when such procedures adequately protect defendants' fourth amendment rights.[153] In addition, the court noted that *in camera, ex parte* procedures have been upheld by the Supreme Court in areas other than foreign intelligence based on the rationale that the confrontation right does not apply to all pretrial hearings.[154] Last, the court, without explanation, cited a variety of cases to support the statement that there is no absolute right to a public trial during pretrial suppression hearings.[155] The court concluded that FISA is constitutional on its face and as applied, granted the government's motion to review the legality of the instant surveillance, found that surveillance legal, and denied the defendants' motion to suppress.[156]

B. *United States v. Belfield*

On trial for charges[157] relating to the 1980 assassination of the President of the Iran Freedom Foundation,[158] appellants appealed the district court's finding[159] that electronic surveillances

149. *Falvey*, 540 F. Supp. at 1315.

150. 394 U.S. 310; *see supra* text at note 66.

151. 394 U.S. 316; *see supra* text accompanying note 68.

152. 629 F.2d 830; *see supra* text accompanying notes 80-82.

153. *Falvey*, 540 F. Supp. at 1315.

154. *Id.* The court cited *Manley*, 632 F.2d 978 (*in camera, ex parte* hearing to determine reliability of nondisclosed informants), and McCray v. Illinois, 386 U.S. 300, 314 (1967), and held that the sixth amendment does not preclude use of testimonial privilege, nor mandate that informants appear to testify.

155. *Falvey*, 540 F. Supp. at 1315-16. The court cited *Gannett*, 443 U.S. 368, *see supra* note 83-85 and accompanying text; *Agurs*, 427 U.S. 97, *see supra* note 73 and accompanying text; *Dennis*, 384 U.S. 855, *see supra* note 77 and accompanying text; *Palermo*, 360 U.S. 343, *see supra* note 73 & 74; *Pelton*, 578 F.2d 701, *see supra* note 73 & 74; and United States v. Buckley, 586 F.2d 498 (5th Cir. 1978).

156. *Falvey*, 540 F. Supp. at 1316.

157. Appellants, Horace Butler and Abdul-Mani, were charged with conspiracy to murder, accessory after the fact, grand larceny, unauthorized use of a vehicle, and perjury. *Belfield*, 692 F.2d at 141-42.

158. Ali Akbar Tabatabai, President of the Iran Freedom Foundation, was assassinated on July 22, 1980. *Id.* at 143.

159. On October 22, 1981, Judge Gasch of the United States District Court

of them conducted by the Government under FISA were legal, challenging the *in camera, ex parte* procedure used to determine legality.[160] Prior to trial, appellants requested disclosure of any electronic surveillance covering them; the Government responded that each defendant had been overheard once incidentally during the course of electronic surveillance authorized under FISA.[161] The Government then submitted logs of the overhears to the Superior Court which, after an *in camera* examination, declared them irrelevant, immaterial, and not discoverable.[162] According to the Government, neither the surveillances nor any fruits of the surveillances were used during the trial, but an *in camera* exhibit did contain logs of the overhears, the FISA application with supporting papers, and the FISA court's orders.[163] Based on that exhibit, the Government petitioned the district court under FISA for an *ex parte* determination of the legality of the surveillances.[164] The Attorney General filed a declaration stating that disclosure would harm national security—appellants responded by requesting disclosure and an adversary hearing.[165] The district court ruled *in camera, ex parte* that the surveillances were legal.[166] Appellants appealed the procedures used by the district court, claiming that the failure to disclose the *in camera* exhibit and the failure to allow an adversary hearing on the question of legality was an abuse of discretion under FISA and, alternatively, that the closed proceedings violated their fifth amendment due process rights and their sixth amendment right to counsel.[167] The United States Court of Appeals for the District of Columbia Circuit affirmed the district court opinion, holding the court did not abuse its discretion[168] and that FISA's *in camera, ex parte* proce-

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for the District of Columbia ruled the surveillances legal, based on papers filed by the Government, the Government's *in camera* exhibit, and appellants' motion for disclosure and an adversary hearing. *Id.* at 144.

