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Fixing FISA for Long War: Regulating Warrantless Surveillance in the Age of Terrorism

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I. INTRODUCTION

The English poet W.H. Auden once claimed that "Peeping Toms are never praised, like novelists or bird watchers, for the keenness of their observations."[1] Perhaps Auden would have modified his maxim had he lived in the age of terrorism.[2] A certain degree of government surveillance of even intimate communications is expected, encouraged, and indeed praised when the government's efforts lead to the prevention of catastrophe. However, it is also expected that the government will minimize these intrusions, will conduct surveillance only on legitimate targets, and will follow the procedural safeguards that the representatives of the people have enacted in their name. As the Bush Administration has recently discovered, where these caveats are (or are perceived to have been) disrespected, government surveillance is perceived to degenerate into an illegitimate invasion of privacy and arbitrary abuse of power.

On December 16, 2005, the New York Times revealed that, shortly after the terrorist attacks of September 11, the White House surreptitiously authorized the National Security Agency ("NSA") to conduct surveillance on Americans inside the United States. This search for evidence of terrorist activity without first obtaining a court-approved warrant was in apparent violation of the Foreign Intelligence Surveillance Act ("FISA") and in possible abrogation of the Fourth Amendment.[3] Although the Bush Administration maintained that the appropriate Congressmen had been briefed of the existence of the program upon its inception and assured the public

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1. W.H. Auden, *The Cave of Nakedness*, Selected Poems 273 (Edward Mendelson ed., 1979).

2. Auden certainly knew the anguish of war, however: "Exiled Thucydides knew / All that a speech can say / About Democracy, / And what dictators do . . . / The enlightenment driven away, / The habit-forming pain, / Mismanagement and grief: / We must suffer them all again." W.H. Auden, *September 1, 1939*, in *Chief Modern Poets of Britain and America*, I-367 (Gerald DeWitt Sanders et al. eds., 5th ed., Macmillan Co. 1970).

3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. Times A1 (Dec. 16, 2005). According to the article, the New York Times learned of the story a year before it published the article in deference to the White House's concerns that the report would jeopardize continuing investigations. *Id.*

that the program is critical to preventing future terrorist attacks,[4] the revelation that the Administration may have violated existing law and intruded on the private conversations of United States citizens provoked shock and outrage among congressional leaders of both parties and large segments of the American public in general.[5] The Administration and other supporters of the surveillance program scrambled to defend the legality of the warrantless wiretaps with three principle arguments: (1) the President's broad and exclusive powers as Commander-in-Chief under Article II of the Constitution include the inherent authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes, notwithstanding FISA;[6] (2) Congress authorized the President to conduct such surveillance with Authorization for Use of Military Force ("AUMF"),[7] and therefore the NSA program is consistent with FISA;[8] and (3) the NSA activities constitute a "reasonable" search within the meaning of the Fourth Amendment of the Constitution.[9]

Irrespective of the merits of the Administration's legal arguments, the President's decision to initiate the surveillance program in secret and with no extra-Administration safeguards has created a political scandal, giving rise to demands for a congressional investigation into the extent and operation of the program.[10] The Senate Select Committee on Intelligence ("Senate Intelligence Committee") recently rejected proposals to initiate such an investigation, but recognized the political (if not legal) necessity of reforming FISA so that the NSA may collect the intelligence through the opera-

4. *See* Dan Eggen & Walter Pincus, *Campaign to Justify Spying Intensifies*, Wash. Post A4 (Jan. 24, 2006); Douglas Jehl, *Spy Briefings Failed to Meet Legal Test, Lawmakers Say*, N.Y. Times A36 (Dec. 21, 2005). Vice President Dick Cheney revealed the existence of the program to approximately fourteen Congressmen in separate, brief meetings. *Id*.

5. Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, Wash. Post A1 (Dec. 17, 2005); ABA Press Release, *Majority of Americans Say President Should Not Suspend Constitutional Freedoms without Court Order or Congressional Authorization*, http://www.abanet.org/media/releases/news021006.html (Feb. 10, 2006); *see also* John Diamond & David Jackson, *Surveillance Program Protects Country, Bush Says*, USA Today, http://www.usatoday.com/news/washington/2006-01-23-bush_x.htm (Jan. 23, 2006).

6. *See e.g.* Alberto Gonzales, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President of the United States* 6-8 (Jan. 19, 2006) [hereinafter Gonzales, *Legal Authorities*].

7. *See e.g. id*. at 10.

8. *Id*. at 17. The Attorney General conceives of these arguments as separate points, but one is a corollary of the other.

9. *Id*. at 36-37. The Administration implicitly argues that the Reasonableness Clause and the Warrant Clause of the Fourth Amendment are separate provisions by which the Fourth Amendment permits a search or seizure. Modern constitutional scholarship and the plain language of the Amendment support this interpretation. *See e.g.* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 70 (Yale U. 1998); Stanley C. Brubaker, *The Misunderstood Fourth Amendment*, 11 Wkly. Stand. 24, http://www.weeklystandard.com/Content/Protected/Articles/000/000/011/911wzgse.asp?pg=1 (Mar. 6, 2006).

10. *See* Hope Yen, *Probe Sought on NSA Surveillance*, Wash. Post A5 (Dec. 19, 2005).

tion of the program, but with greater congressional oversight.[11] To that end, four Republican Senators on the Senate Intelligence Committee proposed a bill that would permit the NSA to eavesdrop without a warrant for forty-five days but would require the White House to justify any decision to continue beyond that time frame to a new seven-member Intelligence subcommittee.[12]

Apparently, the subcommittee would fulfill an oversight function to ensure that the warrantless searches of the NSA are "reasonable" within the meaning of the Fourth Amendment. However, the Senators have not indicated what powers this subcommittee would possess or how conflicts arising between the Administration and the subcommittee would be resolved. If the subcommittee's authority will be limited to mere oversight of the program such that it is powerless to challenge individual cases before the Foreign Intelligence Surveillance Court ("FISC"),[13] it is unlikely that this legislative body could perform as an effective guardian of Fourth Amendment rights. Standing alone, political checks on the executive's power are insufficient protections of individual rights in general; that is even more so the case here, where any resolution of a conflict between the subcommittee and the NSA must be negotiated in private due to the classified nature of the information and because Congressmen have little incentive to be vilified as unpatriotic and "soft" on terrorism for raising objections to individual searches. As a result, Congress should explore alternatives to the proposal raised by the four Senators. In this article, assuming that the warrantless searches are necessary and that strict compliance with FISA in its current form would inhibit the collection of intelligence vital to national security, I will suggest amendments to FISA that would create a new independent body, appointed by the FISC, with the power to review the NSA's warrantless searches and with the standing to challenge the constitutionality of individual searches before the FISC. Where an individual's constitutional rights have been violated, the agency would be able to collect damages on his behalf and to move for an injunction on continued surveillance. I will also suggest statutory limitations restricting the admissibility of evidence gathered through warrantless surveillance in criminal prosecutions. Before I offer any suggestions for the amendment of FISA,

11. *See* David D. Kirkpatrick & Scott Shane, *G.O.P. Senators Say Accord is Set on Wiretapping*, N.Y. Times A1 (Mar. 8, 2006).

