96TH CONGRESS
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No. 96-1017

IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978—1979-80

REPORT

OF THE

SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

OCTOBER 30, 1980.—Ordered to be printed

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Mr. BAYH, from the Select Committee on Intelligence, submitted the following

REPORT

IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978—1979-80

I. INTRODUCTION

The Foreign Intelligence Surveillance Act of 1978, Public Law 95-511, 92 Stat. 1783, et seq., requires that each year for five years after enactment the Senate Select Committee on Intelligence shall report to the Senate concerning the implementation of the Act. Such reports are to include an analysis and recommendations concerning whether the Act should be (1) amended, (2) replaced, or (3) permitted to continue in effect without amendment. This is the second annual report of the Select Committee under the Act. The first report, submitted in 1979, concluded that the brief experience since all procedures of the Act had become applicable did not provide sufficient grounds for consideration at that time of amending or replacing the Act. Therefore, the Select Committee recommended that the Act should be permitted to continue in effect without amendment.

During the past year the Select Committee has conducted a continuing analysis of the Act and oversight of its implementation based on information obtained from the Attorney General and the agencies concerned. The Act requires the Attorney General to inform the Select Committee fully, on a semiannual basis, concerning all electronic surveillance under the Act. In addition to the information set forth in the Attorney General's reports, further specific information concerning electronic surveillances under the Act and related matters has been provided to the Select Committee by the Department of Justice and the agencies that conducted the surveillances.

Two significant developments during the past year may require action by the Senate during the next session of Congress. First, the

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Executive branch has expressed concern about the need for several amendments to the Foreign Intelligence Surveillance Act to address matters that have arisen during the course of its implementation. The Select Committee considered these proposals as part of intelligence charter legislation in 1980, but final recommendations were postponed. Second, during the past year, applications have been made to judges of the Foreign Intelligence Surveillance Court for orders approving the use of techniques, other than electronic surveillance as defined in the Foreign Intelligence Surveillance Act, to acquire foreign intelligence information. These techniques would have required a judicial warrant if they had been employed for law enforcement purposes. Orders approving such techniques were issued by the judges to whom the applications were made. There is no statutory authority for the use of these techniques for foreign intelligence purposes. Nor is there express statutory jurisdiction for judges of the Foreign Intelligence Surveillance Court to issue orders approving the use of such techniques. Therefore, the actions of the Executive branch and the legal basis for the court orders will require the most careful examination.

Legislation may be necessary to clarify the authority of the Executive branch and the role of the judiciary in the collection of foreign intelligence information by means of techniques (other than electronic surveillance as defined in the Foreign Intelligence Surveillance Act) which require a judicial warrant when used for law enforcement purposes. The Select Committee has considered, as part of intelligence charter legislation, statutory authorization for the use of such techniques including court order requirements similar to the Foreign Intelligence Act. Under that legislation, judges of the Foreign Intelligence Surveillance Court would have been given express statutory jurisdiction to issue such orders. However, the Select Committee has postponed any recommendations on such legislation. The decision of the Executive branch to employ such techniques and to seek court orders approving their use, in the absence of express statutory authorization, raises important questions that should be addressed in the next session of Congress.

II. IMPLEMENTATION OF THE ACT

Number of applications and orders

The Foreign Intelligence Surveillance Act requires the Attorney General to transmit in April of each year to Congress and the Administrative Office of the United States Courts a report 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 8, 1980, Attorney General Benjamin R. Civiletti submitted the following report to the Senate pursuant to this requirement:

> During calendar year 1979, 199 applications were made for orders and extensions of orders approving electronic surveillance under this Act. The United States Foreign Intelligence Surveillance Court issued 207 orders granting authority for the requested electronic surveillances. No orders were entered which modified or denied the requested authority.

These statistics covered the period from May 18, 1979, when the Chief Justice first designated the seven United States district court judges to serve on the court, until the end of 1979. To protect the security of properly classified information, no additional quantitative indication of the extent to which electronic surveillance under the Act has been used is being made public by the Select Committee in this report.

It should be noted, however, that the Act provides for the issuance of several different types of orders and extensions of orders approving electronic surveillance under the Act. An order may approve an electronic surveillance of certain types of foreign powers for as long as one year. An order may approve an electronic surveillance of any other type of foreign power, or an agent of a foreign power, for no longer than ninety days. Extensions of orders may be granted for the same time-periods (with a limited exception) on the basis of new findings made by the court in the same manner as required for an original order. Additional orders may be issued to direct that a specified person furnish information or assistance necessary to accomplish the surveillance. As the public statistics indicate, an application for an order or an extension results in some cases in the issuance of more than one order. A detailed breakdown of the number of surveillances of foreign powers and agents of foreign powers in each category is reported to the Select Committee.

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 or, in the case of the three-judge court of review, every two or three years. On May 18, 1980, the one-year term expired for Thomas Jamison MacBride, Senior Judge, United States District Court, Eastern District of California. The Chief Justice designated as his successor to serve a full seven-year term William C. O'Kelley, District Judge, United States District Court, Northern District of Georgia.

Executive branch implementation

The Select Committee has reviewed the administrative practices adopted by the Executive branch for the implementation of the Act. Only two intelligence agencies have conducted electronic surveillance pursuant to court order or Attorney General certification under the Act—the Federal Bureau of Investigation and the National Security Agency. The FBI conducts electronic surveillance for foreign counterintelligence purposes and, when requested by officials of the Intelligence Community designated by the President, may conduct electronic surveillance to collect positive foreign intelligence. The National Security Agency is limited by Executive Order 12036 to signals intelligence and communications security activities. Executive Order 12036 bars the Central Intelligence Agency from engaging in any electronic surveillance within the United States, except for training, testing, and defensive "sweep" purposes that are strictly limited by the Act and may not be targeted at the communications of a particular person.

