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Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

September 25, 2001

MEMORANDUM FOR DAVID S. KRIS
ASSOCIATE DEPUTY ATTORNEY GENERAL

From: John C. Yoo
Deputy Assistant Attorney General

Re: *Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches*

You have asked for our opinion on the constitutionality of amending the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (1994 & West Supp. 2000) ("FISA"), so that a search may be approved when the collection of foreign intelligence is "a purpose" of the search. In its current form, FISA requires that "the purpose" of the search be for the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B). We believe that this amendment would not violate the Fourth Amendment.

It should be made clear at the outset that the proposed FISA amendment *cannot* cause a facial violation of the Fourth Amendment. Because "a" purpose would include the current warrant applications in which foreign intelligence is "the" purpose of the search, a significant class of valid searches would continue to fall within the new statutory language. It may be the case that some warrant applications – for example, those instances where criminal investigation constitutes an overwhelming purpose of the surveillance – will be rejected by the FISA court. In those situations, the FISA amendment would not be unconstitutional, so much as the Court would be construing the statute, according to the canon that statutes are to be read to avoid constitutional problems, so as not to require the issuance of a warrant that would go beyond the Fourth Amendment. In other words, the proposed amendment cannot violate the Fourth Amendment because it would simply allow the Department to apply for FISA warrants up to the limit permitted by the Constitution, as determined by the FISA court. Amending FISA merely gives the Department the full flexibility to conduct foreign intelligence surveillance that is permitted by the Constitution itself.

We caution, however, that much will depend on the manner in which the Department chooses to operate within the new standard. Some warrant applications might be rejected by the courts if prosecutors become too involved in the planning and execution of FISA searches. Nonetheless, as we observed in 1995, "the courts have been exceedingly deferential to the government and have almost invariably declined to suppress the evidence, whether they applied the 'primary purpose' test or left open the possibility of a less demanding standard." Memorandum for Michael Vatis, Deputy Director, Executive Office for National Security, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: *Standards for Searches Under Foreign Intelligence Surveillance Act* at 1 (Feb. 14, 1995). We believe that the Department would continue to win such deference from

the courts if it continues to ensure that criminal investigation not become a primary purpose of FISA surveillance.

I.

The Fourth Amendment declares that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated." U.S. Const. amend. IV (emphasis added). The Amendment also declares that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

Thus, the touchstone for review is whether a search is "reasonable." *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'"). When law enforcement undertakes a search to discover evidence of criminal wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant. *See id.* at 653. But the Court has made clear that a warrant is not required for all government searches. A warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*

As a result, the Court properly has found a variety of warrantless government searches to be consistent with the Fourth Amendment. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); *Acton* (drug testing of high school athletes); *Michigan v. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (drunk driver checkpoints); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In these circumstances, the Court has examined several factors to determine whether a warrantless search is reasonable. As the Court stated just last Term: "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001). In creating these exceptions to its warrant requirement, the Court has found that, under the totality of the circumstances, the "importance of the governmental interests" has outweighed the "nature and quality of the intrusion on the individual's Fourth Amendment interests." *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

Of particular relevance here, the Court has found warrantless searches reasonable when there are "exigent circumstances," such as a potential threat to the safety of law enforcement officers or third parties. The Court has also recognized that a government official may not need to show the same kind of proof to a magistrate to obtain a warrant for a search unrelated to the investigation of

a crime "as one must who would search for the fruits or instrumentalities of crime." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967). For example, "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Id. See also Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (in context of seizure and exigent circumstances, Fourth Amendment would permit appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee).

II.

This analysis of Fourth Amendment doctrine demonstrates that the government could conduct searches to obtain foreign intelligence without satisfying all of the requirements applicable in the normal law enforcement context. It is important to understand the current shape of Fourth Amendment law, and how it would apply to the circumstances at hand, in order to evaluate the constitutionality of the proposed amendment to FISA. As we have noted earlier, the Fourth Amendment's reasonableness test for searches generally calls for a balancing of the government's interest against the individual's Fourth Amendment interests. Here, the nature of the government interest is great. In the counter-intelligence field, the government is engaging in electronic surveillance in order to prevent foreign powers or their agents from obtaining information or conducting operations that would directly harm the security of the United States.

