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No. 97-280

IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

(1980–81)

REPORT

OF THE

SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

NOVEMBER 24 (legislative day, NOVEMBER 2), 1981.—Ordered to be printed

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REPORT

IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: 1980-81

I. INTRODUCTION

This report is submitted to the Senate by the Select Committee on Intelligence pursuant to section 108(b) of the Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783, 50 U.S.C. 1808(b), which provides:

> On or before one year after the effective date of this Act and on the same day each year for four years thereafter, the Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence shall report respectively to the House of Representatives and the Senate, concerning the implementation of this Act. Said reports shall include but not be limited to an analysis and recommendations concerning whether this Act should be (1) amended, (2) replaced, or (3) permitted to continue in effect without amendment.

This is the third report submitted by the Select Committee pursuant to the Act. The first report in 1979 concluded that the brief experience since all procedures of the Act had become applicable did not provide sufficient grounds for considering any modification.[1] The second report in 1980 examined several amendments proposed by the Executive branch and recommended that the Act be permitted to continue in effect pending further consideration of those amendments.[2] The 1980 report also raised questions concerning a decision by the Justice Department to obtain orders approving unconsented physical searches for foreign intelligence purposes from judges designated to serve on the Foreign Intelligence Surveillance Court established by the Act.

During the past year the Select Committee has continued to be kept informed by the Attorney General and the relevant agencies concerning implementation of the Act. Section 108(a) of the Act requires the

[1] Senate Report No. 96-359, p. 3.
[2] Senate Report No. 96-1017, p. 9.

Attorney General to inform the Select Committee fully, on a semiannual basis, concerning all electronic surveillance under the Act. Since the previous report to the Senate, the Select Committee has received two classified written reports from the Attorney General covering the periods September 1, 1970–February 28, 1981 and March 1, 1981–August 31, 1981. These reports have been supplemented by additional information provided at periodic meetings with representatives of the Attorney General and the agencies involved in electronic surveillance conducted under the Act.

II. STATISTICAL REPORT

Section 107 of the Act requires annual public reports to the Congress and the Administrative Office of the United States Courts setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under the Act; and (b) the total number of such orders and extensions either granted, modified, or denied. On April 22, 1981, Attorney General William French Smith submitted the following unclassified report to the Senate pursuant to this requirement:

> During calendar year 1980, the first full year the Act has been in effect, 319 applications were made for orders and extensions of orders approving electronic surveillance under the Act. The United States Foreign Intelligence Surveillance Court issued 322 orders granting authority to the Government for the requested electronic surveillances. No orders were entered which modified or denied the requested authority, except one case in which the Court modified an order and authorized an activity for which court authority had not been requested.

A detailed breakdown of the number of surveillances of foreign powers and agents of foreign powers in various categories is included in the Attorney General's semiannual classified reports to the Select Committee.

Heretofore, the time periods covered by the Attorney General's semiannual reports have not coincided with the calendar year periods covered by the unclassified statistical reports to the Congress. To ensure that the statistical bases for these reports are comparable, the Select Committee suggests that the next classified report of the Attorney General to the Committee cover the time period September 1, 1981–December 31, 1981. Thereafter, the two semiannual classified reports for each calendar year should have the same statistical base as the annual public report. This action should also alleviate somewhat the administrative workload involved in preparing these reports.

The public report for calendar year 1980 stated that there was "one case in which the Court modified an order and authorized an activity for which court authority had not been requested." The Select Committee has been informed of the pertinent circumstances and legal issues involved in that case. The principal question concerned interpretation of the term "electronic surveillance." The Act defines "electronic surveillance" to include "the installation or use of an electronic, mechanical, or other surveillance device in the United

States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." 50 U.S.C. § 1801(f)(4). In one case an application was made for an order approving use of a technique under § 1801(f)(4) where there was some question as to the circumstances in which a warrant would be required.

The application requested authority for use of the technique in limited circumstances, but the Court determined that judicial authority was required to use the technique under all circumstances of the particular case.

The Justice Department has advised the Select Committee that the Government will conform its use of monitoring devices within the United States for foreign intelligence purposes to the precedents established by the Foreign Intelligence Surveillance Court in cases such as this.

III. DESIGNATION OF JUDGES

The terms of the first seven judges designated to serve on the Foreign Intelligence Surveillance Court were staggered in accordance with the Act so that one term expires every year. In the case of the three-judge court of review, the terms expire every two or three years. In May 1981, the two-year term expired for James H. Meredith, Chief Judge, United States District Court, Eastern District of Missouri. The Chief Justice designated as his successor to serve a full seven-year term Frederick A. Daughtery, Chief Judge, United States District Court, Western District of Oklahoma. (The current membership of the courts is set forth in Appendix A.)

IV. PHYSICAL SEARCHES

In 1980, the Department of Justice adopted a new policy under which it made applications to judges designated to serve on the Foreign Intelligence Surveillance Court for orders approving unconsented physical searches of the personal property of foreign agents for foreign intelligence purposes. The judges to whom the applications were made issued the orders without opinion, and the searches were carried out. In each case the Justice Department determined that the search would have required a judicial warrant if it had been undertaken for law enforcement rather than intelligence purposes. The searches did not involve unconsented physical entry of real property, and the persons whose property was searched were not notified of the fact of the search. A Justice Department memorandum explaining the legal principles and policies adopted in these cases was included as an appendix to the Select Committee's 1980 report.