160. "Appellants are not directly challenging the legality of the surveillance. Rather, they are seeking to participate in the determination of legality." *Id.*

161. Appellants were not the targets of the surveillance. *Id.* at 143.

162. On October 26, 1982, the court ruled under Brady v. Maryland, 373 U.S. 83 (1963), that the logs were not discoverable. *Belfield,* 692 F.2d at 143.

163. *Belfield,* 692 F.2d at 143.

164. The Government petitioned the court under 50 U.S.C. § 1806(f). *Id.* at 143-44.

165. *Id.* at 144.

166. *Id.*

167. *Id.*

168. *Id.* at 147.

dure was constitutional as applied.[169]

After reviewing the history of FISA, the court of appeals first addressed appellants' statutory claims. Responding to appellants argument that failure to disclose the *in camera* exhibit and hold an adversary hearing was an abuse of discretion under *Alderman*,[170] the court noted that (1) the language of section 1806(f) clearly anticipates an *in camera, ex parte* determination of legality[171] and (2) the legislative history of that section sets forth examples of exceptional circumstances for which disclosure and an adversary hearing may be necessary, none of which applied in the instant case.[172] Because there were no complicating considerations,[173] because all statutory requirements had been met, and because disclosure would harm national security, the court concluded the district court's action was not an abuse of discretion.[174] The court conceded, however, that if disclosure had been ordered, appellants would have been entitled to an adversary hearing.[175]

Appellants argued alternately that they were entitled to Title III's mandatory disclosure provisions as a constitutional minimum.[176] The court responded by distinguishing Title III's purpose—conducting criminal surveillance while protecting individual privacy rights—from FISA's purpose, gathering foreign intelligence information while protecting both the national security and individual rights.[177] The court concluded that mandatory disclosure is not constitutionally required because FISA protects individual rights by expanded minimization procedures and an in-depth oversight of FISA surveillance by all three branches of

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169. *Id.* at 149.

170. 394 U.S. 165; *see supra* text at note 60.

171. *Belfield*, 692 F.2d at 147.

172. Exceptional circumstances noted by the court include possible misrepresentations, vague identifications, or possibly illegal surveillances. *Id.*

173. The court explicitly stated that the determination of legality of the 42-page exhibit was not complex and that four judges, not including the FISA judge, had agreed on the legality of the surveillance. *Id.*

174. "Indeed the surveillance is so clearly supported by the documents in the Exhibit that it would have been an abuse of discretion for the district court to order disclosure." *Id.*

175. "[A]ppellants are correct that if disclosure were ordered, they would be entitled to an adversary hearing." *Id.*

176. *Id.* at 148. Before the contents of a surveillance may be used in any criminal proceeding, 18 U.S.C. § 2518 requires disclosure. See *supra* text accompanying notes 60-63.

177. *Id.* at 148.

government.[178] The court also cited pre-FISA precedent[179] as supporting *in camera, ex parte* determinations of the legality of a surveillance, particularly when the surveillance involves foreign intelligence gathering. Commenting that FISA actually simplifies a court's legality inquiry,[180] the *Belfield* court held the FISA's *in camera, ex parte* provision constitutional in the instant case.[181]

IV. Analysis

A. The National Security Exception

In mandating procedures for all foreign intelligence surveillance within the United States, Congress refused to recognize any inherent power of the Executive to conduct warrantless national security surveillance[182] and intended to define, in combination with Title III, the exclusive means by which domestic electronic surveillance could be conducted.[183] The *Falvey* court, in following pre-FISA case law[184] and accepting FISA as a constitutional limitation on an inherent executive power rather than as a legislative loosening of a universal constitutional restraint, undermined a major purpose of FISA by leaving open the possibility of legal warrantless national security surveillance outside of FISA. By endorsing an inherent executive power to conduct national security surveillance,[185] the *Falvey* court also revealed its opposition to a strong judicial role in the authorization process. The court, for

178. For example, the Executive promulgates minimizations procedures, 50 U.S.C. § 1801(u)(i); the Judiciary rules on applications, 50 U.S.C. § 1805; and Congress receives periodic reports on FISA surveillances, 50 U.S.C. § 1807-1808. *Belfield*, 692 F.2d at 148 & n.34; *see also supra* text accompanying notes 92-106.

