SHIFTING THE FISA PARADIGM: PROTECTING CIVIL LIBERTIES BY ELIMINATING EX ANTE JUDICIAL APPROVAL

The legal-academic reaction to the revelation of the National Security Agency's secret surveillance program (the Terrorist Surveillance Program, or TSP) was swift, vigorous, and almost universally negative.[1] Primary attention centered on the fact that the TSP operated entirely outside of the system of ex ante judicial review put in place by the Foreign Intelligence Surveillance Act of 1978[2] (FISA). Under the proposed amendments to FISA currently under consideration in Congress, however, not only would the particular brand of surveillance utilized by the TSP be subject only to executive authorization, but so would many of the foreign intelligence surveillance techniques that had previously required ex ante approval from the secretive federal court that FISA created for that purpose, the Foreign Intelligence Surveillance Court (FISC). These legislative proposals therefore squarely present the question whether, and to what extent, ex ante judicial approval of foreign intelligence surveillance is necessary and desirable.

Part I of this Note provides a brief background of FISA's development and the current legislative proposals' positions on the necessity of ex ante judicial approval for foreign intelligence surveillance. Part II considers FISA's misplaced reliance on ex ante judicial review and rejects attempts on the part of some commentators to correct this problem through the enhancement of the judicial role. Part III offers a reconceptualization of the legal treatment of foreign intelligence surveillance, arguing that as both a constitutional and a policy matter it is necessary to rely primarily on political checks. Viewing the recent legislative proposals in this light, it seems that removing ex ante judicial review may ultimately enhance protection of liberty if several key political checks are included. Part IV concludes.

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1 *See* John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 567 (2007) ("Fire rained down not only from the left, but also from the right."). For a description of the TSP, see John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 106–22 (2006); and Katherine Wong, Recent Development, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 518–24 (2006).

2 Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1862 (West 2003 & Supp. 2007)).

I. FISA AND EX ANTE JUDICIAL APPROVAL

A. A Brief History of FISA

Although the political developments leading to the enactment of FISA can be traced deep into American history,[3] the statute's immediate catalyst was the work of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities. The Church Committee, as it was popularly known, was "convened to investigate affairs surrounding the Watergate scandal and secret executive surveillance of political enemies."[4] Its final report detailed a startling history of constitutional violations stemming from electronic surveillance conducted under the malleable rubric of "national security."[5] Surveillance had "seriously infringed . . . Fourth Amendment Rights" under "vague and elastic standards," leading to the government's accumulation of "vast amounts of information — unrelated to any legitimate government interest — about the personal and political lives of American citizens," and creating a powerful "chilling effect."[6]

When Congress set out to curb the abuses detailed in the Church Committee Report, the system it created relied heavily on ex ante judicial approval through the issuance of warrants. FISA constituted two Article III courts to implement the Act: the Foreign Intelligence Surveillance Court (FISC), composed of seven federal district court judges, which would issue orders authorizing surveillance,[7] and the Foreign Intelligence Surveillance Court of Review (FISCR), composed of three circuit court judges, which would hear appeals from denials.[8] A FISC order was required to conduct electronic surveillance unless

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[3] *See* William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1219–28 (2007).

[4] Elizabeth Gillingham Daily, *Beyond "Persons, Houses, Papers, and Effects": Rewriting the Fourth Amendment for National Security Surveillance*, 10 LEWIS & CLARK L. REV. 641, 645 (2006); *see also* Diane Carraway Piette & Jesselyn Radack, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL'Y REV. 437, 486 (2006) ("FISA was a compromise forged in the fires of controversy created by Watergate, COINTELPRO, and the fifty-year litany of abuses meticulously documented in the Church Committee Report. FISA was a compromise designed to protect the American people from an overreaching, over-intrusive, and unchecked government while still allowing the government to conduct vital surveillance for foreign intelligence purposes with judicial oversight.").

[5] *See* S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE, S. REP. NO. 94-755 (1976) [hereinafter CHURCH COMMITTEE REPORT], *available at* http://www.aarclibrary.org/publib/church/reports/contents.htm.

[6] Banks, *supra* note 3, at 1227 (quoting S. REP. NO. 95-604, at 8 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3909) (internal quotation marks omitted).

[7] FISA § 103(a), 92 Stat. at 1787 (codified as amended at 50 U.S.C.A. § 1803).

[8] *Id.* § 103(b).

the Attorney General issued a written certification under oath[9] certifying that the surveillance was "solely directed at" foreign powers,[10] carried "no substantial likelihood" of intercepting communication of a U.S. person,[11] and would be conducted with certain minimization procedures,[12] in which case the Attorney General could authorize warrantless surveillance for up to one year.[13] In the alternative, the Attorney General could seek an order from the FISC authorizing surveillance by submitting an application that included, inter alia, the identity of the applying officer, the identity of the surveillance target, "a statement of the facts and circumstances relied upon by the applicant to justify his belief" that the surveillance targeted a foreign power, "a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance," and statements attesting to the necessity and propriety of electronic surveillance.[14] The FISC was required to enter an order if the attestations of the Attorney General met the statutory standards.[15]

Three decades of amendments to FISA[16] have lowered the standards for a FISA order, a shift that has itself indirectly removed power from the courts by limiting the scope of their review. Yet FISA's reliance on ex ante judicial approval has remained central. Both defend-

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[9] *Id.* § 102(a)(1).

[10] *Id.* § 102(a)(1)(A). More particularly, the surveillance had to be directed at "the contents of communications transmitted by means of communications used exclusively between or among foreign powers," *id.* § 102(a)(1)(A)(i), or at "the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power," *id.* § 102(a)(1)(A)(ii).

[11] *Id.* § 102(a)(1)(B).

[12] *Id.* §§ 102(a)(1)(C), 102(a)(2). Minimization procedures generally were meant to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." *Id.* § 101(h)(1).

[13] *Id.* § 102(a)(1).

[14] *Id.* § 104.

[15] *Id.* § 105(a).

[16] *See* CONG. RESEARCH SERV., AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) (2006), *available at* http://www.fas.org/sgp/crs/intel/m071906.pdf. The most recent major amendments to FISA prior to those discussed below occurred in the 2001 Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.). Two commentators summarize the changes as follows:

> First, the amendments approve searches where criminal prosecution of individuals is the primary purpose of the search, so long as a significant intelligence purpose remains. . . . Second, the Act increases the number of judges on the FISA court from seven to eleven. Third, the Act expands FISA's coverage with respect to certain data gathering devices and business records. Finally, the Act also amends FISA to include a private right of action for private citizens who are illegally monitored.