After submitting its 1980 report to the Senate, the Select Committee received from the Presiding Judge of the Foreign Intelligence Surveillance Court a copy of a memorandum prepared by the Court's legal adviser which concluded that the Court had no authority under the Foreign Intelligence Surveillance Act to issue an order approving a physical search or the opening of mail.[3]

[3] Letter from Hon. George L. Hart, Jr., presiding judge, U.S. Foreign Intelligence Surveillance Court, Oct. 31, 1980.

During 1981, the Department of Justice reversed the position adopted by the previous Administration, and the Foreign Intelligence Surveillance Court issued a formal opinion stating that it has no authority to issue orders approving physical searches. This opinion was issued after the Justice Department made application to the Court for an order authorizing the unconsented physical search of nonresidential premises under the direction and control of a foreign power and of personal property of agents of a foreign power on those premises. The search would not have required nonconsensual entering of the real property in question. The Department also submitted a Memorandum of Law to the Court contending that the Court lacked jurisdiction and authority to approve physical searches for foreign intelligence purposes. The Presiding Judge denied the application and issued an opinion stating that the Foreign Intelligence Surveillance Court has no statutory, implied or inherent authority or jurisdiction to review intelligence physical search or mail opening applications. The other designated judges of the Court concurred in this judgment. (The texts of the Justice Department Memorandum of Law and the opinion of the Court are set forth in Appendix B.)

The Court's decision did not address the merits of the Justice Department's view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes. The Court simply established that, without further legislation, the legal procedures adopted in the Foreign Intelligence Surveillance Act may not be employed to authorize techniques other than electronic surveillance. In this connection, the Committee believes that consideration should be given to the possibility of amending the Foreign Intelligence Surveillance Act to provide an unambiguous and statutory basis for physical searches in the United States for intelligence purposes.

V. AMENDMENTS

In a letter to the Senate on April 15, 1981, Director of Central Intelligence William J. Casey submitted Administration proposals for amendments to the Foreign Intelligence Surveillance Act. Director Casey recommended that they be considered as part of the Intelligence Authorization Act for Fiscal Year 1982. He described the proposals, along with other recommendations for legislation on different subjects, as "designed to implement the President's determination to enhance the nation's intelligence capabilities and promote the more efficient and effective performance of intelligence functions." [4] Three of the four amendments proposed by Director Casey were recommended by the previous Administration and were discussed in the Select Committee's 1980 report.

During consideration of the Intelligence Authorization Act for Fiscal Year 1982, the Select Committee did not address the merits of these amendments to the Foreign Intelligence Surveillance Act. Due to the possible need for public hearings, it was decided not to consider such amendments in the Intelligence Authorization Act, which is considered by the Select Committee in executive session. The Select Committee is

[4] Letter from William J. Casey, Director of Central Intelligence, Apr. 15, 1981.

continuing to assess the need for such amendments in consultation with the Executive branch.

The first proposed amendment would amend subsection 101(b)(2) of the Foreign Intelligence Surveillance Act by deleting "or" at the end of (C), changing the period at the end (D) to a semicolon, adding "or" at the end of (D), and adding the following new provision: "(E) is a current or former senior official of a foreign power as defined in subsection (a) (1) or (2)." The following analysis of this amendment was submitted by Director Casey.

> [This amendment] remedies a deficiency which was not foreseen when the FISA was enacted. [It] amends subsection 101(b)(2) of the FISA by modifying the targeting standards pertaining to agents of foreign powers so as to permit electronic surveillance of dual nationals who occupy senior positions in the government or military forces of foreign governments or factions while simultaneously retaining U.S. citizenship, and of former senior officials whether or not they are acting in the United States as members of a foreign government or faction. Experience under the FISA has shown that this amendment is necessary to avoid the repetition of situations which have resulted in the loss of significant foreign intelligence information.

The second proposed amendment would amend subsection 105(e) of the Foreign Intelligence Surveillance Act by deleting "twenty-four" wherever it appears and inserting in lieu thereof "forty-eight." The following analysis of this amendment was submitted by Director Casey:

> [This amendment] amends subsection 105(e) of the FISA by changing from 24 to 48 hours the time limit on electronic surveillance that may be authorized without a court order in an emergency situation pursuant to that subsection. Extension of the emergency surveillance period would aid in ensuring that there is sufficient time to accomplish the administrative steps necessary for submission of applications to the FISA court without running the risk of having to terminate an emergency surveillance under the terms of the Act. The change would not affect provisions which require subsequent court review of emergency surveillances and which restrict the use of information obtained from any such surveillance which the court disapproves.

The third proposed amendment would amend subsection 105(f) of the Act by adding the following new provision: "(4) Notwithstanding any other provision of this subsection, any information acquired under this subsection which indicates a threat of death or serious bodily harm may, with notice to the Attorney General, be retained and disseminated to appropriate law enforcement or security agencies." The following analysis of this amendment was submitted by Director Casey:

> [This amendment] amends subsection 105(f) of the FISA to allow the dissemination to law enforcement or security agencies, with notice to the Attorney General, of protected

communications unintentionally acquired during the testing of or training in the use of electronic surveillance equipment or during the conduct of audio countermeasures activities (including testing and training), for the sole purpose of protecting any person from the threat of death or serious bodily harm. Under existing law, the dissemination of such information to protect life would be prohibited, and this amendment merely provides a disclosure exception for such situations. This amendment recognizes that the conduct of audio countermeasures, as well as testing and training with other electronic surveillance equipment, could result in the acquisition of a life threatening communication. While such a result is unlikely, it is technically possible; and the FISA should not be a legal impediment to the use of that information by proper authorities. Under the present provisions by the FISA, such a communication could not lawfully be used or disseminated in any manner; and the technician or trainee would have to violate Federal law if he were to use the information in an attempt to save a life. Realizing this potential, it is unconscionable for the government to continue to make a crime of such a life-saving use of information, and it would be more unconscionable if the government were to ignore the opportunity to prevent a crime of violence because the threat was contained in a protected communication.