To be sure, the Supreme Court has subjected counter-intelligence searches of purely domestic terrorist groups to a warrant requirement. When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes. *Katx v. United States*, 389 U.S. 347, 358 n.23 (1967); *see also Mitchell v. Forsyth*, 472 U.S. 511, 531 (1985). Later, however, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 299 (1972) ("*Keith*"), the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups. In doing so, the Justices framed the question by explaining that, "[i]ts resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." While acknowledging that "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," *id.* at 312, the Court cautioned that "[t]he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* at 314. As a result, the Court held that the absence of neutral and disinterested magistrates governing the reasonableness of the search impermissibly left "those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Id.* at 317.

The court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or without the country. *Id.* at 308. And after the *Keith* decision, lower courts have found that when the government conducts a search, for national security reasons, of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of criminal law enforcement. In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for example, the Fourth Circuit observed that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities." *Id.* at 913. The Court based this determination on a number of factors, including:

> (1) "[a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations," *id.*;
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> (2) "the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance . . . . Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source," *id.* at 913-14; and
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> (3) the executive branch "is also constitutionally designated as the pre-eminent authority in foreign affairs." *Id.* at 914.

The Court also recognized, however, that "because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount." *Id.* at 915. *See also United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

Therefore, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators since such cases are "most likely to call into play difficult and subtle judgments about foreign and military affairs," 629 F.2d at 915; and (2) "when the surveillance is conducted 'primarily' for foreign intelligence reasons . . . . because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." *Id.*

The factors favoring warrantless searches for national security reasons may be even more compelling under current circumstances than at the time of these lower court decisions. After the attacks on September 11, 2001, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order – the need to defend the nation from direct attack. As the Supreme Court has said, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The compelling nature of the government's interest here may be understood in light of the Founders' express intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

> it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

Id. at 147-48.[1] Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States,* 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary "to victories in the field." *Application of Yamashita,* 327 U.S. 1, 12 (1946). The authority over national security "carries with it the inherent power to guard against the

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[1] *See also The Federalist* No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (federal government is to possess "an indefinite power of providing for emergencies as they might arise"); *The Federalist* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . . .The powers requisite for attaining it, must be effectually confided to the foederal councils.") Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of the "the circumstances which may affect the public safety," and that the federal government's powers are correspondingly broad. *See, e.g., Dames & Moore v. Regan,* 453 U.S. 654, 662 (1981) (noting that the President "exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal"); *Hamilton v. Regents,* 293 U.S. 245, 264 (1934) (federal government's war powers are "well-nigh limitless" in extent); *Stewart v. Kahn,* 78 U.S. (11 Wall.) 493, 506 (1870) ("The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."); *Miller v. United States,* 78 U.S. (11 Wall.) 268, 305 (1870) ("The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.").

immediate renewal of the conflict." *Id.*

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority. The Constitution, for example, vests in the President the power to deploy military force in the defense of the United States by the Vesting Clause, U.S. Const. art. II, § 1, cl. 1, and by the Commander in Chief Clause, *id.*, § 2, cl. 1.[2] Intelligence operations, such as electronic surveillance, very well may be necessary and proper for the effective deployment and execution of military force against terrorists. Further, the Constitution makes explicit the President's *obligation* to safeguard the nation's security by whatever lawful means are available by imposing on him the duty to "take Care that the Laws be faithfully executed." *Id.*, § 3. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the Presidency rather than Congress.[3]

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[2] *See Johnson v. Eisentrager,* 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page,* 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual."); *Loving v. United States,* 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent powers" of the Commander in Chief "are clearly extensive."); *Maul v. United States,* 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts v. Laird,* 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham,* 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992) (Barr, A.G.).

