IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 08-CR-522**
NAM QUOC NGUYEN, et al.	**:**	

ORDER

AND NOW, this day of , 2009, after a review of the Motion of the Defendants to Suppress All Evidence Obtained or Derived from Electronic Surveillance Conducted Under the Foreign Intelligence Surveillance Act, and the Government's response thereto, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

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HONORABLE TIMOTHY J. SAVAGE
United States District Court

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v.	**:**	**CRIMINAL NO. 08-CR-522**
NAM QUOC NGUYEN, et al.	**:**	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS' CHALLENGE TO THE CONSTITUTIONALITY OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

On October 16, 2009, Defendants filed a Motion to Suppress All Evidence Obtained or Derived from Electronic Surveillance Conducted Under the Foreign Intelligence Surveillance Act, together with a Memorandum in Support of that Motion ("Defendants' Memorandum"). In this Motion and Memorandum, Defendants appear to raise a facial challenge to the constitutionality of the Foreign Intelligence Surveillance Act ("FISA"),[1] based on three principal arguments.

First, Defendants argue that because the USA PATRIOT Act changed the certification the Government must make regarding its purpose in conducting surveillance – from a certification that "the primary purpose" was to obtain foreign intelligence, to a certification that "a significant purpose" was to obtain foreign intelligence – FISA now violates the Fourth Amendment in that the Government may obtain surveillance orders under FISA, rather than warrants under the Fourth Amendment, even if the Government's primary purpose is to gather evidence of domestic criminal activity.

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[1] To the extent the Defendants are also challenging the specific FISA applications and procedures utilized in this case, the Government has addressed these arguments in its Memorandum in Opposition to Defendants' Motion to Compel Disclosure of All FISA Applications and Motion to Suppress FISA-Derived Evidence, which is being filed contemporaneously with this document.

Second, Defendants appear to argue that FISA's probable cause requirement is constitutionally infirm because – they claim – it allows the Government to certify that probable cause exists subject only to a deferential "clearly erroneous" review by the Foreign Intelligence Surveillance Court ("FISC").

Finally, Defendants argue that FISA violates the Sixth Amendment because it is possible that surveillance authorized under FISA would include attorney-client communications.

Defendants are advancing these claims only in the form of a facial attack on FISA. They assert:

> The FISA motion is a "motion to suppress" in that suppression is the remedy for the defendants upon a finding by the Court that FISA, as amended by the Patriot Act and the FISA Amendment Act of 2008, is unconstitutional. The response to the FISA motion simply requires the government to respond [to] the *defendants' challenge to the constitutionality of FISA on its face and not as applied to these particular defendants* in the execution of FISA orders.

Memorandum in Response to Motion of the Government to Reset the Date for Responses to Defense Motions Regarding the Classified Information Procedures Act and the Foreign Intelligence Surveillance Act ("Defendants' Response") at 2 (emphasis added). Defendants thus intend their motions and memoranda to mount a facial challenge to the constitutionality of FISA.[2]

Defendants' arguments are wholly without merit, and their motion should be denied, for three reasons:

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[2] Nonetheless, in the interest of caution and as stated above, the Government has addressed the specific FISA applications and procedures utilized in this case in its Memorandum in Opposition to Defendants' Motion to Compel Disclosure of All FISA Applications and Motion to Suppress FISA-Derived Evidence, which is being filed contemporaneously with this document.

First, it is a well-established principle of constitutional jurisprudence that defendants to whom a statute has specifically and concretely been applied – like the Defendants in this case – are barred from mounting a facial challenge to that statute.

Second, Defendants' arguments rest on speculation that the Government's primary purpose in conducting the surveillance was to support the investigation and prosecution of domestic crimes, rather than to obtain foreign intelligence. As the record shows, however, that is not the case.

Third, even if Defendants' could mount a facial challenge to the constitutionality of FISA, each of Defendants' arguments lacks merit, either because it proceeds from a fundamental misunderstanding of the structure and application of FISA or because it cuts against the decisive weight of precedent, or both.