Tara M. Sugiyama & Marisa Perry, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149, 155 (2006) (footnotes omitted).

ers and critics of FISA rely heavily on the role of the judiciary in foreign intelligence collection: the former cite the role of the FISC as a central legitimizing factor for FISA,[17] while the latter demand a more active role for the judiciary, describing FISC review as insufficiently rigorous.[18] Indeed, the proposition that ex ante judicial review of some kind is at least desirable and possibly necessary in a broad range of cases may be the only common ground in the discussion. In light of the substantial changes that have transformed the statute over the past three decades, perhaps the one basic element undergirding the statutory scheme — that is, the one constant legitimizing factor — is the role of the FISC.

B. The Legislative Debate over FISA

In August of 2007, in response to the Bush Administration's claims that FISA was in need of modernization,[19] Congress passed the Protect America Act.[20] The most important change was to the definition of "electronic surveillance": by stating that the term shall not be "construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States,"[21] the new law eliminated the need for a FISC order for a major category of surveillance. In addition:

> The law further modernize[d] FISA by allowing the executive branch to conduct warrantless surveillance without FISA court approval where the target of surveillance is located in a foreign country, permitting the Attorney General to direct a third-party to provide the government with "information, facilities, and assistance" to obtain the desired electronic surveillance information, and requiring the Attorney General to submit to the FISA court [for approval for general use] those procedures used to collect

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[17] *See, e.g.*, 150 CONG. REC. S6099 (daily ed. May 21, 2004) (statement of Sen. Kyl) ("[T]he USA PATRIOT Act preserves the historic role of courts by ensuring that the vital role of judicial oversight is not diminished." (quoting *Preventing and Responding to Acts of Terrorism: A Review of Current Law: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Deputy Att'y Gen. James Comey)) (internal quotation marks omitted)).

[18] *See, e.g.*, JERRY BERMAN, JIM DEMPSEY & NANCY LIBIN, CDT ANALYSIS OF THE TERRORIST SURVEILLANCE ACT OF 2006 (2006), http://www.cdt.org/security/20060324dewine analysis.pdf (arguing that "[a]fter-the-fact review by congressional subcommittees is not a substitute for the prior judicial approval that the Fourth Amendment requires," especially "in the national security context, where the government can investigate legal activities, conduct broader and secret investigations, and withhold after-the-fact notice from the target of surveillance").

[19] *See, e.g.*, *Hearing on FISA Before the S. Select Comm. on Intelligence*, 110th Cong. (2007) (written statement of Kenneth L. Wainstein, Assistant Att'y Gen. for the National Security Division, United States Department of Justice), *available at* http://www.usdoj.gov/nsd/testimony/WainsteinTestimony5-01-07SSCI.pdf ("We should restore FISA to its original focus on establishing a framework for judicial approval of the interception of communications that substantially implicate the privacy interests of individuals in the United States.").

[20] Pub. L. No. 110-55, 121 Stat. 552 (2007) (to be codified at 50 U.S.C. §§ 1803, 1805A–1805C).

[21] *Id.* § 105A, 121 Stat. at 552.

> information about non-U.S. persons located in a foreign country to ensure that the target is outside the United States.[22]

However, the Protect America Act's changes expired in February of 2008 pursuant to the Act's sunset provision.[23] Thus, Congress merely postponed the basic question of whether FISA would continue to rely on ex ante approval of surveillance via FISC orders, or whether the role of the court would be substantially reduced.

As of this Note's publication, the Senate and House of Representatives remained at an impasse over what direction to take.[24] The Senate passed a bill[25] that would make much the same subtraction from FISC pre-approval as did the Protect America Act, albeit in a different way. It provides that "the Attorney General and Director of National Intelligence may authorize jointly, for periods of up to 1 year, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information"[26] so long as there is neither an intentional targeting of a person known to be in the United States[27] nor a significant purpose of acquiring the communication of a person reasonably believed to be within the United States.[28] Additionally, it allows the Attorney General and Director of National Intelligence to issue directives requiring telecommunications companies to provide certain information, reviewable only upon a petition of the company alleging the order's illegality.[29]

Under this scheme, the role of the FISC is very different. Rather than issue ex ante orders authorizing surveillance, the FISC would perform ex post review of the government's collection of information.[30]

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[22] Joshua H. Pike, Note, *The Impact of a Knee-Jerk Reaction: The Patriot Act Amendments to the Foreign Intelligence Surveillance Act and the Ability of One Word To Erase Established Constitutional Requirements*, 36 HOFSTRA L. REV. 185, 235 (2007) (quoting Protect America Act § 2, 121 Stat. at 552) (footnotes omitted).

[23] *See* Protect America Act § 6(c), 121 Stat. at 557.

[24] To be sure, much of the political debate has centered on whether or not to confer immunity upon telecommunications companies that previously participated in the TSP.

[25] *See* S. 2248, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.2248.RS:.

[26] *Id.* sec. 101, § 702(a).

[27] *Id.* sec. 101, § 702(b)(1).

[28] *Id.* sec. 101, § 702(b)(2).

[29] *Id.* sec. 101, § 702(h).

[30] *Id.* sec. 101, § 702(i)(5) ("If the Court finds that a certification required by subsection (g) contains all of the required elements and that the targeting and minimization procedures required by subsections (e) and (f) are consistent with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the continued use of the procedures for the acquisition authorized under subsection (a)."). Targeting procedures are used to identify United States persons abroad so as not to knowingly target them. *Id.* sec. 101, § 702(e). Minimization procedures are used to curtail the harm from the accidental acquisition of information about U.S. persons. *Id.* sec. 101, § 702(f). The certification requirement reflects the affirmations of the Attorney General and the Director of National Intelligence that the substantive standards are met. *Id.* sec. 101, § 702(g).

This would have the effect of "essentially leav[ing] the Protect America Act intact and permit[ting] the government to collect all communications coming into and out of the United States without any prior court review, without any suspicion of wrongdoing, and without any limits on how such information can be used once collected."[31] While the pre-approval role of the FISC would be retained for purely domestic interceptions, this bill would drastically limit the number of situations in which an ex ante order would be required.

