Testimony of

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Thirty years ago the Supreme Court first confronted the tensions between unmonitored executive surveillance and individual freedoms in the national security setting. United States v. United States District Court (Keith) arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property - the dynamite bombing of a CIA office in Ann Arbor, Michigan. During pretrial proceedings, the defendants moved to compel disclosure of electronic surveillance. The Government admitted that a warrantless wiretap had intercepted conversations involving the defendants. In the Supreme Court, the government defended its actions on the basis of the Constitution and a national security disclaimer in the 1968 Crime Control Act. Justice Powell's opinion for the Court first rejected the statutory argument and found that the Crime Control Act disclaimer of any intention to legislate regarding national security surveillance simply left presidential powers in the area untouched.

Turning to the constitutional claim, the Court found authority for national security surveillance implicit in the President's Article II Oath Clause, which includes the power "to protect our Government against those who would subvert or overthrow it by unlawful means." However, the "broader spirit" of the Fourth Amendment, and "the convergence of First and Fourth Amendment values" in national security wiretapping cases made the Court especially wary of possible abuses of the national security power. Justice Powell then proceeded to balance "the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." Waiving the Fourth Amendment probable cause requirement could lead the executive to "yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." Although the government argued for an exception to the warrant requirement, citing the unique characteristics of ongoing national security surveillance, and the fear that leaks could endanger sources and methods of intelligence gathering, Justice Powell answered that the potential for abuse of the surveillance power in this setting, along with the capacity of the judiciary to manage sensitive information in ex parte proceedings, rendered any inconvenience to the government "justified in a free society to protect constitutional values."

Justice Powell was careful to emphasize that the case involved only the domestic aspects of national security, and that the Court was not expressing an opinion on the discretion to conduct surveillance when foreign powers or their agents are targeted. Finally, the Court left open the possibility that different warrant standards and procedures than those required in normal criminal investigations might be applicable in a national security investigation:

We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance

operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

The Court implicitly invited Congress to promulgate a set of standards for such surveillance: Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of the citizen rights deserving protection.

Although Congress did not react immediately to Keith, Justice Powell's opinion provided an important impetus for the development of what became the Foreign Intelligence Surveillance Act of 1978 (FISA). Like the Supreme Court, Congress recognized that warrantless surveillance by the executive branch untethered by law could undermine important constitutional values at the confluence of the First and Fourth Amendments. At the same time, Congress came to appreciate that the nature and purpose of intelligence investigations differs considerably from criminal law enforcement investigations. As such, the traditional warrant requirement as practiced by law enforcement might not be the best model for assuring that the balance of security and liberty is fairly struck in national security investigations.

The system that emerged through twenty-four years of practice under FISA has been repeatedly construed by the federal courts as an adequate substitute for the law enforcement warrant to satisfy the "reasonableness" requirement of the Fourth Amendment. Central to the development of this body of case law upholding the FISA procedures has been the principal that FISA is designed for the gathering of foreign intelligence information and that any criminal prosecution that follows from surveillance undertaken pursuant to FISA has been incidental to the purpose of gathering foreign intelligence information.

Although the "primary purpose" standard was developed by judges in pre-FISA judicial review of warrantless surveillance and does not appear as such in FISA, the "primary purpose" standard guided the implementation and review of FISA surveillance for twenty -three years. FISA seeks to ensure that its searches and surveillances are conducted for foreign intelligence purposes by requiring a senior-level certification of foreign intelligence purpose, and providing for limited judicial review of those certifications. Each certification must also designate the type of foreign intelligence information being sought, and explain the basis for this designation.

Admittedly, "primary purpose" is a qualitative standard that invites after-the-fact subjective judgments in evidentiary hearings, where judges are inclined to defer to the decisions of intelligence professionals. In addition, in the midst of an investigation, the need for speedy action, along with problems of coordination among the law enforcement and intelligence agencies, means that the intelligence professionals make the "primary purpose" calls, not a magistrate. The logic, however, is that once an investigation becomes primarily criminal in nature, the courts are entirely competent to make the usual probable cause determination when surveillance or search authority is sought, and individual privacy interests come to the fore when the government is attempting to form the basis for a criminal prosecution.

Criminal defendants have asserted many times since 1978 that FISC-approved surveillance was not for the primary purpose of foreign intelligence collection. In each such challenge, the federal courts have sustained the FISA surveillance under the "primary purpose" test. The government's defense in each case was aided by the prophylactic protection afforded by a FISC judge's prior

approval of the surveillance as being in pursuit of foreign intelligence or foreign counterintelligence information.

The Intelligence/Law Enforcement Overlap

Even in 1978, the drafters of FISA understood that intelligence gathering and law enforcement would overlap in practice. In the years since 1978, the reality of terrorism and the resulting confluence of intelligence gathering and law enforcement as elements of counter terrorism strategy has strained the FISA-inspired "wall" between intelligence and law enforcement. In addition, the enactment of dozens of criminal prohibitions on terrorist activities and espionage has added to the contexts in which surveillance may be simultaneously contemplated for intelligence gathering and law enforcement purposes.