Accordingly, the Government respectfully requests that the Court deny Defendants' Motion to Suppress.

I. DISCUSSION

A. The Doctrine of Constitutional Avoidance Bars Defendants from Mounting a Facial Challenge to the Constitutionality of FISA.

Defendants have asked the Court to suppress information obtained under FISA surveillance on the grounds that FISA is facially unconstitutional. *See* Defendants' Response at 2. As the Third Circuit has recently observed, however, "facial challenges to statutes . . . are disfavored." *United States v. Fullmer*, 584 F.3d 132, 152 (3rd Cir. 2009). "Facial challenges. . . run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of

constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 1191 (2008). Where a statute has been applied to defendants in a concrete and specific context, therefore, "an inquiring court may only consider the statute's constitutionality in that context; the court may not speculate about the validity of the law as it might be applied in different ways, or on different facts." *In re Directives Pursuant to Section 105B of FISA*, 551 F.Supp. 3d 1004, 1010 (Foreign Intell.Surv.Rev. 2008); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (noting the Court's reluctance "to invalidate legislation on the basis of its hypothetical application to situations not before the Court"); *Pullman Company v. Knott*, 235 U.S. 23, 26 (A statutory scheme "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts of the case as they are.") (Holmes, J.).[3]

As Defendants are aware, FISA has been applied to them in a specific and concrete context. Defendants were each provided with notice (an "aggrieved person notice") that the Government intended to use "information obtained and derived from electronic surveillance and physical search conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1811, 1821-1829" and that, following entry of an appropriate protective order by the Court, the Government will produce discoverable FISA information to the Defendants. Defendants' Memorandum, Exhibit A.

Defendants are also aware from their aggrieved persons notices that they are *not* aggrieved persons under the provisions added to FISA by the FISA Amendments Act, 50 U.S.C.

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[3] The strong presumption against facial challenges does not apply in the First Amendment context, *see FW/PBS Inc. v. City of Dallas*, 439 U.S. 215, 223 (1990), but Defendants' Memorandum does not argue that the Government violated the First Amendment.

§ 1881 *et seq*. ("FAA"). Nonetheless, as part of their Motion to Suppress, Defendants purport to challenge the constitutionality of these provisions. Because no information was obtained in this case pursuant to the FAA, there is nothing to be suppressed. *See United States v. Abdi*, 498 F.Supp.2d 1048, 1087 (S.D. Ohio 2007) (denying as moot defendant's motion to suppress information obtained under FISA because the Government indicated it would not introduce any such information into evidence). Defendants' arguments with respect to the FAA provisions are simply irrelevant to this motion and this case. Defendants seek to entice the Court into precisely the kind of speculative, anticipatory constitutional adjudication that the Supreme Court has counseled courts to avoid. *See Washington State Grange*, 128 S.Ct. at 1191 (noting that "[f]acial challenges are disfavored" because they "often rest on speculation" and therefore "raise the risk of premature interpretation of statutes on the basis of factually barebones records"); *United States v. Raines,* 362 U.S. 17, 22 (1960) (counseling courts "never to anticipate a question of constitutional law in advance of the necessity of deciding it").

Even if it were proper for Defendants to bring a facial challenge to FISA in this context, in order to prevail they would have to show that the law is unconstitutional in all of its applications – a burden which is impossible for them to meet. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (a party must show "that no set of circumstances exists under which the law would be valid" in order to prevail on a facial challenge); *Artway v. Attorney General*, 81 F.3d 1235, 1252 n.13 (3rd Cir. 1996) (same). As discussed at length below, all but one court to have considered the constitutionality of FISA, either as enacted in 1978 or as subsequently amended, have upheld the statute's constitutionality. Plainly, then, there are a number of constitutional applications of the statute and a facial challenge must therefore fail. The Court should deny

Defendants' motion purporting to "challenge FISA on its face" or, in the alternative, construe it as an "as applied" challenge.