The fourth proposed amendment would amend Subsection 102(a) of the Foreign Intelligence Surveillance Act by adding the following new provision: "(5) The Attorney General may authorize physical entry of property under the open and exclusive control of a foreign power, as defined in subsection 101(a) (1), (2), or (3), for the purpose of installing, repairing, or removing any electronic, mechanical, or other surveillance device used in conjunction with an electronic surveillance authorized in accordance with subsection 102(a)." The following analysis of this amendment was submitted by Director Casey:

[This amendment] amends subsection 102(a) of the FISA by adding a new provision which would clarify existing law by expressly allowing the Attorney General to authorize, without a court order, physical entry of property of premises under the open and exclusive control of certain types of foreign powers, for the purpose of implementing an electronic surveillance under subsection 102(a). The provisions of subsection 102(a) for a narrow category of surveillances without a court order do not specifically make reference to physical entry for the purpose of installing, repairing, or removing surveillance devices. The purpose of the amendment is to clarify the law to ensure that lawful surveillances are not frustrated by uncertainty over such physical entry authority. The amendment would not authorize physical entry without a court order for any purpose other than the installation, repair, or removal of devices used for the narrow category of electronic surveillances that may be directed against certain types of foreign powers pursuant to the Attorney General's certification under subsection 102(a) of the FISA.

With regard to the last of these proposed amendments, the matter has recently been addressed in a new interpretation of the Act by the Justice Department. The provisions of § 102(a), which authorize a narrow category of surveillances of certain types of foreign powers without a court order, do not mention the question of physical entry. By contrast, the court order provisions for other categories of surveillances of the same types of foreign powers expressly state that the applications and court orders shall specify "whether physical entry will be used to effect the surveillance." Because of this disparity, the question arose whether the Act permits the Attorney General to authorize such an entry under § 102(a).

Under the previous Administration, the Attorney General determined that the Act "does not authorize the Attorney General to authorize physical entry for the purpose of implementing § 102(a) surveillances." During the past year, however, the Justice Department has adopted a different interpretation of § 102(a). In a memorandum to the FBI Director, dated October 9, 1981, the Attorney General's Counsel for Intelligence Policy, Richard K. Willard, concluded that § 102(a) provides implied statutory authority for the Attorney General to authorize physical entry to implement electronic surveillance approved under § 102(a). A copy of this memorandum, parts of which are classified, has been provided to the Select Committee by Attorney General William French Smith. The Justice Department's interpretation is based on an analysis of the structure and purpose of the Foreign Intelligence Surveillance Act, in light of the Supreme Court's decision in *Dalia* v. *United States*, 441 U.S. 238 (1979). The Justice Department memorandum states:

> Section 102(a) contains no language that explicitly empowers or withholds from the Attorney General the power to authorize physical entries incident to surveillances approved under this provision. Similarly, the legislative history which pertains specifically to section 102(a) is silent on this issue. . . .
>
> It is a well-settled principle that in the face of congressional silence, a statute must be interpreted in a manner consistent with its underlying purpose. Thus, in *Dalia* v. *United States*, 441 U.S. 238 (1979), the Supreme Court considered whether covert physical entries could be used to effect electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The Court concluded that, although Title III does not refer explicitly to covert entry, the "language, structure and history of the statute" demonstrated that Congress meant to authorize courts, in certain specified circumstances, to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they were reasonable under the circumstances. Id. at 249.

The memorandum indicates that the effect of the interpretation adopted by the previous Attorney General "would be effectively to preclude the government, in some cases, from engaging in electronic surveillance of the nature envisioned under section 102(a)." The memorandum concludes:

> The silence of section 102(a) with regard to the Attorney General's power to authorize physical entries should not be interpreted to produce such results unless otherwise required by the statutory language or legislative history. Nowhere in the pertinent statutory language or the legislative history, however, is there any clear evidence that would compel this anomalous and illogical conclusion.

Thus, under the construction of § 102(a) now adopted by the Justice Department, an amendment to the Foreign Intelligence Surveillance Act may not be essential to permit the use of physical entry for the purpose of implementing § 102(a) surveillance.

VI. RECOMMENDATION

The Foreign Intelligence Surveillance Act has been in full effect for over two years. During this period it has provided the legal procedures for the conduct of electronic surveillance within the United States for foreign intelligence purposes. The Act has limited such surveillance to foreign powers and agents of foreign powers, as defined in the statute, and has required the implementation of procedures to minimize the acquisition, retention, and dissemination of information concerning United States persons. The Act has also permitted electronic surveillance to be conducted in circumstances where the Government was previously reluctant to use such techniques beause of uncertainty about the legal requirements. During the past year FBI Director William H. Webster has informed the Select Committee that the Act "has been valuable" to the FBI in conducting foreign counterintelligence activities to protect the United States against clandestine intelligence and international terrorist activities by foreign powers and their agents. The amendments proposed by the Administration remain under study, and public hearings may be desirable before the Select Committee makes a final recommendation on them. The Select Committee recommends that the Foreign Intelligence Surveillance Act be permitted to continue in effect without amendment pending the results of such study and further deliberations by the Committee.