12. *Id*. Senator Arlen Specter has proposed an alternative bill enabling the issuance of FISA warrants for surveillance of any unspecified number of individuals suspected of communication with alleged terrorists upon a showing of probable cause that the surveillance program in general will yield foreign intelligence information. *See infra* pt. IV(A).

13. Congress created the FISC as a permanent court composed of eleven United States District Court judges appointed by the Chief Justice of the United States Supreme Court. It has the authority to grant or reject FISA warrant applications. *See* 50 U.S.C. § 1803 (2006).

however, I will describe in further detail the purpose and relevant provisions of the law to be amended and the deficiencies of the Administration's legal justifications for bypassing those provisions.

Because the Administration believes that the President has the inherent authority to conduct warrantless searches pursuant to his power as Commander-in-Chief, it does not believe that amendments to FISA (or even FISA itself) are necessary. Thus, in Part II of this article, I will briefly sketch the historical circumstances which led Congress to believe why it was necessary and proper to enact FISA, outline the provisions of FISA which are relevant to this article, and describe the contours of the NSA program to the extent that they have been made public. In Part III, I will suggest why the Administration's arguments regarding the legality of the domestic surveillance program lack merit. Finally, in Part IV, I will offer suggestions for the amendment of FISA.

II. WARRANTLESS SURVEILLANCE BEFORE AND AFTER FISA

A. *Civil Rights Abuses, the Church Committee, and the Enactment of FISA*

Electronic surveillance of private conversations for the purposes of national security and law enforcement is as old as telecommunications itself. As Attorney General Gonzales has pointed out, President Lincoln authorized the warrantless eavesdropping of telegraphed messages during the Civil War to detect enemy plans, and other presidents, including Franklin Delano Roosevelt, have authorized warrantless domestic electronic surveillance during wartime to intercept the communications of suspected spies.[14] At the time, all such activity was unquestionably legal; in *Olmstead v. United States*,[15] the Supreme Court found that, except under limited circumstances, electronic surveillance of telephone communications was not a "search or seizure" under the Fourth Amendment.[16] Thus, the Fourth Amendment did not encumber the government's ability to use wiretaps and other forms of eavesdropping to collect intelligence and evidence that would be difficult to acquire by other means.

However, covert surveillance also provided the government with the means to monitor its citizens and collect information unrelated to any le-

14. Alberto Gonzales, *Testimony at Hearing of the Senate Judiciary Committee,* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020600931.html?nav=rss_politics (last updated Feb. 6, 2006, 3:05 p.m.).

15. 277 U.S. 438 (1928).

16. *Id*. at 465-66.

gitimate public interest. As Justice Douglas noted in his concurring opinion in *Berger v. New York*,[17]

> [t]he traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope – without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations.[18]

In *Katz v. United States*,[19] decided the same year as *Berger*, the Court found that the Fourth Amendment requires law enforcement officers to procure a warrant based on probable cause to conduct wiretaps, reversing its holding in *Olmstead*.[20] A year after the Supreme Court decided *Katz* and *Berger*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), which prohibits electronic surveillance except upon the issuance of a warrant upon a showing of probable cause in the investigation of ordinary crimes.[21]

Title III explicitly does not apply to surveillance related to the gathering of intelligence for national security purposes.[22] Moreover, the Court in *Katz* expressly stated that its holding does not necessarily apply to surveillance operations involving national security.[23] Thus, the Federal Bureau of Investigation ("FBI"), even after *Katz* and the enactment of Title III, arguably retained the legal authority to continue its Cold War program of warrantless surveillance directed against American citizens and aliens within the United States "to collect foreign intelligence, intelligence and counterintelligence information, to monitor 'subversive' and violent activ-

17. 388 U.S. 41 (1967).

18. *Id*. at 65.

19. 389 U.S. 347 (1967).

20. *Id*. at 359.

21. *See* 18 U.S.C. §§ 2510-22 (2006). Under Title III, a judge may issue a warrant only if he finds that probable cause exists to believe that "an individual is committing, has committed, or is about to commit" an enumerated criminal offense and that "particular communications concerning that offense will be obtained through . . . interception." *Id*. at § 2518(3)(a)-(b).

22. *See id*. at § 2511(3) (1968) ("Nothing contained in this measure . . . shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States."). Following the enactment of FISA, Congress deleted this provision and added a new provision to reflect the procedures laid out in the new statute. *See id*. at § 2511(2)(e) ("Notwithstanding any other provision of this title . . . , it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in Section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.").

23. 389 U.S. at 358 n. 23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

ity, and to determine the sources of leaks of classified information."[24] With no effective guidance from Congress or the judiciary, however, "executive branch officials developed broad and ill-defined standards for the use of warrantless electronic surveillance," resulting in the monitoring of "many individuals who engaged in no criminal activity and who, by any objective standard, represented no genuine threat to the security of the United States."[25] The government thereby misused its authority to conduct wiretaps to harass anti-war activists, monitor the conversations of government officials, journalists, and civil rights leaders, and conduct other improper surveillance for political reasons.[26] Among the most infamous of the program's excesses arose from Attorney General Robert Kennedy's 1963 decision to authorize the FBI to wiretap the telephones of Martin Luther King, Jr. and his associates because one of King's advisors was once a member of the American Communist Party.[27] In the course of this surveillance, the FBI learned that King had indulged in peccadilloes of a personal nature, which the FBI attempted to publicize to discredit King for political reasons.[28]

As evidence on the abuses of the surveillance program emerged in the shadow of Watergate, Congress initiated a formal investigation of the country's foreign intelligence practices, headed by Senator Frank Church. The voluminous reports of the Church Committee, published in 1975-76, concluded that the government's foreign intelligence program undermined the constitutional rights of citizens "primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."[29] While the Church Committee recognized the need for lawful intelligence gathering, it encouraged Congress to enact legislation providing congressional and judicial oversight to counteract the three main departures it concluded were responsible for the abuse of the program: excessive executive power, excessive secrecy, and avoidance of the rule of law.[30]

In 1978, Congress enacted FISA as the "exclusive means" by which the President may conduct domestic surveillance for gathering foreign in-

24. Select Comm. to Study Govtl. Operations, *Final Rep. of the Select Comm. to Study Govtl. Operations with Respect to Intelligence Activities: Suppl. Detailed Staff Rep. on Intelligence Activities and the Rights of Americans* 2 (1976) [hereinafter *III Church Comm. Final Rep.*].

25. *Id*. at 3.