The House bill passed in response[32] takes quite a different approach. Most fundamentally, the bill would essentially employ FISA's current ex ante approval arrangement for "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[33] Under the bill, as in FISA itself, surveillance could only be conducted pursuant to a FISC order or the Attorney General's certification of an emergency situation.[34]

Moreover, the House version would institute several new checks and oversight provisions. First, it would require the Attorney General to adopt internal guidelines and the Director of National Intelligence to adopt a training program.[35] Second, it would increase reporting requirements.[36] Third, it would require review by the inspectors general of the relevant agencies.[37] Fourth, it would establish a "Commission on Warrantless Electronic Surveillance Activities" backed by subpoena power and charged with investigating past warrantless wiretapping.[38] Finally, it includes an earlier sunset than the Senate bill.[39]

II. THE CASE AGAINST EX ANTE JUDICIAL APPROVAL

A. Limitations of Ex Ante Judicial Review

The FISC approves virtually every application for an order with which it is presented. According to Electronic Privacy Information Center (EPIC) statistics, the court denied only five applications from

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[31] Caroline Fredrickson & Michelle Richardson, ACLU Letter to the Senate Urging No Votes on Any Bill that Would Authorize Warrantless Wiretapping or Grant Immunity to Telecoms (Feb. 4, 2008), *available at* http://www.aclu.org/safefree/general/33909leg20080204.html.

[32] *See* H.R. 3773, 110th Cong. (as amended by the House, Mar. 14, 2008), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.3773.EAH:.

[33] *Id.* sec. 101, § 702(a).

[34] *Id.*

[35] *Id.* sec. 101, § 702(f).

[36] *See, e.g.*, *id.* sec. 103.

[37] *Id.* sec. 110.

[38] *Id.* sec. 301.

[39] *Compare id.* sec. 403(b)(1) (sunset provision of Dec. 31, 2009), *with* S. 2248, 110th Cong. sec. 101(c)(1) (2008) (sunset provision of Dec. 31, 2011).

its inception through 2006.[40] In that time, it has approved thousands of others, including a new high of 2176 in 2006.[41] Of course, "[i]t is possible to draw divergent conclusions from this data. One could infer that the extensive FISA safeguards have forced the Executive to self-censor its requests. One could also argue, however, that the courts act merely as a 'rubber stamp' whenever the Executive invokes national security."[42] Upon analyzing FISA's structure and track record, the nature of electronic surveillance in service of national security, and more general separation of powers and national security lessons, it seems that something more like the latter is the ultimate result of FISA.

Limitations inherent in the project of judicial pre-approval of national security surveillance render the system unable to perform the function for which it was created; each of the problems described below mutually reinforces the others, leading to systemic ineffectiveness. In the absence of the notice requirements that attach in domestic surveillance,[43] and in light of the ex parte nature of FISC proceedings, no opportunity for meaningful review may ever present itself.[44] "The potential for abuse is substantial, since all applications remain sealed and unavailable to the public, and since targets are never notified that they have been under surveillance."[45]

1. Non-adversariality. — One of the most striking elements of the FISA system is the total absence of adversariality. Because the collection of intelligence in this context requires by its very nature that the surveilled party not receive notice in advance, the ex ante approval system is almost by definition also ex parte. This puts the FISC in an "anomalous position,"[46] in the words of the current Attorney General, similar to that of a court reviewing FISA materials for admission in a criminal case. In such situations, "[t]he judge is forced not only to act as an arm of the prosecution in weighing the prosecution's arguments about whether disclosure would or would not compromise national security, but also to act as a defense lawyer in determining whether the

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[40] Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979–2006, http://epic.org/privacy/wiretap/stats/fisa_stats.html (last visited May 12, 2008).

[41] *Id.*

[42] Robert A. Dawson, *Shifting the Balance: The D.C. Circuit and the Foreign Intelligence Surveillance Act of 1978*, 61 GEO. WASH. L. REV. 1380, 1397 (1993).

[43] *See* Kelly J. Smith, Note, *An Enemy of Freedom:* United States v. James J. Smith *and the Assault on the Fourth Amendment*, 39 LOY. L.A. L. REV. 1395, 1417 (2006) (comparing notice requirements of FISA with those governing domestic surveillance cases).

[44] *See, e.g.*, *id.* at 1396–97; *see also* Andrew Adler, Note, *The Notice Problem, Unlawful Electronic Surveillance, and Civil Liability Under the Foreign Intelligence Surveillance Act*, 61 U. MIAMI L. REV. 393, 407–08 (2007) (describing the extremely narrow instances in which notice is required).

[45] David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 311 (1996).

[46] Michael B. Mukasey, *Secrecy and the Criminal Justice System*, 9 J.L. & POL'Y 9, 11 (2000).

information is useful to the defendant."[47] Similarly, in reviewing a FISA application, the FISC must attempt the difficult, if not impossible, task of simultaneously occupying the roles of advocate and neutral arbiter — all without the authority or ability to investigate facts or the time to conduct legal research.[48] The judge lacks a skeptical advocate to vet the government's legal arguments, which is of crucial significance when the government is always able to claim the weight of national security expertise for its position. It is questionable whether courts can play this role effectively, and, more importantly, whether they should.[49]

2. Reliance on Executive Representations. — One frequently overlooked element of the FISA system is its almost complete reliance upon the Executive's representations and willingness to abide by the statutory terms.[50] This would be all the more true if Congress lowers the degree of factual specificity necessary for issuance of a FISC order, a change that is included in both the Senate and House bills.[51] Even under the current standard, however, the FISC cannot inquire behind the representations made by the applicant; so long as the applicant presents a "statement of facts showing that there are reasonable grounds"[52] for the order to issue, "the judge shall enter an ex parte order as requested."[53]

There is a strong connection between the difficulties of relying on executive branch representations and the ex parte nature of the FISC inquiry: the FISC lacks the presence of an adversarial voice drawing into focus any concerns with an application. In this sense, the two problems are mutually reinforcing. Indeed, the FISC on one occasion detailed "misstatements and omissions of material facts" that the gov-

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[47] *See id.* at 11–12.

[48] *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–84 (1978).