[3] As Alexander Hamilton explained in *The Federalist* No. 74, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist* No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, in 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 107 (2d ed. Ayer Company, Publishers, Inc. 1987) (1888). *See also* 3 Joseph Story, *Commentaries on the Constitution* § 1485, at 341 (1833) (in military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power").

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." *The Apollon,* 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the "power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety." *Duncan v. Kahanamoku,* 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. *See, e.g., The Prize Cases,* 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *Kahanamoku,* 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity" for emergency measures); *United States v. Smith,* 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); *see also* 3 Story, *Commentaries* § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

This Office has maintained, across different administrations and different political parties, that the President's constitutional responsibility to defend the nation may justify reasonable, but warrantless, counter-intelligence searches. In 1995, we recognized that the executive branch needed flexibility in conducting foreign intelligence surveillance. Memorandum for Michael Vatis, Deputy Director, Executive Office for National Security, From Walter Dellinger, Assistant Attorney General, *Re: Standards for Searches Under Foreign Intelligence Surveillance Act* (Feb. 14, 1995). In 1980, this Office also said that "the lower courts – as well as this Department – have frequently concluded that authority does exist in the President to authorize such searches regardless of whether the courts also have the power to issue warrants for those searches." Memorandum for the Attorney General, from John M. Harmon, Assistant Attorney General, *Re: Inherent Authority* at 1 (Oct. 10, 1980). Based on similar reasoning, this Office recently concluded that the President could receive materials, for national defense purposes, acquired through Title III surveillance methods or grand juries. *See* Memorandum for Frances Fragos Townsend, Counsel, Office of Intelligence Policy and Review, from Randolph D. Moss, Assistant Attorney General, *Re: Title III Electronic Surveillance Material and the Intelligence Community* (Oct. 17, 2000); Memorandum for Gerald A. Schroeder, Acting Counsel, Office of Intelligence Policy and Review, from Richard L. Shiffrin, Deputy Assistant Attorney General, *Re: Grand Jury Material and the Intelligence Community* (Aug. 14, 1997); *Disclosure of Grand Jury Matters to the President and Other Officials*, 17 Op. O.L.C. 59 (1993). As the Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary for its effective exercise.

This examination of the government's interest demonstrates that the current situation, in which Congress has recognized the President authority to use force in response to a direct attack on the American homeland, has changed the calculus of a reasonable search. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. *See, e.g., Romero v. Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1995), *cert. denied,* 516 U.S. 1073 (1996); *O'Neal v. DeKalb County*, 850 F.2d 653 (11th Cir. 1988). Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and of its citizens. *Cf. In re Neagle*, 135 U.S. 1 (1890); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862). If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.

III.

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Nonetheless, FISA itself is not required by the Constitution, nor is it necessarily the case that its current standards match exactly to Fourth Amendment standards. Rather, like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. Thus, it is wholly appropriate to amend FISA to bring its provisions into line with changes in the Fourth Amendment's reasonableness calculus. As outlined above, that calculus has shifted in light of the September 11 attacks and the increased counter-terrorism threat.

This is not to say that FISA searches would be constitutional no matter how little foreign intelligence purpose is present in the warrant application. We do not disagree with the analysis of the courts that it is the national security element in the search that justifies its exemption from the standard law enforcement warrant process. After the enactment of FISA, for example, courts have emphasized the distinction between searches done to collect foreign intelligence and those undertaken for pursuing criminal prosecutions. Although this may be due, in part, to a statutory construction of the FISA provisions, the courts' language may be seen as having broader application. As the Second Circuit has emphasized, although courts, even prior to the enactment of FISA, concluded that the collection of foreign intelligence information constituted an exception to the warrant requirement, "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal prosecutions." *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). The *Duggan* Court held that FISA did not violate the Fourth Amendment because the requirements of FISA "provide an appropriate balance between the

individual's interest in privacy and the government's need to obtain foreign intelligence information." *Id.* at 74. However, the court's holding was made in the context of acknowledging the reasonableness of "the adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation." *Id.* at 73. As such, the court's finding that the purpose of the surveillance was to secure foreign intelligence information, and not directed towards criminal prosecution, may very well be of constitutional magnitude.