26. Mark Agrast, Am. Bar Assn. Sec. of Individual Rights and Responsibilities, *Report to the House of Delegates*, http://www.abanet.org/leadership/recommendations03/118.pdf (Feb. 2003).

27. *III Church Comm. Final Rep.*, *supra* n. 24, at 20, 24-25.

28. *Id*. at 2-3, 24-25, 48-49.

29. Select Comm. to Study Govtl. Operations, *Final Rep. of the Select Comm. to Study Govtl. Operations with Respect to Intelligence Activities: Intelligence Activities and the Rights of Americans, Conclusions and Recommendations*, 2 (1976).

30. *Id*. at 4-5.

telligence to address these concerns.[31] To strengthen the rule of law in foreign intelligence gathering, FISA contains protections in tort and criminal law to deter inappropriate surveillance and to recompense victims of wrongful surveillance and the use of information gathered in surveillance for purposes not strictly related to national security or criminal law enforcement.[32] To guard against excessive secrecy, FISA requires that the executive branch submit semiannual reports to the House Permanent Select Committee on Intelligence and the Senate Intelligence Committee describing the extent of surveillance conducted pursuant to FISA and the use of information obtained through such surveillance in criminal cases.[33] To provide checks and balances and to diffuse the accumulation of excessive executive power, FISA requires the executive branch in most cases to seek a warrant from the FISC before, or shortly after, initiating surveillance on "United States persons" for national security purposes.[34]

B. *Procedure Under FISA*

1. *Electronic Surveillance Pursuant to a FISA Warrant*

Congress enacted FISA to provide judicial scrutiny of the executive branch in foreign intelligence surveillance to ensure compliance with the Fourth Amendment, but without causing undue intrusion on executive branch discretion in matters of national security. To strike this compromise, in most cases FISA requires a federal officer to submit to the FISC a foreign surveillance application stating, among other things, that "a significant purpose" of the surveillance is to obtain foreign intelligence.[35] The court must then determine whether there is probable cause to establish that

31. *See e.g.* Americo R. Cinquegrana, *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, 810-11 (1989). As stated above, a separate regime regulating electronic surveillance in an ordinary law enforcement context exists under Title III.

32. *See* 50 U.S.C. §§ 1809, 1810. Under § 1809, a person who intentionally "engages in electronic surveillance under color of law except as authorized by statute" or "discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute" is guilty of a felony punishable by a fine of $10,000 and imprisonment up to five years. Under § 1810, Congress has created a cause of action to recover actual and punitive damages for any person who has been wrongfully subjected to electronic surveillance or who has been injured by the wrongful disclosure of information gathered through electronic surveillance.

33. *Id*. at § 1808.

34. *Id*. at § 1805.

35. *Id*. at § 1804. In its original form, FISA required that "the" purpose of the surveillance was to acquire foreign intelligence information. In 2002, Congress changed the language to read "a significant purpose," reflecting concerns that FISA inhibited necessary intelligence sharing among law enforcement and national security agencies. *See infra* pt. III.

the target of the investigation is a "foreign power or an agent of a foreign power."[36] In some circumstances, the FISA probable cause requirement is less demanding than the probable cause standard that Article III judges apply to determine whether a warrant will issue in ordinary criminal investigations. For example, under provisions added to FISA as part of the USA PATRIOT Act of 2002 ("Patriot Act"), the FISC need determine only whether there is probable cause to believe that the ultimate target of the investigation is an international or foreign terrorist group or a member of an international or foreign terrorist group, so long as the target is not a "United States person."[37] If the target of the surveillance is a United States person, there must be probable cause to determine that the individual will engage in espionage, international terrorism, or other criminal activities in furtherance or aid of such crimes, a standard that approaches that of a normal Fourth Amendment warrant.[38]

2. *Warrantless Surveillance under FISA*

FISA permits a federal agency to commence surveillance without first obtaining a warrant in only three circumstances. Under § 1802, the President may authorize electronic surveillance if the Attorney General certifies that the surveillance is solely directed at intercepting communications between or among foreign powers, or pertains to technical intelligence under the control of a foreign power, and there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.[39] Under § 1805, the government may commence surveillance without a warrant if the Attorney General determines that the factual basis for a warrant exists and that the circumstances present an emergency such that surveillance must reasonably begin before an order authorizing it can be obtained from the FISC.[40] In such a case, the

36. 50 U.S.C. § 1805. If the target of the investigation is a United States citizen, permanent resident alien, or business incorporated in the U.S., the FISC may not issue a warrant if the government's evidence rests solely on activities protected by the First Amendment. *Id.* at § 1805(a)(3)(A).

37. *Id.* at §§ 1801(b)(1)(A), 1805(a)(3)(A). A "United States person" is a United States citizen, lawful permanent resident, or United States corporation or business association. *Id.* at § 1801(i).

38. *Id.*; *In re Sealed Case*, 310 F.3d 717, 738 (For. Intelligence Surveillance Ct. Rev. 2002). While the probable cause standard under FISA is roughly the same as in a criminal context in this type of circumstance, a FISA analysis focuses on the probability of possibility (the probability to believe that a United States person may engage in foreign intelligence crimes), while an ordinary probable cause analysis focuses on the probability of the existence of a fact (probability that a crime has been, is being, or is about to be committed). Ltr. from Charles Doyle to Mike Davidson, Sen. Select Comm. on Intelligence, *Probable Cause, Reasonable Suspicion, and Reasonableness Standards in the Context of the Fourth Amendment and Foreign Intelligence Surveillance Act*, http://www.fas.org/sgp/crs/intel/m013006.pdf (Jan. 30, 2006).

39. 50 U.S.C. § 1802(a).

40. *Id.* at § 1805(f).

Attorney General must apply for a warrant within seventy-two hours of beginning the surveillance.[41] Finally, under § 1811, the Attorney General may authorize surveillance without obtaining a warrant for up to fifteen days following a declaration of war by Congress.[42] None of these provisions justifies the President's warrantless surveillance program as described below.

III. THE BUSH ADMINISTRATION'S WARRANTLESS SURVEILLANCE PROGRAM

FISA assumed national prominence for the first time since its passage in the aftermath of the terrorist attacks of September 11, which, according to conventional wisdom, could have been prevented if existing intelligence had been shared among law enforcement and national security agencies.[43] Many commentators argued that FISA created a "wall" of separation between agencies responsible for law enforcement and those responsible for military and foreign intelligence such that cooperation between the agencies on matters of national security was not possible.[44] Under FISA § 1804(a)(7)(B) as it existed on September 11, a federal officer could not obtain a FISA warrant unless he certified in his application to the FISC that "the purpose" of the surveillance was to obtain foreign intelligence information.[45] Several federal Courts of Appeal interpreted this provision to require that the "primary purpose" of the investigation be related to the acquisition of foreign intelligence information, and that if the primary purpose were prosecution of a crime, no warrant could issue.[46] In light of

41. *Id*.

42. *Id*. at § 1811.