The certifications and applications for orders under the Act are prepared by the agencies that conduct the surveillance in consultation with the Department of Justice. In 1979, Attorney General

Griffin B. Bell established an Office of Intelligence Policy and Review within the Justice Department. This office is headed by a Counsel for Intelligence Policy appointed by the Attorney General and subject to the general supervision and direction of the Attorney General or, when appropriate, the Deputy Attorney General. The Counsel and his office have general responsibility for all intelligence matters within the Department of Justice including policy and operational matters. The Counsel is specifically directed to supervise the preparation and submission to the court of certifications and applications for orders under the Foreign Intelligence Surveillance Act. The Counsel is also responsible for advising the Attorney General, other parts of the Justice Department, and other executive agencies on questions relating to the interpretation and application of statutes, regulations and procedures relating to U.S. intelligence activities.[1]

For each application to the court, the Federal officer making the application is an official having operational responsibilities in the agency that conducts the surveillance. An attorney from the Office of Intelligence Policy and Review represents the applicant agency before the court. Each application is approved by the Attorney General (or Acting Attorney General) or the Deputy Attorney General based upon his findings that it satisfies the criteria and requirements of the Act. Each application also contains a certification by a senior executive official in the area of national security of defense that the surveillance is undertaken to obtain foreign intelligence information that cannot reasonably be acquired by normal investigative techniques.

Section 102(a) provides for a narrow class of electronic surveillances without a court order if the Attorney General certifies in writing under oath that such surveillance is directed solely at specified types of foreign powers, and that communications of United States persons are unlikely to be acquired. The Attorney General's certifications are transmitted under seal to the Foreign Intelligence Surveillance Court. The Clerk of the court numbers such certifications in sequence and maintains a record of all such certifications by designated number and date of receipt. The minimization procedures for such surveillance were submitted to the Select Committee on June 27, 1979, and no changes thereto have been reported to the Committee since then. Discussions with Executive branch officials clarified for the Committee certain aspects of these procedures, which are not subject to court review. The Chairman and Vise Chairman have advised the Attorney General of the Select Committee's understandings, and the Attorney General has provided for periodic assessment of compliance.

Assessment of implementation

In the course of the Select Committee's oversight of the implementation of the Act, the Committee has discovered that certain paperwork problems result in delays in the processing of applications and certifications. These problems are not generally due to the requirements of the Act, but primarily to the administrative practices of the Executive branch. In urgent cases when time is of the essence, the paperwork obstacles have been overcome without great difficulty. Some adjustment in the 24-hour time limitation for emergency surveillance

[1] 28 C.F.R. Subpart F–1, sec. 0.33a–c.

without a court order has been suggested, as discussed in Part III. However, the principal problem appears to arise in more routine cases of applications for extensions of ongoing surveillances. There is a risk that, because of administrative delays in preparing for applications and scheduling court appearances, lawful surveillance coverage may be interrupted when an extension is not obtained before the expiration of the previous court order. Greater efforts could be made to streamline the administrative practices to prevent such occurrences. The Select Committee intends to monitor such efforts in the next year before considering any change in the time-period for extensions in certain types of cases.

A question has also arisen as to whether the Act permits the Attorney General to authorize physical entry of property or premises that may be necessary for an electronic surveillance conducted without a court order under section 102(a). An amendment to the Act to resolve this question is discussed in Part III.

The Select Committee has reviewed with special care the surveillances conducted under the "agent of a foreign power" standard. The information obtained by the Committee indicates that these surveillances have been consistent with the language and intent of the Act including the statutory definition of "agent of a foreign power." The court order requirement has encouraged the Executive branch to give careful attention to each surveillance so as to anticipate possible questions that might be raised by the judges. The statute has also permitted electronic surveillance to be conducted in circumstances where, because of uncertainty about the legal requirements, the Government might otherwise have been reluctant to use such techniques for detecting dangerous clandestine intelligence and international terrorist activities by foreign agents. A modification in the "agent of a foreign power" definition suggested by the Executive branch is examined in Part III.

Finally, the intelligence community has a favorable overall assessment of the impact of the Act on its ability to discharge its responsibilities. Admiral B. R. Inman, Director of the National Security Agency, has testified that the Foreign Intelligence Surveillance Act "has worked very well." Although suggesting the need for "some minor technical changes," Admiral Inman stated:

> The experience with having the court has reassured any reservations I might have had earlier about the fact that one can get legislation that both restricts but also spells out authorities very clearly and [I] find it, in fact, not difficult to use. Security is infinitely better than I have predicted in that aspect. The legislation did, of course, give us some benefits . . . The real impact on us was the question of going for warrants for electronic surveillance. I can honestly say it works well.[2]

FBI Director William H. Webster has stated.

> In the Foreign Intelligence Surveillance Act, Congress established a special court and new standards to control the use of electronic surveillance in counter-intelligence cases. This Act properly addressed the Fourth Amendment concerns inherent in those electronic surveillances. While, initially, I had reservations about the Foreign Intelligence Surveillance

[2] Hearings on S. 2284, the National Intelligence Act of 1980, Feb. 28, 1980.

Act, I can say, on the basis of our experience, that it works well and has not had a deleterious effect on our counter-intelligence effort.[3]

III. ANALYSIS AND RECOMMENDATIONS

The Select Committee on Intelligence has found that, since its implementation in 1979, the Foreign Intelligence Surveillance Act has provided a workable legal procedure for electronic surveillance conducted within the United States for foreign intelligence purposes. The Executive branch has proposed several amendments to the Act which require further consideration. Moreover, important questions are raised by the decision of the Executive branch, in the absence of express statutory authorization, to employ other techniques which would require a judicial warrant for law enforcement purposes and to seek court orders from judges of the Foreign Intelligence Surveillance Court approving the use of such techniques to acquire foreign intelligence information. The following analysis and recommendations address each of these matters.