APPENDIX A

Judges Designated by the Chief Justice of the United States Pursuant to Section 103 of the Foreign Intelligence Surveillance Act

I. FOREIGN [1] INTELLIGENCE SURVEILLANCE COURT

George L. Hart, Jr.,[1] senior judge, U.S. District Court, District of Columbia, term expires 1982.

Frank J. McGarr, judge, U.S. District Court, Northern District of Illinois, term expires 1983.

Lawrence Warren Pierce, judge, U.S. District Court, Southern District of New York, term expires 1984.

Frederick B. Lacey, judge, U.S. District Court, District of New Jersey, term expires 1985.

Albert V. Bryan, Jr., judge, U.S. District Court, Eastern District of Virginia, term expires 1986.

William C. O'Kelley, judge, Northern District of Georgia, term expires 1987.

Frederick A. Daugherty, chief judge, Western District of Oklahoma, term expires 1988.

II. COURT OF REVIEW

George Edward MacKinnon,[2] circuit judge, U.S. Court of Appeals for the District of Columbia Circuit, term expires 1982.

James E. Barrett, circuit judge, U.S. Court of Appeals for the Tenth Circuit, term expires 1984.

A. Leon Higgenbotham, Jr., circuit judge, U.S. Court of Appeals for the Third Circuit, term expires 1986.

[1] Presiding judge, Foreign Intelligence Surveillance Court.
[2] Presiding judge, Court of Review.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE,
ASSISTANT ATTORNEY GENERAL, LEGISLATIVE AFFAIRS,
Washington, D.C., June 8, 1981.

HON. BARRY GOLDWATER,
Chairman, Senate Select Committee on Intelligence,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On June 4, 1981, the Department of Justice made application to the Foreign Intelligence Surveillance Court (FISC) for an order authorizing the physical search of nonresidential premises and personal property. The Department also submitted a Memorandum of Law to the Court contending that the Court lacked jurisdiction and authority to approve physical searches for foreign intelligence purposes.

Presiding Judge George L. Hart, Jr., denied the application on the basis that the FISC has no statutory, implied or inherent authority or jurisdiction to review intelligence physical search applications. The Memorandum of Law, which was written in unclassified form to permit its publication in a Congressional report, and a redacted copy of the Court's order are attached for your information.

We have been apprised that the Court intends to issue a written opinion describing the grounds for its denial of the application. We shall transmit this opinion to you as soon as it is issued.

Sincerely,

MICHAEL W. DOLAN,
Acting Assistant Attorney General,
Office of Legislative Affairs.

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

DOCKET NO. 81———

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE PHYISICAL SEARCH OF NONRESIDENTIAL PREMISES AND PERSONAL PROPERTY

MEMORANDUM OF LAW

This Memorandum of Law is being filed in connection with an application for the FBI to undertake a physical search of nonresidential premises under the direction and control of a foreign power and of personal property of agents of a foreign power on those premises. The search would not require nonconsensual entering of the real property in question.

This application is being presented to the Foreign Intelligence Surveillance Court (hereinafter referred to as FISC) for a determination whether the judges of the FISC have the authority to review and approve physical searches for foreign intelligence purposes. The Government believes that judges of the FISC have no statutory, implied, or inherent authority to approve physical searches for intelligence purposes. Yet, because three prior physical searches were presented to and approved by the Court, the Government believes it is advisable to obtain a determination by the FISC of its authority to review such applications.[1]

Should the FISC hold that it has no authority to approve physical searches undertaken for foreign intelligence purposes, then such searches will continue to be reviewed and approved by the Attorney General pursuant to the standards and authority delegated by the President.

ARGUMENT AND AUTHORITIES

There are two possible grounds for an assertion of jurisdiction by the FISC: one based on its enabling statute and the other based on inherent or implied authority derived from the Constitution or from a legislative regulatory scheme. Neither of these grounds provides a basis for the assertion of jurisdiction over intelligence physical searches by the FISC or its judges.

A. The Foreign Intelligence Surveillance Act of 1978 does not empower the FISC to review Intelligence physical searches

The FISC, and the judges serving by designation on the court, have limited statutory authority that does not include reviewing intelligence physical search applications. The Foreign Intelligence Surveillance Act of 1978 (hereinafter referred to as the Act of FISA), 50 U.S.C. § 1801, *et seq.*, provides that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in the Act." FISA, § 103(a). No provision in the Act extends that mandate to intelligence searches, and the legislative history unambiguously indicates that the Congress did not intend anything in the Act to empower the FISC to consider physical searches or the opening of mail for intelligence purposes. H. Rep. No. 1283, 95th Cong., 1st Sess. 53 (1978); S. Rep. No. 604, 95th Cong., 1st Sess. 6 (1977).