43. *See e.g.* John Ashcroft, *Testimony before the National Commission on Terrorist Attacks upon the United States*, http://www.9-11commission.gov/hearings/hearing10/ashcroft_statement.pdf (Apr. 13, 2004) [hereinafter *Ashcroft Testimony*]; Stewart Baker, *Wall Nuts*, Slate.com, http://www.slate.com/id/2093344 (Dec. 31, 2003); Jason Zengerle, *Critiquing Ashcroft's 9/11 Show*, http://www.cbsnews.com/stories/2004/04/15/opinion/main612043.shtml (Apr. 15, 2004).

44. *See e.g. Ashcroft Testimony*, *supra* n. 43.

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

46. *See e.g. U.S. v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (stating that "the investigation of criminal activity cannot be the primary purpose of the [FISA] surveillance"); *U.S. v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) ("The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain."); *U.S. v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (FISA warrant properly issued where the primary purpose was to gather foreign intelligence information); *U.S. v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987) (FISA application properly granted where telephone surveillance "did not have as its purpose the primary objective of investigating a criminal act"); *but see U.S. v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988) (refusing "to draw too fine a distinction between criminal and intelligence investigations" because international terrorism "by definition, requires the investigation of activities that constitute crimes").

these decisions, in the 1980s the Department of Justice ("DOJ") began to interpret the "primary purpose" test as limiting its ability to obtain FISA warrants if it intended to prosecute the target of the surveillance, even for foreign intelligence crimes such as espionage.[47] Thus, the DOJ established a "wall" preventing communication between those conducting investigations with the primary purpose of prosecuting crimes from those conducting surveillance primarily to gather foreign intelligence. In the months preceding the September 11 attacks, the DOJ concluded that the "primary purpose" test and the wall of separation had unnecessarily inhibited the operation of certain investigations and had made some operations inefficient and redundant.[48] Thus, in the amendments to FISA contained in the Patriot Act, Congress and the President expressly eliminated the "primary purpose" test by lowering the requirement that foreign intelligence gathering be "the purpose" of FISA surveillance and making it only "a significant purpose," while simultaneously acknowledging the vitality of the basic statutory scheme.[49]

The Patriot Act amendments to FISA have greatly facilitated the Administration's ability to procure FISA warrants. As the Foreign Intelligence Surveillance Court of Review held in *In re Sealed Case*,[50] the elimination of the "primary purpose" test compels the FISC to issue a warrant where the specific and primary purpose for seeking one is the prosecution of a crime, so long as there is a token foreign intelligence justification as well.[51] In so doing, the Patriot Act "has virtually eliminated the specialized intelligence-gathering function of FISA orders," effectively mutating a FISA warrant into a Title III warrant that may be "issued secretly with no required showing of probable cause."[52]

A. *The Bush Administration Initiates its "Terrorist Surveillance Program"*

The Administration pushed hard for these changes in the months following September 11 and made eager use of them when Congress passed the Patriot Act. The Administration requested, and was granted, an all-time high of 1,758 FISA warrants in 2004.[53] In 2004, as in 2003, more

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

48. *See* Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 Yale L.J. 179, 193-94 (2003).

49. Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 Harv. J.L. & Pub. Policy 319, 325-26 (2005).

50. 310 F.3d 717.

51. *See id*. at 735-36.

52. Breglio, *supra* n. 48, at 180.

53. Elec. Priv. Info. Ctr., *Foreign Intelligence Surveillance Act: News*, http://www.epic.org/privacy/terrorism/fisa (accessed May 22, 2006). The FISC has not rejected any of the more than 16,000 applications it has received since its establishment. *See* Breglio, *supra* n. 48, at 188.

FISA warrants were granted than warrants under Title III.[54] Even so, the Administration initiated a secret surveillance program designed to bypass FISA entirely. At no point in the debate over the Patriot Act did the Administration recommend that Congress amend FISA to broaden the government's power to conduct warrantless surveillance under the statute. But the Administration apparently recognized the national security necessity of secretly conducting surveillance where it could not show that it had probable cause to believe that a target within the United States is a member of a international terrorist group, as required by FISA,[55] or where the administrative requirements for obtaining a FISA warrant retard the NSA's ability to conduct operations with the speed and efficiency necessary to detect fleeting communications between terrorist groups and persons within the United States.[56]

The exact contours of the program have been kept classified, and Congress rejected proposals for an investigation, but the Administration has released limited information about the program out of political necessity. After the media first published the story, the Administration reassured Americans that the program intercepts only international communications and that the authority on which the surveillance is based is reviewed "approximately every forty-five days" to ensure that the terrorist threat justifying the surveillance continues to exist.[57] The NSA refused to comment directly on reports that the program had used data-mining techniques to search large volumes of domestic phone and internet traffic for suspicious patterns,[58] but stated that the program is narrowly focused on intercepting communications "entering or leaving America involving someone [the agency] believe[s] is associated with al Qaeda."[59] However, based on a continuing media investigation, the government has now been forced to concede the veracity of the initial reports indicating that the program used data-mining techniques to collect the phone records of *tens of millions* of Americans, using data provided by several telecommunications companies,

54. *See* Elec. Priv. Info. Ctr., *supra* n. 53.

55. The NSA is authorized to conduct surveillance operations where there is a "reasonable basis to believe" that the target is a terrorist. *See* Alberto Gonzales, *Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center*, http://www.fas.org/irp/news/2006/01/ag012406.html (Jan. 24, 2006) [hereinafter *Gonzales Remarks at GULC*]. This formulation suggests that the agents may proceed where probable cause does not exist.

56. *Id*. at 6.

57. *Gonzales Remarks at GULC*, *supra* n. 55, at 8.

58. Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times A6 (Dec. 24, 2005).

59. Gen. Michael V. Hayden, *What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation*, http://www.dni.gov/release_letter_012306.html (Jan. 23, 2006) (copy of website on file with the *Pierce Law Review*).

without a court order.[60] The NSA reportedly uses the database to "analyze communications patterns to glean clues from details like who is calling whom, how long a phone call lasts and what time of day it is made, and the origins and destinations of phone calls and e-mail messages."[61] The Administration contends that it does not access the content of any purely domestic communication without a court order and that the collection of data, which it uses to select surveillance targets,[62] is entirely legal and necessary to prevent terrorism.[63] However, the President's reassurances ring more hollow with each secret he is forced to reveal, and the reports that the NSA keeps a massive database collecting information on United States citizens gives the impression that the surveillance program is more widespread than initially advertised.[64] The clumsy and piecemeal dissemination of information regarding the program has prolonged the scandal and undermined confidence in the Administration's honesty and competence among Congressmen, who continue to express outrage over the absence of oversight of the program outside the executive branch.[65]According to the unperturbed Administration, congressional and judicial oversight of the program are not mandated by any statute or the Constitution, and concessions to Congress in the field of foreign intelligence gathering are unnecessary and unwise.