A. Revisions in the Foreign Intelligence Surveillance Act

During 1980 the Executive branch proposed three amendments to the 1978 Act in the course of the consideration of intelligence charter legislation. These amendments were alluded to only briefly during the Select Committee's public hearings on the charter proposals.

Physical entry under section 102(a)

The first proposed amendment would have expressly allowed the Attorney General to authorize, without a court order, physical entry of property or premises under the open and exclusive control of certain types of foreign powers for the purpose of implementing an electronic surveillance under section 102(a) of the Act. This amendment was proposed by the Executive branch to resolve an ambiguity in the Act. The provisions of section 102(a) for a narrow category of surveillances of such foreign powers without a court order do not refer to physical entry. By contrast, the court order provisions for other electronic surveillances expressly state that the applications and court orders must specify "whether physical entry will be used to effect the surveillance." Because of this disparity, the question has arisen whether the Act permits the Attorney General to authorize such an entry without a court order under section 102(a).

The legislative history of the Act does not directly address this issue. There is a general statement in the statement of managers accompanying the conference report that "physical entry may be authorized to effect electronic surveillance under this bill." H. Rept. 95–1720, p. 27. However, this statement was an explanation of the resolution of the differences between the House and Senate bills regarding the references to physical entry in the court order provisions. The Supreme Court has held that physical entry may be employed to implement court-ordered law enforcement surveillance under Title 18, U.S. Code, without express statutory authority. *Dalia* v. *United States*, 441 U.S. 238, (1979). However, the courts has not addressed the issue of physical

[3] Remarks by William H. Webster, Director, Federal Bureau of Investigation, before the University of Chicago Intelligence Workshop, Chicago, Ill., June 27, 1980.

entry in the context of electronic surveillance without a court order. Attorney General Civiletti has advised the Select Committee that, in his opinion, the Foreign Intelligence Surveillance Act "does not provide authority for the Attorney General to authorize physical entry for the purpose of implementing § 102(a) surveillances."

The purpose of the amendment proposed by the Executive branch was only to clarify the law to ensure that necessary and lawful surveillance would not be frustrated by the absence of such physical entry authority. The amendment would not have authorized 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 section 102(a) of the Act.

Emergency surveillance

The second proposed amendment would have changed from 24 to 48 hours the time limit on electronic surveillance that may be authorized without a court order under section 105(e) of the Act in an emergency situation, when a court order cannot "with due diligence be obtained." Director of Central Intelligence Stansfield Turner testified before the Select Committee that "the 24-hour period is inadequate, leading to the necessity of delaying implementation of emergency surveillances." NSA Director Inman explained that "we were not farsighted enough to recognize in the bureaucracy, with weekends and things like that, 24 hours is not very long for emergency; 48 would be better." [4]

Under the Act an emergency surveillance that is authorized by the Attorney General without a court order must be terminated within 24 hours unless a court order is obtained. By comparison, the law enforcement surveillance procedures under Title 18, U.S. Code, permit 72-hour emergency surveillance without a court order. The Executive branch has advised the Select Committee that extending the 24 hours to 48 would permit sufficient time to accomplish the administrative steps necessary for submission of an application to the court without running a risk that an emergency surveillance would have to be terminated. The change to 48-hours proposed by the Executive branch would not have affected the provisions of the Act requiring subsequent court review of the surveillance and restricting the use of information obtained from a surveillance which the court disapproves.

"Agent of a foreign power"

The third proposed amendment would have amended the definition of "agent of a foreign power" in section 101(b) of the Act to add any person, including a United States person, who is a current or former senior officer of a foreign government or faction. Director of Central Intelligence Stansfield Turner testified that this amendment was needed to "permit targeting of dual nationals who occupy senior positions in the government or military forces of foreign governments, while at the same time retaining United States citizenship." He explained that when such persons visit the United States on official business, their activities frequently would not bring them

[4] Hearings on S. 2284, Feb. 21, 28, 1980.

under "the quasi-criminal targeting standard" required by the Act for electronic surveillance of U.S. citizens. Admiral Turner also testified that "various situations have arisen in which it is clear that a former foreign government official who is present in the United States may have significant foreign intelligence information." [5] Under the Act such a former official (other than a U.S. person) can be targeted if the person acts in the United States as an officer or employee of a foreign power or as a member of an international terrorist group, if the person may engage in clandestine intelligence activities for or on behalf of certain types of foreign powers, or under the criminal standard.

The Select Committee has reviewed the recent experience of the intelligence community under the current definition of "agent of a foreign power" in the Foreign Intelligence Surveillance Act. That review indicated that the absence of authority for surveillance under the proposed new "agent of a foreign power" standards has not adversely affected the acquisition of foreign intelligence information. Moreover, during the Committees' consideration of intelligence charter legislation, a proposal was made to exclude United States persons from the "former senior officer" standard. Questions were also raised as to whether the "current senior officer" standard should apply to U.S. citizens only if they hold dual nationality and are acting in their official capacity within the United States.

Attorney General Civiletti has advised the Select Committee that under the Act "there is no targeting provision for former senior officials of foreign governments solely on the basis of such status." However, the language and legislative history of the Act would not foreclose the targeting of non-United States persons who act in the United States as leaders of factions of foreign nations or as leaders of foreign-based political organizations under that element of the "agent of a foreign power" definition that applies to "any person other than a United States person who acts in the United States as an officer . . . of a foreign power." Sec. 101(b)(1)(A). Such foreign factions or political organizations may not have formal "officers" in the same sense as foreign governments, but a leader of such a faction or organization could reasonably be considered an "officer" for the purposes of the Act. Thus, in some cases a former senior official of a foreign government could be targeted under the Act on this basis.

