

September 11 Responses and Responsibilities

By Elizabeth Rindskopf Parker

Editor's Note: *This article is an expanded version of an address made by Elizabeth Rindskopf Parker at the California Judges Association Annual Meeting in Newport Beach on October 11, 2002. Excerpts of the speech originally appeared in the Fall 2002 issue of The Bench, a publication of the California Judges Association.*

Among other lessons, September 11 demonstrated how integral the law and the legal system will be to assuring national security in the future. Unfortunately for most Americans, including those of us in the legal profession, the need for a “national security law” was given little thought before the terrorist strikes; as a result, both the general public and the legal community largely were caught by surprise. If nothing else, the intervening months have revealed just how poorly prepared the nation is for the challenges that terrorism presents to our legal system.

Until recently, attempts to prepare for a new strategic level of terrorist activity did not involve our court system extensively. Now, thanks to a recent decision by an almost unknown court, the Foreign Intelligence Surveillance Court of Review (FISCR), the judiciary has been drawn directly into responding to the national security emergency.¹ Issued on November 18, 2002, this *ex parte* FISCR decision sweeps away several decades of precedent about the relationship between intelligence and law enforcement agen-

cies with regard to using wiretaps to obtain information relevant to national security initiatives. It rejects the wall that traditionally separated law enforcement efforts and intelligence activities and creates a new category of “foreign intelligence crimes” in which law enforcement can help facilitate intelligence gathering. The court found no “constitutionally significant” distinction between warrant procedures under the Foreign Intelligence Surveillance Act (FISA)² and traditional criminal warrants for installing wiretaps. The decision states:

FISA’s general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from the outset been distinguishable from “ordinary crime control.” . . . Although the Court in *City of Indianapolis* cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable, it certainly remains a crucial factor. [This] case may well involve the most serious threat our country faces . . . FISA as amended is constitutional because the surveillances it authorizes are reasonable.

Language in the opinion further suggests that Fourth Amendment warrant procedures may not be required at all when used by the executive branch for national security purposes.

Unfortunately, it now appears that the attempt to guard against terrorism may lead to an overreaction that could erode our traditional constitutional values while doing little to advance

security interests. For the courts and for the nation, the lack of experience with national security legal issues could produce a serious inequity in balancing safety and liberty in a time of terrorist threat.

The surprising and profound change of direction represented by this opinion is disturbing for several reasons. The doctrine it espouses—warrantless searches for national security purposes under exigent circumstances—is not unknown but reflects a dramatic change that rejects more than two decades of administrative practice endorsed by lawyers within successive administrations and Congress and consistently applied by the foreign intelligence surveillance court, the lower court in the FISA judicial structure. Furthermore, this is the court of review’s first decision since FISA created the body in 1978: an *ex parte* proceeding in which the government appeared without opposition and for which no obvious means for review exists. These concerns are exacerbated by the fact that the court operates in secret, making future applications of the opinion difficult to monitor. Although it could be argued that FISA has been rewritten, opportunity for further judicial scrutiny of this dramatic shift in legal approach appears nonexistent.

Hopefully, a detailed examination of the legal reasoning employed by the FISCR will occur within professional and academic legal circles and in Congress. In fact, this process has already started within the American

Bar Association, where a resolution questioning the FISCR's approach is being actively considered. My focus here, however, is not to provide extensive legal analysis of the FISCR decision, but rather to explore its policy and practical implications.

The Law and National Security

Some might argue that a single court decision doesn't really matter—after all, in times of crisis, our officials will act as they must. My background in the American “intelligence community”—those national agencies and departmental components dedicated to overseas foreign intelligence collection, analysis, and dissemination—teaches quite the opposite, however. My experience as a lawyer in this community has been, until the FISCR decision, reassuring with regard to the consistent efforts of the intelligence community and its lawyers to adhere to the law as it was being interpreted, with a remarkable and gratifying concern for the individual civil rights and civil liberties of Americans. But my professional history convinces me that this new ruling, which turns two decades of legal learning on its head, may not be helpful in combating terrorism.

