CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEPARATION OF POWERS — FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW HOLDS THAT PROSECUTORS MAY SPY ON AMERICAN AGENTS OF FOREIGN POWERS WITHOUT A WARRANT. — *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

In waging the war against terrorism, Congress has granted the Justice Department unprecedented power to spy on Americans.[1] Recently, the Foreign Intelligence Surveillance Court of Review[2] upheld some of this power in its first-ever decision,[3] *In re Sealed Case*,[4] holding that neither the Foreign Intelligence Surveillance Act (FISA)[5] nor the Fourth Amendment prohibits criminal prosecutors from "directing or controlling . . . investigation[s] using FISA searches and surveillances toward law enforcement objectives."[6] While many critics have decried the decision as a blank check for the government to invade individuals' privacy,[7] another troubling — yet often overlooked — aspect of the decision is its suggestion that the Foreign Intelligence Surveillance Court has no authority to oversee the "internal organization and investigative procedures of the Department of Justice."[8] By weakening the FISA court's ability to check executive power over foreign intelligence surveillance, the review court's decision threatens to reduce the FISA court to a rubber stamp for the Justice Department, potentially eroding both privacy and the separation of powers.

Congress passed the Foreign Intelligence Surveillance Act of 1978[9] to protect the privacy of Americans against potential executive abuses of power.[10] The Act established the FISA court and charged it with authorizing electronic surveillance if there was probable cause to believe that the target was a "foreign power or an agent of a foreign

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1 *See* Vanessa Blum, *Guarding Against Mission Creep: Critics Fear Routine DOJ Use of Terror Laws*, LEGAL TIMES, Nov. 25, 2002, at 1.

2 The review court, which hears appeals from the Foreign Intelligence Surveillance Court, consists of three federal appellate judges: Judge Guy of the Sixth Circuit, Judge Silberman of the D.C. Circuit, and Judge Leavy of the Ninth Circuit. *Id.* at 13.

3 *Id.*

4 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

5 50 U.S.C.A. §§ 1801–1862 (West 2003).

6 *Sealed Case*, 310 F.3d at 720.

7 *See, e.g.*, Editorial, *A Green Light To Spy*, N.Y. TIMES, Nov. 19, 2002, at A30.

8 *Sealed Case*, 310 F.3d at 731.

9 Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1829).

10 *See* Helene E. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs*, 12 RUTGERS L.J. 405, 405–08 (1981).

power."[11] If the target also happened to be a "United States person,"[12] the Act empowered the court to approve the order only if it found that first, the government's proposed "minimization procedures" were "reasonably designed" to avoid unnecessary invasions of privacy,[13] and second, the government was not "clearly erroneous"[14] in its certification that "the purpose" of the surveillance was to obtain foreign intelligence information and that such information could not "reasonably be obtained by normal investigative techniques."[15]

During the 1980s, federal courts began to interpret FISA as prohibiting electronic surveillance when the "primary purpose" was not to acquire foreign intelligence information but to obtain evidence for a criminal prosecution.[16] Accordingly, the Attorney General's 1995 Procedures,[17] which the FISA court adopted in 2001 as standard "'minimization procedures' to apply in all cases before [it],"[18] specified that "the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's *directing or controlling* the . . . [foreign intelligence] investigation toward law enforcement objectives."[19]

In response to the events of September 11, 2001, Congress passed the USA Patriot Act,[20] which amended FISA to authorize electronic surveillance if "a significant purpose"[21] — rather than "the purpose" — is to obtain foreign intelligence information. The Patriot Act also added a provision allowing the FBI to "consult with" the Criminal Division in cases involving FISA surveillance.[22]

On March 7, 2002, the government petitioned the FISA court to vacate its 2001 order adopting the 1995 Procedures and to adopt in-

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11 50 U.S.C.A. § 1805(a)(3)(A).

12 "United States persons" include both American citizens and legal permanent resident aliens. *See id.* § 1801(i).

13 *Id.* §§ 1801(h)(1), 1805(a)(4).

14 *Id.* § 1805(a)(5).

