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Going, Going, Gone: Sealing the Fate of the Fourth Amendment

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Abstract

We will begin by analyzing the history of the Foreign Intelligence Surveillance Act (FISA), discuss the context of the two recently published decisions of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review FISCR, respectively, before analyzing the *In re Sealed Case* decision in light of the requirements of the Fourth Amendment. Ultimately, we conclude that FISA, as amended by Congress in the USA PATRIOT Act, and as interpreted by the FISCR, is unconstitutional in that it offends the requirements of the Fourth Amendment.

GOING, GOING, GONE: SEALING THE FATE OF THE FOURTH AMENDMENT

*Michael P. O'Connor & Celia Rumann**

INTRODUCTION

The United States is a Nation in transformation. The hijackers who attacked the World Trade Towers and the Pentagon on September 11, 2001, set in motion a chain of events, which have undermined the constitutional limits of executive power. Sadly, though not surprisingly, President George W. Bush and his administration have taken advantage of the fear generated by these terrorists (along with a fateful confluence of historical and political forces) and, through a series of bold moves, have amassed unprecedented power in the Executive Branch.[1] Nowhere is that consolidation of executive power more evident than in the forces being brought to bear against U.S. persons (citizens and lawful resident aliens) by Attorney General John Ashcroft and the U.S. Department of Justice. Detention of U.S. persons without charge, access to counsel, meaningful judicial review, or even the ability to communicate with loved ones — powers more appropriately associated with totalitarian regimes — are now vigorously defended by the U.S. government.[2] In addition, with the assistance of the other two branches of govern-

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1. This should come as no surprise, for the very structure of our government presumes that each branch will vie for power against the others. From the birth of our Republic, the Framers recognized the enormous temptation each branch would feel to assume as much power to itself as was possible. "[E]xperience assures us that the efficacy of the provision [of merely marking the boundaries of power] has been greatly overrated." James Madison, FEDERALIST No. 48, at 146 (Roy P. Fairfield ed., 2d ed. 1966). *See also* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). It is sad, however, because the powers being assumed by the Executive Branch today are amassed chiefly at the expense of the People.

2. *See, e.g.*, CNN.COM, *Ashcroft: Critics of New Terror Measures Undermine Effort*, Dec. 7, 2001, *available at* http://www.cnn.com/2001/US/12/06/inv.ashcroft.hearing/ [hereinafter *Ashcroft Statements*]; *see also* Brief for Government, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (No. 02-6895), *available at* http://news.findlaw.com/legalnews/us/terrorism/cases/index.html; Motion to Dismiss Amended Petition for a Writ of Habeas Corpus, Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-4445), *available at* http://news.findlaw.com/legalnews/us/terrorism/cases/index.html.

ment, the Executive has amassed dramatic new surveillance powers, previously deemed intolerable under both the Fourth Amendment and federal statutes, for use in investigating suspected criminal offenses.[3] These unprecedented new powers signal nothing less than the transformation of the U.S. government from one of limited, enumerated, and balanced powers, to one of extra-constitutional authority whose justification resides in a purported state of emergency.

These new powers being exercised in the United States surprisingly mirror, in many ways, those being exercised in Northern Ireland, and more generally, in the United Kingdom ("UK").[4] This is surprising because Northern Ireland and the UK are emerging from a period defined by emergency and the threat of terrorism into a time that promised more stability and normalcy. In fact, recently passed legislation permitting a broad range of surveillance activity in the UK, promised to protect human rights and act as a check upon the government's surveillance powers.[5] Under the Regulation of Investigatory Powers Act 2000 ("RIPA"),[6] however, the incidence of wiretaps and mail openings has skyrocketed.[7] While some "emergency" UK legislation was passed following the World Trade Center attacks,[8] RIPA and the Terrorism Act 2000[9] are permanent pieces of legislation,

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3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, "USA PATRIOT Act," Pub. L. No. 107-56, Sec. 202, 115 Stat. 272, 291 (2001).

4. Both governments and societies are in transition and both can learn much from the other's experience. One lesson the United States should carefully consider is how frequently "emergency" powers become permanent, whether *de facto* or *de jure*. In Northern Ireland and the Republic of Ireland, emergency legislation was repeatedly renewed, becoming *de facto* permanent. *See, e.g.*, Emergency Provisions Acts of 1973, 1978, 1987, 1991 and 1996 (Eng.); Prevention of Terrorism (Temporary Provisions) Acts (Eng.); *see also* Committee on the Administration of Justice, *No Emergency, No Emergency Laws: Emergency Legislation Related to Northern Ireland — the Case for Repeal* (Mar. 1995), *available at* http://www.caj.org.uk/PublicationsCatalogue.htm#criminal; Michael P. O'Connor & Celia Rumann, *Into the Fire*, 24 CARDOZO L. REV.__ (forthcoming 2003). Finally, many of these powers were made permanent *de jure* through the Terrorism Act 2000 (Eng.).

5. *See Explanatory Notes to Regulation of Investigatory Powers Act 2000, Summary and Background, available at* http://www.hmso.gov.uk/acts/en1/2000en.

6. Regulation of Investigatory Powers Act 2000, ch. 23 (Eng.).

7. *See* STATEWATCH NEWS ONLINE, *UK Surveillance of communications goes through the roof, available at* http://www.statewatch.org/news/2003/jan/11ukteltap.htm.

8. *See e.g.*, Anti-Terrorism, Crime and Security Act 2001, ch. 24 (Eng.), *available at* http://www.hmso.gov.uk/acts/acts2001/20010024.htm#aofs.

9. Terrorism Act 2000, ch. 11 (Eng.).

granting broad investigatory powers to the government, whose existence is not contingent upon a state of emergency. The UK government responded to the September 11 attacks by aggressively using these powers and justifying their expansion and solidification.[10] This development in the UK mirrors, in process and substance, the new and dramatic exercise of executive power in the United States.

This, of course, is not the first time that one branch of the U.S. government has assumed powers which were not explicitly granted to it by the Constitution. U.S. history is replete with examples of one branch encroaching upon the powers appropriately reserved to one of the other two coequal branches.[11] It is also not unique for the Executive to exercise extra-constitutional powers to the detriment of our citizens' civil liberties.[12] One need not look too far into the past to see examples of the Executive Branch running afoul of the constitutional limits on its power and justifying these excesses in the name of national se-

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10. *See* AMNESTY INTERNATIONAL, *United Kingdom: Rights Denied: the UK's Response to 11 September 2001*, *available at* http://www.statewatch.org.

11. *See e.g.*, I.N.S. v. Chadha, 462 U.S. 919 (1983) (holding that the Legislature improperly assumed veto power of the Executive); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating congressional intrusion on Executive Branch); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding that Congress may not give away Article III "judicial" power to an Article I judge); Myers v. United States, 272 U.S. 52 (1926) (holding that Congress cannot limit President's power to remove Executive Branch official).

12. While there are many examples of the abuse of executive power to the detriment of civil liberties, perhaps none is more relevant to some of the powers being exercised by the current Bush Administration than the internment of Japanese-Americans during World War II. In recent years, it has become practically an article of faith that what was done to Japanese Americans was both disgraceful and unlawful. *See* Civil Liberties Act of 1988, Restitution for World War II Internment of the Japanese Americans and Aleuts, 50 U.S.C. App. Sec. 1989. That Section states:

> The purposes of this Act are to—
>
> (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
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> (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
>
> (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals *so as to prevent the recurrence of any similar event.*

Id. (emphasis added). It must be noted however, that both Congress and the federal courts during World War II supported the Executive's internment of Japanese-Americans. *See* Korematsu v. United States, 323 U.S. 214 (1944).

curity.[13] Nevertheless, the Bush Administration is pursuing extraordinary powers with such vigor, that these actions are properly characterized as unprecedented in their disregard for any constitutional or statutory limitations.[14] While the range of extra-constitutional powers assumed by the Bush Administration has been broad, affecting even the most basic rights to counsel, access to the courts, and to be informed of the nature of the charges against oneself, the newly assumed powers of surveillance may eventually prove to be the most corrosive of liberty and the rule of law in this Nation.[15]

A recent, historic decision by the Foreign Intelligence Surveillance Court of Review ("FISCR"), *In re Sealed Case*, has expanded to criminal investigations the broad scope of surveillance powers previously available only for foreign intelligence investigations.[16] Under the Foreign Intelligence Surveillance Act ("FISA"), broadened surveillance powers were granted to investi-

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13. The Nixon Administration's misconduct during the Watergate scandal directly contributed to the limitations placed upon executive action under the Foreign Intelligence Service Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (hereinafter FISA]. The Iran-Contra Affair is another of the more notorious of such episodes in recent U.S. history. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305-17 (1988).