B. FISA, As Amended, Is Constitutional

Prior to the enactment of FISA, the Supreme Court recognized that national security surveillance differs from ordinary criminal surveillance in several significant respects. The Court observed:

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

United States v. United States District Court (Keith, J.), 407 U.S. 297, 322 (1972). In light of those distinctions, the Court explained that "[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Id.* at 322-23. In particular, "the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection," and "[i]t may be that Congress. . . would judge that the application and affidavit showing probable cause need not follow the exact

requirements of [18 U.S.C.] § 2518 but should allege other circumstances more appropriate to domestic security cases." *Id.* at 323.[4]

Six years after *Keith*, relying in part on the Court's observations in that case, Congress enacted FISA, a statutory foreign intelligence surveillance regime specifically tailored to the nature of national security investigations. *See* S. Rep. No. 95-701, at 16 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3985 (quoting *Keith* and recognizing the distinct character of national security investigations). As part of the statutory regime, Congress established robust safeguards that parallel those in the criminal surveillance context, but recognize the distinct concerns and needs associated with national security surveillance.

Under FISA, the Government may conduct electronic surveillance only after applying for and obtaining an order from the FISC. Three main requirements must be met for the FISC to approve the application. First, the Government must establish, and a neutral and independent Article III judge must find, probable cause to believe that the "target" of the surveillance is a "foreign power" or an "agent of a foreign power," and that the target is using, or is about to use, the "facility" that is the subject of the order (*e.g.*, a telephone number). *See* 50 U.S.C. §§ 1803; 1804(a)(3); 1805(a)(2).

Second, the application must include "minimization procedures" for the surveillance as defined by the statute. *Id.* §§ 1804(a)(5); 1805(a)(3). These are specific procedures designed among other things to minimize the acquisition and retention, and to prevent the dissemination, of information concerning U.S. persons that is unrelated to foreign-intelligence purposes. *See id.*

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[4] In *Keith*, the Court was addressing *domestic* threats to national security, but as discussed below the Court's reasoning applies *a fortiori* to *foreign* threats to national security.

at § 1801(h); *In re Sealed Case*, 310 F.3d 717, 730-31 (Foreign Int.Surv.Ct.Rev. 2002) (providing examples).

Third, the Attorney General must approve the application and a high-ranking national security official must certify that the information being sought is foreign intelligence information; that obtaining foreign intelligence information is a "significant purpose" of the surveillance; and that the information cannot reasonably be obtained by normal investigative techniques. *See* 50 U.S.C. § 1804(a)(7). If the court approves the application, the court's order must specify where and how the surveillance will be carried out, must limit the duration of the surveillance, and must require compliance with FISA's minimization procedures. *See id.* at §§ 1805(c)(1)(B)-(E), (c)(2)(A), (e)(1).

FISA includes additional protections for American citizens or other "United States persons" who are the targets of foreign intelligence surveillance.[5] The definition of "agent of a foreign power" that applies to United States persons is closely linked to criminal activity. *See* 50 U.S.C. § 1801(b)(2). Indeed, in many cases, a showing that a United States person is an agent of a foreign power under FISA will be tantamount to a showing that he or she has committed or is about to commit certain crimes that relate to national security.

Moreover, the information being sought must be "necessary to" the ability of the United States to protect against threats from foreign powers and their agents, or "necessary to" the national defense or security or the conduct of foreign policy, rather than simply "relat[ing] to" those goals. 50 U.S.C. § 1801(e)(1)-(2); *see* S. Rep. No. 95-701, p. 31 (1978), reprinted in 1978

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[5] A "United States person" is defined by the statute to mean, as to natural persons, a citizen or permanent resident of the United States. *See* 50 U.S.C. § 1801(j).

U.S.C.C.A.N. at 4000 ("necessary" means "both important and required," not merely "useful or convenient"). In addition, when, as in this case, the target is a United States person, the certifications required by 50 U.S.C. § 1804(a)(7), including the certification that a significant purpose of the surveillance is to obtain foreign intelligence information, are subject to judicial review. *Id.* § 1805(a)(5). When the target of FISA surveillance is not a United States person, the certification of significant purpose is not subject to review, but it remains a substantive precondition for the filing of applications for electronic surveillance and physical searches in such cases. *See id.* §§ 1804(a)(7)(B), 1805(a)(5).