Judges of the FISC cannot derive this jurisdiction from any other statutory authority. Title III of the Omnibus Crime Control and Safe Streets Act provides no basis for authority in the FISC because it does not govern searches for foreign intelligence purposes. *See, e.g.*, *United States* v. *United States District Court*, 407 U.S. 297 (1972). Moreover, Rule 41 of the Federal Rules of Criminal Procedure, which empowers federal courts to authorize physical searches in a law enforcement context, permits searches solely to gather evidence of a crime, and its attendant procedures and limited jurisdictional grant

[1] The basis for the presentation of these applications to the FISC was a policy judgment by former Attorney General Civiletti. *See* Memorandum for FBI Director William H. Webster from Kenneth C. Bass, III. Re: Jurisdiction of Foreign Intelligence Surveillance Court Judges to Issue Orders In Foreign Intelligence Investigations, dated Oct. 14, 1980 (hereinafter referred to as Justice Department Memorandum, Oct. 14, 1980). This policy decision has been subject to criticism, particularly with regard to the jurisdiction of the ECSC to approve such matters. See Memorandum to Judge Hart from Robert S. Erdahl, dated Oct. 30, 1980; H.R. Rep. No. 1466, 96th Cong., 2d Sess. 5 (1980); S. Rep. No. 1017, 96th Cong., 2d Sess. 9–10 (1980).

are inappropriate for intelligence searches. Fed. R. Crim. P. 41 (b), (c), (d).

B. The FISC has neither inherent nor implied authority to review intelligence physical search applications

The FISC has neither inherent nor implied authority to review intelligence physical searches merely because Fourth Amendment considerations are involved.[2] Under the Constitution, the jurisdiction and authority of lower federal courts is determined by express grant from Congress.[3] Courts have carved out three exceptions to this general rule and have asserted authority over matters beyond their statutory grant of jurisdiction (1) to ensure the integrity of the judicial process, (2) to carry out Congress intent in enacting a regulatory scheme, and (3) to provide judicial review where the Constitution so requires.[4] None of these three exceptions provides a basis for the FISC to extend its jurisdiction and authority beyond its limited legislative grant.

1. Authority to insure the integrity of the judicial process

Courts have asserted extra-statutory power and authority to preserve the integrity of the judicial process and to control those appearing before them. *Osborn* v. *United States*, 385 U.S. 323 (1966) (authorizing electronic surveillance of member of bar suspected of attempting to bribe a member of a jury panel in a prospective federal criminal trial); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 355 (1931) (asserting inherent authority to discipline prosecutor and prohibition agent and to suppress and return unlawfully obtained evidence); *Hunsucker* v. *Phinney*, 497 F.2d 29, 32–33 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (establishing power of federal court to order the suppression or return of illegally seized property even though no criminal proceedings had commenced and even though no statute authorized such action). Extra-statutory powers also have been asserted to insure that statutory procedures regulating searches and seizures for law enforcement purposes were properly observed by federal law enforcement agents. *Rea* v. *United States*, 350 U.S. 214, 217 (1956). Because intelligence physical searches do not affect the integrity of any judicial process, this rationale certainly cannot justify the assertion of FISC jurisdiction to approve such searches.

2. Jurisdiction implied from a regulatory scheme

Federal courts have asserted extra-statutory power to issue search warrants to implement regulatory statutes where Congress has failed explicitly to provide for warrants, but where failure to issue such warrants would frustrate the statutory scheme by rendering inspec-

[2] A contrary position was elaborated in a Justice Department memorandun in support of the policy decision to submit the prior applications for FISC review. Justice Department Memorandum Oct. 14, 1980, supra note 1.

[3] U.S. Const., art. III, § 1. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1907); *Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 688, 672 (5th Cir. 1979).

[4] Courts asserting such extra-statutory power have often stated that they were relying on their "inherent" powers. Yet, they fail to articulate a persuasive theory identifyling the source or nature of such authority. These powers can be better described as "implied" powers which are derived from a statutory scheme or from constitutional requirements. Regardless of the nomenclature applied to these powers, however, the government contends that they do not authorize FISC review of foreign intelligence physical searches.

tions contemplated by the statute unlawful. For example, following the Supreme Court's ruling in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), that warrantless OSHA inspections violated the Fourth Amendment, lower courts presented with applications for OSHA inspection warrants have accepted jurisdiction over these petitions. In *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1370–71 n.3 (5th Cir. 1979), the Fifth Circuit found jurisdiction in the district court to issue an OSHA inspection search warrant:

> We note that the evidence of Congress' concern about the constitutionality of OSHA searches . . . when viewed in connection with the Supreme Court's ruling in *Barlow's supra*, argues strongly for the position that federal courts do have jurisdiction to issue OSHA search warrants. We also note that numerous courts have reached this result, and that none has held otherwise.

Most of the courts asserting jurisdiction over OSHA search warrants have described their authority to be an "inherent" power of the courts or magistrates, *e.g.*, *Empire Steel Manufactuirng Co.* v. *Marshall*, 437 F. Supp. 873, 881 (D. Mont. 1977); *In The Matter of Urick Property*, 472 F. Supp. 1193, 1194 (W.D. Pa. 1979), or an unarticulated assertion of federal judicial power, *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611 (1st Cir. 1979); *Marshall* v. *Burlington Northern, Inc.*, 595 F.2d 511, 514 (9th Cir. 1979) (dicta); *Marshall* v. *Chromalloy American Corp.*, 433 F. Supp. 330 (E.D. Wis. 1977), *aff'd sub nom. In The Matter of Establishment Inspection of Gilbert and Bennett Manufacturing Co.*, 589 F.2d 1335 (7th Cir. 1979); *Marshall* v. *Reinhold Construction Inc.*, 441 F. Supp. 685 (M.D. Fla. 1977). However, none of these courts analyzed with any rigor the source for their authority over the inspection petitions. *See also United States* v. *Dalia*, 441 U.S. 238 (1979) (Title III impliedly authorized entry to install eavesdropping equipment).