14. *See, e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) ("The USA PATRIOT Act gives the Attorney General unprecedented power to detain aliens without a hearing and without a showing that they pose a threat to national security or a flight risk.").

15. To date, Congress has accommodated the Administration, and the judiciary has acquiesced in this encroachment upon the civil liberties of U.S. persons. This ongoing shift of power within the federal government raises serious questions about the operation of fundamental checks and balances within our tripartite system of government. These important issues and the related separation of powers questions raised by the Executive's actions are beyond the scope of this paper. However, other issues concerning the appropriate checks and balances placed upon the Executive, that are inextricably linked to the warrant requirement of the Fourth Amendment, will be analyzed when discussing how the changes to FISA offend the dictates of that Amendment.

16. *In re* Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002). The decision is historic in two important ways. First, it is the only decision ever issued by the Foreign Intelligence Surveillance Court of Review ("FICSR") in the twenty-four-year history of that court. This is particularly significant because it means that the government, the only party appearing in the lower Foreign Intelligence Surveillance Court ("FISC"), has never had reason to appeal a single decision of the FISC. Second, the decision is historic because it turns on its head the entire rationale of previous federal court decisions upholding searches under FISA. Those previous decisions of various federal district courts and federal courts of appeal relied upon the limitation requiring searches under FISA to be conducted only during investigations whose primary purpose was to gather foreign intelligence information. *See, e.g.*, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991).

gators, whose primary purpose is to gather foreign intelligence information.[17] These surveillance powers were permitted upon a standard less than that required under the Fourth Amendment, because the purpose of the investigation was to gather foreign intelligence information, rather than the investigation of criminal activity. *In re Sealed Case* has turned the rationale of FISA on its head, and permitted the government to use these expansive powers of surveillance when the government's primary purpose is law enforcement.[18]

It is these newly asserted powers of surveillance that are the focus of this Article. While many issues are raised by the use of these newly expanded powers, including their use against targets identified solely on the basis of lawful activities, the primary focus of this analysis will be on how *In re Sealed Case* granted to the Executive broad surveillance powers which offend the dictates of the Fourth Amendment.[19] We will begin by analyzing the history of the FISA, discuss the context of the two recently published decisions of the Foreign Intelligence Surveillance Court ("FISC") and the FISCR, respectively, before analyzing the *In re Sealed Case* decision in light of the requirements of the Fourth Amendment.

Ultimately, we conclude that FISA, as amended by Congress in the Uniting and Strengthening America by Providing Appro-

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17. FISA, Pub. L. No. 95-511, Sec. 104. FISA surveillance powers are extraordinary in many ways, which are detailed in the sections below. Among the substantial differences from ordinary surveillance powers conducted pursuant to the Fourth Amendment and Title III of the United States Code ("U.S.C."), are the following: surveillance permitted without any showing (of probable cause or even reasonable suspicion) that evidence of criminal activity will be discovered; surveillance approved through *ex parte* secret proceedings, which are never revealed to a defendant challenging the introduction of evidence against him; warrantless surveillance permitted; surveillance not limited by requirements of particularity; and surveillance permitted over long periods of time which are potentially open-ended.

18. Congress' role in this intrusion on civil liberties is more than *de minimus*. Under the provisions of the inaptly named USA PATRIOT Act, Congress amended the FISA to permit such surveillance where foreign intelligence information was "a significant purpose" of the investigation. *See* USA PATRIOT Act, Pub. L. No. 107-56, Sec. 202; *see also* O'Connor & Rumann, *supra* n.4. On March 6, 2003, the Senate Judiciary Committee approved legislation to allow FISA surveillance of people believed to be "lone wolf" terrorists, even if no evidence connected them to a specific terrorist group or a foreign power that supported terrorism. *See Bill Status of S. 113, available at* http://thomas.loc.gov.

19. First Amendment issues will be discussed insofar as they relate to the history of and purposes behind the Fourth Amendment.

priate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), and as interpreted be the FISCR, is unconstitutional in that it offends the requirements of the Fourth Amendment.

I. *HISTORICAL FRAMEWORK*

A. *History of the FISA*

FISA was passed in 1978. It authorized "applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information."[20] It was passed in response to the Church Committee's review of the Nixon Administration's surveillance of the activities of political opponents, including the Democratic Party, under the guise of national security.[21] Through FISA, Congress attempted to limit the propensity of the Executive Branch to engage in abusive or politically motivated surveillance. FISA was Congress's attempt to balance the "competing demands of the President's constitutional powers to gather intelligence deemed necessary to the security of the Nation, and the requirements of the Fourth Amendment."[22]

Prior to the enactment of FISA, beginning with the Administration of Franklin Roosevelt, the Executive Branch asserted an "inherent" authority to engage in surveillance for foreign intelligence purposes.[23] Successive Administrations asserted that this authority arose under the foreign affairs powers delegated to the Executive Branch by the Constitution.[24] Various members of Congress disputed this assertion,[25] and legislation to address this dispute initially stated that the Executive Branch had no

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20. S. Rep. 95-701, *reprinted in* 1978 U.S.C.C.A.N. 3973.

21. S. Rep. 95-701, 709. *See also* Ira Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 HARV. J. ON LEGIS. 119, 120 (1977-78); David Johnston, *Administration Begins to Rewrite Decades-Old Spying Restrictions*, N.Y. TIMES, Nov. 30, 2002, at A1.

22. H.R. Rep. No. 95-1283, at 15.

23. *See* Shapiro, *supra* n.21.

24. *See, e.g.*, Americo R. Conquegrana, *The Walls (and Wires) have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 794 (1989).

25. *See* Shapiro, *supra* n.21, at 121 "In the wake of revelations about Watergate Senators Nelson (D-Wis.), Kennedy (D-Mass.), and Mathias (R-Md), asserting that the President had no authority to disregard the Fourth Amendment in national security cases, introduced legislation to prohibit warrantless electronic surveillance."

such authority. FISA, as passed, was a compromise between these competing views.[26] It limited the authority of the Executive, asserting a check on its power by requiring it to obtain judicial authorization before it could engage in surveillance for "the purpose" of gathering foreign intelligence information.

Originally, FISA, by its terms, was limited to electronic surveillance.[27] However, in 1994, FISA was amended to apply to physical searches as well.[28]

B. *History of the FISC*

The FISC was established by FISA. It originally consisted of seven judges, appointed by the Chief Justice of the Supreme Court.[29] The PATRIOT Act expanded the number of judges serving to eleven.[30] These judges are charged with reviewing surveillance applications submitted under FISA and determining whether the applications meet the requirements for the issuance of a warrant for foreign intelligence surveillance.[31] Such applications are submitted and orders are issued *ex parte*.[32] As such, the only party that can appeal the decision to issuance, modify, or deny any application, is the government.

Between 1979 and 2001, there were 14,036 applications for FISA surveillances or searches.[33] During that time period, all but

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26. For a thorough discussion of the competing interests and the evolution of Bills that eventually became FISA, *see* Conquegrana, *supra* n.24, at 794.