In light of these extensive safeguards, as the Defendants concede, up until 2003 "every court to consider the issue ha[d] upheld FISA on constitutional grounds." Defendants' Memorandum at 8. In fact, to this day, "every court to consider the constitutionality of FISA, with the exception of *Mayfield [v. United States*, 504 F.Supp.2d 1023 (D.Or. 2007)], has found FISA to comport with the Fourth Amendment." *See United States v. Abu-Jihad*, 531 F.Supp.2d 299, 305 n.6 (D.Conn. 2008) (collecting cases); *United States v. Mubayyid*, 521 F.Supp. 2d 125, 135-36 (D.Mass. 2007) (collecting cases). Nonetheless, Defendants recapitulate two arguments, each considered and rejected by other courts, that the portions of FISA, as amended, with respect to which they are "aggrieved persons" are unconstitutional.

1. The "Significant Purpose" Test Does Not Render FISA Unconstitutional

Defendants first argue that in light of PATRIOT Act amendments to FISA in 2001 that require a Senate-confirmed national security official to certify that "a significant purpose," rather than "the purpose," of the surveillance is to obtain foreign intelligence, FISA is now

unconstitutional. *See* Defendants' Memorandum at 13-21. Defendants base their argument in part upon *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), and *United States v. Butenko*, 494 F.2d 593 (3rd Cir. 1974). *See* Defendants' Memorandum at 14. These cases observed that the President could under the Executive Power vested in him by Article II of the Constitution, authorize surveillance for the purpose of obtaining foreign intelligence without a grant of authority from Congress or independent judicial review. *See Truong Dinh Hung* at 914 ("[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."); *Butenko* at 604 (noting that the absence of a warrant authorizing foreign intelligence surveillance was not constitutionally "fatal"). Defendants cite these cases for the proposition that the Government can only conduct such foreign intelligence if the "sole" or "primary" purpose of the surveillance is to obtain foreign intelligence and therefore argue that the amendments noted above requiring certification only that a "significant" purpose is to obtain foreign intelligence render the statute constitutionally infirm.

A great deal has changed since *Truong Dinh Hung* and *Butenko*. As noted above, Congress enacted FISA in 1978, establishing a statutory foreign intelligence surveillance framework that has been upheld as constitutional time and again. Whereas neither of the other branches of government had passed on the constitutionality of the surveillance in those cases, and a more circumscribed executive surveillance power may therefore have been appropriate, both of the other branches of government have found FISA's surveillance framework constitutional. *Truong Dinh Hung* and *Butenko* simply do not address the issue before the Court – whether FISA is constitutional.

The balance of Defendants' argument that the significant purpose requirement renders FISA unconstitutional rests on a refutation of the court's reasoning in *In re Sealed Case*, 310 F.3d 717, 743-44 (Foreign Int.Surv.Ct.Rv. 2002), and a request that this Court reject all other precedent and follow the District of Oregon's decision in *Mayfield v. United States*, 504 F.Supp. 2d 1023 (D. Or. 2007). *See* Defendants' Memorandum at 15-21. The weight of authority does not support Defendants' argument.[6]

A separate three-judge panel of the FISA Court of Review has since reviewed and unanimously relied upon (and, indeed, expanded in ways not relevant to this case) the reasoning and holding of *In re Sealed Case*. *See In re Directives Pursuant to Section 105B of the Foreign Intelligence*, 551 F.3d 1004, 1011-12 (Foreign Int.Surv.Ct.Rev. 2008). In addition, a number of other federal courts have examined the "significant purpose" requirement and concluded that it withstands constitutional scrutiny. *See, e.g., United States v. Wen*, 477 F.3d 896, 897 (7th Cir.