15 Pub. L. No. 95-511, § 104(a)(7)(B)–(C), 92 Stat. 1783, 1789 (current version at 50 U.S.C.A. § 1804(a)(7)(B)–(C)).

16 *See Sealed Case*, 310 F.3d at 725–27 (describing the "primary purpose" test articulated in *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980)).

17 Memorandum from the Attorney General, Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995) [hereinafter 1995 Procedures], http://fas.org/irp/agency/doj/fisa/1995procs.html.

18 *Sealed Case*, 310 F.3d at 729.

19 *Id.* at 727–28 (quoting and adding emphasis to 1995 Procedures, *supra* note 17).

20 Pub. L. No. 107-56, 2001 U.S.C.C.A.N. (115 Stat.) 272 (2001).

21 *Id.* § 218, 2001 U.S.C.C.A.N. (115 Stat.) at 291 (codified at 50 U.S.C.A. § 1804(a)(7)(B) (West 2003)).

22 *Id.* § 504(a), 2001 U.S.C.C.A.N. (115 Stat.) at 364 (codified at 50 U.S.C.A. § 1806(k)(1)).

stead the Attorney General's 2002 Procedures,[23] which permitted "the complete exchange of information and advice between intelligence and law enforcement officials."[24] In its first-ever published opinion, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*,[25] the FISA court held that the 2002 Procedures failed to meet the statutory requirements for minimization procedures.[26] Pursuant to its statutory authority to grant surveillance orders "as requested or as modified,"[27] the court modified the 2002 Procedures with language from the 1995 Procedures prohibiting criminal prosecutors from "directing or controlling" FISA investigations.[28] To ensure that the Justice Department complied with these strictures, the court added a provision requiring that the Office of Intelligence Policy and Review (OIPR) — the unit of the Justice Department that appears before the FISA court — "be invited" to all foreign intelligence consultations between the FBI and the Criminal Division.[29]

Nevertheless, on July 19, 2002, the government applied for a surveillance order and "expressly proposed using the 2002 Procedures *without modification*."[30] The FISA judge granted the surveillance order but modified the 2002 Procedures in accordance with the court's decision in *All Matters*.[31] The government appealed, treating the modification as a denial of its original application.[32]

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[23] Memorandum from the Attorney General, Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI (Mar. 6, 2002) [hereinafter 2002 Procedures], http://fas.org/irp/agency/doj/fisa/ago30602.html.

[24] *Sealed Case*, 310 F.3d at 729.

[25] 218 F. Supp. 2d 611 (Foreign Int. Surv. Ct. 2002).

[26] *Id.* at 625. The court reasoned that the 2002 Procedures were "designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes, instead* of being consistent with the need of the United States to 'obtain, produce, and disseminate *foreign intelligence information*' . . . as mandated in § 1801(h)." *Id.* at 623 (quoting and adding emphasis to 50 U.S.C.A. § 1801(h)(1)).

[27] 50 U.S.C.A. § 1805(a); *see All Matters*, 218 F. Supp. 2d at 618 (noting that Congress intended a FISA judge to have "the *discretionary power to modify* the order sought, such as with regard to . . . the *minimization procedures* to be followed" (quoting and adding emphasis to H.R. REP. NO. 95-1283, pt. 1, at 78 (1978) [hereinafter HOUSE REPORT])).

[28] *All Matters*, 218 F. Supp. 2d at 625.

[29] *Id.* The FISA court noted that if OIPR is unable to attend these consultations, OIPR should be "apprised of the substance of the consultations forthwith in writing so that the Court may be notified at the earliest opportunity." *Id.*

[30] *Sealed Case*, 310 F.3d at 730.

[31] *Id.*

[32] *See id.* at 721. Because the government was the only party to the case, the review court accepted amicus briefs from the American Civil Liberties Union and the National Association of Criminal Defense Lawyers. *Id.* at 719. After the review court handed down its decision, the amici moved to intervene so that they could petition for a writ of certiorari. *See* Dan Eggen, *High Court Won't Rule on Terror Surveillance*, WASH. POST, Mar. 25, 2003, at A3. The Supreme Court recently denied the motion in *ACLU v. United States*, No. 02M69, 2003 WL 1447870 (U.S. Mar. 24, 2003) (mem.).