27. This changed after the Administration requested, and the FISC refused to authorize, a warrant requesting a physical search. *See* Report of the Select Committee on Intelligence, United States Senate, *Implementation of the Foreign Intelligence Surveillance Act of 1978* (1980-81). The FISC denied the request because by its term and as confirmed in the legislative history, physical searches were not authorized under the FISA. *See id. See also In re the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (June 11, 1981), *reprinted in* Report of the Select Committee on Intelligence, United States Senate, *supra.*

28. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, Sec. 807(b), 108 Stat. 3423, 3453 (1994).

29. FISA, Pub. L. No. 95-511, Sec. 103.

30. USA PATRIOT Act, Pub. L. No. 107-56, Sec. 208.

31. 50 U.S.C. Sec. 1803(a).

32. *Id.*

33. *See generally* Annual Reports of the Attorney General, *available at* http://fas.org/irp/agency/doj/fisa. These Annual Reports list the annual number of warrant applications and the decisions of the FISC on those requests. The authors have complied the numbers contained in these reports for the totals listed here. Of these applications, only four were modified by the court before issuing the warrant. One of these modifications actually expanded the request, authorizing "an activity for which court

one of these requests were granted.[34] Only four of these previous applications have been modified before being issued.[35] Indeed, even *In re All Matters*, the 2002 decision by the FISC that dealt with the minimization procedures, and was appealed by the government in *In re Sealed Case*, did not deny the requested application.[36] It granted the application with modification to the proposed minimization procedures.[37]

II. *ARTICLE III COURTS' INTERPRETATION OF FISA*

A. *Changes to FISA in the USA PATRIOT Act*

The PATRIOT Act contained many changes to the FISA. These changes were some of the most controversial contained in that piece of legislation.[38] This Article focuses on the change in the PATRIOT Act that the FISCR addressed in its opinion. Specifically, we analyzed the FISCR interpretation of the effect of the amendment that changed the requirement that foreign intelligence be "the purpose" of the surveillance to merely requiring that it be "a significant purpose."

As originally drafted and implemented over its twenty-four -

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authority had not been requested." Annual Report of the Attorney General, Apr. 22, 1981, *available at* http://fas.org/irp/agency/doj/fisa/1980rept.html.

34. *See generally* Annual Reports of the Attorney General 1979-2001, *available at* http://fas.org/irp/agency/doj/fisa. These numbers are all the more astonishing when one considers the revelations by the FISC, noting the concern for misrepresentation by the government. These numbers are particularly interesting given the information contained in the FISC decision, noting that on seventy-five occasions, the government confessed error relating to "misstatements and omissions of material facts" it had made in its FISA applications. Indeed, the FISC took the extraordinary step of preventing one FBI agent from appearing before it as an affiant. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 621 (Foreign Int. Surv. Ct. 2002) [hereinafter *In re All Matters*].

35. Annual Reports of the Attorney General 1979-2001, *supra* n.33. Interestingly, one of these four modifications involved the government being given broader surveillance capability than even requested.

36. *In re Sealed Case*, 310 F.3d at 720.

37. It should also be noted that the FISCR jurisdiction is limited to appeals of denials. 50 U.S.C.A. Sec. 1803(b). In spite of this fact, that court reviewed the granting of a FISA surveillance order and went beyond this. In the absence of any statutory authority, the FISCR ruled on a question that had never been presented to the FISC: whether the purpose requirement as amended by the PATRIOT Act was constitutional.

38. As the lone dissenting Senatorial vote on the PATRIOT Act, Senator Russ Feingold explained how "troubled" he was "by the broad expansion of government power" under FISA. He summed up his objections to the changes to the FISA by stating: "This is a truly breathtaking expansion of police power." 147 CONG. REC. S10,990 (2001) (statement of Sen. Feingold).

year history, FISA applications were only properly granted when "the purpose" of the surveillance was foreign intelligence gathering.[39] Under the PATRIOT Act changes, a warrant under FISA would now issue, so long as "a significant purpose" of the surveillance was foreign intelligence.[40] This minor change of language has had a dramatic impact on its use. Now, for the first time in history, the government can conduct surveillance to gather evidence for use in a criminal case, so long as it presents a non-reviewable assertion that it also has a significant interest in the target for foreign intelligence purposes.

B. *In re Sealed Case: The Rarest of the Rare, a Published Decision by the FISCR*

1. Lower Court Decision

On May 17, 2002, the FISC issued a rare public and unanimous opinion.[41] In that case, the government had sought to conduct surveillance of an "agent of a foreign power."[42] The FISC granted that request.[43] However, in granting the request, the FISC also addressed the propriety of the government's proposed minimization procedures under FISA.[44] It is important to note that the FISC specifically limited its analysis to the question before it, stating that it was not "reaching the question of whether FISA may be used primarily for law enforcement purposes."[45] In resolving the minimization question, the FISC catalogued the opportunities for and methods of coordination and information-sharing under the 1995 minimization procedures, as augmented in January 2000 and August 2001.[46]

However, because FISA required the FBI Director to certify that "the purpose" of any proposed surveillance was the collection of foreign intelligence information, the FISC decision ad-

39. *See* FISA, Pub. L. No. 95-511, Sec. 104(a)(7)(B).

40. USA PATRIOT Act, Pub. L. No. 107-56, Sec. 218.

41. *In re All Matters*, 218 F. Supp. at 621.

42. *In re Sealed Case*, 310 F.3d at 720.

43. *Id.*

44. *In re All Matters*, 218 F. Supp. 2d at 613. Minimization procedures are those steps designed to minimize the acquisition and retention of information learned about non-consenting United States persons, and to prohibit the unlawful dissemination of this information. 50 U.S.C. Secs. 1801(h) and 1821(4).

45. *Id.* at 615, n.2. This is important to note because the FISCR did not so limit its review.

46. *Id.* at 619.

dressed its longstanding practice of being "routinely apprised of consultations and discussion between the FBI, the Criminal Division, and the U.S. Attorney's offices in cases where there were overlapping intelligence and criminal investigations or interests."[47] To ensure that FISA surveillances and searches remained limited to foreign intelligence cases and "were not being used *sub rosa* for criminal investigations," the FISC had routinely approved "information screening 'walls'" in such cases.[48] However, the FISC noted that in September 2000, the government admitted that in seventy-five previous FISA applications relating to terrorism, the government had made "misstatements and omissions of material facts."[49]

It was within this frame of reference that the FISC considered whether newly proposed minimization procedures were adequate to meet the statutory requirements. It concluded that they were not. The FISC noted that "[t]he 2002 procedures appear to be designed to amend the law and substitute FISA for Title III electronic surveillances and Rule 41 searches."[50] It noted that the effect of this would be that "criminal prosecutors will tell the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic surveillance), what techniques to use, what information to look for, what information to keep as evidence, and when use of FISA can cease because there is enough evidence to arrest and prosecute."[51] As such, it held that portions of the proposed minimization procedures were "NOT reasonably designed," consistent with the need of the government "'to obtain, produce, or disseminate foreign intelligence information' as defined in § 1801(h) and § 1821(4) of the" FISA.[52]

The government objected to this limitation on the role that law enforcement could play in foreign intelligence gathering. As such, it filed the first ever appeal to a court that had never before met — the FISCR.

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47. *Id.* at 619-620.
48. *Id.* at 620.
49. *Id.*
50. *Id.* at 623.
51. *Id.* at 624.
52. *Id.* at 625 (emphasis in the original).