179. The court cited *Zweibon*, 516 F.2d 594; *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *Ajlouny*, 629 F.2d 830; *Butenko*, 494 F.2d 593; and *Brown*, 484 F.2d 418. *Belfield*, 692 F.2d at 149 & nn. 35-38; *see supra* text accompanying notes 71-72, 80-82. The court also cited *Giordano*, 394 U.S. 310, and *Taglianetti*, 394 U.S. 316. *Belfield*, 692 F.2d at 149 n.38; *see supra* text accompanying notes 66-72.

180. The court pointed out that prior to passage of FISA, courts had to determine whether surveillance fell within the President's inherent power to conduct foreign intelligence surveillance; post-FISA courts need only decide whether the application and order meets statutory requirements. *Belfield*, 692 F.2d at 149.

181. *Id.*

182. *See supra* text accompanying note 90.

183. *See supra* text accompanying notes 89-90.

184. *See supra* notes 132 & 134 and accompanying text.

185. *See supra* note 134.

example, relegated to a footnote in its opinion the defendants' arguments that FISA judges may be acting in a less-than-judicial capacity and may simply "rubber stamp" Executive determinations.[186] The court failed to question the scope of the FISA judges' probable cause determination[187] and simply accepted their presence in the warrant process as an adequate safeguard against an arbitrary Executive.

The *Belfield* court, which earlier in *Zweibon* had expressed strong reservations about whether a national security exception existed even in the context of foreign affairs,[188] did not address this issue.[189]

B. The First Amendment

Because FISA protects "United States citizens" by prohibiting

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186. *See supra* note 129. The *Megahey* opinion, *see supra* note 131, refutes the defendants' article III objections, pointing out that FISA judges make concrete decisions designed to protect individual's privacy interests, and do not simply issue advisory opinions or "rubber stamp" Executive determinations. *Megahey*, CR-82-00327, at 42-44.

Critics have questioned whether FISA judges are acting in more of a clerical and managerial than a judicial capacity and have characterized their determinations as advisory and possibly unconstitutional. *See, e.g., Hearings on S. 1566, supra* note 48 at 97 (statement by Professor Christopher Pyle); S. REP. No. 701, *supra* note 79, at 92, *reprinted at* 4043 (views of Sen. Malcolm Wallop). On the rubber stamp issue, see *Hearings on S. 3197, supra* note 36, at 213-14 (ACLU memorandum). *See generally* Sharipo, *supra* note 2, at 190.

Recent Senate Reports show the following statistics:

Year	Applications	Orders Granting Authorization
1979	199	207* (none modified or denied)
1980	319	322 (one modified)
1981	431	433 (none modified or denied)

*one application can result in several orders

1979 figures from H. REP. No. 1466, 96th Cong., 2d Sess, 4 (1980); 1980 figures from S. REP. No. 280, 97th Cong., 1st Sess, 2 (1981); 1981 figures from a letter from Attorney General William French Smith to Hon. Thomas F. O'Neill (Apr. 15, 1982).

187. *See supra* text and accompanying notes 94-96.

188. 516 F.2d at 613 & n. 42; see *supra* notes 48-52 and accompanying text.