The version of the Act passed by the House included an "agent of a foreign power" standard for non-United States persons who act in the United States as "members" of foreign powers. This authority was not contained in the Senate bill, and the conference report adopted a compromise standard applying only to members of international terrorist groups. Clearly, a "leader" would have been encompassed by the "member" standard in the House bill. However, the deletion of "member" in the case of foreign factions or foreign-based political organizations does not necessarily affect the inclusion of leaders within the meaning of "officer." The legislative history of the Act described "a faction of a foreign nation or nations" as intended to include factions "which are in a contest for power over, or control of the territory of, a foreign nation or nations." The leaders of such a faction could reasonably be considered its "officers." The

[5] Hearings on S. 2284, Feb. 21, 1980.

legislative history characterized "a foreign based-political organization" as including ruling and minority political parties and "other foreign political organizations which exercise or have potential political power in foreign country or internationally." A person who occupies a leadership position in such an organization could also reasonably be termed an "officer" under the Act. See H. Rep. 95–1283, pp. 29, 31; S. Rep. 95–701, pp. 17–18. Thus, the Act appears to permit surveillance of a former senior foreign government official (other than a U.S. person) who acts in the United States as a leader of a foreign faction or political organization.

Recommendations

Attorney General Civiletti has advised the Select Committee that, in his view, amendments to the Foreign Intelligence Surveillance Act addressing the matters discussed above would be "consistent with the purpose of the Act in protecting the national security and in avoiding intrusions on the rights of personal privacy in the United States." The amendment to allow physical entry for surveillances conducted under section 102(a) was included in the intelligence charter bill introduced by members of the committee in 1980. The Select Committee recommends that further consideration be given in the next session of Congress to the need for amendments to address each of the concerns expressed by the Executive branch. It is also recommended that specific legislative proposals be developed in consultation with the Executive branch for this purpose. Pending further consideration of these proposals, the Select Committee recommends that the Act should be permitted to continue in effect without amendment.[6]

B. Unconsented Physical Searches

During the past year, the Department of Justice made applications to federal district 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. The Justice Department has provided to the Select Committee a written explanation of the legal principles and policies adopted in these cases.[7]

[6] As reported by the conference committee, the Act deleted a House provision requiring the respective intelligence committees when through review of the information provided by the Attorney General, they determine that a surveillance of a U.S. person produced no foreign intelligence information and the national security would not be harmed, to notify the target of such surveillance. The conferees expected that the annual reviews to be conducted by the respective intelligence committees would fully examine this issue. H. Rept. 95–1720, p. 33. The Select Committee does not believe it would be appropriate to provide such authority by legislation. If necessary, such notice could be provided pursuant to the provisions of S. Res. 400, 94th Congress, which established the Select Committee on Intelligence.

[7] On June 11, 1980, the Chairman and Vice Chairman of the Select Committee wrote to the Attorney General asking that the Justice Department address certain questions in the materials to be submitted to the Committee. The materials provided by the Justice Department in response to this request are included as an appendix to this report.

Executive Order 12036 provides that unconsented physical searches for intelligence purposes within the United States, as well as such searches conducted outside the United States and directed against United States persons, may be undertaken only as permitted by procedures approved by the Attorney General.

The order requires that such procedures "protect constitutional rights and privacy, ensure that information is gathered by the least intrusive means possible, and limit the use of such information to lawful governmental purposes." The Executive order also places additional restrictions on warrantless searches. Unconsented physical searches for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes may not be "undertaken against a United States person without a judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power." [8] Classified procedures approved by the Attorney General pursuant to the Executive order place further limitations on unconsented physical searches conducted without a judicial warrant. According to the Justice Department, it is the policy of the Attorney General to follow the Executive order restrictions on using techniques without a warrant, even if a court order is obtained under the procedure used in these cases.

The conduct of unconsented physical searches pursuant to orders issued by federal district judges designated to serve on the Foreign Intelligence Surveillance Court raises important questions that should be considered in the next session of Congress. These questions involve the absence of any express authority for the issuance of such orders, the scope of the jurisdiction of the judges, and other departures from traditional Fourth Amendment procedures. Moreover, while the court orders have thus far involved only searches of personal property, there are questions as to whether this procedure could also apply to surreptitious entries of homes and offices and the electronic surveillance of Americans abroad. The 1978 Act, which created the Foreign Intelligence Surveillance Court and its jurisdiction, does not authorize the court to issue orders approving physical searches. The legislative history of the Foreign Intelligence Surveillance Act makes clear that Congress did not intend to authorize the use of other techniques for foreign intelligence purposes under the procedures established for electronic surveillance within the United States.[9] While bills for this purpose were introduced in the 95th and 96th Congresses and hearings on them were held by the Select Committee, no action has been taken on those proposals. The Select Committee intends to examine carefully these and other questions raised by this development.

[8] Sec. 2–201, 2–204, Executive Order 12036, Jan. 26, 1978. The recent *Truong* decision sustained a "foreign intelligence exception" to the Fourth Amendment warrant requirement for an unconsented physical search. In that case the Government searched a sealed package that was being transmitted between foreign agents by a courier who was a Government informant. *United States* v. *Truong*, No. 78–5076 (4th Cir. July 17, 1980).

[9] H. Rep. 95–1283, pp. 51, 53; S. Rep. 95–701, pp. 34–35, 38.

APPENDIX

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF INTELLIGENCE POLICY AND REVIEW,
Washington, D.C., October 27, 1980.

Hon. BIRCH BAYH,
Chairman, Select Committee on Intelligence, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the Attorney General I am responding to your letter of June 11, 1980, regarding applications to the Foreign Intelligence Surveillance Court in connection with certain physical searches.