The extra-statutory jurisdiction asserted in these cases can best be described as "implied" jurisdiction because the courts acted in each case to implement a legislative scheme that had not explicitly anticipated the need for judicial involvement to enforce the statute. In each case, there existed a clear legislative intent that the regulatory searches be carried out. Also, the Constitution required that prior judicial review be obtained in order for those searches to be lawful. The courts, therefore, implied their jurisdiction to issue inspection warrants from the OSHA statutory scheme and the evident congressional desire to legislate an effective and constitutional statute.

The acceptance of "implied" jurisdiction in the OSHA cases, however, provides no authority for FISC's, assertion of jurisdiction over intelligence physical searches. Two critical factors present in the OSHA cases are not met here. First, as discussed at pp. 2–3, *supra*, the Congress specifically intended not to authorize judicial review of intelligence physical searches when the FISC was established. This fact, alone, undermines any argument that the FISC has "implied" jurisdiction to review intelligence physical searches. Second, as will be shown below, the President has the power to authorize warrantless physical searches for foreign intelligence purposes, and thus there is no constitutional requirement for the FISC to review intelligence physical search applications.

3. Jurisdiction implied by constitutional necessity

Several cases, without reference to any statutory scheme, have suggested that federal courts may assert extra-statutory powers to issue search warrants where the Fourth Amendment requires prior judicial review of a particular governmental activity. In *United States* v. *Giordano*, 416 U.S. 505 (1974), Justice Powell, concurring in part and dissenting in part, recognized that because the pen register was not subject to Title III of the Omnibus Crime Control and Safe Streets Act, "[t]he permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirement of the Fourth Amendment," *Id.* at 553–554. Mr. Justice Powell, and the Court, apparently assumed that federal courts had valid jurisdiction to enforce the warrant requirement of the Fourth Amendment.[5]

This assumption that federal courts have an extra-statutory jurisdiction to authorize pen register searches was also accepted by several courts of appeal which later addressed the issue. *Michigan Bell Telephone Co.* v. *United States*, 565 F.2d 385 (6th Cir. 1977); *United States* v. *Southwestern Bell Telephone Co.*, 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1978); *Application of the United States of America In The Matter of An Order Authorizing the Use of Pen Register or Similar Mechanical Device*, 538 F.2d 956 (2nd Cir. 1976).

The Supreme Court avoided ruling on the question of the extra-statutory powers of federal courts by holding that Rule 41 of the Federal Rules of Criminal Procedure authorized pen register orders. *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). However, Justice Stevens, joined in a dissent by Justices Brennan and Marshall, analyzed at length the issue of inherent judicial power to issue pen register warrants and concluded that "the historical and legislative background . . . make it abundantly clear that federal judges were not intended to have any roving commission to issue search warrants." *Id.*, 434 U.S. at 181.

Whether or not federal courts possess extra-statutory powers to issue warrants when required by the Constitution, the FISC would not be empowered to review intelligence physical searches because there is no constitutional necessity to obtain a judicial warrant for the government to engage in a properly authorized intelligence physical search.

The Department of Justice has long held the view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes. This authority derives from the President's Constitutional powers as Commander In Chief[6] and as the principal instrument for U.S. foreign affairs.[7] The Executive's authority to conduct warrantless foreign intelligence searches and surveillances against foreign powers and

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[5] See also *United States* v. *United States District Court*, supra; *Katz* v. *United States*, 389 U.S. 347, 354 (1967) (court sub silentio affirmed the extra-statutory authority of federal judges to execute warrants authorizing electronic surveillance for law enforcement purposes).

[6] U.S. Const. art. II. § 1.

[7] *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

their agents has been upheld in every case where the existence of that authority has been necessary to the decision. *United States* v. *Truong*, 629 F.2d 908 (4th Cir. 1980) (physical searches and electronic surveillance); *United States* v. *Buck*, 548 F.2d 871, 875–876 (9th Cir.), *cert. denied sub nom. Ivanov* v. *United States*, 419 U.S. 881 (1974) (electronic surveillance); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) (electronic surveillance); *but see Zweibon* v. *Mitchell*, 516 F.2d 594, 613–614 (D.C. Cir. 1975) (en banc) (plurality opinion) (dicta), *cert. denied*, 425 U.S. 944 (1976) (*Zweibon I*).

The President's power to authorize warrantless intelligence searches has also been upheld by the only appellate court that has considered this question in the context of a physical search of the property of an agent of a foreign power. *United States* v. *Truong*, *supra*, 629 F.2d at 917 n. 8 (sealed packages and envelopes). In *Truong*, the Court applied the analytic approach for resolving Fourth Amendment problems arising in national security cases suggested in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297, 315 (1972), by balancing individual privacy against the Government's need to protect the national security. The Fourth Circuit concluded,

> [B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. *United States* v. *Truong*, *supra*, 629 F.2d at 914.