[49] Despite argument to the contrary, the FISC's proceedings, like criminal search warrants, are generally believed to meet Article III's requirement of an actual case or controversy. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 1105 n.663 (2008) (citing *In re* Sealed Case, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002); United States v. Megahey, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982)). Yet this apparent constitutional permissibility does not solve the related practical problems just outlined.

[50] As demonstrated by the TSP, the government can always conduct surveillance outside of any statutory parameters. While this risk is not unique to the FISA scheme, it is perhaps uniquely worrying given that, absent intentional disclosure, well-conducted surveillance is specifically designed not to be detected.

[51] *See* S. 2248 sec. 104 (replacing requirements of "detailed description" and "statement" with those of "summary description" and "summary statement"); H.R. 3773 sec. 104 (same).

[52] 50 U.S.C.A. § 1861(b)(2)(A) (West 2003 & Supp. 2007).

[53] *Id.* § 1861(c)(1) (emphasis added).

ernment confessed "in some 75 FISA applications,"[54] problems that did not come to light at the time the orders were issued. In this context it is also worth noting that the Executive has never actually accepted that it is bound by FISA, citing inherent presidential authority over national security under Article II of the Constitution.[55] The current administration acted in part on this basis in operating the TSP.[56] Lacking the ability to initiate an inquiry beyond what the Executive brings to its attention, the FISC's oversight of the process is substantially controlled by the very entity it is designed to oversee.

3. Institutional Limitations of the Judiciary. — Even if the above problems could be overcome, institutional factors that are inherent in the national security arena will always function to limit the ability of the judiciary to serve as an effective check. First, the surveillance that FISA deals with necessarily involves secrecy, inherently requires policy judgments, and takes place in the context of the increased powers of the Executive in the national security arena. As a result, policymakers are rightly fearful of giving too much review power to courts and face inevitable pressure to scale back the amount of decisionmaking authority left to the judiciary.

Second, the courts are, and have always been, extremely passive in exercising jurisdiction over cases touching upon national security, both because of the reasons just noted (political judgment and executive power) and because of resultant concerns for institutional legitimacy and judicial restraint.[57] Courts tend to be highly deferential because of "concern for the efficiency and expertise of the nation's foreign intelligence process and the deleterious effects that might result from judi-

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[54] *See In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620 (FISA Ct. 2002) (mem.).

[55] *See, e.g.*, John C. Eastman, *Listening to the Enemy: The President's Power To Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. INT'L AND COMP. L. 49, 55–56 (2006).

[56] *See, e.g.*, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–10 (2006) [hereianfter NSA WHITE PAPER], *available at* http://www.usdoj.gov/opa/whitepaperonnsalegal authorities.pdf. The administration also argued that Congress had authorized warrantless surveillance outside of FISA when it authorized the use of military force against the perpetrators of the 9/11 attacks. *Id.* at 10–28.

[57] *See* CIA v. Sims, 471 U.S. 159, 176 (1985) (reasoning that Congress left "complex political [and] historical" decisions involving intelligence to the executive branch because judges "have little or no background in the delicate business of intelligence gathering"); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

cial interference."[58] Judges are most certainly aware of the limits of their own policy expertise. This effect is greatly enhanced when judges must weigh the national security necessity ex ante, rather than being asked to review it after the fact.

Indeed, it is interesting to note that the scope of review exercised by the FISC has steadily narrowed over time. To be sure, it was narrow to begin with,[59] but both legislative action and limiting constructions applied by the courts themselves have narrowed the FISC's authority even further. For example, when Congress amended FISA to require only that national security be a "significant purpose," rather than the "primary purpose," of the surveillance for which authorization is sought,[60] the FISCR read the statutory shift quite broadly. It held that when surveillance of a foreign agent is undertaken for purposes of both national security and law enforcement, the government need only "entertain[] a realistic option of dealing with the agent other than through criminal prosecution" in order to satisfy the test.[61] The court reasoned that the new provisions "eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses."[62] Yet this seems a far less robust limit than the plain language or legislative history indicated: importantly, the legislature considered and rejected requiring only "a" rather than "a significant" purpose.[63] Given a hint of statutory ambiguity, then, the court effectively read the requirement of "significant purpose" out of the statute, resulting in a regime of even less exacting scrutiny. Ultimately, "[t]hrough a combination of government tactics, the mandate of the FISA court, and federal court interpretations of the FISA law, the FISA safeguards which were intended to balance individual rights against the government's claims of national security have been essentially eviscerated."[64]

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[58] 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, 804 (1989).

[59] The original FISA was "very permissive; it provide[d] for expansive surveillance powers with little judicial supervision," Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1289 (2004), especially because it only allowed the FISC to act "on the basis of the facts submitted," 50 U.S.C. § 1805(a)(3) (2000).

[60] *See supra* note 16.

[61] *In re* Sealed Case, 310 F.3d 717, 735 (FISA Ct. Rev. 2002).

[62] *Id.*

[63] *See, e.g.*, *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Jerry Berman, Executive Director, Center for Democracy and Technology).

[64] Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 100–01 (1999).

As a result, "[c]harging a panel of federal judges with insufficient background information on specific cases, and little intelligence experience, with approving foreign intelligence surveillance applications has resulted in an essentially rubber stamp process where applications are practically never denied."[65] Primary reliance on judicial oversight will virtually always tend toward deference, both in exercising jurisdiction and in determining individual cases.

4. The Nature of Terrorism. — Institutional limitations are especially pressing given the vagaries of "terrorism."[66] Substantial gray areas exist in distinguishing domestic from foreign and criminal from intelligence interests. Courts, fearful of treading too heavily in the national security arena, will be loath to tell the government that someone it has determined to be connected to terrorism is in fact being targeted unfairly for his or her religion or national origin.

Indeed, recent statutory developments have greatly clouded the already difficult task of making such distinctions. For example, the legislative move from "primary" to "significant" purpose discussed above, and the related tearing down of the "wall" that prevented information sharing between intelligence and law enforcement entities,[67] means that a court must accuse the government of not reasonably suspecting a target's involvement with terrorism if it is to deny an application. Similarly, the standard for pen/trap orders[68] was lowered from a showing that the device was used to communicate with an agent of a foreign power under the old 50 U.S.C. § 1842(c)(3) to a much lower showing of "relevant to an ongoing investigation" under the new 50 U.S.C. § 1842(c)(2). Whereas before the FISC may at least have been able to point to the relatively objective question of whether an individual was in fact an agent of a foreign power, the current loose standard would force the court to tell the government that the desired target bore no relevance to a terrorism investigation.