When I arrived at the National Security Agency (NSA) in 1984, my



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is dean of the McGeorge School of Law at the University of the Pacific. An expert on national security law and anti-terrorism law, she served for eleven years in key federal government positions, most notably as general counsel for the National Security Agency, principal deputy legal advisor for the Department of State, and general counsel for the Central Intelligence Agency. Early in her career, she was active in litigating civil rights and civil liberties matters, with two successful arguments before the U.S. Supreme Court.

experience was limited to domestic litigation about civil rights, civil liberties, and Vietnam-era draft resistance. This improbable background gave me an arrogant assumption that I was somehow uniquely prepared to protect the legal rights of Americans from possible intrusions by U.S. intelligence agencies and that my staff, particularly those who were active-duty military lawyers, would be of little assistance in my new venture. In fact, the reverse proved true. The NSA lawyers, especially those in uniform, were far more careful than I about individual rights and liberties as they interpreted the law applicable to national security activities. This cautious approach extended to interpretations of FISA and to the largely classified regulatory framework that governed foreign intelligence activities.

In order to understand the underlying reasons for the care invested in their legal interpretations, I began to reexamine the evolution of modern national security law. I started by reacquainting myself with the three executive roles of the president and how those constitutional powers differed according to whether the chief executive was acting as domestic enforcer of the law, commander in chief, or principal diplomat. It became clear that the concept of a “limited government,” embodied in the Constitution in order to preserve and protect the rights of citizens, has a different meaning depending on whether the president's duties involve enforcing the laws at home or protecting the nation from external threats. The scope of presidential authority depends directly on the use to which it is put. Where national security is involved, that authority is often very broad indeed.

The Body of Legal Precedent

Wiretap surveillance provides the best example of this point. Considered a “search and seizure” subject to the Fourth Amendment's protections as a result of the decision in *Katz v. United States*,³ the standards for conducting wire surveillance varied depending on whether the intended purpose was for-

eign intelligence or domestic law enforcement. Wiretaps directed at overseas foreign powers for foreign intelligence purposes were subject to far more generous standards than those applied at home against individual citizens for law enforcement purposes. Location, purpose, and citizenship of those involved justified distinctly different legal rules, albeit all subject to constitutional dictates.

These constitutional distinctions within presidential powers were based on a modest but growing body of legal precedent. One example is Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴ also known as the *Steel Seizure* case, which outlined the president's three roles and showed how the Constitution provides great flexibility among the presidential roles of enforcer of the laws, commander in chief, or principal diplomat. More recent decisions such as the *Keith* case, *United States v. United States District Court*,⁵ and *United States v. Truong Dinh Hung*⁶ developed a law of national security with regard to Fourth Amendment standards. This body of law was consistently interpreted as establishing different legal requirements for surveillance at home for law enforcement purposes or for surveillance overseas for national security goals. The passage and interpretation of the provision of the FISA reinforced this approach and strengthened the belief in a constitutional bright line between requirements for law enforcement and for intelligence surveillance—the reasoning that was completely rejected by the FISCR decision.

Nonetheless, based on this limited body of court precedent, a companion body of internal executive branch opinions grew over time. By the time of my arrival at NSA, a body of executive branch law—much of it classified—had been carefully constructed over the years, with supervision and review by lawyers in the Department of Justice and periodic review by judges under the FISA and Congress.

This combination of statutory, judicial, and administrative law provided little opportunity for external review or academic comment and was largely unknown outside national security circles. The facts to which the legal principles were applied typically remained classified, and text concerning any issues was generally neither released nor available pursuant to Freedom of Information Act requests.⁷

Nevertheless, the legal precedents that were created appeared to reinforce the approach being taken, particularly with regard to the constitutionality of the more relaxed warrant procedures of FISA.⁸ It was frequently noted that, were the distinction between law enforcement and intelligence not maintained, intelligence activities might be subject to the more stringent requirements applied to law enforcement.

These contexts were analyzed and applied carefully within the intelligence community. They were important to lawyers at NSA and their “clients,” who recognized that without clear rules to protect Americans from the appearance—never mind the fact—of a domestic intelligence service, public support for intelligence would fail. Moreover, many NSA lawyers and their clients had lived through painful times when individual rights to privacy of Americans had been violated by the federal government, supposedly in support of the goal of security. No one wanted to return to such a time, nor to the harsh criticism voiced in congressional oversight hearings responding to the excesses that had occurred.