B. *The Administration's Legal Justification of the Program*

The Administration has defended the legality of the warrantless wiretaps with three principal, overlapping arguments: (1) the President's broad and exclusive powers as Commander-in-Chief under Article I of the Constitution include the inherent authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes, notwithstanding FISA;[66] (2) Congress authorized the President to conduct such surveillance when it passed the AUMF by joint resolution;[67] and (3) the NSA activities constitute a "reasonable" search within the meaning of the Fourth Amendment of the Constitution because national security surveillance qualifies as a "special needs" search.[68] On balance, none of these

60. Leslie Caulie, *NSA Has Massive Database of Americans' Phone Calls*, USA Today A1 (May 11, 2006); John O'Neil, *Bush Says U.S. Spying is Not Widespread*, N.Y. Times A1 (May 11, 2006).

61. O'Neill, *supra* n. 60.

62. *See* James Bamford, *Big Brother is Listening*, Atlantic Monthly 66 (Apr. 2006).

63. Caulie, *supra* n. 60; O'Neil, *supra* n. 60.

64. *See* Barton Gellman & Arshad Mohammed, *Data on Phone Calls Monitored*, Wash. Post A1 (May 12, 2006).

65. *See id*.

66. Gonzales, *Legal Authorities*, *supra* n. 6, at 6-8.

67. *Id*. at 10.

68. *Id.* at 17.

arguments justifies the secret program given the current statutory framework under FISA, and none satisfactorily addresses the dangers inherent in excessive executive power and excessive secrecy that motivated Congress to enact FISA in the 1970s.

1. *The President Cannot Ignore Laws Duly Enacted by Congress*

As the Attorney General argues, the Supreme Court has long recognized the President's power to use secretive means to collect intelligence necessary to conduct foreign affairs and military campaigns.[69] According to the Attorney General, it follows that "[i]n reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes," citing examples of domestic surveillance ordered by Presidents Roosevelt and Truman.[70] The Attorney General also cites several Federal Courts of Appeal cases, such as *United States v. Truong Dinh Hung*, that hold that the President has the inherent constitutional authority to order warrantless surveillance to collect foreign intelligence information.[71] None of these cases directly supports the Attorney General, however. In each one, the court ruled on the legality of a search for foreign intelligence information conducted in the pre-FISA era, and therefore the President could proceed without any legislative constraints. Where the President, relying on his inherent powers, acts in the absence of any Congressional act regulating an area of law in which the President and Congress share authority, "congressional inertia . . . enable[s], if not invite[s], measures on independent presidential respon-

69. Gonzales, *Legal Authorities*, *supra* n. 6, at 7; *see e.g. Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world."); *Totten v. U.S.*, 92 U.S. 105, 106 (1876) (The President "was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.").

70. Gonzales, *Legal Authorities*, *supra* n. 6, at 7-8.

71. *See id*. at 8 (citing *U.S. v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *U.S. v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *U.S. v. Brown*, 484 F.2d 418 (5th Cir. 1973)). The Attorney General also cited *In re Sealed Case*, which assumed (but did not hold) that the President has such power and that Congress cannot encroach upon it. However, the FISA Court of Review did not find that FISA is an unconstitutional encroachment on the President's powers. Furthermore, the Court based its assumptions of the President's powers based on *Truong*, which indicated that FISA's restrictions on the President's powers are permitted by the Constitution. *See* 629 F.2d at 915 (stating that "the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, should be left to the intricate balancing performed in the course of the legislative process by Congress and the President"); *see also* Ltr. from Curtis A. Bradley et al., to Members of Congress, at 7 n. 11, http://www.cdt.org/security/20060109legalexpertsanalysis.pdf (Jan. 9, 2006) [hereinafter *Law Professors' Letter to Members of Congress*].

sibility."[72] Therefore, as *Truong* and other cases held, in the pre-FISA era the President could rely on his inherent authority to conduct warrantless surveillance to collect foreign intelligence information. But "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[73] When it enacted FISA, Congress concluded that:

> [E]ven if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which surveillance may be conducted.[74]

Unless Congress overestimated its power under the Constitution, rendering FISA unconstitutional, the President's "inherent power" as Commander-in-Chief does not permit him to conduct surveillance outside of FISA.

The Administration has never argued that FISA is unconstitutional.[75] However, some of the Administration's supporters, including Senate Intelligence Committee Chairman Pat Roberts, have suggested as much, claiming that "Congress, by statute, cannot extinguish a core constitutional authority of the President."[76] Although the President's power as Commander-in-Chief is broad, it is not infinite or exclusive.[77] Indeed, the Constitution gives the President and Congress concurrent wartime and foreign affairs powers. Although "Congress cannot deprive the President of command of the army and navy," it is "empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."[78] While the President has the authority "to direct the performance of those functions which may constitutionally be performed by the military arm of the

72. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

73. *Id.*

74. H.R. Rpt. 95-1283, pt. 1, at 24 (1978).

75. Indeed, in signing the Patriot Act, the President acknowledged that FISA is the law.

76. Ltr. from *Senator Pat Roberts* to *Senate Judiciary Committee*, www.fas.org/irp/congress/2006_cr/roberts020306.pdf (Feb. 3, 2006).

77. Moreover, Senator Roberts' argument is a red herring. FISA did not extinguish the President's power to collect foreign intelligence information; it merely regulated it by providing judicial safeguards.

78. *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). Congress may, for example, enact general guidelines proscribing the types of weapons and tactics that the President may use while engaged in a military campaign. *See e.g. Chemical Weapons Convention Implementation Act of 1998*, 22 U.S.C. § 6701 (2006) (outlawing chemical weapons); *see also Law Professors' Letter to Members of Congress*, *supra* n. 71, at 6. Thus, while only the President may order an infantry assault on enemy, Congress may order the President not to use chemical weapons in conducting the campaign.

nation in time of war,"[79] including "important incident[s] to the conduct of war,"[80] the President is obliged to follow laws enacted by Congress under its concurrent war powers, especially where such laws establish procedures designed to protect individual rights guaranteed by the Constitution.[81] As Justice Jackson stated in his seminal concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[82] "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[83] In that case, the Court found that the President could not order the seizure of steel mills, which the President considered necessary to defend the nation, in the face of congressional hostility. It would be anomalous to suggest that Congress has greater authority to protect individual property rights than personal rights.[84] Congress thus acted within its concurrent powers when, to protect civil liberties, it made FISA the exclusive means by which the President may conduct electronic surveillance to gather foreign intelligence. The President therefore acted outside the law when he authorized surveillance by other means.

2. *AUMF did not Supercede FISA*

The Administration next argues that even if the President lacks inherent constitutional authority to order warrantless searches outside of FISA, Congress effectively altered FISA's warrant requirements with subsequent legislative acts. On September 18, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[85] The Attorney General argues that "all necessary and appropriate force" includes the power to conduct warrantless surveillance, and therefore Congress, in passing the AUMF, implicitly modified FISA to permit the President to authorize surveillance outside FISA's guidelines.[86] At its broadest, this justification – that Congress intended to repeal all laws that the President

79. *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

80. *Id*.