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[65] Bob Barr, *A Tyrant's Toolbox: Technology and Privacy in America*, 26 J. LEGIS. 71, 78 (2000).

[66] *See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that "heightened deference to the judgments of the political branches" may be appropriate in cases involving "terrorism or other special circumstances").

[67] *See generally* David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487 (2006).

[68] "Pen/traps collect addressing and routing information about communications — for example, which numbers are dialed by a particular telephone or the email addresses from which a particular email account receives messages. They may not be used to collect the content of communications." Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 845 (2007).

B. Harms of Ex Ante Judicial Review

Ex ante judicial review is not only of limited effectiveness, but it is also affirmatively harmful in several respects. Ex ante judicial approval imparts a broader imprimatur of validity than is warranted given the limited effectiveness of the review. Further, it clouds accountability and can be a cumbersome and intrusive process harmful to national security interests. In fact, "the creation of FISA courts may actually have resulted in *fewer* restrictions on the domestic surveillance activities of intelligence agencies"[69] because "[t]he secrecy that attends FISC proceedings, and the limitations imposed on judicial review of FISA surveillance, may insulate unconstitutional surveillance from any effective sanction."[70]

1. The Judicial Imprimatur. — The issuance of an order by the FISC confers a stamp of approval from the widely respected Article III courts. A FISC order makes a strong statement that a neutral arbiter has looked closely at the situation and found the surveillance warranted. Yet, as the set of limitations just discussed indicates, the protective force of a FISC order may not align with the actual vigor of the inquiry.

This disparity may give rise to several problems. First, changed circumstances following the issuance of the order may undermine the validity of the surveillance. Minimization procedures are largely unhelpful in solving this problem: "[T]he Act provides for the same kind of incoherent and largely unenforceable 'minimization' requirements that plague criminal wiretap statutes."[71] Much more importantly, the judicial order may mask and indeed later provide cover for improper governmental motives and improper intrusions on liberty.[72] In these situations, ex ante review may sanitize the improper surveillance. The presence of the judicial order may function to dissuade legislative or executive oversight entities from inquiry. Worse, judicial orders offer the potential for the government to hide behind the nominally objective, even if only minimally rigorous, scrutiny that they represent. Surveillance conducted for political reasons, for example, might escape detection, condemnation, and consequences — political, if not legal —

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[69] Barr, *supra* note 65, at 78 (emphasis added).

[70] William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 87 (2000).

[71] Barr, *supra* note 65, at 78.

[72] Of course, improper intrusions could have one of two causes: recklessness or intentional targeting for illegitimate reasons. Although the latter is obviously of primary concern, and is the primary focus of this Note, the former is also a major problem. *See, e.g.*, Mark S. Davies, *"Quotidian" Judges vs. Al-Qaeda*, 105 MICH. L. REV. 1107, 1111 (2007) (book review) (citing OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE 17, 205, 269 (2006)).

if that surveillance is given judicial protection.[73] Indeed, this sanitization could occur on an even broader level: ex ante judicial approval interferes with the healthy public skepticism that attends political actors and that may help keep the citizenry engaged in considering the difficult tradeoffs between liberty and security necessary in this context.

This is not to say that the judiciary should decline to play a constitutionally permissible role; rather, the point is that system designers concerned with protecting civil liberties should keep in mind the drawbacks of ex ante approval. In total, the capacity of ex ante approval to enable some of the most dangerous sorts of abuses far outweighs its middling ability to provide a useful check.

2. Clouded Accountability. — Although several of FISA's provisions recognize the need for clear lines of accountability, the statute's broad structure fails to account for this crucial element. A simple comparison is useful: The Attorney General would be far more politically exposed if he or she signed off on an improper emergency order, which permits an exception to the ex ante approval requirement, rather than a regular FISA order approved by the FISC. In fact, the emergency authorization procedures under 50 U.S.C. § 1805(f) recognize the need for accountability by requiring notice if the application is turned down after the Attorney General has authorized it on an emergency basis.[74] Similarly, the personal review provisions of § 1804(e) establish clear lines of authority for approval. But the presence of a judicial order authorizing surveillance permits a culpable official to escape the political consequences of his or her improprieties by using the court's approval as evidence of reasonableness, claiming reasonable reliance, or foisting blame upon the court.

Exposing the Attorney General — and through him or her the President — to the political consequences of these decisions is crucial for two reasons: First, it minimizes the possibility of politically motivated surveillance that would pass minimal judicial review, because such invasions of privacy would be seen as wholly illegitimate.[75] Second, it would both enable and force the American public to confront the fact that, ultimately, it is responsible for determining the proper balance between liberty and security. The public will be much more comfortable with allowing invasions of fellow citizens' privacy when judges authorize them. In the end, "if a government is intent on en-

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[73] Consider the effect on the condemnation of the incidents detailed in the Church Committee Report that might have occurred had they been given ex ante judicial approval. Even if ex post oversight is joined with ex ante approval, it may have such a sanitizing effect.

[74] *See* Adler, *supra* note 44, at 416–17. Curiously, notice is deemed acceptable here even though the general concerns about notifying potential suspects still seem to attach.

[75] Consider, for example, the Church Committee's analysis of the surveillance of Martin Luther King, Jr. *See* 3 CHURCH COMMITTEE REPORT, *supra* note 5, at 79–184.

gaging in interrogation to protect national security there is little the judges can do about it anyway."[76] Forcing citizens to think hard about their values is of particular importance in the context of a vague "war on terror" devoid of identifiable boundaries.

3. The Demands of National Security. — Finally, while the focus of this Note is on the protection of civil liberties, the current system may also do a poor job of promoting security. From an institutional competence perspective, it seems questionable that judges should occupy a gatekeeping role. Indeed, all the reasons discussed above that judges have invoked in reducing their own authority over such issues apply with equal force here.[77]

The inefficiencies of the current system are even more problematic. Given the permissiveness of the statutory standards and the FISA courts, inefficiency is the primary motivating force behind attempts to reduce judicial oversight. As DOJ has noted, "[n]umerous Congressional and Executive Branch reviews of the FISA process have recommended that the FISA process be made more efficient."[78] Others are more forthright, describing the FISC order procedures as "hopelessly slow and bureaucratic."[79] On the whole, "if we are seeking a model of judicial review that advances security, there is little reason to think that the FISA Court, at least as currently set up, advances that goal."[80]

C. The Inadequacy of Proposals to Strengthen Judicial Review

Several proposals in the literature have sought to correct perceived problems with FISA's review system by increasing reliance on the FISC. For the reasons discussed below, however, none is able at once to overcome the problems outlined in the previous sections, meet the requirements of workability, and adequately balance national security and liberty interests.

