

APPENDIX B

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

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

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

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

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

Sincerely,

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

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

DOCKET NO. 81—

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

MEMORANDUM OF LAW

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

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

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

ARGUMENT AND AUTHORITIES

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

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

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

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

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

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

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

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

1. Authority to insure the integrity of the judicial process

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

2. Jurisdiction implied from a regulatory scheme

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

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

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

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

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

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

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

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

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

3. Jurisdiction implied by constitutional necessity

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

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

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

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

The Department of Justice has long held the view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes. This authority derives from the President's Constitutional powers as Commander In Chief⁶ and as the principal instrument for U.S. foreign affairs.⁷ The Executive's authority to conduct warrantless foreign intelligence searches and surveillances against foreign powers and

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

⁶ U.S. Const. art. II, § 1.

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

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

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

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

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

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

CONCLUSION

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

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

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

Dated: June 3, 1981.

Respectfully submitted,

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

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

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

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

Sincerely,

ROBERT A. McCONNELL,
Assistant Attorney General.

Attachment.

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

DOCKET NO. ———

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

Before Hart, Presiding Judge:

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

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

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

IMPLEMENTATION OF THE FOREIGN
INTELLIGENCE SURVEILLANCE
ACT OF 1978

(1980-81)

REPORT
OF THE
SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE



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