189. The issue was not raised by the *Belfield* appellants. In recounting the history of FISA, however, the *Belfield* court noted that the several courts of appeals had approved warrantless national security surveillance but that the Circuit Court of the District of Columbia in *Zweibon* had suggested that the national security exception may be unconstitutional. *Belfield*, 692 F.2d at 145 & n. 15. For a summary of the *Megahey* court's treatment of the national security exception, see *infra* note 203.

a probable cause finding based solely on activities protected by the first amendment,[190] the *Falvey* court was correct to examine the activities justifying the FISA warrant.[191] Once again, however, the court accepted the presence of a FISA judge as adequately protecting the defendants from politically-motivated surveillance, without questioning the "clearly erroneous" standard of judicial review.[192]

In response to the challenge that FISA is overbroad, the *Falvey* court noted the detail necessary to establish that a surveillance target is an "agent of a foreign power." The court could have strengthened its defense by evaluating FISA in terms of the *Berger*[193] particularity criteria adhered to by Congress in creating Title III.[194] The defendants in *Belfield* did not raise a first amendment challenge.

C. The Fourth Amendment

The fourth amendment challenge to FISA is the most critical, as FISA's less-than-probable cause standard is central to attacks on the statute. From FISA's inception, its most persistent critics held out the specter of an intrusive search initiated on vague grounds that would be used to produce evidence which could convict unfortunate citizens.[195] In *Falvey,* the court simply adopted the legislature's conclusion that *Keith* provides a satisfactory rationale for FISA,[196] accepted *Keith* as defining the limits of the Executive's constitutional flexibility under the fourth amend-

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190. *See supra* text accompanying note 104.

191. *See supra* note 147 and accompanying text.

192. Critics have faulted FISA's "clearly erroneous" standard of review over certifications regarding the purpose and necessity for FISA surveillance of "United States persons." *See generally* S. REP. No. 701, *supra* note 79, at 54, *reprinted* at 4023 (defending the standard of review). *But see id.* at 92, *reprinted* at 4044.

193. 388 U.S. 41.

194. The constitutionality of Title III was upheld on the basis of the *Berger* criteria. *See supra* note 28. The ACLU in an amicus curiae brief challenged *Berger* on first amendment grounds. *See supra* note 25.

195. *See Hearings on S. 1566, supra* note 48, at 111 (ACLU statement); Note, *F.I.S.A.: Unconstitutional Warrant Criteria Permit Warrant if a 'Possibility of International Terrorism is Found,* 17 SAN DIEGO L. REV. 963, 972 (1980). *See generally Hearings on S. 1566, supra* note 48; *Hearings on S. 3197, supra* note 36.

196. *Compare Falvey,* 540 F. Supp. at 1312 *with* S. REP. No. 604, *supra* note 2, at 18, *reprinted at* 3919-20.

ment, and easily found that FISA satisfies *Keith*'s "reasonableness" standard.[197] The court did not address critics' concern that *Keith*'s less-than-probable cause standard is more appropriate for a limited administrative search than for a highly intrusive electronic surveillance conducted with an eye toward possible criminal indictments.[198] Instead, in applying *Keith*'s balancing of legitimate government interests against the protection of individual rights, the court documented at length the self-evident conclusion that combatting international terrorism is a legitimate goal of foreign intelligence surveillance[199] and simply accepted the presence of a FISA judge in the warrant process as adequately protecting individuals from the potential arbitrariness of the Executive.[200]

In *Falvey* the defendants argued that their particular FISA surveillance should be subject to *Truong*'s[201] "primarily for the purpose" test[202] and should be held illegal because the primary purpose of the surveillance had shifted from foreign intelligence gathering to a criminal investigation under which a Title III criminal warrant could have been obtained. When the court refused to apply the *Truong* test and distinguished *Truong* as involving a warrantless search, it forgot that the *Truong* surveillance was illegal because its purpose had clearly shifted from foreign intelligence surveillance to obtaining evidence in a criminal investigation, not because it was warrantless. Instead of examining the

197. *See supra* text accompanying note 34.