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[6] Defendants base their argument that the "significant purpose" test renders FISA unconstitutional on the supposition that the Government may now "obtain surveillance orders under FISA even if the Government's primary purpose is to gather evidence of domestic criminal activity." Defendants' Memorandum at 15. Whether or not surveillance under those circumstances would pass constitutional muster, and as demonstrated herein it would, that is expressly not the specific case before the Court. The Government's certification in this case states that the primary purpose of the surveillance authorities requested "is **not** to obtain information for the prosecution of crimes other than those referred to in [FISA], 50 U.S.C. § 1801(a)-(e), or related to such foreign intelligence crimes." (Emphasis in original). If the Court chooses, therefore, it can decline to reach the question of whether foreign intelligence surveillance the primary purpose of which is to obtain evidence of domestic criminal activity is constitutional and simply join the other federal courts that have decided that the surveillance in this case, which does not have that primary purpose, is constitutional. *See, e.g., United States v. Warsame*, 547 F.Supp.2d 982, 996-97(D.Minn. 2008) (noting that despite "very significant concerns" regarding the "significant purpose" requirement, "the Court need not decide the issue here" because the Government had satisfied the "primary purpose" requirement for all surveillance); *United States v. Sattar*, 2003 WL 22137012 at *12 (S.D. N.Y. 2003) (noting that all the surveillance in the case occurred before the PATRIOT Act amendments and all surveillance therefore met the "primary purpose" requirement).

2006) (declining invitation to disagree with *In re Sealed Case* and upholding surveillance conducted on the basis of the "significant purpose" requirement); *United States v. Mubayyid*, 521 F.Supp.2d 125, 141 (D. Mass. 2007) ("[T]his Court cannot conclude that the balance drawn by Congress and upheld by multiple courts, is unreasonable or otherwise violates the Constitution."); *United States v. Holy Land Foundation*, 2007 WL 2011319 at *5 (N.D. Tex. 2007) (endorsing *In re Sealed Case*, noting that it "thoroughly analyz[ed] the legislative history of FISA, judicial interpretations of the PATRIOT Act and briefs from the government, the American Civil Liberties Union and the National Association of Criminal Defense Lawyers").

Defendants urge the Court to ignore all of those cases and rely instead on *Mayfield*. As has already been noted, *Mayfield* is an outlier, the only case to find FISA unconstitutional. *See United States v. Warsame,* 547 F.Supp.2d 982, 995 (D.Minn. 2008) ("Since the Patriot Act amendment, all but one court have upheld FISA as consistent with the requirements of the Fourth Amendment."). Other courts have found *Mayfield* "unpersuas[ive]," *see United States v. Abu-Jihad*, 531 F.Supp.2d. 299, 305 (D. Conn. 2008), because it fundamentally fails to recognize, as the Supreme Court did nearly 40 years ago in *Keith*, that the Fourth Amendment does not require precisely the same procedural safeguards for surveillance that is intended, at least in part, to collect foreign intelligence as it does for ordinary domestic criminal surveillance.

In enacting FISA, Congress recognized that the grounds justifying different surveillance rules in domestic security cases apply with even greater force in the foreign intelligence context. FISA authorizes collection relating to, *inter alia*, "actual or potential attack[s] or other grave hostile acts," clandestine intelligence activities, weapon of mass destruction proliferation, and acts of sabotage and international terrorism. 50 U.S.C. § 1801(e)(1). The national interest in

detecting and disrupting these activities is paramount. *See Haig v. Agee*, 453 U.S. 280, 305 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.") (internal quotations omitted). It would pose an unacceptable threat to national security and the lives of American citizens if the Government were unable to monitor the clandestine activities of terrorist organizations, foreign powers, and their agents who may be engaged in such activities. Federal courts have consistently held that *Keith's* endorsement of greater Fourth Amendment flexibility in domestic security cases, including "more appropriate" probable cause standards, applies with even greater force to foreign intelligence surveillance. *See, e.g. United States v. Cavanaugh*, 807 F.2d 787, 790 (9th Cir. 1987) ("[T]he showing necessary under the Fourth Amendment to justify a surveillance conducted for national security purposes is not necessarily analogous to the standard of probable cause applicable to criminal investigations."); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 72-73 (2d Cir. 1984).