I enclose for your information and a legal memorandum prepared by this office which explains the theory on which these applications were based. I understand you intend to publish this memorandum as part of your Committee's Annual Report to Congress under the Foreign Intelligence Surveillance Act. We have no objection to this proposed publication.

The Attorney General has, as a matter of policy, decided that he will, wherever possible submit physical search issues to the FISA Court for judicial review. He believes this proposal provides maximum protection for individual rights and is consistent with national security interests. In submitting such applications, the Attorney General does not intend to alter the existing Executive policy regarding physical searches as set forth in the internal, classified documents which have previously been made available to you. Any change in this policy or the internal Executive regulations will, of course, be brought to your attention.

I recognize that this letter and the enclosed memorandum might not answer all of the questions which your Committee might have concerning this issue. We are, of course, ready to meet with you in any appropriate setting to discuss this issue further.

Cordially,

KENNETH C. BASS III,
Counsel for Intelligence Policy,
Office of Intelligence Policy and Review.

MEMORANDUM FOR WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Re Jurisdiction of foreign intelligence surveillance court judges to issue orders in foreign intelligence investigations

Upon application by the Department of Justice,[1] judges of the Foreign Intelligence Surveillance Court have issued orders authorizing

[1] The applications have been modeled after the procedures for an electronic surveillance application under the Foreign Intelligence Surveillance Act of 1978. All applications were authorized by the Attorney General and described the basis for believing the target was an agent of a foreign power and that the information sought was significant foreign intelligence or counterintelligence information. In the second and subsequent applications a certification of the Director, Federal Bureau of Investigation was drafted using FISA as an example and was included with the application. The Department does not believe that the FISA standards must, as a legal matter, be followed to comply with the Fourth Amendment.

the interception and physical search of personal property of agents of a foreign power where there was probable cause to believe that the searches would produce significant foreign intelligence or foreign counterintelligence information. The judges have approved the Government's applications in their dual capacities as U.S. district court judges and as judges designated to serve on the Foreign Intelligence Surveillance Court. These applications and the subsequent orders represent the first time that the Government has sought prior judicial approval of a physical search application in the context of an intelligence [2] investigation. We believe such judicial review is neither constitutionally nor statutorily required. Nevertheless, in his discretion, the Attorney General may seek prior approval by the Judiciary which has concurrent jurisdiction with the Executive Branch to authorize physical searches for intelligence purposes. The Attorney General has determined that the Government will, as a general rule, seek prior judicial authorization for intelligence searches under those circumstances where obtaining judicial approval would not frustrate the Executive's duty to protect the national security.

I. THE EXECUTIVE'S INHERENT AUTHORITY TO AUTHORIZE WARRANTLESS INTELLIGENCE SEARCHES

It is comparatively well-settled that intelligence searches authorized by the President must comport with the constitutional requirements of the Fourth Amendment. *United States* v. *Butenko*, 494 F.2d 593 603–04 (3rd Cir.), cert. denied sub nom. *Ivanov* v. *United States*, 419 U.S. 881 (1974). However, the two substantive clauses of that amendment have independent significance. Thus, while there is no doubt that every search within the meaning of the Fourth Amendment must be "reasonable," it is a different question whether presidentially authorized intelligence searches involving agents of a foreign power require prior judicial approval to be constitutional under the Fourth Amendment.

The Department has previously considered the question of the Executive's inherent authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes and concluded that the President has constitutional authority as Commander in Chief [3] and as the principal officer in the foreign affairs area [4] to authorize such physical searches. The Department's opinion is consistent with reported judicial opinions that have upheld the President's power to authorize warrantless electronic surveillance for the purpose of gathering foreign intelligence.[5] The President's power to authorize a warrantless physical search of sealed packages and envelopes sent by an agent of a foreign power has also been upheld by the only appellate court to have considered this issue. *United States* v. *Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), aff'd in part remanded for further proceedings on other grounds sub nom. *United States* v.

[2] The word "intelligence" is used herein to mean foreign intelligence and foreign counterintelligence. Section 4–206, Executive Order 12036.

[3] U.S. Const. art. II, § 1.

[4] *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).

[5] *United States* v. *Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), aff'd in part and remanded for further proceedings on other grounds sub nom. *United States* v. *Truong*, No. 58–5177 (4th Cir. July 17, 1980); *United States* v. *Butenko*, supra; *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

Truong, No. 58–5177, slip op. at 22 n. 8 (4th Cir. July 17, 1980).[6] The court 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. *Troung*, *supra*, slip op. at 12.

This foreign intelligence exception to the Fourth Amendment warrant requirement is limited to those situations where the object of the search or the surveillance is a foreign power, its agents or collaborators, Id. at 14, and where the surveillance is conducted "primarily" for foreign intelligence reasons. Id. at 15.

Nothing in the recent applications to the Foreign Intelligence Surveillance Court judges is inconsistent with, or alters in any way, this conclusion that the President has inherent authority to authorize warrantless foreign intelligence searches. The recent applications represent a judgment of the Attorney General that, in light of the passage of the Foreign Intelligence Surveillance Act of 1978 and experience under that Act, there is now an adequate judicial procedure to invoke, under certain circumstances, a concurrent jurisdiction of the Federal judges who also serve on the Foreign Intelligence Surveillance Court to issue orders permitting physical searches for intelligence purposes.[7]

II. THE JURISDICTION OF THE FEDERAL COURTS TO AUTHORIZE INTELLIGENCE SEARCHES

We believe that federal judges, including judges of the Foreign Intelligence Surveillance Court, have jurisdiction, concurrent with the Executive, to authorize intelligence searches involving foreign powers or agents of foreign powers. While the Fourth Amendment as interpreted by the Courts does not require prior judicial review, the Attorney General, in his discretion, may apply to a federal judge serving on the Foreign Intelligence Surveillance Court (FISC) for an order prior to the Government's engaging in an intelligence search. The federal judiciary's jurisdiction to consider applications for a foreign intelligence search order stems from its inherent authority to protect Fourth Amendment rights by reviewing proposed federal activities and from the general statutory grant of jurisdiction pertaining to actions commenced by the United States Government in