198. *Keith*'s rationale is based on Camara v. Municipal Court, 387 U.S. 523 (1967), which upheld a warrantless search by housing inspectors as reasonable in light of the governmental interest in citizen health and safety. *Id.* at 535. The appropriateness of applying the flexible probable cause standard of *Camara* to criminal cases and to intrusive electronic surveillance was challenged by many during the FISA hearings. *See, e.g., Hearings on S. 3197, supra* note 36, at 210 (ACLU statement); *Hearings on S. 1566, supra* note 48, at 114 (ACLU statement). *See generally* Shapiro, *supra* note 2, at 154-55; Note, *The Foreign Intelligence Surveillance Act of 1978,* 13 VAND. J. OF TRANSNAT'L L. 719, 749-51 (1980) [hereinafter cited as Note, *FISA*].

199. *See supra* note 139.

200. The *Megahey* court, *see supra* note 131, held that the FISA warrant is a constitutional warrant by fourth amendment standards, reasoning that under *Camara,* 384 U.S. 523, the "reasonableness" standard for probable cause may vary and an independent FISA judge applies FISA standards in a manner that, although different from the standard civil or criminal warrant procedure, is "reasonably adapted to the peculiarities of foreign intelligence gathering." *Megahey,* CR-82-00327, at 24-28.

201. 629 F.2d 908.

202. *Id.* at 916; *see supra* text and accompanying notes 53-58.

Falvey surveillance to determine if a similar shift had occurred, the court adopted a per se rule: what begins as a legal FISA-warranted surveillance results in admissable evidence.[203] Unfortunately, what may be gained in judicial efficiency by the court's approach could encourage precisely the abuse envisioned by the FISA critics. In defense of the FISA's noncriminal warrant standard, the court could have made several stronger arguments: (1) the probable cause standard for "an agent of a foreign power" engaging in or preparing to engage in international terrorist activities is extremely close to a criminal standard;[204] (2) FISA's legitimate purpose of preventing international terrorist activities requires a more flexible probable cause standard than Title III's criminal standard which seeks evidence that a crime has been, is being, or is about to be committed;[205] and (3) FISA authorizations are not easier for the Government to obtain than Title III warrants but are in some respects more detailed and complicated.[206] The fourth amendment issue was not raised by the *Belfield* defendants.

D. The Fifth and Sixth Amendments

Both the *Falvey* and *Belfield* courts responded to defendants' charges that FISA's *in camera, ex parte* legality determination violated their constitutional rights under the fifth and sixth amendments. The *Falvey* court, faced with extensive surveillance

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203. The *Megahey* court, *see supra* note 131, took an entirely different approach. Because the *Truong* rationale was based on the Supreme Court's reasoning in *Keith,* Judge Sifton upheld FISA as meeting the limitations for a national security exception to the fourth amendment warrant requirement as articulated in *Truong.* Judge Sifton reasoned that because *Truong*'s "primarily for the purpose" test is implicit in FISA standards, FISA is constitutional on its face. *Megahey,* CR-82-00327, at 21. Furthermore, because the *Megahey* surveillance, based on Judge Sifton's *in camera, ex parte* review, was conducted primarily for foreign intelligence purposes, the court found that FISA was constitutionally applied. *Id.* at 22. Importantly, Judge Sifton required the individual surveillance to pass *Truong*'s "primarily for the purpose" test. *Id.* at 17-24.

204. *See supra* note 97 and accompanying text; *see also* S. REP. No. 604, *supra* note 2, at 47, *reprinted* at 3948.