The Widespread Lack of Understanding

In contrast, a pervasive lack of public and judicial understanding existed regarding the limits imposed on foreign intelligence collection in the United States. This confusion provides the context for the recent FISC ruling. The FISC’s almost cavalier rejection of the body of national security law suggests that the court may be a victim of just such a lack of contextual understanding.

My professional history convinces me that the new FISC ruling, which turns two decades of legal learning on its head, may not be helpful in combating terrorism.

Our constitutional system relies heavily on the thoughtful, independent, and reasoned review of bureaucratic decisions by our courts. This is no less true for national security and foreign intelligence matters than it is for other, less exotic situations. In fact, the limited opportunity for judicial review of national security matters makes the court’s periodic contributions even more important. For years courts have made outstanding contributions to ensuring that the constitutional balance is maintained even through executive branch allegations of national security needs.⁹ Thus, the willingness of the FISC to adopt much of the administration’s argument, seemingly without question, and to reverse precedent of many years’ standing is disappointing. But in retrospect, the court’s decision may have been predictable.

I first confronted the lack of appreciation for the significance of the evolving body of national intelligence law almost ten years ago. In an *in camera* appearance, a federal district court judge inquired why the NSA had not assisted in the investigation of a large transnational criminal banking conspiracy by monitoring the wire transfers of a local branch. The judge had difficulty understanding that, without regard to

the technical capabilities required, no U.S. intelligence agency was authorized to collect domestic law enforcement information inside the United States against a U.S. corporate citizen. These distinctions seemed of little moment to him, and I realized that he assumed such capabilities existed and were routinely employed in the domestic setting without regard to issues of individual privacy and liberty under the Fourth Amendment. Like so many Americans, he was unaware of the responses to the misuse of national security authorities during the Vietnam and Watergate eras—responses that in the 1970s produced new laws and a greater sensitivity among intelligence community lawyers and their “clients” to protect individual rights and liberties. Strict prohibitions against use of intelligence information for law enforcement purposes had become an important guide.

This experience illustrates the national context of the November 2002 FISC decision and leads to several conclusions. After World War II, Americans in all walks of life lost their understanding of the differing responses needed for national security and domestic tranquillity, as reflected in our constitutional structure. While at the NSA, I

became acquainted with the late Justice Lewis Powell, who had handled exceptionally sensitive coded information as an Army officer in World War II. From this experience, he came to understand the interaction of national security and domestic tranquillity occasionally reflected in court decisions.¹⁰ His understanding, however, was the exception, not the rule, among judges, lawyers, and the public at large. Younger generations especially, lacking wartime experience, had no experience of the interrelation—evidently a legacy of long years of peace and avoidance of military service during the Vietnam War.

Although Watergate-era abuses produced strong support for correcting perceived intelligence abuses, little awareness existed about the legal measures they engendered. Few seemed aware that FISA, for example, was enacted in response to congressional investigations—part of a comprehensive effort to fuse a combination of law, congressional oversight procedures, and internal operating rules and procedures. In combination, these would produce a legal structure that would dramatically reenforce the separation between law enforcement at home and foreign intelligence overseas, and protect American civil liberties.

Even less appreciation existed for the diligence with which these reforms were subsequently applied and followed within the intelligence community. I learned that my own early reactions to the careful work of the NSA lawyers was part of this pattern: I was prepared to be less careful about civil rights and civil liberties because concerns for national security proved overpowering. In short, I lacked the practice and experience of my NSA colleagues in ensuring the balance between security and liberty.

The Past as Prologue

The FISCR decision makes it important to recall abuses from the Watergate and Vietnam eras that produced legal reforms. In the late 1970s the entire intelligence community was

faulted for using its resources to support domestic law enforcement agencies' responses to actions opposing the Vietnam War. The Nixon administration faced particular criticism for using wiretap authority, without judicial warrant, for highly questionable domestic law enforcement goals—although it justified this use on the basis of national security.¹¹

Unfortunately, unlike employees of the intelligence community, few Americans today are aware that Watergate-era reforms consistently have been interpreted as precluding intelligence from being involved in law enforcement, collecting information about U.S. persons, and operating overseas. Rules that were considered almost religious doctrine within the U.S. intelligence community, because they preserved an intelligence that served but could not oppress its citizens, remained unknown and underappreciated. In this context, the FISCR decision may be seen as a wholesale rejection of the intelligence community's response to legal reforms: a complete repudiation of years of careful, if unheralded, work by lawyers and their clients to ensure that Watergate-era abuses were forever ended. Under such conditions, maintaining respect for the legal restraints that we expect our intelligence services to observe will be challenging.