The review court reversed.[33] It first held that FISA does not require the "primary purpose" test, which rests on a "false dichotomy" between intelligence and criminal investigations.[34] Because FISA itself defines "agents of foreign powers" and "international terrorism" in terms of criminal activity,[35] the court reasoned, "it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes."[36] In addition, the court argued, both the text and the legislative history of the Patriot Act amendments indicate that Congress intended to reject the primary purpose test.[37]

The court went on to hold that FISA, as amended by the Patriot Act, does not violate the Fourth Amendment.[38] The court first suggested that a FISA order is analogous to a warrant[39] because it is issued by a "neutral and detached magistrate," requires a finding of probable cause, particularly describes the type of information to be obtained and the facilities to be monitored, authorizes only "necessary" surveillance, and limits the duration and intrusiveness of that surveillance.[40] To the extent that a FISA order is not "a warrant in the constitutional sense,"[41] the court continued, FISA surveillance is nevertheless reasonable under the Fourth Amendment because it appropriately balances privacy interests with the government's "special needs, beyond the normal need for law enforcement,"[42] to "protect the nation against terrorists and espionage threats."[43]

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[33] *Sealed Case*, 310 F.3d at 719–20.

[34] *Id.* at 723–28.

[35] *See* 50 U.S.C.A. § 1801(b)(2)(A) (West 2003) (defining "an agent of a foreign power" as anyone who gathers intelligence for a foreign power in violation of federal criminal law); *id.* § 1801(c) (defining "international terrorism" as coercive or intimidating acts of international violence that violate federal or state criminal law).

[36] *Sealed Case*, 310 F.3d at 723. In addition, the court reasoned, "arresting and prosecuting terrorist agents of, or spies for, a foreign power may well be the best technique to prevent them from successfully continuing their terrorist or espionage activity." *Id.* at 724.

[37] *See id.* at 732–33.

[38] *See id.* at 746.

[39] While the review court did not explicitly decide whether FISA procedures meet Fourth Amendment warrant standards, it noted that they "certainly come close," *id.* at 746 — an observation that "certainly bears on [their] reasonableness under the Fourth Amendment," *id.* at 742.

[40] *See id.* at 738–40 (comparing FISA with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2000), which sets forth warrant requirements for electronic surveillance conducted in ordinary criminal investigations).

[41] *Id.* at 741 (noting that FISA and Title III "diverge in constitutionally relevant areas").

[42] *Id.* at 745 (quoting *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987))) (internal quotation marks omitted).

[43] *Id.* at 746; *see also id.* at 742 (noting that the Supreme Court recognized in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), that even with respect to domestic intelligence surveillance, procedures that deviate from Title III standards "may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the government for intelligence information and the protected rights of our citizens" (quoting *Keith*, 407 U.S. at 322–23) (internal quotation marks omitted)).

While the review court's Fourth Amendment analysis rests on shaky and previously unexplored ground,[44] its impact may not be as dramatic as critics predict, since Fourth Amendment challenges cannot be raised in FISA courts[45] and the review court's constitutional holding may not bind ordinary federal courts.[46] A less obvious but more immediate problem is the review court's unduly narrow construction of the "minimization procedures" that the FISA court may review and modify — a statutory interpretation informed by a flawed conception of the separation of powers doctrine. By curtailing the FISA court's authority to oversee executive procedures for conducting foreign intelligence surveillance, the review court's opinion threatens to render the FISA court's approval a mere formality, potentially eroding both privacy and the separation of powers.

In holding that the FISA court exceeded its statutory authority to modify proposed minimization procedures, the review court maintained that the lower court mistakenly categorized the 2002 Procedures as minimization procedures.[47] To support this contention, the review court noted that, whereas minimization procedures are designed to limit the acquisition, retention, and dissemination of private information that is "not foreign intelligence information," the FISA court's orders prohibited the Criminal Division from advising the FBI on obtaining foreign intelligence information, "even if such information includes evidence of a foreign intelligence crime."[48] Contrary to the review court's assertion, however, "the face of section 1801(h)"[49] does not exclude foreign intelligence information from the purview of minimization procedures,[50] and the legislative history suggests that Congress intended minimization procedures to limit dissemination of

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[44] The review court itself conceded that "the constitutional question presented by this case — whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment — has no definitive jurisprudential answer." *Id.* at 746. Although some critics argue that the Patriot Act amendments to FISA violate the Fourth Amendment, *see, e.g.*, John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1101–04 (2002), this position is just as tenuous as the review court's holding, since the Supreme Court's muddled Fourth Amendment jurisprudence, *see generally* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), provides no clear support for either conclusion.