2. Appellate Decision

On November 18, 2002, the FISCR issued its first opinion.[53] It based this decision on the briefs and arguments presented by the government, and two *amicus curiae* briefs filed by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers.[54] The FISCR opinion reversed the decision of the FISC, to the extent that the FISC "imposed conditions on the grant of the government's applications."[55] In a decision that Attorney General John Ashcroft recognized as so revolutionary, that he called it "a giant step forward,"[56] the FISCR reversed twenty years of court decisions and Justice Department policy. Though praised by the Department of Justice, this decision raised concerns for civil libertarians and was quickly criticized.[57]

In this decision, the FISCR purported to be addressing an appeal of the minimization question decided by the FISC.[58] Whatever the propriety of the decision to review the granting of an application with modification, the FISCR did not limit itself to this question. Indeed, it spent very little time addressing the minimization question. The FISCR spent much of its opinion

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53. *See In re Sealed Case*, 310 F.3d at 717.

54. *Id.* at 710. *See also* Brief on Behalf of *Amici Curiae* American Civil Liberties Union, Center for Democracy and Technology, Center for National Security Studies, Electronic Privacy Information Center, Electronic Frontier Foundation, and Open Society Institute In Support of Affirmance, *available at* http://archive.aclu.org/news/2002/n092002a.html; Brief on Behalf of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Affirmance, *available at* http://www.criminaljustice.org/public.nsf/newsreleases/2002mn045?opendocument.

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

56. Dep't of Justice, Attorney General John Ashcroft's Press Conference re: Foreign Intelligence Surveillance Court of Review (Nov. 18, 2002), *in* State Dep't Press Releases & Documents, *available at* 2002 WL 25973318. *See also* Adam Liptak, *In the Name of Security, Privacy for Me, Not Thee*, N.Y. TIMES, Nov. 24, 2002, Sec. 4, at 1.

57. *See, e.g.*, Editorial, *A Green Light to Spy*, N.Y. TIMES, Nov. 19, 2002, at A30; D. Hudson, Jr., *Unusual Appeals Process in Wiretap Case*, 1 A.B.A. J. 45 (2002). These criticisms have ranged from concerns about the objectivity of a court "hand-picked by Chief Justice Rehnquist" and consisting entirely of Reagan appointees, to the secret and one-sided nature of the proceedings, to the inability of anyone to file an appeal to the substantive decision and its interpretation by the Justice Department.

58. There are serious jurisdictional questions raised by the court's review of this case, since the FISC granted the application in question, with modification to the minimization procedures. *See* 50 U.S.C. Sec. 1803(b). Additional jurisdictional questions are raised by the scope of the court's analysis, which includes issues not raised or decided in the court below. These questions are clearly important, but are beyond the scope of this Article.

discussing the question that was specifically not addressed by the FISC, namely whether both pre- and post-PATRIOT Act FISA may be used primarily for law enforcement purposes. It also addressed the Fourth Amendment questions inherent in any finding that FISA orders could be obtained in cases where the objective of the investigation is a criminal prosecution, rather than foreign intelligence gathering.[59]

On the question of pre-PATRIOT Act FISA, the FISCR ignored the plain language of the statute, as enacted, which very clearly required, among other things, that the applications contain a certification "that the purpose of the surveillance is to obtain foreign intelligence information."[60] Instead, the FISCR focused on the definition of "foreign intelligence information," which means information that is "necessary to the ability of the United States to protect against" sabotage, international terrorism or clandestine intelligence activities by a foreign power or an agent of a foreign power."[61] Because an "agent of a foreign power" circularly defines itself as anyone who "knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States," and the definitions of "sabotage" and "international terrorism" similarly refer to violations of criminal law,[62] the FISCR concluded that FISA was never meant to prohibit its use in criminal cases.

In support of this conclusion, the FISCR quoted from the Congressional record, including the Senate Report on FISA at the time of its passage. The FISCR includes a long quote from the Senate Report which notes that "intelligence and criminal law enforcement tend to merge in this area . . . [S]urveillances conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecu-

59. The FISCR summarily overlooked statutorily-constructed restrictions of its jurisdiction to "review of the denial of any application" to address issues that it admits have "never previously been advanced either before a court or Congress." *In re Sealed Case*, 310 F.3d at 721. It announces that since the proceedings are *ex parte* it "can entertain an argument supporting the government's position not presented to the lower court." *Id.* at n.6.

60. 50 U.S.C. Sec. 1804 (a)(7)(B).

61. 50 U.S.C. Sec. 1801 (e)(1)(B).

62. 50 U.S.C. Sec. 1801 (b)(2)(A), (C).

tion are appropriate."[63]

Edited from this quote by the FISCR is the Congressional indication of the appropriate balance in this area, where intelligence and criminal law enforcement merge. The Senate made clear that where these objectives merge, "[t]he targeting of U.S. persons and the overlap with criminal law enforcement require close attention to traditional Fourth Amendment principles."[64]

Instead of heeding this admonition to pay close attention to traditional Fourth Amendment principles, the FISCR did the opposite. It decided that because there was an overlap of intelligence and criminal law objectives, the limited protections of FISA would prevail over traditional Fourth Amendment requirements. Thus, the FISCR concluded that foreign intelligence never really needed to be the primary purpose under FISA, as originally enacted.

Rather than stop there, the FISCR went further. It addressed the issue newly presented by the government's argument — that whether originally required or not, given that the PATRIOT Act amended FISA to state that "the purpose" need only be "a significant purpose" – the government could now use FISA even if its primary purpose was criminal investigations, rather than foreign intelligence investigations. The FISCR had no trouble concluding that this was the intent behind the amendments to FISA contained in the PATRIOT Act.

So concluding, the FISCR then addressed the Fourth Amendment problems inherent in such an analysis. It suggested that although FISA's requirements for a surveillance order are different than those under Title III, "few of those differences have constitutional relevance."[65] It went so far as to suggest that in some ways, FISA provides greater protections than does a Title III warrant.[66] FISCR stated that "while Title III contains some protections that are not in FISA, in many significant respects the two statutes are equivalent, and in some, FISA contains addi-

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63. *In re: Sealed Case*, 310 F.3d at 725 (emphasis in the original).

64. S. Rep. No. 95-701, at 10-11 (1978) (ellipse in the original).

65. *In re Sealed Case*, 310 F.3d at 737. For example, the FISCR summarily concludes that a "FISA judge satisfies the Fourth Amendment's requirement of a 'neutral and detached magistrate.'" *Id.*

66. *Id.* at 739 ("Nevertheless, FISA provides additional protections to ensure that only pertinent information is sought.").

tional protections."[67]

One of the interesting anomalies of its Fourth Amendment analysis is that after spending much of the opinion deciding that FISA never has required, and does not now require, foreign intelligence gathering to be the primary purpose for the surveillance, FICSR asserted that FISA meets Fourth Amendment standards because of the differences between the investigative needs and objectives in foreign intelligence investigations and those in criminal cases governed by Title III.[68] For example, in discussing the expanded duration for FISA warrants, as compared to Title III warrants, FISCR noted that "[t]his difference is based on the nature of national security surveillance, which is 'often long range and involves the interrelation of various sources and types of information.'"[69]

Ultimately, FISCR sidestepped thorny points and glossed over any meaningful analysis of Fourth Amendment law. For example, FISCR did not decide whether a FISA order is a "warrant," as contemplated by the Fourth Amendment.[70] Instead, it analyzed the question of whether "FISA, as amended by the PATRIOT Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens."[71] In conducting this analysis, FISCR dismissed the holding of *United States v. Troung*.[72]

Troung held that evidence obtained through warrantless searches and surveillances of a defendant after an investigation had become primarily criminal investigations, was inadmissible.[73] FISCR determined that the *Troung* decision rested on a "false premise" that foreign intelligence gathering is distinct

67. *Id.* at 741. It must be noted that this "additional protection" is the involvement of the Attorney General.

68. *Id.* at 737-42.

69. *Id.* at 740. In a twist of irony, the FISCR asserted that "this longer surveillance period is balanced by continuing FISA court oversight of minimization procedures during that period." This came after the portion of the opinion in which the court determined that the wall that the FISC had held as a necessary component of those procedures, was not permitted because criminal prosecutions could now be the objective for the surveillance.