81. *See e.g. Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (noting that, even in wartime, the President may not suspend *habeas corpus* without an act of Congress pursuant to 28 U.S.C. § 2241, which constitutes "a critical check on the Executive").

82. 343 U.S. at 644 (Jackson, J., concurring).

83. *Id*.; *see also Padilla v. Hanft*, 389 F. Supp. 2d 678, 690 (D.S.C. 2005) (holding that President lacks power to detain suspects as "enemy combatants" in absence of legislation granting such power), *rev'd on other grounds*, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

84. David S. Eggert, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 Duke L.J. 611, 636-37 (1983).

85. *Authorization for Use of Military Force*, S.J. Res. 23, § 2(a) (Sep. 18, 2001).

86. Gonzales, *Legal Authorities*, *supra* n. 6, at 23-24.

unilaterally believes might inhibit his ability to kill or capture terrorists – is absurd on its face, amounting to an argument that Congress (unconstitutionally) delegated its power to repeal any number of long-standing laws to the executive branch.

The Administration valiantly attempts to draw on *Hamdi v. Rumsfeld*[87] for the proposition that the AUMF means exactly that, at least with respect to FISA.[88] In that case, Yaser Hamdi, a United States citizen captured in Afghanistan during the war against the Taliban, challenged his continuing extra-judicial detention and designation as an "enemy combatant" under the Fourth Amendment and 18 U.S.C. § 4001(a), which requires that no United States citizen may be detained "except pursuant to an Act of Congress."[89] The Supreme Court found that the AUMF was an "Act of Congress" permitting detention under § 4001(a) because the AUMF's formula of "all necessary and appropriate force" includes detention of enemy combatants.[90] The Attorney General argues that if "all necessary and appropriate force" includes extra-judicial detention, then it must also include less intrusive means of force such as warrantless electronic surveillance.[91] However, the implications of the *Hamdi* decision are not broad enough to permit this inference. The Supreme Court expressly limited its holding to the narrow question before it: whether Congress authorized the detention of citizens who were "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there."[92] Thus, *Hamdi* does not plausibly support the Administration's argument that Congress authorized the surveillance program when it enacted the AUMF.[93]

3. *Fourth Amendment Implications*

The Administration next argues that the surveillance program is necessary to national security and has adequate safeguards such that all searches are "reasonable" under the "special needs" exception to the warrant requirement of the Fourth Amendment.[94] Under the "special needs" doc-

87. 542 U.S. 507 (2004).
88. Gonzales, *Legal Authorities*, *supra* n. 6, at 24.
89. *Hamdi*, 542 U.S. at 517.
90. *Id*.
91. Gonzales, *Legal Authorities*, *supra* n. 6, at 23.
92. *Hamdi*, 542 U.S. at 516.
93. Furthermore, many lawmakers have expressed skepticism that the President believed that Congress was voting to permit warrantless surveillance at the time it enacted the AUMF. *See e.g.* Tom Daschle, *Power We Didn't Grant*, Wash. Post A21 (Dec. 23, 2005).
94. Because the surveillance program violates FISA, which may impose requirements more stringent than the Fourth Amendment, analysis under the Fourth Amendment is superfluous to a judgment

trine, the government may conduct warrantless searches and seizures, and in some cases without individualized suspicion, where "special needs, beyond the normal need for law enforcement"[95] exist, where the expectation of privacy is diminished or the intrusion is minimal, and/or where there is an increased need to be able to react swiftly. Thus, the Supreme Court has permitted warrantless searches without any showing of individualized suspicion in cases involving searches of the property of students in public high schools,[96] in random sobriety checkpoints to check all motorists for evidence of drunk driving,[97] and in border checkpoints to search for illegal immigrants.[98] There is no doubt that the pursuit of foreign intelligence information is a national security necessity "beyond the normal need for law enforcement," as the primary programmatic purpose of foreign intelligence surveillance, and any prosecution resulting from such surveillance, is to prevent potential foreign attacks on the nation, not to punish the wrongdoer and deter similar activity.[99] But as the Foreign Surveillance Court of Review noted, "wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning,"[100] and the expectation of privacy in a telephone or electronic communication is substantial. Moreover, the NSA may place a surveillance target on a terrorist watch list to be shared with the FBI, CIA, DOJ, Secretary of State, and other domestic and foreign government agencies, threatening fundamental rights other than privacy.[101] Once a person's name is added to a secret terrorist watch list, it is nearly impossible to remove it, as there is currently no way to confirm whether a name is on the list until that person is arrested or denied a passport.[102] Thus, while the jurisprudence of the "special needs" exception suggests that the Fourth Amendment does not require that the Administration seek a traditional search warrant before beginning electronic surveillance to gather foreign intelligence information, the consequences of wrongful surveillance are much more onerous than in standard "special needs" searches. Consequently, there must be significant and reliable safeguards in place to ensure that the methods and duration of surveillance

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whether the Administration broke the law, but useful to an inquiry whether FISA itself should be amended or repealed.

95. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

96. *See id*. at 664-65 (approving suspicionless drug testing of all students involved in extracurricular activities); *N.J. v. T.L.O.*, 469 U.S. 325, 340 (1985) (upholding warrantless searches of property of public school students).

97. *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444, 455 (1990).

98. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

99. *See In re Sealed Case*, 310 F.3d at 744-45. Obviously, punishment and deterrence are objectives of prosecution of terrorism and espionage, but these are secondary objectives. *Id*.

100. *Id*. at 746.

101. *See* Bamford, *supra* n. 62, at 66-67.

102. *Id.* at 66.

are "reasonable" and that reasonable grounds exist to suspect that the target is appropriate for foreign intelligence surveillance, as the Supreme Court has suggested.[103]

The Administration argues that the safeguards currently in place, as described above in Part III(A), are adequate. If the Administration in fact follows these guidelines, courts might agree with the Administration that the program is reasonable. Indeed, as the NSA supposedly intercepts only international calls, some critics of the program argue that the Administration has been overly cautious, as its legal justification for the program would support eavesdropping on purely domestic communications as well.[104] However, while these safeguards are significant, whether the NSA reliably follows them is known by the Administration alone. The program indicates a return to the pre-FISA era of excessive secrecy and excessive executive power. According to the Pentagon, the war on terror, also known as the "Long War," is a generational conflict that could last decades.[105] Even if Americans trust this Administration to follow the guidelines it has established with good faith and integrity, the abuses of the past suggest that there is no guarantee that future governments will honor the safeguards now in place or administer them with competence and vigilance. "Trust me" is not an acceptable long-term policy for warrantless surveillance in the Long War and does violence to the principle of checks and balances.