In the weeks after September 11, the Justice Department pressed for greater authorities to conduct surveillance of would-be terrorists. Officials reasonably maintained that counter terrorism investigations are now expected to be simultaneously concerned with prevention of terrorist activities and apprehension of criminal terrorists. Surveillance of such targets is for overlapping purposes, both of critical importance. In the USA Patriot Act, Congress agreed to lower the barrier between law enforcement and intelligence gathering in seeking FISA surveillance. Instead of intelligence collection being the primary purpose of the surveillance, it now must be a "significant purpose" of the search or wiretap.

The statutory change may or may not have been necessary or even prudent. Whatever its wisdom, however, the "significant purpose" language does not mean that prosecutors can now run the FISA show. The FISA was largely untouched by the USA Patriot Act; its essence remains foreign intelligence collection. Greater information sharing and consultation was permitted between intelligence and law enforcement officials, but law enforcement officials are not permitted under "significant purpose" or any other part of FISA to direct or manage intelligence gathering for law enforcement purposes.

The May 2002 FISC Opinion

The concern exposed by the May 17 FISC opinion is easy to envision, stripping away the technical questions of statutory interpretation: Prosecutors may seek to use FISA to end-run the traditional law enforcement warrant procedures. They gain flexibility that way, but they also become less accountable, and any of us could be subject to surveillance and then arrested and detained without the protections afforded by the criminal justice system.

The May 17 FISC opinion, signed by all seven judges, is nuanced but firm in its partial repudiation of the proposed revised 2002 minimization procedures of the Department of Justice to effectively permit placement of supervision and control over FISA surveillance in the hands of law enforcement teams. Although it may have been preferable as a tactical matter for the FISC to respond directly to the effect of the "significant purpose" amendment in the USA Patriot Act, the court was nonetheless on solid ground in concluding that the entire FISA, including its requirements for minimization procedures, continues to constitute a system for monitoring the gathering of foreign intelligence information. The Department of Justice based its proposed 2002 revisions to the minimization procedures on its understanding that the USA Patriot Act amendments to FISA permit FISA to be used primarily for a law enforcement purpose. As the FISC noted, portions of the Department's procedures would permit useful coordination among intelligence and law enforcement agencies to become subordination of the former to the latter. The USA Patriot Act authorizes consultation between intelligence and law enforcement officers to "coordinate efforts to investigate or protect against foreign threats to national security." The limits drawn by the FISC opinion on Department of Justice procedures seek to assure that efforts

to "coordinate" do not become a ruse for subordination. Without delving into the details of the minimization guidelines, it is fair to say that the modest restrictions imposed by the FISC follow reasonably from the court's conclusion that some of the Department of Justice proposals would have permitted the law enforcement officials to do more than engage in "consultations" with intelligence officials.

The Department of Justice Appeal to the Foreign Intelligence Surveillance Court of Review

The brief of the Department of Justice on appeal to the Foreign Intelligence Surveillance Court of Review is forcefully written. Its legal arguments are powerful. However, it is hardly the case as the brief maintains that the FISC was "plainly wrong." Although the USA Patriot Act did lower the wall between intelligence and law enforcement, it was not removed, and the essence of FISA as an exceptional procedure for the gathering of foreign intelligence information remains. In the end, the brief begs the question: If the FISC did not directly interpret the "significant purpose" change to FISA, precisely how does the USA Patriot Act affect the meaning of FISA? That fundamental question was answered, albeit implicitly, by the FISC. FISA continues to restrict the use of FISA procedures for law enforcement purposes. FISA is still fundamentally a mechanism for gaining access to foreign intelligence information. Each of the statutory definitions of "foreign intelligence information" pertain to categories of intelligence that may further the counter terrorism goals of law enforcement, but each definition requires that the surveillance be for "information" that furthers these purposes. "Obtaining evidence for conviction" is something different from "obtaining foreign intelligence information," even if the conviction will deter terrorism. The change in FISA from "purpose" to "significant purpose" acknowledges the evolving interconnectedness of intelligence gathering and law enforcement as counter terrorism tools, but there is no indication in the USA Patriot Act that the fundamental purpose of FISA was altered.

Although the Department of Justice brief notes that FISA must be read as a whole, not in bits and pieces, the brief does just what it cautions against. For example, the brief notes that the definition of "foreign intelligence information" does not limit how the government may use the information to protect against threats to the national security. However, as the FISC explained, other parts of FISA, including the minimization requirements, do so limit the government. Similarly, the Department of Justice is correct to assert that "foreign intelligence information" may be used for a law enforcement purpose, but the information may only be used according to the other requirements of FISA, including minimization. Finally, while the USA Patriot Act expressly authorizes consultation and coordination between intelligence and law enforcement officials, the Act also expressly continues to place intelligence officials as those in charge who will do the consulting and information sharing with law enforcement officials.