70. *Id.* at 741-42.

71. *Id.* at 742.

72. United States v. Troung, 629 F.2d 908 (4th Cir. 1980).

73. *See id.*

from criminal investigations.[74] It opined that this line was "inherently unstable, unrealistic, and confusing."[75] Although the FISCR noted that the FBI in its pre-9/11 terrorism investigations may have misunderstood the dictates of *Troung*, the FISCR suggested that the requirements based on *Troung* may have contributed "to the FBI missing opportunities to anticipate the September 11, 2001 attacks."[76]

After rejecting the lesson of *Troung*, the FISCR analyzed the "special needs" cases. "Special needs" cases are those where the Supreme Court has found it appropriate to carve out an exception to the Fourth Amendment's requirement of probable cause, based upon an individualized suspicion of wrongdoing. In these cases, the Court found that "special needs, beyond the normal need of law enforcement," might justify an otherwise unconstitutional search.[77] It specifically considered the recent Supreme Court case of *City of Indianapolis v. Edmond*.[78] In that case, the Supreme Court held that "a highway checkpoint designed to catch drug dealers did not fit within its special needs exception because the government's 'primary purpose' was merely 'to uncover evidence of ordinary criminal wrongdoing.'"[79] The FISCR, on the other hand, reasoned that because subjective intent "is not relevant in ordinary Fourth Amendment probable cause analysis," it was the "programmatic purpose" that was determinative.[80]

Ignoring its own conclusion on the purpose question, the FISCR then concluded that because "FISA's general programmatic purpose" is foreign intelligence gathering, as distinguished from what it called, without defining, "ordinary crime control," FISA, as amended, is constitutional because the surveillances it authorizes are "reasonable."[81]

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74. *In re Sealed Case*, 310 F.3d at 743.

75. *Id.*

76. *Id.* at 744. For a discussion of the FBI's implementation of FISA, *see generally*, *Interim Report of FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures* (Feb. 2003), *available at*, http://www.fas.org/irp/congress/2003_rpt/fisa.html.

77. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989).

78. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

79. *In re Sealed Case*, 301 F.3d at 745 (citing *Edmond*).

80. *Id.*

81. *Id.* at 746.

III. *TRANSITION TO EXTRA-CONSTITUTIONAL SYSTEM FOR SURVEILLANCE*

A. *FISA Modifications, the Primary Purpose Requirement, and the Fourth Amendment*

The modifications of FISA, as contained in the PATRIOT Act and as interpreted by FISCR in *In re Sealed Case*, raise several fundamental problems under the Fourth Amendment. Searches conducted pursuant to these provisions, which are not primarily for foreign intelligence purposes, cannot pass constitutional muster. The conclusion to the contrary by the FISCR in *In re Sealed Case* is predicated upon internally inconsistent logic, selective editing and application of judicial decisions and statutory language, and a disregard for the legislative history of FISA.[82]

The reasoning of the court in *In re Sealed Case* is most generously described as internally inconsistent. The court's two fundamental premises for its ruling — namely that FISA never contained a purpose requirement, and that in altering the purpose requirement, Congress did nothing to undermine the validity of searches conducted pursuant to FISA — are facially inconsistent.[83] In addition to contradicting each other, the court's arguments are individually based upon specious reasoning, compartmentalization of related items, and omissions of essential information. The result of this fuzzy logic is a picture that remains out of focus and out of step with Fourth Amendment law. In this section, we will attempt to clarify the picture and place the *In re Sealed Case* decision in its proper context by analyzing the history of the Fourth Amendment in relation to foreign intelligence investigations. We will begin by providing a brief history of the application of Fourth Amendment protections to criminal wiretapping surveillance, move on to discuss the ways in which for-

82. There have been numerous challenges raised to the validity of the FISA proceedings that may have increased validity in light of the changes to FISA, enacted through the PATRIOT Act and the ruling of the FISCR in *In re Sealed Case*. Most of these arguments are beyond the scope of this Article, which is focused on the Fourth Amendment aspects of FISA, which have been changed by the PATRIOT Act, as interpreted in *In re Sealed Case*.

83. Even the FISCR recognized this fact, but suggested without directly stating it, that Congress, when it enacted the PATRIOT Act, was itself confused about the purpose requirement. *In re Sealed Case*, 310 F.3d at 732-33. The artificial separation of these issues will not be repeated in our analysis of the Fourth Amendment implications of *In re Sealed Case*.

eign intelligence investigations are permitted to operate under a different set of rules, and finally analyze the ways in which *In re Sealed Case* confused these two sets of rules, permitting the Executive to engage in widespread snooping on U.S. persons, unfettered by constitutional constraints.

B. *The Courts, Congress, and Wiretapping Under the Fourth Amendment*

In many ways, the greatest flaw in the *In re Sealed Case* decision is its failure to recognize a pattern of interaction among the Executive, the Judiciary, and the Legislature in the area of electronic surveillance. For the better part of eighty years, this pattern has consisted of executive encroachment into the private lives of U.S. persons through the use of new technologies,[84] a court decision outlining the current legal constraints operating on the Executive, and Congress responding to the Court's decisions through legislation.

In the first of the major wiretap decisions, *Olmstead v. United States*,[85] Chief Justice Taft, writing for the Court, held that wiretap surveillance did not amount to a search and seizure and, therefore, was not governed by the Fourth Amendment.[86] Writing in dissent, Justice Brandeis recognized that:

> [t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.[87]

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84. This encroachment is sometimes taken pursuant to legislative authorization and sometimes without such authorization. *Compare* Berger v. New York, 388 U.S. 41 (1967), *with* Katz v. United States, 389 U.S. 347 (1967). In either event, Congress has repeatedly responded to Supreme Court decisions by enacting legislation, which recognizes the holdings of the Court. This pattern is of course reasonable and quite familiar. Yet, the FISCR ignores this dynamic when analyzing *In re Sealed Case*.

85. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., *dissenting*).

86. *Id.*

87. *Id.* at 475-76. Justice Brandeis went on to provide a cautionary note, which,

Justice Brandeis's dissenting opinion was the first recognition by a member of the Supreme Court that the unconstrained invasion of privacy inherent in wiretapping, provides a dangerous weapon for the government, which needs to be checked by the Fourth Amendment if we are to remain free from "tyranny and oppression." Chief Justice Taft rested the majority's decision upon the plain language of the Fourth Amendment, which protects material things — "the person, the house, his papers or his effects."[88] Yet, Chief Justice Taft was not blind to the potential dangers identified by Justice Brandeis and invited Congress to enact legislation, which would protect the secrecy of phone conversations by making their introduction inadmissible in federal criminal trials.[89]

Congress took up this invitation and passed the Federal Communications Act of 1934 which stated that no person could "intercept any communication and divulge or publish" this communication without the consent of the recorded party.[90] The focus on divulging or publishing intercepted communications permitted the Executive to continue gathering information through wiretaps; it merely prohibited its introduction into federal criminal trials.[91]

For nearly forty years after *Olmstead*, courts would treat wiretaps as belonging outside the purview of the Fourth Amendment.[92] A pair of decisions by the Supreme Court in 1967 altered this analysis and placed wiretap surveillance firmly within the confines of the Fourth Amendment. In *Katz v. United States*, the Supreme Court rejected its holding in *Olmstead* along with the Executive's request to create an exception to the warrant re-

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unfortunately, is often forgotten by the courts and public alike: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." *Id.* at 479.

88. *Id.* at 464.

89. *Id.* at 465.

90. Federal Communications Act of 1934, Pub. L. No. 73-416, Sec. 605, 48 Stat. 1064, 1103 (1934).

91. Interestingly, this provision was not interpreted to bar federal agents from providing intercepted messages to State prosecutors for use in State criminal trials. *See, e.g.*, MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 475 (1999).