[6] In the district court, Judge Bryan had explicitly found that there was no constitutional significance to the difference between a physical search and an electronic seizure for purposes of defining the scope of the President's inherent foreign affairs powers under the Fourth Amendment. *United States* v. *Humphrey*, supra, 456 F. Supp. at 63 n. 13. But cf. *United States* v. *Ehrlichman*, 376 F. Supp. 29, 33–44 (D.D.C. 1974) (in an action determining the constitutionality of a warrantless physical entry into the private office of an individual not an agent of a foreign power, Judge Gesell distinguished between electronic surveillances and physical searches and found that the national security exception to the warrant requirement applied to the former, but not to the latter), aff'd on other grounds, 465 F.2d 910, 925 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977). The Fourth Circuit agreed with Judge Bryan's conclusion without elaboration. *United States* v. *Truong*, supra, slip op. at 22 n. 8.

[7] The Department recognizes that the Supreme Court has never ruled on the applicability of the warrant clause in foreign intelligence cases. See *United States* v. *United States District Court* (*Keith*), 407 U.S. 297, 321–22 n. 20 and accompanying text (1972). If the Court were ultimately to hold that a warrant is required for intelligence activities, it would appear that the federal courts would necessarily have jurisdiction to issue such warrants even in the absence of statutory authority. See pp. 6–10, infra.

federal courts. 28 U.S.C. 1345.[8] These two bases for invoking federal judicial review of foreign intelligence physical search applications will be taken up separately.[9]

A. Inherent Judicial Authority to Review Proposed Government Searches

While it is generally true that the jurisdiction of federal courts (other than the Supreme Court) is to be determined by express grant of Congress,[10] in appropriate cases the federal courts have almost unflinchingly asserted their undefined inherent authority to ensure the integrity of the judicial process [11] and to preserve and protect constitutional rights. This latter rationale for jurisdiction has been invoked to assert authority over warrant applications sought by the Government to implement regulatory statutes and to carry out its law enforcement responsibilities.[12] An analysis of the judicial decisions explicitly or implicitly relying on the judiciary's inherent jurisdiction suggests that the federal courts also have the jurisdiction to entertain foreign intelligence search applications.

1. *Inherent Jurisdiction to Protect Fourth Amendment Rights.*—In *Osborn* v. *United States*, 385 U.S. 323 (1966), the Supreme Court upheld the clandestine use of a recording device which had been jointly authorized by two district court judges, even though the federal judges had no explicit grant of jurisdiction to approve the request for use of such a recording device. In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court sub silentio reaffirmed the inherent

[8] Federal courts not only have jurisdiction to entertain search applications, but also the All Writs statute, 28 U.S.C. § 1651, provides them with a statutory grant of power to issue any writ or order "necessary or appropriate" to adjudicate matters within their jurisdiction. As an example, the All-Writs statute empowers a federal court to order third parties to assist in the implementation of a lawfully authorized pen register surveillance. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171–178 (1977).

[9] There is no specific statutory grant of judicial authority to approve physical search applications for foreign intelligence gathering purposes. Title III of the Omnibus Crime Control and Safe Streets Act does not govern searches authorized by the Attorney General for foreign intelligence purposes. See, e.g., *United States* v. *United States District Court* (*Keith*), supra. Also, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801, et seq., only provides for judicial review of applications for foreign intelligence electronic surveillance and its legislative history unambiguously indicates that the Act did not empower the Foreign Intelligence Surveillance Court to invoke jurisdiction over intelligence physical searches. H. Rep. No. 1283, 95th Cong., 1st Sess. 53. Rule 41 of the Federal Rules of Criminal Procedure, which empowers the federal courts to authorize physical searches in the law enforcement context, cannot be easily applied to foreign intelligence physical searches because the jurisdiction of the court is limited to the district in which the court sits while intelligence activities are national and international in scope, the punrpose of Rule 41 is solely to gather evidence of a crime, and the procedures for notice are not compatible with intelligence needs.

[10] U.S. Const. art. III, § 1. Ex parte *Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); *Marshall* v. *Gibson's Products, Inc. of Plano*, 584 F.2d 668, 672 (5th Cir. 1979).

[11] Courts have relied on their inherent powers 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 discpline 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 proneprty even though no criminal proceedings had commenced and even though no statute authorized such action). Inherent powers also have been asserted to ensure that procedures relating to searches and seizures were properly observed by federal law enforcement agents. *Rea* v. *United States*, 350 U.S. 214, 217 (1956).

[12] A similar rationale has been used by the Supreme Court in cases dealing with the Executive's authority to invoke judicial authority to protect important interests of the government. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–92 (1960) (no statute was necessary to authorize suit to enjoin the discharging of industrial solid wastes which had reduced depth of river channel); *Sanitary District* v. *United States*, 266 U.S. 405, 425–26 (1925) (without specific statutory authority, the Attorney General could bring a suit to protect the proper water levels of the Great Lakes); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (setting forth the test that an action may be maintained in federal court despite lack of specific legislative authority where the United States has an interest to protect or defend).

jurisdiction of federal judges to execute valid warrants authorizing electronic surveillances for law enforcement purposes. Id. at 354.