IV. PROPOSALS TO AMEND FISA

A. *Ideas from the Senate*

In response to the controversy over the terrorist surveillance program, the Senate has taken the lead in proposing legislation to amend FISA to

103. *See U.S. v. E.D. Mich.*, 407 U.S. 297, 322-23 (1972) (

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the [g]overnment for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection

); *see also Katz*, 389 U.S. at 358 n. 23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not present in this case.").

104. Dan Eggen, *Limiting NSA is Inconsistent with Rationale, Critics Say*, Wash. Post A5 (Feb. 8, 2006).

105. Bradley Graham & Josh White, *Abizaid Credited with Popularizing the Term 'Long War,'* Wash. Post A8 (Feb. 3, 2006); Josh White & Ann Scott Taylor, *Rumsfeld Offers Strategies for Current War*, Wash. Post A8 (Feb. 3, 2006).

permit greater flexibility in foreign intelligence operations involving persons within the United States. Senator Arlen Specter has proposed an innovative bill that would require the Attorney General to divulge information concerning the program to the FISC so that the court could regularly evaluate the constitutionality of "an electronic surveillance program," defined as an operation to intercept communications among international terrorists where "it is not feasible to name every person or address every location to be subjected to electronic surveillance."[106] Neither the Bush Administration nor certain FISC judges have endorsed the draft proposal, which determines the constitutionality of a program in general and fails to provide safeguards to protect *individuals* targeted for surveillance.[107] The Attorney General need certify only the facts justifying the belief that *one* of the participants in the communications to be intercepted in the program will be a foreign power or agent of a foreign power seeking to commit an act of terrorism or a person who had communications with such a foreign power and is seeking to commit acts of terrorism.[108] The FISC is then directed to determine whether probable cause exists to believe that "the electronic surveillance program will intercept communications of the foreign power or agent of a foreign power specified in the application."[109] Thus, while Senator Specter's proposal permits executive flexibility to infiltrate networks and allows for some degree of judicial oversight, it creates a more attenuated probable cause standard than that which now exists under FISA – granting a warrant to conduct surveillance against any unspecified number of individuals in a "program" when only one of the targets may be a member of a terrorist group. Such a procedure would give judicial sanction to surveillance not only of terrorists and those who have communicated directly with terrorists, but also of individuals who have communicated with people who have communicated with terrorists. It is said that all people on earth are connected by only six degrees of separation.[110] If there is any credence to that theory, Senator Specter's proposal would compel the issuance of warrants to conduct surveillance on a large segment of individuals who have no relationship with al Qaeda. Such surveillance may turn out to have been reasonable. But the law should not grant an *ex ante* imprimatur of legitimacy on searches of individuals by issuing a judi-

106. *National Security Surveillance Act of 2006*, Sen. 2453, 109th Cong. § 701(5)(B) (Mar. 16, 2006) [hereinafter *Proposed NSSA*].

107. *See* Eric Lichtblau, *Judges on Secretive Panel Speak Out on Spy Program*, N.Y. Times A19 (Mar. 29, 2006).

108. *Proposed NSSA* § 703(a)(7).

109. *Id*. at § 704(a)(3).

110. *See* Judith Kleinfeld, *Six Degrees of Separation: Urban Myth?*, Psychology Today (Mar./Apr. 2002).

cial warrant based on "probable cause" that the program in general will yield results.

For its part, the Administration, while disclaiming the necessity of any new legislation to legalize the program, prefers the more conservative bill proposed by Senator DeWine and other Republican members of the Senate Intelligence Committee.[111] This proposal would create a seven-member "terrorist surveillance subcommittee and require the administration to give it full access to the details of the program's operations."[112] In addition, the proposal permits the Administration to conduct warrantless electronic surveillance for up to forty-five days if communication under surveillance involves someone suspected of being a member of a terrorist group and at least one party is outside the United States, after which it would be forced to seek a FISA warrant.[113] If the Administration chose to continue surveillance without seeking a warrant, the Attorney General would be required to explain to the subcommittee the reasons why it has not sought a warrant and why continued surveillance is necessary.[114]

While this proposal grants the executive sufficient flexibility to initiate surveillance efficiently and without administrative interference, it lacks adequate safeguards to protect individual liberties. Congress is not structurally or functionally intended to protect the rights of individual citizens in particularized cases. Indeed, this is the constitutional function of the judiciary, which is, at least theoretically, insulated from political pressure so that it may act according to legal principles. Congress, on the other hand, must be responsive to the attitudes and moods of voters, who do not always favor a "generous" interpretation of individual rights, especially where the individual involved is believed to be a member of a terrorist organization. As such, a Congressman performing oversight of the program may have little incentive to challenge the administration over the operation of the program. Moreover, even if some brave and principled member of the subcommittee dared to risk his political future to save the honor of the program, he or she would have no power to challenge the executive's decisions before the FISC, rendering opposition symbolic, rather than substantive.

111. Charles Babbington, *Specter Proposes NSA Surveillance Rules*, Wash. Post A11 (Feb. 26, 2006).
112. *See* Kirkpatrick & Shane, *supra* n. 11.
113. *See id.*
114. *See id.*

B. *A Different Proposal*

A more protective regime would involve the judiciary to provide a legal, as well as a political, check on the executive. If, as the Administration argues, it is not feasible to procure a warrant requirement for each act of surveillance, *ex post* remedies in tort law may provide the best balance between respect for civil liberties and the need for foreign intelligence surveillance. Such a regime would not prevent the government from following leads it believes are reasonable to follow, but would vindicate the rights of the aggrieved where the government is wrong.[115] Some scholars have suggested that individuals who have been subjected to unreasonable surveillance should have standing to redress their injuries through a cause of action under § 1983.[116] Under one such proposal, the DOJ would be required to inform targets that they have been under surveillance, and the aggrieved individual could seek a determination from a United States District Court as to whether the surveillance was reasonable.[117] But such a remedy insufficiently protects individual rights, as there is no means to cut short unreasonable surveillance where necessary, and requires the publication of sensitive or classified information, such as the existence of each act of surveillance and the techniques used during the surveillance.[118] A solution to these problems may be found in a regime composed of an agency with the power to seek injunctions on continued surveillance, procure orders to purge watchlists of individuals' names, and pursue remedies in tort for unreasonable surveillance on behalf of the aggrieved, combined with statutory provisions limiting use of evidence gathered in surveillance to certain crimes. This solution would provide adequate protections of privacy and liberty without retarding reasonable foreign intelligence investigations.

1. *New Agency*

Under this regime, Congress would provide for the creation of an agency to be staffed by members chosen by the FISC.[119] The Administra-

115. In addition to receiving money damages, an innocent individual should have the opportunity to clear his name from any government terrorist watch lists. *See* Bamford, *supra* n. 62, at 66-67.

116. *See* Breglio, *supra* n. 48, at 213-14.

117. *Id*.