92. *See, e.g.*, Robert A. Pikowsky, *An Overview of the Law of Electronic Surveillance Post September 11, 2001*, 94 LAW LIBR. J. 601 (2002).

quirement for wiretap surveillance of a telephone booth.[93] That same year, the Court decided *Berger v. New York*. In *Berger*, the Court struck down a New York statute authorizing wiretaps based upon "reasonable ground to believe that evidence of a crime may be thus obtained."[94] The Court found this statute incompatible with the Fourth Amendment requirement that a particular offense be identified.[95] In addition, the Court found that the statute failed to adequately describe the conversations to be intercepted, authorized eavesdropping for a two-month period without a particular termination date, did not provide notice to the suspect, and raised some special circumstances, which would obviate the need to adhere to the warrant requirement.[96] For all of these reasons, the Court struck down the New York statute as a violation of the Fourth Amendment.[97]

Once again, Congress responded to the Supreme Court's lead by passing Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").[98] Title III, like *Katz* and *Berger*, recognized that wiretaps are searches requiring fidelity to the Fourth Amendment. In particular, Title III strictly requires that wiretaps be conducted pursuant to a warrant issued by a neutral and detached magistrate, after adherence to a carefully prescribed application process.[99] Title III also incorporates the particularity requirements identified by the Supreme Court in *Berger*.[100] Over time, Congress has expanded federal protection to cellular and cordless telephones.[101]

This pattern of executive action, judicial decision, and Congressional enactment, has also characterized the development of

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93. *See id.* This decision was a watershed, not only because it applied Fourth Amendment protections to wiretap surveillance, but also due to the fact that it expanded those protections outside the home to a public setting.

94. *Berger*, 388 U.S. at 58-60.

95. *Id.*

96. *Id.*

97. *Id.*

98. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

99. 18 U.S.C. Sec. 2518 (1)-(2).

100. 18 U.S.C. Sec. 2518 (1)(b). This subsection requires details about the "particular offense that has been, is being, or is about to be committed," and a "particular description of the type of communications sought to be intercepted," as well as any available details about the particular target of the warrant and the nature and location of the facilities to be placed under surveillance.

101. *See* 18 U.S.C. Sec. 2510 (1); 47 U.S.C. Sec. 1001.

controls placed upon searches conducted for the purpose of gathering foreign intelligence information. This interaction is discussed below.

C. *The Fourth Amendment and Foreign Intelligence*

That FISA originally contained a purpose requirement is clear.[102] FISA applications were required to contain a certification that "the purpose" of the surveillance sought was to obtain foreign intelligence information. In *In re Sealed Case*, the court glossed over this fact and disregarded its significance.[103] This is particularly disconcerting because this certification requirement did not accidentally materialize in the FISA statute. Only by ignoring the holding of previous Supreme Court and other federal cases, could the FISCR conclude that Congress was not following the dictates of prior precedent when it enacted the purpose requirement in the FISA statute.

In 1972, the United States Supreme Court decided the case of *United States v. United States District Court* ("*Keith* case").[104] The *Keith* case and its aftermath followed the familiar pattern outlined above in relation to wiretap cases. In *Keith*, the Executive Branch had used wiretaps authorized by the Attorney General, but not by a judicial officer, to conduct electronic surveillance of U.S. persons suspected of various offenses, including the bombing of a Central Intelligence Agency office in Ann Arbor, Michigan.[105] The government argued that a warrant was not required because of the President's authority to "gather intelligence information" and to "protect the national security."[106] Instead, the government urged the Court to permit the procedure used by the Executive in which the Attorney General authorized wiretaps where appropriate to combat domestic organizations seeking to undermine or "subvert the existing structure of government."[107] The Court denied this request and made clear that the Fourth

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102. *See* Part I.A., *supra*. In addition to the above discussion detailing the certification requirement, this fact will be developed in the following discussion.

103. *In re Sealed Case*, 310 F.3d at 723.

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

105. *Id.* at 299.

106. *Id.* at 300-01. The President's purported authority in this area was being exercised through U.S. Attorney General, John Mitchell.

107. *Id.* It should be noted that the Supreme Court's decision was handed down in 1972, a time of significant domestic unrest during which the government was forced

Amendment's requirements that a warrant issue from a neutral and detached magistrate upon a finding of probable cause to believe that a crime had been committed, applied equally to the investigation of crimes implicating domestic national security:

> These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[108]

The *Keith* case is important not only because of its unwavering fidelity to the Fourth Amendment,[109] but because it is the genesis of the "purpose requirement" contained in FISA. While not addressing the issue directly, for it was not before the Court, *Keith* repeatedly mentioned that a different set of rules may appropriately apply in cases where the government is conducting surveillance for the purpose of gathering foreign intelligence information.[110]

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to contend with numerous domestic organizations, which were committed to active violent opposition to the United States government.

108. *Id.* at 316-17. This case, of course, was decided before the abuses of the Nixon Administration during the Watergate scandal were known.

109. The Court continued:

> Some have argued that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers' who are a party of any system of law enforcement."

Id. at 315-16 (internal citations omitted).

110. The Court said: "As stated in the outset, this case involves only the domestic

After the Supreme Court's decision in *Keith*, and prior to the enactment of FISA, numerous federal courts of appeal affirmed warrantless surveillance authorized within the Executive Branch, because the purpose of the surveillance was foreign intelligence gathering.[111] The Third, Fifth, and Ninth Circuits all held that warrantless surveillance could be conducted by the Executive Branch only if the purpose of this surveillance was to gather foreign intelligence.[112] Though ignored by the FISCR in *In re Sealed Case*, it is against this backdrop, and the findings of the Church Committee on the Nixon Administration's abuses of surveillance on such groups as the Democratic Party, that Congress passed FISA. Congress was concerned about the Executive Branch's improper use of surveillance powers against political enemies. At the same time, Congress was seeking to act in a manner consistent with judicial rulings about the inherent power of the Executive to act in the area of foreign affairs and defense of the nation. The holdings of these cases are reflected in FISA's requirement that the Executive Branch certify to the FISC that the surveillance application is sought for foreign intelligence gathering purposes.[113] FISCR's assertions to the contrary cannot change the fact that Congress was acting consistently with a series of precedent in granting power to the Executive while attempting to constrain the Executive from abusing that power in the way the Nixon Administration had.[114]

D. *In re Sealed Case's Specious Reasoning*

An analysis of whether conducting criminal surveillance under FISA offends the Fourth Amendment, properly rests upon determinations of whether the process meets the requirements

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aspects of national security. We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents." *Id.* at 321-22. The Court went on to note the decision in United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971) "for the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved." *Id.* at 322, n.20.

111. *See, e.g.*, United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974); United States v. Buck, 548 F.2d 871 (9th Cir. 1977). *But see* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

112. *See Brown*, 484 F.2d at 426; *Butenko*, 494 F.2d at 593; *Buck*, 548 F.2d at 871.

113. 50 U.S.C. Sec. 1804(a)(7)(B).

114. The Nixon Administration was neither the first, nor unfortunately, the last Administration to abuse wiretapping powers. *See* V. NAVASKY, KENNEDY JUSTICE 404-10 (1971) for a discussion of wiretapping authorized by Robert Kennedy.

of a warrant issued by a neutral and detached magistrate; a finding of probable cause to believe that a particular crime has been committed; and an identification, with particularity, of the places to be searched and the items or things to be seized. Attempts to suppress evidence obtained through FISA surveillance have previously withstood such challenges because the purpose requirement obviated the need for adhering to the dictates of the Fourth Amendment.[115] Whether this purpose is truly required, therefore, is the crux of the analysis in *In re Sealed Case* and will be the focus of our discussion as well.[116]

As noted above, the FISCR not only argued that there never was a purpose requirement under FISA, but it also contradicted that argument by holding that the changes to the purpose requirement enacted by Congress in the PATRIOT Act in no way undermined the constitutionality of surveillance conducted pursuant to FISA. This position is untenable under Supreme Court case law and no amount of obfuscation and faulty logic can save it. The following is a distillation of the court's rationale in *In re Sealed Case.*[117]

There are certain rules mandated by the Fourth Amendment that govern surveillance in criminal matters. These rules do not apply to surveillance conducted for foreign intelligence purposes. By definition, foreign intelligence surveillance will frequently result in gathering information related to certain criminal activities.[118] Congress did not intend for investigators to stop pursuing evidence of crimes uncovered during foreign

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115. *See, e.g.*, *Duggan*, 743 F.2d at 59.