[45] *See* 50 U.S.C.A. § 1803(a) (West 2003) (limiting the FISA court's jurisdiction to reviewing applications and granting orders for electronic surveillance).

[46] *See* David L. Hudson, Jr., *Unusual Appeals Process in Wiretap Case*, A.B.A. J. E-REPORT, Nov. 22, 2002, WL 1 No. 45 ABAJEREP 1.

[47] *Sealed Case*, 310 F.3d at 730.

[48] *Id.* at 731.

[49] *Id.*

[50] While § 1801(h)(2) applies specifically to "nonpublicly available information, which is not foreign intelligence information," § 1801(h)(1) contains no such language. *Compare* 50 U.S.C.A. § 1801(h)(2), *with id.* § 1801(h)(1).

foreign intelligence information among and within different divisions of the Justice Department.[51] Moreover, the legislative history suggests that Congress intended minimization procedures to include "provisions relating to the proper authority in particular cases to approve the retention or dissemination of the identity of United States persons" and "provisions relating to internal review of the minimization process."[52]

Based on this understanding of minimization, the FISA court's decision in *All Matters* can be reasonably regarded as a legitimate exercise of the court's authority to modify and order minimization procedures.[53] And even if the FISA court was wrong to conclude that the statute requires the primary purpose test, its decision could still be understood as an authorized modification of minimization procedures "to prevent the government from targeting a foreign agent when its 'true purpose' was to gain non-foreign intelligence information" — a purpose that the review court itself deemed impermissible under FISA.[54]

Underlying the review court's narrow interpretation of "minimization procedures" is its misguided concern that the FISA court "may well have exceeded the constitutional bounds that restrict an Article III court" by asserting "authority to govern the internal organization and investigative procedures of the Department of Justice which are the province of the Executive Branch (Article II) and the Congress (Article I)."[55] The Supreme Court, however, has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'"[56] In fact, the Court has noted that congressionally authorized judicial oversight of executive officers does not violate the separation of powers doctrine simply because it "reduces the amount of control or supervision that the [executive] exercises over the investigation and prosecution of a certain class of alleged criminal activity."[57] As long as the executive retains "a degree of control over

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[51] *See* HOUSE REPORT, *supra* note 27, at 59 ("Many agencies have widely disparate functions themselves, or are subordinate elements of departments which have functions totally unrelated to intelligence. It is the intent of the committee that use within an agency is potentially subject to minimization.").

[52] *Id.* at 56.

[53] The court's order prohibiting the Criminal Division from "directing or controlling" FISA investigations can be reasonably regarded as a provision "relating to the proper authority in particular cases to approve the retention or dissemination of the identity of United States persons," and its order requiring that OIPR "be invited" to consultations between the FBI and the Criminal Division can be reasonably regarded as a provision "relating to internal review of the minimization process."

[54] *Sealed Case*, 310 F.3d at 736.

[55] *Id.* at 731.

[56] Morrison v. Olson, 487 U.S. 654, 693–94 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

[57] *Id.* at 695.

the power to initiate an investigation,"[58] judicial supervision does not violate the separation of powers doctrine, since it does not wholly "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions."[59]

The review court's narrow conception of the FISA court's statutory and constitutional authority raises serious Fourth Amendment and separation of powers concerns. First, it potentially blindfolds the FISA court to blatant violations of the Fourth Amendment. The review court recognized in *Sealed Case* that FISA surveillance conducted primarily to gather evidence of "ordinary criminal wrongdoing," as opposed to a foreign intelligence crime, would clearly violate both FISA and the Fourth Amendment.[60] The court also recognized that any "manifestation of such a purpose . . . would continue to disqualify an application."[61] Nevertheless, the review court denounced any "FISA court inquiry into the origins of the investigation [or] examination of the personnel involved" as judicial usurpation of executive prerogative[62] — even though such an inquiry may well reveal a blatantly unconstitutional purpose.