Similarly, the Ninth Circuit found that the lowered probable cause showing required by FISA is reasonable because, although the application need not state that the surveillance is likely to uncover evidence of a crime, "the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence, [and therefore] such a requirement would be illogical." *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (Kennedy, J.).[4] And consistent with both the language of the Second and Ninth Circuits, the First Circuit, in upholding the constitutionality of FISA, explained that "[a]lthough evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance [and therefore] [t]he act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches." *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (citations omitted), *cert. denied,* 506 U.S. 816 (1992).

On the other hand, it is also clear that while FISA states that "the" purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, so long as the surveillance also has a legitimate foreign intelligence purpose. FISA itself makes provision for the use in criminal trials of evidence obtained as a result of FISA searches, such as rules for the handling of evidence obtained through FISA searches, 50 U.S.C. §§ 1801(h) & 1806, and procedures for deciding suppression motions, *id.* § 1806(e). In approving FISA, the Senate Select Committee on Intelligence observed: "U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassination, kidnapping, and terrorist acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area." S. Rep. No. 95-701, at 10-11 (1978). The Committee also recognized that "foreign counterintelligence surveillance frequently seeks information needed to detect or anticipate the commission of crimes," and that "surveillances 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 prosecution are more appropriate." *Id.* at 11.

The courts agree that the gathering of counter-intelligence need not be the only purpose of a constitutional FISA search. An "otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial." *Duggan,* 743 F.2d at 78. This is due to the recognition that "in many cases the concerns of the government with respect to foreign intelligence will overlap

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[4] The Ninth Circuit has reserved the question of whether the "primary purpose" test is too strict. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988).

those with respect to law enforcement." *Id.* In order to police the line between legitimate foreign intelligence searches and law enforcement, most courts have adopted the test that the "primary purpose" of a FISA search is to gather foreign intelligence. *See id.*; *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). Not all courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the "primary purpose" is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988). No other Circuit has explicitly held that such a formulation would be unconstitutional.

In light of this case law and FISA's statutory structure, we do not believe that an amendment of FISA from "the" purpose to "a" purpose would be unconstitutional. To be sure, it is difficult to predict with exact certainty where the courts would draw the line in the context of balancing individual privacy interests and government foreign policy concerns. So long, however, as the government has a legitimate objective in obtaining foreign intelligence information, it should not matter whether it also has a collateral interest in obtaining information for a criminal prosecution. As courts have observed, the criminal law interests of the government do not taint a FISA search when its foreign intelligence objective is primary. This implies that a FISA search should not be invalid when the interest in criminal prosecution is significant, but there is still a legitimate foreign intelligence purpose for the search. This concept flows from the courts' recognition that the concerns of government with respect to foreign policy will often overlap with those of law enforcement.

Further, there are other reasons that justify the constitutionality of the proposed change to FISA. First, as an initial matter, the alteration in the statute could not be facially unconstitutional. As the Court has held, in order to succeed a facial challenge to a statute must show that the law is invalid "in every circumstance." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 699 (1995). As the Court made clear in *United States v. Salerno*, 481 U.S. 739 (1987), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. Such a challenge would fail here. Even if FISA were amended to require that "a" purpose for the search be the collection of foreign intelligence, that class of searches would continue to include both searches in which foreign intelligence is *the only* purpose and searches in which it is the *primary* purpose – both permissible under current case law.