205. S. REP. No. 604, *supra* note 2, *reprinted* at 3981. *See also supra* note 126.

206. *Compare, e.g.,* FISA's minimization procedures, 50 U.S.C. § 1801(h), required for authorization under 50 U.S.C. § 1805(4), *with* Title III's vague minimization requirement, 18 U.S.C. § 2518(5). *See generally* Note, *FISA, supra* note 195, at 740-43.

to be used against defendants at trial, dismissed the challenge almost summarily; the *Belfield* court, faced only with limited surveillance not used as evidence in a criminal proceeding, examined the constitutionality of the *in camera, ex parte* provision much more thoroughly. The *Falvey* court upheld the lower court's legality determination without discussion and was equally unhelpful in defending FISA's use of the closed proceedings. The court, for example, erroneously cited *Giordano*[207] and *Taglianetti,*[208] among others, as supporting the proposition that the legality of an electronic surveillance should be determined on an *in camera, ex parte* basis. More accurately, these cases indicate that closed proceedings may be used if a defendant's fourth amendment rights are not jeopardized,[209] an issue the *Falvey* court never considered, despite citing *Ajlouny* for precisely that proposition.[210] The court's bald statement that the sixth amendment's confrontation right and the right to a public trial do not necessarily apply to pretrial proceedings supplants what would have been a more helpful balancing of the national interest in secrecy against the defendants' need for disclosure and an adversary hearing to protect their constitutional rights.[211] Instead, the court cited a string of cases,[212] none of which involve the Government's need to protect foreign intelligence information and many of which involve determinations less complex and less crucial to defendants' guilt or innocence. The court never mentioned the obvious policy justification for closed proceedings—the need for the confidentiality of intelligence information—nor did it discuss whether public proceedings could have been detrimental to the defendant. In short, the *Falvey* court simply "rubber stamped" FISA's *in cam-*

207. 394 U.S. 310.

208. 394 U.S. 316.

209. *Falvey*, 540 F. Supp. at 1315.

210. *Belfield* cited *Giordano, Taglianetti,* and *Ajlouny,* as supporting this proposition. *Ajlouny,* also cited in *Falvey,* expressly recognized the unsettled state of the law on the issue. *See Ajlouny,* 629 F.2d at 839 & n.12 (noting the unsettled state of the law on *in camera, ex parte* hearings to determine the legality of a surveillance). The *Ajlouny* court decided that an *in camera, ex parte* legality determination would not jeopardize defendant's fourth amendment rights because the determination was not complex, the surveillances did not concern the subject matter of the indictment, and they were not used to initiate the investigation that led to charges against the defendant. *Id.* at 838-39.

211. *See supra* text accompanying notes 73-78; *see also* S. REP. No. 701, *supra* note 79, at 55-56, *reprinted* at 3957.

212. *See supra* text and accompanying notes 150-53.

era, ex parte provision.

The *Belfield* court, in upholding the lower court's legality determination, scrutinized the particular surveillance order not only to determine whether the statutory requirements were met, but also to determine whether any complicating considerations required disclosure or an adversary hearing to adequately protect appellants' rights.[213] In rejecting appellants' argument under *Alderman*[214] that determining the legality of any surveillance is too complex for a closed proceeding, the *Belfield* court set precedent by construing FISA's language and legislative history as envisioning closed proceedings to be the norm. At the same time, however, the court left open the possibility that, in spite of national security interests, circumstances could require disclosure and an adversary hearing.[215] The *Belfield* court effectively defended FISA procedures against the argument that Title III's mandatory disclosure provisions are a required constitutional minimum by noting that (1) FISA and Title III have different purposes and national security interests prevent ready disclosure of FISA surveillances, (2) Congress took extra measures to protect appellants' right by including participation of all three branches of government in the FISA warrant process, and (3) FISA simplifies the determination of legality, making disclosure and an adversary hearing less necessary to protect defendants' rights.[216] Once again, in noting the defendants' "understandable reluctance" to be excluded from a process which "incidentially affected" them and by commenting that "*this* exclusion did not rise to the level of a constitutional violation"[217] (emphasis added), the court left open the possibility that a more complex determination or one more crucial to defendants' guilt or innocence determination could require open proceedings. In contrast to the *Falvey* court, which asserted that *in camera, ex parte* proceedings should be used to determine the legality of a surveillance, the *Belfield*

213. *See supra* text accompanying note 172.