In response some may argue that the demands of the “war against terrorism” require the new approach between intelligence and law enforcement embodied in the FISCR decision. The surprise and shock we experienced as a nation on September 11 and the lack of warning from domestic and foreign security services have become synonymous with license to restructure the relationship between intelligence and law enforcement. Certainly the FISCR decision contributes a possible solution to this dilemma. Better coordination between law enforcement and intelligence is an urgent need, one that is long overdue. The solution is not, however, to remove legal distinctions in the governance structures of law enforce-

ment and intelligence but to prioritize coordination through expanded practice and training drills. Moreover, the USA Patriot Act of 2001 addressed the relatively minor legal coordination problems that existed on September 11.

The FISCR decision removes all barriers to the creation of an ill-defined category of national security crimes. The benefits to this approach are dubious at best. There is no reason to believe that better coordination or removal of boundaries between foreign intelligence and domestic law enforcement would have enabled either group to stitch together vague hints to produce a credible warning that extremists were determined to fly airplanes into buildings. No amount of intelligence or law enforcement effort can help investigate the unimaginable. September 11 represents most of all a failure to imagine the actions of those who have declared their intention to harm and destroy us.

The FISCR decision could not have addressed the most fundamental problem revealed by September 11: the almost total lack of analyst capabilities in law enforcement organizations and the inadequate national resources devoted to national security, foreign affairs, and language studies in our universities. Solutions to such problems are the missing component in our response to terrorism, and lie beyond court action.

The FISCR decision can hardly be faulted for failing to respond to these issues, but the holding should be held to account if its sweeping decision proves counterproductive. This is a legitimate concern whenever years of administrative precedent and practice are rejected in a single stroke. The elimination of structures to protect citizens' civil rights and liberties may distract us from more productive approaches to security—and in all likelihood erode the confidence both law enforcement and intelligence require to function effectively. Pressure to prosecute “terrorists” will inevitably lead some individual law enforcement officials to questionable actions that

overbalance security against concerns for privacy and civil rights. The pressure to bend rules from the “best motives” during such emergencies will be intense, and the war on terrorism could become increasingly vulnerable to concerns guided more by paranoia than facts. It is not beyond imagination that we may be on a course to repeat Watergate’s violations.

The Dangers of a Misguided Approach

The FISCR decision will facilitate intrusive collection through enhanced wiretaps—a cheaper but likely less effective response to terrorism than the careful analysis and police work needed to detect future acts of terrorism and apprehend those responsible. At the same time, the decision appears to see law enforcement as the principal—indeed only—means of combating terrorism,

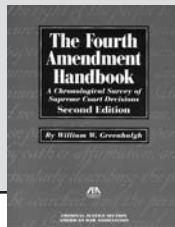
and thus an appropriate vehicle for significantly increased authority. In fact, law enforcement in a democracy is neither intended nor designed to serve such a broad preventive function. Expanding the use of intrusive collection runs the risk of distorting the legitimate role of domestic law enforcement while threatening individual security and distracting us from effective deterrence of terrorism.

The FISCR approach may be appropriate and necessary, but it will certainly mean major changes within the intelligence community. The questions raised by the decision are sufficiently weighty that, at a minimum, they should be thoroughly reviewed and analyzed in special hearings before Congress. Not to do so may well hand terrorists their ultimate victory: the loss of our private civil rights and liberties in service to an unattainable national security.

Notes

1. See *In re Sealed Case No. 002*, U.S. FISA Ct. Rev. (2002).
2. 50 U.C.C. §§ 1801-1862 (West 1991 and Supp. 2002).
3. 389 U.S. 347 (1967).
4. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
5. *United States v. United States District Court*, 407 U.S. 27 (1972).
6. 629 F.2d 908 (1980), *cert. denied*, 454 U.S. 1144 (1982).
7. See 5 U.S.C. § 552(b)(1)(A) and (7).
8. See *United States v. Duggan*, 743 F.2d 59 (1984).
9. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).
10. See *Snepp v. United States*, 444 U.S. 507 (1980).
11. See *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979).

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