The courts have also implicitly relied on their inherent jurisdiction to issue orders authorizing the use of pen register searches. 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. This assumption that federal courts have an inherent 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) (relying on a liberal interpretation of Federal Rules of Criminal Procedure 41 and on *Katz* and *Osborn* to issue a search warrant authorizing the use of telephone traces and traps); *United States* v. *Illinois Bell Telephone Co.*, 531 F.2d 809 (7th Cir. 1976); *United States* v. *Southwestern Bell Telephone Co.*, 546 F.2d 243 (8th Cir. 1976), cert. denied, 434 U.S. 1008 (1978) ("court's power to order pen register surveillance is the equivalent of the power to order a search warrant and is inherent in the District Court," 546 F.2d at 245); *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (2nd Cir. 1976). These court of appeals' opinions were noted by the Supreme Court in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 168 n. 14 (1977), although the Court itself relied exclusively on Fed. Rule Crim. Proc. 41 to authorize the federal court's issuance of a pen register order in that case.[13]

These search warrant and pen register cases support the proposition that the federal courts have an inherent power to protect constitutional rights and to issue search orders which conform with the Fourth Amendment. The courts have displayed a willingness to assume jurisdiction over a variety of law enforcement searches to ensure that they adhere to the prophylactic protection of prior judicial review.

2. *Inherent Authority to Issue Search Warrants Required to Implement Regulatory Statutes.*—The federal courts also have stated that they have power to issue search warrants to implement regulatory statutes even though Congress has failed to explicitly provide for warrants. "[S]uch authority stems from the inherent powers of the courts as well as the duties and powers of the courts to effectuate the intent of Congress." *Empire Steel Manufacturing Co.* v. *Marshall*, 437 F. Supp. 873, 881 (D. Mont. 1977). The courts have assumed jurisdiction over search warrant applications where a warrant has been required by the Fourth Amendment to authorize inspections under a regulatory statute. *In The Matter of Establishment Inspection of Gil-*

[13] Following *United States* v. *New York Telephone Co.*, supra, Fed. Rule Crim. Proc. 41 has been invoked to assert federal court jurisdiction over a telephone tracing warrant, *Application of United States of America*, 610 F. 2d 1148 (3rd Cir. 1979), and a warrant for the use of electronic beepers, *United States* v. *Bailey*, 564 F. Supp. 1138 (E.D. Mich. 1979), aff'd, No. 79–5092 (6th Cir. July 31, 1980), despite the fact that the procedures anticipated in Rule 41 do not fit telephone traces or electronic beepers.

bert and Bennett Manufacturing Co., 589 F.2d 1335 (7th Cir. 1979) (upholding power of magistrate to issue post-*Barlow's* OSHA inspection warrant); *State Fair of Texas v. United States Consumer Products Safety Commission*, 481 F. Supp. 1070 (N.D. Texas 1979) upholding jurisdiction of court to issue an inspection warrant under the Consumer Product Safety Act).

The OSHA inspection cases illustrate the willingness of federal courts to assert jurisdiction over search warrant applications even where they do not have an explicit statutory grant of authority. 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, every lower court presented with an application for an OSHA inspection warrant has accepted jurisdiction over the petition. In *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369 (5th Cir. 1979), the Fifth Circuit found that the district court had no jurisdiction to grant an affirmative injunction under OSHA but that jurisdiction to issue a search warrant was clearer and distingiushable,

> 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.* 592 F.2d at 1370–71 n. 3. (Emphasis added.)

Most of the courts assuming jurisdiction over OSHA search warrants have based their assertion of authority on the inherent powers of the courts or magistrates, e.g., *Empire Steel Manufacturing Co.* v. *Marshall, supra; In The Matter of Urick Property*, 472 F. Supp. 1193, 1194 (W.D. Pa. 1979), or on 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); cf *Marshall* v. *Huffhines Steel Co.*, 478 F. Supp. 986 (N.D. Texas 1979) (finding that district courts and magistrates have jurisdiction under OSHA to issue post-*Barlow's* search warrants, Judge Higginbotham relied in part, on the implicit grant of jurisdiction provided by 28 U.S.C. § 1337).

The OSHA inspection cases indicate that federal courts, even where there is no explicit statutory grant of warrant authority in a regulatory statute, may invoke their inherent powers to provide judicial review of the Executive's search authority. These cases reinforce our opinion that there is inherent authority in the federal courts to review proposed intelligence activities in order to protect Fourth Amendment rights. The precise basis for the assertion of judicial power has not always been clear, but the result has consistently been the same. Federal courts have and may rely on their inherent powers under the

Fourth Amendment to review actions of the Executive which affect or may affect Fourth Amendment rights.

B. Judicial Jurisdiction Under 28 U.S.C. § 1345 to Review Search Warrant Applications

Federal judges also have authority to issue intelligence search orders under Article III, § 2, of the Constitution as implemented by Title 28, United States Code, section 1345 which provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or *proceedings* commenced by the United States.... (Emphasis added.) [14]

This general grant of jurisdiction is sufficient, by itself, to permit federal courts to entertain suits by the United States to enforce constitutional rights and remedies [15] to obtain ex parte search warrants [16] and to enjoin a private party from refusing an administrative search.[17] As the district court concluded in *Brennan* v. *Buckeye Industries, Inc.*, *supra*, 374 F. Supp. at 1352–53:

> The absence of sepcific statutory authority is no obstacle to original jurisdiction under [28 U.S.C.] § 1345. It is settled that no such prerequisite exists to the appearance of the United States before its own courts.

III. THE UNIQUE POSITION OF FOREIGN INTELLIGENCE SURVEILLANCE COURT JUDGES TO REVIEW FOREIGN INTELLIGENCE SEARCH APPLICATIONS

According to the jurisdictional theories set forth in this memorandum, all federal judges would be empowered to review an application for search authority under most circumstances. However, in the context of foreign intelligence searches of foreign powers or agents of foreign powers, only the federal judges appointed to the Foreign Intelligence Surveillance Court can provide the requisite expertise, experience and security to act without frustrating the Executive's duty to protect the national security of the United States.