1. Introducing Adversariality into FISC Proceedings. — One possible approach is to make FISC proceedings adversarial by instituting

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[76] ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 208 (2007).

[77] *See, e.g.*, cases cited *supra* note 57.

[78] U.S. Dep't of Justice, Fact Sheet: Title IV of the Fiscal Year 2008 Intelligence Authorization Act, Matters Related to the Foreign Intelligence Surveillance Act (Apr. 13, 2007), http://www.usdoj.gov/opa/pr/2007/April/07_nsd_247.html.

[79] Editorial, *Fixing FISA*, NAT'L REV. ONLINE, Oct. 15, 2007, http://article.nationalreview.com/?q=OTQ2NmE3MGMwZDMyYzAwN2E4NjQ4MjU2YWY1NzhlOTc=.

[80] Davies, *supra* note 72, at 1112; *see also id.* at 1111–12 ("The reasons for this judicial ineffectiveness probably include that only the government presents its side of the story (though OIPR tries to consider all sides), that the procedural complications (timing and signature requirements, for example) overwhelm consideration of the factual substance of the application, and that there is a lack of meaningful appellate oversight (the FISA appeals court has sat only once).").

"a formal system for nongovernmental groups to present legal arguments to the court, or perhaps even a public defender type of office that would have the necessary security clearances to challenge the government in these proceedings."[81] Although such an approach addresses some of the concerns that arise with regard to the ex parte nature of FISA proceedings, it faces massive practical problems. For example, because this proposal would require giving the opposing entity time to review, investigate, and craft an argument, it would create huge tension with the need for dispatch in the application process. More importantly, the problem remains that the court would be required to directly trade off the values of security and liberty — the very same values that judges are loath to balance, especially in individual cases, and which necessarily require political and policy judgments.

2. Judicially Ordered Notice to Wrongfully Surveilled Persons. — Another approach would provide a stronger statutory cause of action for improper surveillance, adding an ex post review function to the FISC. Such a scheme would "provide compensation to individuals subject to the most grievous instances of unlawful electronic surveillance" by giving the FISC power to "screen for these violations and discretionarily notify an individual," and then compensate him or her if appropriate.[82] This approach is commendable for attempting to remedy the lack of adversariality and the fact that improper surveillance that occurs after a FISC order is issued — when either changed circumstances or invalid governmental motives never come to light because the government does not attempt criminal prosecution — may go unchecked.[83] But the suggested remedy, to broaden notice by making a "distinction . . . between disclosure that concretely threatens national security and disclosure that would merely embarrass the government,"[84] seems unworkable. Such line drawing necessarily involves crucial policy determinations that the courts are in a bad institutional position to make. Moreover, the ability of the remedy to provide a check on the government seems at best dubious and could even be viewed as permitting the government to purchase the ability to invade constitutional liberties.

3. Enjoining Ongoing Surveillance. — Finally, one commentator has argued for the creation of a cause of action to enjoin ongoing surveillance.[85] This suggestion, which was made in response to the D.C. Circuit's rejection of "ex parte in camera review of . . . claims of ongo-

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[81] *Id.* at 1112.

[82] Adler, *supra* note 44, at 399.

[83] *See id.* at 404–06.

[84] *Id.* at 424.

[85] Dawson, *supra* note 42, at 1411–13.

ing illegal surveillance"[86] in *ACLU v. Barr*,[87] would function as a sort of adjunct to the current ex ante approval regime. While it is perhaps reasonable for the court to "conduct[] an initial ex parte review without requiring the government to admit or deny publicly the existence, or non-existence, of any surveillance,"[88] the government would still face the obvious risk that, in granting a remedy, the court would necessarily disclose such surveillance. For example, if the wrongful surveillance at issue were part of a larger operation, then the court would have to balance the importance of the national security interest against the weight of a statutory or constitutional violation in deciding whether to grant a remedy that would inevitably disclose the violation.

III. THE PRIMACY OF POLITICAL CHECKS

In light of the limitations of ex ante judicial approval to protect civil liberties, it is necessary to consider an alternative approach. The most attractive solution is a framework that relies primarily on political checks. Such a system could force public consideration of the difficult weighing of liberty and security interests and ensure meaningful oversight of the government's conduct of surveillance.[89]

Ultimately, a combination of the two bills that the two houses of Congress have passed, if modified in several respects, would do the best job of protecting liberties while enabling efficient and effective surveillance. Whereas the Senate bill is preferable for drawing back the role of the judiciary in ex ante approval, the House bill offers a host of potentially powerful oversight mechanisms that are necessary to protect civil liberties.

A. Conceptualizing a System of Political Checks

At present, there appears to be a problem of circularity in justifying FISA: those who fear allowing the courts to impact national security argue that they are not active enough to impact it anyway, while those who fear abrogation of civil liberties argue that ex ante judicial approval is needed. As one commentator notes, "[t]he fear that a judicial review requirement would prevent the government from conducting surveillance seems overblown in light of the fact that the FISA court grants virtually all of the government's requests."[90] In effect, this

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[86] *Id.* at 1429.

[87] 952 F.2d 457 (D.C. Cir. 1991).

[88] Dawson, *supra* note 42, at 1427.

[89] While it differs in important respects from this Note, an excellent account of the need to eliminate reliance on ex ante orders is Nola K. Breglio, Note, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179 (2003).

[90] Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67, 129 n.365 (2006).

leaves the difficult decisions to the Executive but does not provide the political accountability necessary to permit the public to influence the way the Executive makes its choices. Moreover, a focus on "political judgments" would also maintain the flexibility the government needs to ensure the continued vitality of the nation that protects those liberties.