118. The Administration claims that the leak revealing the existence of and techniques used in the NSA program has damaged national security. *See e.g.* Dan Eggen, *Justice Dept. Investigating Leak of NSA Wiretapping*, Wash. Post A1 (Dec. 31, 2005).

119. Under the Appointments Clause, Congress may choose whether the courts, the President, or the Cabinet appoints "inferior officers of the United States," but has no power to appoint such officers directly. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). Because the duties and jurisdiction of the proposed agency would be strictly limited to what is necessary to perform its function, without any administra-

tion would be required to submit a certification to the agency within fourteen days of initiating surveillance stating the techniques to be used in intercepting communications and the grounds for suspecting that the target or the person he is communicating with is a member of an international terrorist or espionage ring. The agency would have the power to review the reasonableness of the surveillance periodically and to bring a cause of action on behalf of the injured individual before the FISC. If the FISC agreed that the surveillance was unreasonable, it would grant damages, which would be forwarded to the individual with a minimal notice indicating that the person had been subjected to unreasonable surveillance in violation of the Fourth Amendment and is entitled to execute an order for damages pursuant to the decision of the FISC. If the Administration insisted on continuing the surveillance upon a finding that the act is unreasonable under the Fourth Amendment, the agency could move for an injunction on the surveillance where appropriate. Furthermore, the agency would have the power to seek a court order to have the names of innocent individuals removed from all terrorist watchlists. If the FISC agreed that the individual's name should be purged, that person would be entitled to notice of the court order.

So that Congress may continue oversight of the program, the agency would also be required to report to the Intelligence Committees in each house of Congress the number of certifications for warrantless surveillance it received, the number of surveillances it challenged as unreasonable, the number of times the FISC agreed with agency challenges. Upon request of any Congressman, the agency would report to him the identities and addresses of that Congressman's constituents entitled to damages and equitable remedies under the law.

2. *Statutory Exclusionary Rule*

In addition to the judicial checks provided by the agency, a statute regulating warrantless surveillance should also restrict the uses of evidence obtained in these investigations to guard against the use of the procedure to bypass the warrant requirement in ordinary criminal investigation under Title III. The purpose of warrantless surveillance is to gather foreign intelligence information, and the uses of information obtained through such surveillance should be tailored to that purpose. As the FISA Court of Review has noted, criminal prosecution constitutes an important tool for act-

tive or policy-making function, the members of the agency would be considered "inferior officers" such that the FISC could appoint them. *See Morrison v. Olsen*, 487 U.S. 654, 671-72 (1988) (stating that independent counsel is an "inferior officer" because, among other things, his duties are limited to those necessary to operate his office and because jurisdiction is strictly limited by statute).

ing on foreign intelligence information to prevent attacks on the national security.[120] Therefore, any amendment of FISA should permit use of evidence obtained during a warrantless search in prosecutions for certain enumerated foreign intelligence crimes, such as sabotage, terrorism, espionage, and conspiracy to commit foreign intelligence crimes.[121] However, evidence obtained in warrantless surveillance should not be used as evidence in the prosecution of any other crime so that there will be little risk that the law enforcement agents will resort to warrantless surveillance on the pretext of foreign intelligence gathering when they lack probable cause to support a warrant under Title III. Furthermore, evidence obtained in a search which the new agency determines to have been "unreasonable" under the Fourth Amendment should be inadmissible at trial for even foreign intelligence crimes, and the failure of the agency to find that the surveillance is unreasonable should not lead to the presumption that it is reasonable for the purposes of criminal prosecution. A defendant prosecuted on the basis of evidence obtained in a warrantless search should have the opportunity to challenge its admissibility at trial.

Because of the rules limiting the admissibility of evidence obtained in warrantless surveillance for criminal prosecution, the proposed regime for warrantless surveillance would be no less protective of individual liberties than the current regime under FISA. Even before the FISA Court of Review ruled that prosecution of crime may be the primary purpose justifying the issuance of a FISA warrant, law enforcement officials used "criminal and FISA warrants . . . somewhat interchangeably, with agents choosing the latter when they felt they had a weaker case."[122]

3. *What Becomes of FISA's Warrant Provisions?*

Amendment of FISA so that warrantless surveillance is permitted and regulated obviates the purpose of the statute's warrant provisions. There would be no purpose for the government to use these provisions other than to bypass the exclusions on the use of evidence for prosecutions other than foreign intelligence crimes.[123] As this would contradict the legitimate pur-

120. *In re Sealed Case*, 310 F.3d at 724.

121. Evidence of crimes incidental to foreign intelligence crimes, such as robbing a bank to gain money to build a bomb, could be used to prove conspiracy to commit a foreign intelligence crime, but could not be used to convict the suspect of the underlying crime of which he is accused. *See id.* at 736.

122. Breglio, *supra* n. 48, at 194.

123. If the government inadvertently comes upon evidence of ordinary crime while conducting surveillance pursuant to a FISA warrant, it may transmit such evidence to the proper authority. *See* 50 U.S.C. § 1801(h)(3) (permitting "retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes"); *U.S. v. Isa*, 923 F.2d 1300, 1304-05 (8th Cir. 1991) (holding that FISA permits federal agents conducting surveillance under a lawfully obtained FISA warrant may transmit

poses of the FISA regime, that part of the statute should be repealed; it is not likely that either the Bush Administration or civil libertarians would weep to see it go.

V. CONCLUSION

The terrorist attacks of September 11 unleashed an unprecedented epoch in modern United States history characterized by the consciousness of vulnerability. Fear of another attack, especially one involving weapons of mass destruction, has provoked a recalibration of the balance between civil liberties and the power of the state on the one hand and between the powers of Congress and the President on the other. The Bush Administration asked for and received controversial new legal tools expanding the capability of the executive to conduct foreign intelligence surveillance with the enactment of the Patriot Act. However, the Administration concluded that these amendments to FISA, while useful, granted insufficient power to the President to uphold his constitutional duty to protect the United States, and therefore authorized the NSA to begin surveillance on selected persons within the United States outside the guidelines established by the Patriot Act. With this bold, extra-legal act, the President returned the conduct of foreign intelligence surveillance to the pre-FISA era, reclaiming for the executive the unfettered discretion to direct intelligence collection by the procedures the Administration alone deems necessary and proper. While these procedures might be "reasonable" under the Fourth Amendment, the Administration's efforts to evade any meaningful congressional or judicial supervision of the program presents problematic questions regarding the President's constitutional right to decide unilaterally how best to balance individual rights with the needs of the state. If the President must have the power to conduct warrantless surveillance, then there must be adequate checks on that power to ensure it is used responsibly and properly. An independent executive agency appointed by the FISA court with the power to review the reasonability of individual surveillance would provide that check without inhibiting the President's ability to gather foreign intelligence information.

evidence of ordinary crimes to state and local authorities). But there is no evidence that the intelligence community has yet used FISA warrants to fish for evidence of ordinary crimes.