116. While the FISCR goes to some lengths in comparing FISA proceedings to those under Title III, those issues are mere "window dressing," since FISA, by its very terms, permits surveillance to gather information on a standard less than "probable cause to believe that a particular crime has been committed." *Id.* at 71-74.

117. The FISCR's slip opinion in *In re Sealed Case* is fifty-six pages in length. Obviously, a one paragraph distillation will eliminate many of the nuances of that opinion. Distillation is particularly difficult in a case such as this, where the court's logic is half-formed, inconsistent, and relies on misreading and misapplication of the law. We are not attempting to recreate every facet of the court's reasoning. Moreover, many of those nuances in the decision are misleading and unhelpful to an understanding of the court's decision. We believe however, that this distillation captures the essence of the court's opinion and allows for a more clear understanding of the court's holding than does much of the opinion itself.

118. *In re Sealed Case*, 310 F.3d at 722-24. The court identifies within the definitions of "agent of a foreign power" and "foreign intelligence information" certain crimes that fit under the categories of espionage, sabotage, and terrorism.

intelligence surveillance.[119] Therefore, the FISCR concludes, criminal investigations may be the purpose behind surveillance conducted without adhering to the rules mandated by the Fourth Amendment.[120]

It is the final link in this logic chain that is specious and undermines the entire reasoning of *In re Sealed Case.* The court's analysis is predicated on two faulty premises. First, because FISA did not forbid investigators from pursuing evidence of certain crimes that fit within the definitions of "agent of a foreign power" and "foreign intelligence information," it is appropriate for a criminal investigation to be the purpose behind a FISA surveillance.[121] Second, the primary purpose requirement behind FISA is not constitutionally significant.[122] The second of these arguments is the more important for if the primary purpose requirement is constitutionally significant, it matters not at all whether the definition of "foreign intelligence information" includes evidence of enumerated crimes. Nonetheless, we will deal with these arguments in turn.

1. Crimes Capable of Being Investigated Under FISA

The definition of "foreign intelligence information" contained in FISA includes "sabotage or international terrorism by a foreign power or an agent of a foreign power."[123] The definition of an "agent of a foreign power" includes any person who "knowingly engages in clandestine intelligence gathering activities . . . which involve or may involve a violation of the criminal statutes of the United States," or "knowingly engages in sabotage or international terrorism."[124] "International terrorism" is defined as including activities that "involve violent acts or acts dangerous to

119. *Id.* at 727.

120. The court asserts that it would be inappropriate for the investigation of ordinary crime, unrelated to foreign intelligence, to be the primary purpose behind surveillance conducted pursuant to FISA. *Id.* at 735-36. However, the court did nothing to so limit the application of this decision. As will be discussed, the court in fact encouraged the opposite result, by noting that sometimes "ordinary crimes are inextricably intertwined with foreign intelligence crimes" and by informing the FISC that the court must defer to the assertion of the Executive that a significant purpose of the investigation is foreign intelligence information. *Id.* at 736.

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

122. *Id.* at 746.

123. 50 U.S.C. Sec. 1801 (e)(1)(B).

124. 50 U.S.C. Sec. 1801 (b)(2)(A), (C).

human life that are a violation of the criminal laws of the United States or of any State."

The first thing that should be apparent is the incredible breadth of these definitions. "Agent of a foreign power" is defined in behavioral terms, as engaged in activities, which "involve or may involve a violation of the criminal statutes of the United States," or as one who engages in international terrorism. The definition of "international terrorism" has now been expanded to encompass any violent act that would violate the criminal laws of the United States or of any State. The FISCR carefully detailed these definitions in showing how FISA permits the investigation of criminal behavior.[125] Undoubtedly, that is true, so long as the purpose of the surveillance is foreign intelligence. The very breadth of these statutes proves why it cannot be otherwise.

The terms used above include definitions of criminal behavior so broad, as to encompass any violation of the criminal statutes of the United States, and any violent act which would violate the criminal law of the United States or any State. It is this broad definition of criminal behavior, that the FISCR says can now provide the purpose behind FISA surveillance.[126] In effect, the exception permitting investigation of some criminal activity swallows the rule that foreign intelligence information should be the primary purpose behind the surveillance. This reasoning permits surveillance not governed by the dictates of the Fourth Amendment to be used to conduct investigations which are primarily criminal, so long as the Attorney General informs FISC that "a significant purpose" behind the surveillance is also foreign intelligence. The court's ruling not only offends the Fourth Amendment, but it is a tragically bad policy.

The FISCR decision in *In re Sealed Case* is a classic example of a bad policy that is almost certain to wreak significant harm upon society. The FISCR asserts that the strictures of the Fourth Amendment are not required for FISA surveillances due, in part, to the purported protection afforded by the Attorney General's involvement in approving the FISA applications. The Supreme Court, however, rejected this same argument when made by Attorney General John Mitchell, who approved the surveillance in

125. *In re Sealed Case*, 310 F.3d at 722-23.
126. *Id.*

the *Keith* case. The Court noted in *Keith*, that the Attorney General was not "neutral and disinterested, and his approval could not satisfy the requirements of the Fourth Amendment."[127] The Court noted that the Attorney General, as a political appointee, is more likely to be susceptible to the political pressures, and is in a position to use his power for political ends.[128]

In *Keith*, the Supreme Court identified some of the more problematic effects of such a system: "[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."[129] As *In re Sealed Case* makes clear, the definition of "foreign intelligence" is no less vague.[130] Nor is foreign intelligence an area where the temptations to utilize surveillance to oversee political dissent are less present. As the *Keith* Court noted, "[h]istory abundantly documents the tendency of Government — however benevolent and benign its motives — to view with suspicion those who most fervently dispute its policies."[131] There is ample reason to conclude that Attorney General John Ashcroft views with suspicion those who dispute the Bush Administration's policies.[132] Whether this Attorney General yields to a temptation to investigate these suspicions or not is irrelevant in a system such as ours, where the protection of rights does not, and should not, depend on the benevolence of those in power. Ours is a system of laws, not of men.

2. Constitutional Limits and the Purpose Requirement

The purpose requirement is constitutionally required as any

127. *Keith*, 407 U.S. at 316-17. It should be noted that the Court dismissed out of hand any question of whether a "neutral and detached magistrate" rules on the applications presented to the FISC. *In re Sealed Case*, 310 F.3d at 738. However, this issue may not be as cut and dried as it might seem at first blush. There is now a twenty-four year history of the FISC rulings on surveillance applications presented to it by the government. After being presented with more than 4,000 applications for surveillance, the FISC did not deny outright a single application. Four were modified, for an affirmance rate of 99.96%. It is difficult to describe such a Court as "neutral" or "detached."

128. Keith, 407 U.S. at 316-17.

129. *Keith*, 407 U.S. at 320.

130. Indeed, the *Keith* court recognized this when noting the areas of overlap between foreign and domestic security.

131. *Id.* at 314.