Second, by demanding virtually unqualified deference to the Attorney General, the review court's opinion "impermissibly threatens the institutional integrity of the Judicial Branch"[63] and thus violates the spirit of Article III, which "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government."[64] The institutional independence of the FISA court is

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[58] *Id.* at 696.

[59] *Id.* at 695 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)) (internal quotation marks omitted). Although *Morrison*'s "totality-of-the-circumstances test" has drawn "severe and widespread criticism," 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-8, at 693, 695 (3d ed. 2000), its underlying rationale, which reflects the flexibility that the Constitution affords Congress to "shield the Executive Branch from a disabling conflict of interest and to promote the fact and appearance of impartial law enforcement," *id.* at 694, applies with particular force to *Sealed Case*. Like the judicial oversight of independent counsel at issue in *Morrison*, the FISA court's oversight of executive procedures for conducting foreign intelligence surveillance actually enhances, rather than impairs, the executive's ability "to take Care that the Laws be *faithfully* executed." *Id.* at 693 (quoting and adding emphasis to U.S. CONST. art. II, § 3) (internal quotation marks omitted).

[60] *Sealed Case*, 310 F.3d at 736, 745.

[61] *Id.* at 736.

[62] *Id.*

[63] Mistretta v. United States, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986)) (internal quotation marks omitted).

[64] *Schor*, 478 U.S. at 848 (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985); and *United States v. Will*, 449 U.S. 200, 218 (1980)) (citations and internal quotation marks omitted). While the FISA court does not adjudicate the rights of litigants, it does effectively adjudicate the rights of Americans who may be targeted by FISA surveillance. *See*

especially important because it provides the only real check on the executive's power over foreign intelligence surveillance, as the Attorney General's discretion under FISA is largely exempt from adversarial testing: Surveillance orders must be issued ex parte,[65] and only the government may file appeals.[66] Moreover, while FISA authorizes civil suits for damages that result from a violation of its terms,[67] such suits are unlikely because notice to the target is not required, even after surveillance ends.[68] And although FISA provides for discovery and suppression of information obtained through surveillance when the government intends to use it in a trial or other proceeding,[69] motions to disclose or suppress must be reviewed in camera and ex parte if the Attorney General determines that "disclosure or an adversary hearing would harm the national security of the United States."[70]

Finally, the institutional independence of the FISA court is crucial to the constitutionality of the surveillance that it approves. The review court noted in *Sealed Case* that FISA surveillance is reasonable under the Fourth Amendment partly because it must be approved by a neutral and detached magistrate.[71] But if a FISA judge has no real authority to question executive procedures for conducting foreign intelligence surveillance, he or she functions more like "a compliant arm of the government"[72] than like a neutral and detached magistrate.

According to the Supreme Court, "the greatest security against tyranny — the accumulation of excessive authority in a single Branch — lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."[73] By erroneously interpreting the separation of powers doctrine to require a hermetic division between the FISA court and the Justice Department, the review court's opinion in *Sealed Case* threatens not only privacy interests but also the separation of powers itself.

United States v. Megahey, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) (holding that FISA does not violate the Article III "case or controversy" requirement because the FISA judge "is not faced with an abstract issue of law or called upon to issue an advisory opinion, but is, instead, called upon to ensure that individuals who are targeted do not have their privacy interests invaded, except in compliance with the detailed requirements of the statute"), *aff'd sub nom.* United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).

65 50 U.S.C.A. § 1805(a) (West 2003).

66 *Id.* § 1803(a)–(b); *see also supra* note 32.

67 *Id.* § 1810.

68 *See* Schwartz, *supra* note 10, at 442–43.

69 50 U.S.C.A. § 1806(c)–(e).

70 *Id.* § 1806(f).

71 *Sealed Case*, 310 F.3d at 738.

72 United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987).

73 Mistretta v. United States, 488 U.S. 361, 381 (1989).