Second, amending FISA would merely have the effect of changing the statute to track the Constitution. Courts have recognized that the executive branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. Although the few courts that have addressed the issue have followed a primary purpose test, it is not clear that the Constitution, FISA, or Supreme Court case law requires that test. It may very well be the case that the primary purpose test is more demanding than that called for by

the Fourth Amendment's reasonableness requirement. Adopting the proposed FISA amendment will continue to make clear that the government must have a legitimate foreign surveillance purpose in order to conduct a FISA search. It would also recognize the possibility that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect the national security, the courts should not deny him the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution. At the same time, however, it still remains the province of the FISA court to determine whether such searches are constitutional by following a primary purpose test, or a less severe standard, such as requiring only a "significant" or "substantial" purpose. By altering the FISA standard to "a" purpose, Congress would allow the government to file applications that would be consistent with whatever Fourth Amendment standard the FISA court chooses.

To be sure, the government might seek a FISA warrant where "a" foreign intelligence purpose is present, but "the primary" purpose is to obtain evidence in furtherance of a criminal investigation. The fact that the search is aimed at furthering a criminal investigation, which only incidentally promotes the national security and our foreign affairs interests, probably would not exempt the search from the usual probable cause requirements of the Fourth Amendment. Once the objective in acquiring the information is aimed primarily at effecting a criminal prosecution, as opposed to gathering intelligence information for counterintelligence purposes, the case may be more like *Keith* than it is like *Truong Dinh Hung*. Rather than being a matter of judicial second-guessing of the executive branch's determination that a foreign intelligence search is necessary, the objective would center instead on the desire to obtain information for a criminal prosecution.

In these circumstances, however, the FISA amendment would not permit unconstitutional searches. A court could still conclude that there is no real distinction between the law enforcement objective with incidental national security considerations, despite the fact that it arises in the foreign intelligence context, and the objective at issue in *Keith*. Once the primary purpose of the search is to further a criminal prosecution of one or more individuals, then absent exigent circumstances it would seem that the core principles of the Fourth Amendment are triggered, requiring the reasonableness determination of a neutral magistrate based on the full probable cause standard of the Fourth Amendment. No longer would it be a question of conducting the "delicate and complex decisions that lie behind foreign intelligence surveillance," *Truong Dinh Hung*, 629 F.2d at 913, nor would it primarily be a question of the "importance of particular information to the security of the United States" or "diplomacy and military affairs," *id.* at 913-14. A court could decide that the warrant instead asked whether there are sufficient grounds to search premises or to conduct surveillance of private individuals for purposes of pursuing criminal prosecutions. In such a context, "individual privacy interests come to the fore and government foreign policy concerns recede." *Id.* at 915.

A FISA court still remains an Article III court. As such, it still has an obligation to reject FISA applications that do not truly qualify for the relaxed constitutional standards applicable to national security searches. Rejecting an individual application, however, would not amount to a declaration that the "a" purpose standard was unconstitutional. Rather, the court would only be

interpreting the new standard so as not to violate the Constitution, in accordance with the canon of statutory construction that courts should read statutes to avoid constitutional difficulties. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Amending FISA to require only "a" purpose merely removes any difference between the statutory standard for reviewing FISA applications and the constitutional standard for national security searches.

Third, it is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier in this memo, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that of defending the nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might today. Correspondingly, changing the FISA standard to "a" purpose will allow FISA warrants to issue in that class of searches. A lower standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. Amending FISA only recognizes that the Fourth Amendment standards will shift in reaction to our changed national security environment.

Fourth, amending FISA in this manner would be consistent with the Fourth Amendment because it only adapts the statutory structure to a new type of counter-intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that "[I]ntelligence and criminal law enforcement tend to merge in [the] area" of foreign counterintelligence and counterterrorism. S. Rep. No. 95-701, at 11. September 11's events demonstrate that the fine distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time, received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, will have to take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation. As a result, it is likely that courts will allow for more mixture between foreign intelligence gathering and domestic criminal investigation, at least in the counter-terrorism context. Changing the FISA standard from "the" purpose to "a" purpose would be consistent with this likely development.

Conclusion

For the foregoing reasons, we believe that changing FISA's requirement that "the" purpose of a FISA search be to collect foreign intelligence to "a" purpose will not violate the Constitution.