132. *See Ashcroft Statements*, *supra* n.2.

fair reading of *Keith* will show. In fact, as *Keith* makes abundantly clear, a criminal surveillance for any purpose other than foreign intelligence, even for a purpose that directly implicates national security, cannot escape the constraints of the Fourth Amendment. The simple fact of the matter is that surveillance either complies with the probable cause and warrant requirements of the Fourth Amendment, or meets one of the exceptions permitting surveillance in their absence. The only potential exception routinely available for searches conducted pursuant to FISA, is when foreign intelligence is the purpose of the surveillance.[133] The *Keith* decision refers to this requirement and the subsequent Circuit and District Court decisions spell it out carefully.[134]

For example, in *United States v. Duggan*, the Second Circuit carefully analyzed a Fourth Amendment challenge to FISA.[135] In *Duggan*, the defendant had claimed that FISA violated the probable cause requirements of the Fourth Amendment.[136] The *Duggan* court traced the development of FISA. It noted the development of case law that recognized the inherent authority of the Executive to engage in surveillance for foreign intelligence gathering purposes.[137] After discussing the relevance of the *Keith* decision to the development of law on this issue, the court noted that it was "against this background" that Congress originally passed FISA.[138]

The *Duggan* court then analyzed the legislative history of FISA. It noted that FISA reflected an attempt by the legislature to "fashion a 'secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights."[139] After considering this history, the Second Circuit concluded that FISA was a "constitution-

133. *In re Sealed Case* discusses "special needs" cases; however, it does not analyze or resolve the question of whether FISA surveillances fall within these "special needs" cases.

134. *See Troung*, 629 F.2d at 908; United States v. Megahey, 533 F. Supp. 1180, 1189 (E.D.N.Y. 1982), *aff'd sub nom*, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).

135. *Duggan*, 743 F.2d at 71-74. In *Duggan*, alleged members of the Provisional Irish Republican Army challenged the constitutionality and proper application of FISA to their case.

136. *Id.* at 71.

137. *Id.* at 72.

138. *Id.* at 73.

139. *Id.*

ally adequate balancing of the individual's Fourth Amendment rights against the Nation's need to obtain foreign intelligence information."[140] The FISCR ignored the constitutional basis of the decisions in this area, instead focusing on the potential for overlap in these types of investigations. *Troung*, which detailed the proper relationship between these types of investigations and the Fourth Amendment, was largely disregarded by the FISCR.

In fact, much of *In re Sealed Case* is devoted to dismissing the relevance of *Troung*. In *Troung*, the Fourth Circuit held that once an investigation, which may have begun for foreign intelligence purposes, becomes primarily directed toward a criminal prosecution, the government is required to meet the standard for a warrant under the Fourth Amendment.[141] Ignoring the development of the law on this issue, contained both in precedent and in legislative history, the *In re Sealed Case* court stated that *Troung* was the genesis of the primary purpose requirement.[142] As explained above, this simply is not the case. In any event, the *In re Sealed Case* court felt compelled to find a way to distinguish *Troung*.

To accomplish this task, *In re Sealed Case* focused on the date of the underlying facts in *Troung*. *Troung* was decided four years after FISA was enacted, but since it was not a FISA case, the FISCR dismissed its analysis. However, the *In re Sealed Case* court was merely seeking to avoid the valid holding of that case, namely that warrantless surveillance runs afoul of the Fourth Amendment when the primary purpose of the investigation is criminal investigation, rather than foreign intelligence. *In re Sealed Case* is correct that *Troung* was clearly not analyzing the constitutionality of FISA. It was, however, identifying constitutional minimums that are applicable to any surveillance, which is not conducted for foreign intelligence purposes. Consistent with the Supreme Court's holding in *Keith*, *Troung* correctly held that any surveillance for purposes other than foreign intelligence gathering requires a warrant.

In spite of *Troung*, the *In re Sealed Case* court did not determine whether a FISA surveillance order is a warrant. Pursuant to

140. *Id.*

141. *Troung*, 629 F.2d at 915.

142. *In re Sealed Case*, 310 F.3d at 725.

Keith and *Troung*, if a FISA order is not a warrant, then surveillance can only be conducted for the purpose of foreign intelligence gathering. If the FISA order is held to be a warrant, then all of the requirements of a warrant, such as those articulated by the Supreme Court in *Berger*, must be established. The FISCR avoided this question because a FISA order does not meet the probable cause, particularity, and duration requirements of a warrant, and therefore could not justify searches for purposes other than foreign intelligence. Rather than deal with these facts and instead of looking at the constitutional requirements governing criminal surveillance, the FISCR resorted to statutory analysis. Avoidance of the constitutional requirements, however, does not change the fact that these requirements exist and govern searches in this area.

Foreign intelligence surveillance is obviously a critical component of an effective strategy to defend our Nation against foreign attack. We need our government to be effective in these efforts, but we must also be vigilant in guarding against the abuse of power by those who may be well-meaning, yet overzealous. We rely upon the courts to rein in those who would trample on our Constitution in the name of national security. When the courts fail to play their constitutional role, we are left unprotected by the rule of law.

CONCLUSION

The United States and the UK, long identified as the modern world's leading lights of freedom and the rule of law, are in the midst of dramatic transitions that may undermine those well-deserved reputations. In the name of preserving liberty, enormous powers of surveillance have been entrusted to our governments. Since September 11, 2001, those powers have been wielded with dramatic frequency. In the United States, Congress assisted the Bush Administration's efforts to consolidate additional power in the Executive Branch. In *In re Sealed Case*, the courts have now given a green light to this transition.

The *In re Sealed Case* decision represents a significant step backwards in the evolution of our democratic institutions. In the name of security, we have forgotten the lessons of our history. The FISCR has effectively told us that the Constitution need not control the conduct of criminal surveillance in the

United States. Instead, through a policy of judicial deference to executive assertions, we should trust that the Attorney General will authorize such surveillance only when it is appropriate. If the Executive Branch's history of abusing surveillance powers were not so recent, it would perhaps be understandable that our vigilance against potential tyranny and oppression might wane. It wasn't so long ago, in the midst of a period of great domestic turmoil, that the *Keith* case was decided. The Supreme Court cautioned us then:

> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.[143]

This warning came but thirty years ago. Less time than that has passed since the issuance of the Church Committee's report detailing the abuses of surveillance power by the same executive officials who had urged the Court in *Keith* to adopt a policy of deference to the Executive Branch in matters of national security.

To those who believe that the past is the past, and doubt that our current political leaders would ever abuse their powers to investigate political dissenters the way previous Administrations have, one need look no further than the words of our current Attorney General for a response. In testimony before Congress, this is how John Ashcroft described those who disagreed with the Administration's policies of detention without charge and the planned use of military tribunals:

> To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve . . . They give ammunition to America's enemies and pause to America's friends.[144]

Our current Attorney General believes that those who engage in political dissent in this country "aid terrorists." These comments eerily echo comments made by the very Administration, whose abuses of surveillance were the genesis of FISA. In 1972, White

143. *Keith*, 407 U.S. at 314.

144. *Ashcroft Statements*, *supra* n.2

House official H.R. Haldeman said that the critics of President Nixon's Vietnam peace plan were "consciously aiding and abetting the enemy of the U.S."[145] Make no mistake, under *In re Sealed Case*, if the Attorney General were to certify that a target identified in a FISA application was aiding terrorists, this would provide sufficient grounds for approval of that requested surveillance.

The FISCR has admonished the lower court judges to defer to the Attorney General in determining whether there exists a significant purpose of foreign intelligence behind an application for FISA surveillance. In effect, the FISCR is telling the lower court judges to "trust" the Attorney General. Trust is a wonderful thing to base your personal relationships upon; it is not the proper basis for a system of law. This Nation has been great for over two hundred years because of our fidelity to the rule of law. We are witnessing our Nation in transition from a system of law, to one based upon extra-constitutional authority, justified by an open-ended state of emergency. In the past, Americans have trusted the courts to rein in overzealous agents of government prone to tyranny and oppression. In this instance, we have reason to fear that our trust may be misplaced.

145. N.Y. TIMES, Feb. 8, 1972, at 1, Column 8; *see also Keith*, 407 U.S. at 331, n.11 (Douglas, J. concurring).