The Fourth Circuit, along with every other appellate court that has reached the issue of the President's inherent authority, thus recognized that the Executive's pre-eminent responsibilities in foreign affairs and national defense eliminate the need to obtain judicial approval before undertaking electronic surveillance or physical searches for foreign intelligence purposes.[9]

The Attorney General, pursuant to a delegation of authority by the President, has the power to approve this proposed physical search of the nonresidential premises under the direction and control of a foreign power and of the personal property of agents of a foreign power on those premises. The Constitution does not require prior judicial review of this search for intelligence purposes. Therefore, the FISC has no basis to assert "implied" jurisdiction under the Constitution in order to review this application.

CONCLUSION

This memorandum of law demonstrates that the FISC has no jurisdiction to review this proposed intelligence physical search. The FISC has neither explicit nor implied statutory authority to review these matters, and the Constitution does not require prior judicial review of intelligence physical searches of foreign powers or their agents when properly authorized by the President or the Attorney General.

[9] The enactment of the Foreign Intelligence Surveillance Act of 1978 followed the *Truong* decision. While the Act creates a statutory process for obtaining judicial approval of intelligence-related electronic surveillance in the United States, it did not purport to deal with electronic surveillance abroad or with physical searches for intelligence purposes in the United States or abroad. See pp. 2–3, infra.

The Government therefore requests that the FISC reject this application because of its lack of jurisdiction.

Dated: June 3, 1981.

Respectfully submitted,

RICHARD K. WILLARD,
Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Department of Justice.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., June 22, 1981.

Hon. BARRY GOLDWATER,
Chairman, Senate Select Committee on Intelligence,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Foreign Intelligence Surveillance Court has issued the opinion referred to in Michael W. Dolan's June 8, 1981 letter to you. Attached is a copy of the opinion.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

Attachment.

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

DOCKET NO. ———

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE PHYSICAL SEARCH OF NONRESIDENTIAL PEMISES AND PERSONAL PROPERTY

Before Hart, Presiding Judge:

The United States has applied for an order authorizing the physical search of certain real and personal property. I have decided that as a designated judge of the United States Foreign Intelligence Surveillance Court (FISC) I have no authority to issue such an order, I am authorized to state that the other designated judges of the FISC concur in this judgment.

The FISC was established by the Foreign Intelligence Surveillance Act (FISA), 92 Stat. 1783, 50 U.S.C. 1801. It consists (sec. 103(a)) of seven United States district court judges designated by the Chief Justice "who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act." As an inferior court established by Congress pursuant to Article III of the Constitution, the FISC has only such jurisdiction as the FISA confers upon it and such ancillary authority as may fairly be implied from the powers expressly granted to it.

Obviously, the instant application implicates a question of the jurisdiction of the FISC under the terms of the FISA. Here, as in any case involving statutory interpretation, ". . . the meaning of the statute must, in the first instance, be sought in the language in which

the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminette* v. *United States*, 242 U.S. 470, 485 (1917). In my opinion, the language of the FISA clearly limits the authority of the judges designated to sit as judges of the FISC to the issuance of orders approving "electronic surveillance" as that term is defined in the act.

"Electronic surveillance" is defined in precise terms in sec. 101(f). It includes (1) the "acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication" by or to a U.S. person in the U.S., (2) the acquisition by such a device of the "contents of any wire communication to or from a person in the" U.S., (3) the acquisition by such a device of the "contents of any radio communication . . . if both the sender and all intended recipients are located within the" U.S., and (4) "the installation or use of" such a device "in the United State for monitoring to acquire information, other than from a wire or radio communication." [1]

The reference throughout this subsection is to "electronic, mechanical or other surveillance device." The purpose is the "*acquisition*" of "*the contents*" of a wire or radio communication or monitoring (par. 4) to "*acquire information*, other than from a wire or radio communication." (Emphasis added.) Clearly, the thrust is a search, by the use of surveillance devices, for words or other sounds to acquire "foreign intelligence information" as that term is defined in sec. 101(e). There is not a word in the definitions of "electronic surveillance" even remotely indicating that the term encompasses a physical search of premises or other objects for tangible items.[2]

The limiting terms of sec. 101(f) apply, of course, throughout the FISA. As noted above, FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act" (sec. 103(a)); an "application for an order approving electronic surveillance shall be made," etc. (sec. 104(a)); "the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds," etc. (sec. 105(a)).

The legislative history of the FISA confirms what the statutory language so plainly teaches: the FISC has no jurisdiction in the area of physical searches. The committee reports deal specifically with the subjects of physical searches and the opening of mail; they make the same distinction between such searches and searches by electronic surveillance as is so clearly drawn in the very terms of the FISA.

H. Rep. 95–1283 of the House Intelligence Committee puts the distinction sharply (p. 53):

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[1] It will be noted that these definitions limit the authority to conduct electronic surveillances to the U.S. in a geographic sense as defined in sec. 101(i). The drafters left to another day the matter of "broadening this legislation to apply overseas . . . [because] the problems and circumstances of overseas surveillance demand separate treatment." H. Rep. 95–1283, pp. 27–28. See also id., p. 51; S. Rep. 95–701, pp. 7, 34–35.