Prior to the creation of the Foreign Intelligence Surveillance Court, there was no established judicial procedure available which could be utilized without frustrating the Executive Branch's ability to carry out its intelligence activities. Accordingly, prior judicial approval was not required by the Fourth Amendment for warrantless foreign intelligence searches. This conclusion is supported by the rationale adopted by the Supreme Court in its determination that prior judicial review was required for domestic security searches. *Keith*, *supra*, 407

[14] While section 1345 was not referred to in the court papers, the intelligence search applications to date can be considered as having been brought under 28 U.S.C. § 1345. They were styled, "In the Matter of The Application of the United States for an Order Authorizing the Interception and Physical Search of" specified objects.

[15] E.g., *United States* v. *County of Hawaii*, 473 F. Supp. 261 (D. Ha. 1979) (U.S. brought suit against county, county civil service and chief of county police department alleging discrimination against police officers on the basis of religious beliefs).

[16] *Marshall* v. *Weyerhaeuser, Co.*, 456 F. Supp. 474 (D. N.J. 1978) (Secretary of Labor sought OSHA administrative search warrant); cf. *Carlson* v. *United States District Court*, 580 F.2d 1365, 1376 (10th Cir. 1978) (U.S. Attorney sought ex parte orders granting I.R.S. general authority to enter private property and to search for and seize property of taxpayers. Court was "inclined to believe, without deciding," that 28 U.S.C. § 1345 would grant jurisdiction in district court).

[17] *Brennan* v. *Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974) (Secretary of Labor sought mandatory injunction permitting an OSHA search); *Civil Aeronautics Board* v. *United Airlines*, 542 F.2d 394 (7th Cir. 1976) (C.A.B. brought action against airline to enjoin its refusal to grant U.S. agents access to airline's land, buildings, accounts and records).

U.S. at 315. The Supreme Court there applied a two-pronged balancing test to determine whether a warrant was required to undertake electronic surveillance in a domestic security investigation. The Court stated:

> If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. *We must also ask whether a warrant requirement would unduly frustrate the efforts of Government* to protect itself from acts of subversion and overthrow directed against it. *Keith, supra* 407 U.S. at 315 (Emphasis added.)

The district court in *Humphrey* considered the "frustration" argument a basis for recognizing a warrant exception for foreign intelligence searches. Prior to enactment of FISA, the court found that "no existing warrant procedure can be reconciled with the government's need to protect its security and existence" from interference by foreign powers or agents of foreign powers. *United States* v. *Humphrey, supra*, 456 F. Supp at 55. The judicial system existing at the time of the *Humphrey* surveillance would have frustrated authorization of intelligence searches because it could not provide a physically secure courtroom with "cleared" personnel, nationwide jurisdiction and judges who had experience with the special needs of intelligence as opposed to law enforcement activities. See also *United States* v. *Truong, supra*, slip op. at 9–12.

The creation of the Foreign Intelligence Surveillance Court (FISC) in 1978 with its pertinent protections against compromise and foreign penetration and its establishment of a special group of judges who have expertise in examining questions of law pertaining to foreign intelligence, diplomacy and military affairs eliminated the "frustration" previously existing with regard to judicial review of "electronic surveillance" as defined in the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801(f). While the regular federal judicial system lacks the physical and personnel security structure used by the Executive to protect the national security, the FISC and its judges have secure facilities, personnel and procedures compatible with the Executive's foreign affairs and national security obligations. Also, intelligence searches frequently are based on information derived from intelligence surveillances, as has been the case in some of the applications already submitted. At least in the absence of contested litigation, only the FISC judges can review the files concerning these surveillances. FISC judges, therefore, are in a position to review applications for foreign intelligence searches without jopardizing the Executive's requirements for security and expertise. The fact that FISA created a court of limited jurisdiction which does not include judicial review of physical searches does not undermine the conclusion that the federal judges who are appointed to the FISC and who retain the powers possessed by every federal judge—including the inherent power to review executive search warrants as analyzed above—may, while serving in their dual role as a federal judge and as a member of the FISC, provide a mechanism for issuing intelligence search orders

which does not "frustrate" the Executive's purpose in undertaking such searches.

The reasons which supported the Court's conclusion in *Truong* and which led to the creation of a special foreign intelligence court are still valid reasons for concluding that the use of the normal federal judicial machinery to consider physical searches for intelligence purposes would frustrate the Executive's exercise of foreign affairs and national security powers. Consequently, we conclude that only the FISC judges acting in their dual capacities can assert the judiciary's concurrent jurisdiction to review foreign intelligence physical searches without obstructing the Executive's exercise of constitutional authority in the field of foreign affairs and national defense.

IV. CONCLUSION

Absent a statute which purports to vest exclusive authority in the FISC to issue foreign intelligence physical search orders, our analysis of the Executive's inherent authority in the field of national defense and foreign affairs and of the FISC judges' inherent and statutory authority leads to the conclusion that there is concurrent authority in both the Judicial and Executive branches to authorize physical searches for intelligence purposes. The Executive's inherent authority, which has been delegated to the Attorney General by the President and which has been upheld by every court which has directly addressed the issue, remains in effect and has not been altered by the recent search orders by FISC judges.

While the Attorney General has decided as a general rule to seek judicial review of future foreign intelligence physical searches, in those cases where there are compelling reasons to indicate that prior judicial review would frustrate the purpose of the search request the Attorney General is authorized to approve such searches without prior judicial review. The Attorney General's decision to seek judicial review in all appropriate cases does not represent a conclusion that prior judicial review is legally required by the Constitution. Rather, the decision recognizes the adequacy of the FISC mechanism for most cases and reflects a desire to more fully protect the constitutional rights of the individuals affected by particular searches.

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