The Constitution as construed by the Supreme Court in Keith also supports the continuing legal obligation to balance carefully intelligence gathering and law enforcement investigations. The Department of Justice brief inaccurately characterizes the Keith decision as drawing the constitutional boundaries for surveillance on the basis of the "nature of the threat, not the nature of the government's response to that threat." Both elements figured in the balancing formula in Keith. As noted above, the Court recognized that different standards may be constitutional "if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." The government's duty to protect the national security was pitted against the danger that untethered executive surveillance would abuse individual rights.

The Keith Court supported an exception to the warrant requirements because it is reasonable to

use other procedures in pursuit of intelligence information. FISA occupied the exception recognized by the Supreme Court, leaving the law enforcement model in place. Although it is common to refer to what the FISC issues as "warrants," they have that label not because they are Fourth Amendment warrants, but because the FISC permits the type of surveillance associated with a Title III warrant. Allowing the government to employ FISA to enforce the criminal laws would therefore also be unconstitutional, in violation of the Fourth Amendment.

Why should we care what the primary or even a significant purpose of surveillance is? Why should intelligence gathering and law enforcement investigations be subject to different rules? First, collection of foreign intelligence information is designed to head-off a threat to national security, while law enforcement collection has traditionally been after-the-fact, to identify perpetrators of completed crimes. (Terrorism is admittedly a different kind of crime that has forced all of us to confront a complex range of authority and rights problems.) Foreign intelligence is also sometimes sought simply to keep tabs on foreign groups, absent any anticipated criminal activity. Foreign intelligence gathering is therefore sometimes less specific and more programmatic than law enforcement collection. In addition, foreign intelligence information may also be harder for someone outside the intelligence community to evaluate. Pieces may be understood only as part of a mosaic of information, by contrast to the often more specific, historical information obtained for particular law enforcement purposes. Traditional standards of probable cause are thus inappropriate for foreign intelligence gathering.

It is not accurate to claim, as the brief does, that before the USA Patriot Act the federal courts treated law enforcement and intelligence gathering purposes "as if the two terms are mutually exclusive." Instead, the "primary purpose" standard was developed with care by judges reviewing criminal defendants' claims that FISA surveillance tainted the prosecution in violation of the Fourth Amendment. The standard recognized the frequent overlap of law enforcement and intelligence operations, and sought to draw a reasonable line to guide law enforcement and intelligence officials as they manage parallel investigations. Although the USA Patriot Act amendment required only that the surveillance have a "significant" intelligence purpose, nothing else in the USA Patriot Act or in FISA forgives the required review of consultations between intelligence and law enforcement officials, much less the finding made by the FISC in each case that the surveillance approved is in pursuit of foreign intelligence information.

Continuing Congressional Oversight

It is impossible for any academic to opine intelligently about what goes on in working with FISA. Its proceedings are secret, little reporting is done, and only rarely does any FISA surveillance reach the public eye. We outsiders simply do not know enough to offer a detailed critique of the procedures for implementing FISA, pre or post-USA Patriot Act. Of course our relative ignorance can be remedied, at least in part, by providing more information about the implementation of FISA. Now that some of the guidelines have been disclosed during this dispute, why not assure that all such guidelines are publicly reported, redacted as necessary to protect classified information or intelligence sources and methods. The reporting that now occurs is bare-bones, limited to a simple aggregate number of applications each year with no further detail. Why not report with appropriate break-downs for electronic surveillance and searches, numbers of targets, numbers of roving wiretaps, how many targets of FISA were prosecuted, how many were U.S. persons. The reports should also be available more often than annually.

In addition, among the reforms to FISA that the Judiciary Committee could consider would be a formal role for the FISC in reviewing and approving FISA guidelines, akin to the role the Supreme Court assumes in reviewing the Rules of Civil Procedure and Rules of Evidence. The

FISC is, of course, an Article III court, and the Judiciary Committee is thus centrally responsible for its oversight, even if its work concerns intelligence.

Moreover, the appeal of the FISC decision lays bear the one-sided nature of FISA proceedings. Now that the government has lost a case and has exercised its statutory right of appeal, who will represent the FISC on appeal? As the statute now stands, no one speaks for the FISC. The Judiciary Committee may consider an amendment to FISA that permits the creation of a list of security-cleared counsel who could brief and argue any subsequent appeals from the FISC.

Conclusions

Government works best when the branches work together. The rare glimpse at the secret surveillance mechanism afforded by the release of the May 17 FISC opinion and attendant correspondence has shown that the changing U.S. environment for counter terrorism demands that all the principal government actors must cooperate in reforming a system for such surveillance that keeps us safe and free. Recent developments have exposed some dissonance among those responsible for making FISA attain its aim of granting extraordinary access to intelligence information in the hands of those who would plot against the United States, while protecting the First and Fourth Amendment rights of all persons. Congress should do what it can to enable the government to speak with one voice in national security surveillance, to keep us safe and free.