[2] Paragraph (4) of sec. 101(f) provides for the "installation or use" of a surveillance device "for monitoring to acquire information." "This is intended to include the acquisition or oral communications." H. Rep. 95–1283, p. 52. By implication, it encompasses the means necessary to make an installation. This is made clear by the requirement that an application to a judge of the FISC state "whether physical entry is required to effect the surveillance" (sec. 104(a)(8)) and the provision that an order approving an electronic surveillance shall specify "whether entry will be used to effect the surveillance." Sec. 105(b)(1)(D). But all that is authorized is "physical entry." Such an authorization cannot be bootstrapped into authority to search entered premises for tangible items. The "search" in such a sitation is limited to such observation of the premises as may be necessary to make an effective installation of the surveillance device.

> The committee does not intend the term "surveillance device" as used in paragraph (4) [of sec. 101(f)] to include devices which are used incidentally as part of a physical search, or the opening of mail, but which do not constitute a device for monitoring. Lock picks, still cameras, and similar devices can be used to acquire information, or to assist in the acquisition of information, by means of physical search. So-called chamfering devices can be used to open mail. This bill does not bring these activities within its purview. Although it may be desirable to develop legislative controls over physical search techniques, the committee has concluded that these practices are sufficiently different from electronic surveillance so as to require separate consideration by the Congress. The fact that the bill does not cover physical searches for intelligence purposes should not be viewed as congressional authorization for such activities. In any case, any requirements of the fourth amendment would, of course, continue to apply to this type of activity.

At the end of the paragraph the committee dropped a footnote stating: "It should be noted that Executive Order 12036, Jan. 24, 1978, places limits on physical searches and the opening of mail." That order (43 Fed. Reg. 3674, 3685) governs the conduct of physical searches without judicial warrant for foreign intelligence purposes pursuant to the constitutional authority of the President.

Thus, the clearly expressed view of the House Intelligence Committee was (1) that the FISA does not authorize physical searches or the opening of mail for foreign intelligence purposes and (2) that until Congress legislates in those areas, the executive branch is relegated to the President's inherent authority in such matters or the procedures of F. R. Cr. P. 41.

The same view was articulated by the Senate Intelligence Committee in its earlier S. Rep. 95–701, p. 38. The language there is virtually the same as the language of the House Intelligence Committee quoted above. In addition, the Senate committee referred to the bill S. 2525, 95th Cong., the National Intelligence Reorganization and Reform Act of 1978, which, it said, "addresses the problem of physical searches within the United States or directed against U.S. persons abroad for intelligence purposes." [3] In the same vein, the Senate Judiciary Committee said (S. Rep. 95–604, p. 6); "the bill does not provide statutory authorization for the use of any technique other than electronic surveillance, and, combined with chapter 119 of title 18 [Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510] it constitutes the exclusive means by which electronic surveillance, as defined, and the interception of domestic wire and oral communications may be conducted. . . ."

We have seen that Congress decided to consider separately the subject or physical searches, including the opening of mail. This subject was covered by S. 2284 in the last Congress. Since it would have amended and supplemented the FISA; it must be considered as part of the legislative materials bearing on our question.

Title VIII of S. 2284, entitled, "Physical Searches Within the United States" (Cong. Rec., daily ed., Feb. 8, 1980, pp. S1325–S1327),

[3] S. 2525 was a precursor of S. 2284, 96th Cong., the National Intelligence Act of 1980, discussed below.

was the vehicle for the promised separate consideration of that subject. The section-by-section analysis stated that the "court order procedures of the [FISA] are extended to 'physical search', defined as any search of property located in the United States and any opening of mail in the United States or in the U.S. postal channels, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.*, p. S1333. In a statement joining in the introduction of S. 2284 (*id.*, p. S1334), then Chairman Bayh of the Intelligence Committee said (*id.*, p. S1335):

> . . . But perhaps the best way to bring overseas surveillance and search powers under the rule of law and within the constitutional system of checks and balances is through this Act. We must carefully consider these issues in the weeks to come.
>
> The same is true for the provisions that bring physical search in the United States within the framework of the Foreign Intelligence Surveillance Act of 1978. Current restrictions on physical search under the Executive order procedures are very stringent. Thus, the charter could result in the lifting of certain limitations. However, without the requirement in law to obtain a court order under a criminal standard for searches of Americans in this country, a future administration could abandon the Executive order procedures and assert "inherent power" to search the homes and offices of citizens without effective checks.

Title VIII contained 57 amendments of the FISA, beginning with the insertion of the words, "physical searches and" in the statement of purpose, so as to read, "To authorize physical searches and electronic surveillance to obtain foreign intelligence information," and changing the title of the Act to "Foreign Intelligence Search and Surveillance Act." *Id.*, p. S1325. The other amendments would have added similar appropripriate language to nearly every section of the FISA.

The foregoing review of the language of the FISA and the reports of the three committees which gave the legislation exhaustive consideration demonstrates that the FISC has no jurisdiction to authorize physical searches or the opening of mail. This conclusion is buttressed by the fact that Congress subsequently gave active consideration to the deferred question whether the FISA should be amended to extend the procedures of the Act to cover physical searches. That question has not yet been resolved by amending or other legislation.

In view of the clearly expressed intent of Congress to withhold authority to issue orders approving physical searches, it would be idle to consider whether a judge of the FISC nevertheless has some implied or inherent authority to do so. Obviously, where a given authority is denied it cannot be supplied by resort to principles of inherent, implied or ancillary jurisdiction.

GEORGE L. HART, Jr.,
Presiding Judge,
U.S. Foreign Intelligence Surveillance Court.

June 11, 1981.

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