214. 394 U.S. at 65. *Belfield* cited appellants' brief on this point. 692 F.2d at 147 & n.27. *Alderman* held that determining taint from an illegal surveillance is a task too complex to rely on the *in camera, ex parte* judgment of the court. *Alderman,* 394 U.S. at 192.

215. *Belfield,* 692 F.2d at 147.

216. *Id.; see also* S. REP. No. 701, *supra* note 79, at 65, *reprinted* at 4034 (recognizing that the Government may, in some instances, be forced to choose between disclosure and prosecution).

217. 692 F.2d at 148.

court took a much less categorical approach, citing similar case law as standing for the proposition that open proceedings are not constitutionally mandated as long as defendant's fourth amendment rights are protected.[218] In sum, instead of a blanket endorsement of FISA's *in camera, ex parte* provision, the *Belfield* court indicated that in each case an ad hoc balancing of defendant's rights against the Government's interests should determine whether the provision has been constitutionally applied.[219]

V. CONCLUSION

Within its more limited scope, the *Belfield* decision provides a helpful approach to FISA cases by articulating both a solid rationale for FISA's *in camera, ex parte* provision and a workable balancing approach for determining whether open proceedings may be necessary. The *Falvey* decision, although broader in scope, does not provide a satisfactory rationale for FISA's deviation from the traditional fourth amendment warrant requirement, nor does it articulate a workable approach to evaluating a FISA-warranted surveillance. The *Falvey* court, by predicating its upholding of FISA on an acceptance of the national security exception, may perpetuate a debate that the statute attempted to foreclose. For circuits that have not endorsed warrantless national security surveillance by the Executive, the *Falvey* decision may not offer a satisfactory rationale for accepting FISA's less-than-probable cause standard. Furthermore, *Falvey's* substitution of a per se rule for *Truong*'s "primarily for the purpose" test may be open to constitutional attack in the future.

The *Falvey* and *Belfield* decisions, along with the *Truong* foot-

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218. *See supra* notes 150-53 and accompanying text.

219. In *Megahey*, *see supra* note 131, defendants also charged violation of their sixth amendment rights to counsel, to a public trial, and to confront witnesses against them. *Megahey*, CR-82-00327, at 32. The *Megahey* court applied the *Ajlouny* analysis—examining the surveillance to determine whether the *in camera, ex parte* proceedings sufficiently protected defendants' fourth amendment rights. *Id.* at 34. Because the issues were not raised by defendants, the court concluded that the closed proceeding did not violate defendants' constitutional rights. *Id.* at 34-35. The *Megahey* court, like the *Belfield* court, seemed to suggest that in other circumstances, the closed proceeding may be inadequate: "While the alert eye of an advocate might be helpful in discerning defects in the certificates, I see no reason to believe that an adversary proceedings [in the instant case] is necessary for accuracy." *Id.* at 35.

note,[220] very likely foreshadow the deferential treatment that a much-needed, complex, and extensively debated statute will receive in the courts. While the *Belfield* decision effectively defends FISA's controversial *in camera, ex parte* provision, the *Falvey* decision will disappoint both FISA's supporters and critics, who will have to wait for a more satisfactory statement of their views and a more convincing defense of FISA's controversial deviation from traditional fourth amendment warrant requirements.[221]

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220. *Truong,* 629 F.2d at 914-15 n.4.

> The Act teaches that it would be unwise for the judiciary, inexpert in foreign intelligence, to attempt to enunciate an equally elaborate statement for the core of foreign intelligence surveillance under the guise of a constitutional decision. Such an attempt would be particularly ill-advised because it would not be easily subject to adjustment as the political branches gain experience in working with a warrant requirement in the foreign intelligence area.

221. The *Megahey* court provides a more satisfactory rationale for the judicial acceptance of FISA and for the manner in which FISA cases must be scrutinized. *See supra* notes 131, 186, 200, 203 & 219.