The testimony during the initial FISA hearings of two former Attorneys General, themselves responsible for authorizing foreign intelligence surveillance in the pre-FISA arrangement, is instructive. Former Attorney General Ramsey Clark observed that "we greatly exaggerate the safety and value of" a requirement that "all wiretaps . . . be approved by a judicial officer." Arguing that "[t]he idea that there can be a meticulous review of these applications by the Judiciary is contrary to our experience," he put primary emphasis on political checks through reporting requirements and congressional oversight and standard-setting.[91] Additionally, former Attorney General Elliot Richardson noted the "important role in assuring that this sensitive tool is not abused" to be played by the Senate, via both direct oversight and the confirmation of the Attorney General and Director of the FBI.[92]

More importantly, the legislative history suggests that the most consequential element of FISA is not its judicial review provisions. Rather, FISA's crucial move was to institute a reliance on the use of "public laws, publicly debated and adopted, which specify under what circumstances and under what restrictions electronic surveillance for foreign intelligence purposes can be conducted."[93] The reliance on political checks proposed in this Note avoids the problem identified by Congress when it initially enacted FISA and raised by the TSP — that "the substantial safeguards respecting foreign intelligence electronic surveillance [then] embodied in classified Attorney General proce-

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[91] *Warrantless Wiretapping and Electronic Surveillance: J. Hearings Before the Subcomm. on Admin. Practice and Procedure and the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and the Subcomm. on Surveillance of the S. Comm. on Foreign Relations*, 93d Cong. 68 (1974) [hereinafter *Joint Hearings*], *available at* http://www.cnss.org/fisa040374pt1.pdf.

[92] *Id.* at 18.

[93] H.R. REP. NO. 95-1283, at 21 (1978); *see also* S. COMM. ON THE JUDICIARY, 107TH CONG., INTERIM REPORT ON FBI OVERSIGHT IN THE 107TH CONGRESS, FISA IMPLEMENTATION FAILURES (2003), *available at* http://www.fas.org/irp/congress/2003_rpt/fisa.html ("We are also conscious of the extraordinary power FISA confers on the Executive branch. FISA contains safeguards, including judicial review by the FISA Court and certain limited reporting requirements to congressional intelligence committees, to ensure that this power is not abused. Such safeguards are no substitute, however, for the watchful eye of the public and the Judiciary Committees, which have broader oversight responsibilities for DOJ and the FBI. In addition to reviewing the effectiveness of the FBI's use of its FISA power, this Committee carries the important responsibility of checking that the FBI does not abuse its power to conduct surveillance within our borders. Increased congressional oversight is important in achieving that goal.").

dures" were not enough to overcome "the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties."[94] Here, the Executive is subject not merely to internally created standards that it might change or ignore at will, but also to those set down by the statute, which were themselves created through the public "weighing of important public policy concerns" that Congress performs.[95]

Congress is better situated constitutionally and better equipped institutionally to make the sort of value judgments and political determinations that are necessary to fulfill FISA's purposes. If "[t]he government may abuse FISA in situations like that involving the L.A. Eight, when intrusive electronic surveillance is undertaken based on political activities, rather than on support for terrorist activities,"[96] it seems that Congress will be much better than courts at sniffing out such violations and fashioning broader and more flexible remedies. If one hopes to realize the core purpose of FISA — as described by the ACLU, "to prevent future presidents from intercepting the 'international communications of American citizens whose privacy ought to be protected under [our] Constitution' ever again"[97] — then a new approach is needed.

B. Using Political Safeguards in Practice

In giving shape to a statutory framework that provides a set of political checks and balances, it is useful to delineate the various interests that ought to be protected. First, privacy should be safeguarded to the extent possible. Second, there is independent and functional value in encouraging public debate and conveying to the public a sense of responsibility for deciding the difficult issues at play. Third, there must be protection against unlawful executive action in order to give effect to Congress's intent to "assure the public that it could engage in constitutionally protected political dissent without fear of surveillance, thus facilitating the exercise of individual liberty that is fundamental to American society."[98]

1. Privacy Protection. — Several types of provisions would be useful in ensuring that the government does not intrude upon the privacy of either citizens or aliens. Both the Senate and House bills include appropriate minimization procedures. The House bill provides a

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94 H.R. REP. NO. 95-1283, at 21.

95 *Id.* at 68.

96 Banks & Bowman, *supra* note 70, at 130.

97 *Hearing on FISA Before the S. Select Comm. on Intelligence*, 110th Cong. (2007) (prepared statement of Caroline Fredrickson, Director, ACLU Washington Legislative Office) (quoting 3 CHURCH COMMITTEE REPORT, *supra* note 5, at 735).

98 Dawson, *supra* note 42, at 1387 (citing various sources of legislative history).

much-needed improvement over the woefully inadequate semiannual aggregated statistics reported under 50 U.S.C. § 1871. Ultimately, it seems permissible to entrust this job primarily to the Executive, with Congress focusing on ensuring that improper political motives do not seep into the process.

The Senate bill serves each of these interests by replacing weak ex ante judicial approval, yet it lacks several key safeguards. Elements of the House bill are necessary to ensure that a shift to political checks accomplishes these three purposes.

2. Public Engagement. — Putting Congress in the position of primary responsibility would have the effect not only of enabling it to exercise review, but in some ways of forcing it to do so. Congress would have to publicly debate and announce the applicable statutory standards, which, as noted, would mark a major departure from the TSP. This would require the public to give serious thought as to how to balance the competing demands in this area of the law. In addition, the American people would be able to demand accountability from their elected representatives to exercise adequate oversight. Thus, accountability could be demanded of both the overseeing Congress and the overseen Executive.

Particularly important in this regard are the sunset provisions. Although each of the bills provides a sunset, it seems preferable not to sunset the structural provisions of the law, but rather to arrive at a stable statutory framework while requiring more consistent, perhaps annual or biannual, revision of the substantive standards applied. "If we are to be a Government of laws, . . . lawmakers must face the responsibility to know what agents of the United States do in its name, to set the rule, and see that the rule is followed."[99] This would have the effect of consistently engaging the public and its elected officials in rebalancing liberty and current security demands while establishing more permanently an appropriate institutional structure to apply the extant standard.

3. Preventing Unlawful Action. — Of primary importance in this area is Congress's continuing monitoring of the conduct of surveillance. In this regard, the House bill's provision of consistent inspectors general review and internal guideline adoption, along with the Commission it proposes, are quite helpful.

However, care should be taken not to put exclusive reliance on intra-executive checks, and these reforms should include mandatory reporting and hearing requirements that would force Congress to take testimony under oath. Intensified reporting in accord with the suggestions of former Attorney General Clark is necessary: "full disclosure of

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[99] *Joint Hearings*, *supra* note 91.

time, place, persons involved and reasons for the surveillance" should be "repeated regularly" and, to the extent consistent with national security, publicly.[100] Also important is the Senate's advice and consent power, through which it could require prospective officials to commit to following the standards.

C. The Role of the Courts

While the limitations and dangers associated with ex ante judicial approval of national security surveillance counsel in favor of developing a new core means of protecting civil liberties in this arena, they in no way mandate a complete elimination of the judicial role. To the contrary, an appropriately modified role for the judiciary is of fundamental importance to address some of the limitations of the system of political checks. Ultimately, a return of the judiciary to its pre-FISA role of ex post reasonableness review would permit the federal courts to complement the proposed broader oversight system and to meet Fourth Amendment requirements by restoring judicial focus to individual constitutional rights and relaxing national security pressures on the courts.[101]

1. Fourth Amendment Strictures. — It is worth noting initially that FISA has always contemplated situations in which full-on ex ante judicial oversight is not necessary to permit domestic electronic surveillance. At present, FISA conceives of three situations in which a court order is not necessary. These are all situations in which the balance in favor of the government is most compelling because the risk to privacy interests is low, the need for dispatch is great, or a drastic change of circumstances takes place. First, 50 U.S.C. § 1802 gives the Attorney General power, upon written certification under oath, to authorize up to one year of electronic surveillance directed at communications "exclusively between or among foreign powers" or "technical intelligence . . . from property or premises under the open and exclusive control of a foreign power" so long as "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party" and minimization procedures are complied with. Second, under § 1805(f), the Attorney General may authorize emergency surveillance without court interference for seventy-two hours if he or she determines that a standard FISA order could not be acquired in time and that there is a sufficient "factual basis for issuance of an order." Finally, for fifteen days follow-

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[100] *Id.*

[101] This has the additional benefit of relieving the tension between justiciability requirements and the current quasi-regulatory and preapproval functions of the FISC. *See supra* note 49.

ing a declaration of war, § 1811 permits non-court-ordered, Attorney General–authorized surveillance.

Foreign intelligence surveillance occupies a unique spot in the Court's Fourth Amendment jurisprudence.[102] In *Katz v. United States*,[103] the Court issued perhaps its sternest statement on the obligation of obtaining a warrant prior to exercising a search,[104] while also extending Fourth Amendment protection to include electronic surveillance.[105] Importantly, however, the Court expressly reserved the issue of electronic surveillance in the national security context.[106] In *United States v. U.S. District Court*[107] (the *Keith* case), the Court again focused on the need for "prior judicial scrutiny" in rejecting the government's claim for an exception to the warrant requirement in the domestic national security context.[108] Yet once again, the Court made a crucial reservation: "[T]his case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."[109] It is thus an open constitutional question whether foreign intelligence surveillance falls within an exception to the Fourth Amendment's warrant requirement.

While full argumentation for the proposition that the Fourth Amendment embodies such an exception is beyond the scope of this Note,[110] the case law is clear that the true "touchstone of the Fourth Amendment is reasonableness,"[111] such that the Fourth Amendment only "[s]ometimes . . . require[s] warrants."[112] Especially in light of the increasing number of exceptions to the warrant requirement,[113] it seems likely that an exception is appropriate in the context of foreign intelligence surveillance for purposes of national security, not only in terms of meeting a more formalist reading of the Fourth Amendment, but even more forcefully meeting a functionalist reading, under which

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102 *See generally* Justin W. Whitney, Note, *FISA's Future: An Analysis of Electronic Surveillance in Light of the Special Needs Exception to the Fourth Amendment*, 47 WASHBURN L.J. 127 (2007).

103 389 U.S. 347 (1967).

104 *Id.* at 357 (explaining that searches conducted absent warrant are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions").

105 *Id.* at 353.

106 *Id.* at 358 n.23.

107 407 U.S. 297 (1972).

108 *Id.* at 320.

109 *Id.* at 321–22.

110 For a full account of the argument in favor of a "special needs" exception to the warrant requirement in the case of foreign intelligence surveillance, see NSA WHITE PAPER, *supra* note 56, at 36–41.

111 United States v. Knights, 534 U.S. 112, 118 (2001).

112 Illinois v. McArthur, 531 U.S. 326, 330 (2001).

113 *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring in the judgment).

the improved protections of civil liberties could render the decreased reliance on ex ante judicial review preferable under the Fourth Amendment.

2. Policy Benefits. — A proponent of a national security exception notes that "[t]he repeal of FISA . . . would simply effectuate the nation's return to its previous tradition."[114] Yet the obvious retort is that the very abuses detailed in the Church Committee report were a major product of that tradition. Still, the old tradition did have some benefits that can be obtained by coupling the ex post reasonableness role of reviewing courts with the political checks described above. For one, rather than shielding meaningful inquiry, as ex ante review can, ex post review may produce "a renewed focus on Fourth Amendment principles"[115] by both the judicial and political branches. Indeed, the more developed factual setting available in ex post review would help with the effort to define reasonableness.

Further, it could be argued that since only a small number of people are likely to be affected by surveillance, and especially given that those affected are likely to be disfavored or underrepresented groups such as members of minority religions or immigrants, the political process cannot be trusted to perform oversight. Yet ex post judicial review would remain a powerful check if the government seeks to use FISA-gathered information in other legal settings, such as criminal trials, habeas corpus proceedings, or motions for prospective relief. Ex post reasonableness review thus provides an important backstop to the oversight process.

IV. CONCLUSION

The current FISA system is illogical. Its purported benefits are at best questionable, and it features serious drawbacks in terms of the efficient functioning of national security surveillance and the numerous ways it undermines protections of liberty. While the Senate bill falls short of instituting the sort of robust political checks buttressed by ex post judicial review necessary to provide adequate protections, it offers an important paradigm shift in the way that FISA is conceived. This reconceptualization should be embraced and bettered by incorporating some of the terms of the House bill, rather than rejected as insufficiently protective of the role of the judiciary. Those concerned with protecting civil liberties should view an end to reliance on ex ante judicial review as a chance to develop real political checks that can vigorously protect both national security and liberty interests.

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[114] Breglio, *supra* note 89, at 217.

[115] *Id.*