Mayfield also failed to consider that in many instances foreign intelligence surveillance and criminal prosecution are complementary, the former allowing the Government to secretly monitor a threat to national security and the latter allowing the Government to eliminate that threat by arresting and punishing its perpetrator. The fact that the Government may ultimately prosecute the target of legitimate foreign intelligence collection does not diminish the Government's keen interest in collecting foreign intelligence in a manner that preserves the secrecy of the collection, protects sources and methods, and provides for minimization that takes into account the unique linguistic and communications tradecraft (e.g., the use of code)

challenges that often attend national security cases. Asking whether the Government's "primary purpose" is to collect foreign intelligence information or to pursue criminal prosecution presupposes a rigid distinction and mutual exclusivity between the two purposes that simply does not exist. *See In re Sealed Case*, 310 F.3d at 743-44. In fact, the statutory prerequisites that the Government must demonstrate to engage in FISA surveillance are closely intertwined with criminal offenses and "FISA contemplates prosecution based on evidence gathered through surveillance". *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

When the Government conducts electronic surveillance under FISA, the fact that it uses the fruits of the surveillance to prosecute the target or his associates does not mean that the Government is engaged in ordinary domestic law enforcement. Rather, it means that the availability of criminal prosecution remains "part of an integrated effort to counter the malign efforts of a foreign power." *In re Sealed Case*, 310 F.3d at 744. That overarching effort removes FISA surveillance from the realm of "ordinary crime control" and the conventional Fourth Amendment requirements that govern domestic law enforcement. As a result, FISA's framework for judicially authorized foreign intelligence surveillance based on a showing of probable cause tailored to national security investigations is constitutional, despite the fact that FISA's extensive safeguards differ from those applicable to ordinary domestic law enforcement.

2. FISA's Probable Cause Standard Comports with the Fourth Amendment

Defendants next argue that because the "significant purpose" test would allow the Government to conduct FISA surveillance with the primary purpose of obtaining evidence of domestic crimes, any difference between the probable cause standard in FISA and that required

in criminal cases violates the Fourth Amendment. As shown above, however, what makes FISA surveillance reasonable, and therefore constitutional under *Keith*, is the careful balance struck by Congress between the Government's interest in monitoring foreign powers and their agents on the one hand and protecting Americans' privacy interests on the other. The adoption of the "significant purpose" requirement did not upset that fine balance. The Government's interest in detecting and deterring hostile acts by foreign powers and their agents remains the same. And FISA's principal substantive and procedural protections continue to ensure that the Government does not unduly intrude upon individual privacy. Because this fundamental balance remains intact, FISA remains constitutional.

Defendants argue for a contrary conclusion on the basis of a misunderstanding of FISA, namely that "[u]nder FISA, the government satisfies the probable cause requirement by certifying it is met, and the FISC defers to government certification unless clearly erroneous." Defendants' Memorandum at 22. To the contrary, as in criminal cases, the Government must present to the FISC "the facts and circumstances relied upon by the applicant to justify his belief that the target . . . is a foreign power or an agent of a foreign power" and that the facility "is being used, or is about to be used" by the target, 50 U.S.C. § 1804(a)(3), and the judge may grant the order only if he "finds that . . . there is probable cause to believe" each of these two circumstances exists, 50 U.S.C. § 1805(a)(2). The Government's presentation of facts and circumstances demonstrating probable cause is part of the Government's application, *see* 50 U.S.C. § 1804(a)(3), not part of its certification, *see* 50 U.S.C. § 1804(a)(6), and the "clearly erroneous" standard therefore does not apply to it, *see* 50 U.S.C. § 1805(a)(4).

A number of courts that were not laboring under Defendants' misunderstanding of FISA have held since the PATRIOT Act amendments that whether collection of foreign intelligence information is the "primary purpose" or a "significant purpose" of FISA surveillance has no bearing on the constitutional sufficiency of FISA's probable cause standard. *See Wen*, 477 F.3d at 898-99; *In re Sealed Case*, 310 F.3d at 637-47; *Abu-Jihad*, 2008 WL 219172 at *4-9; *Mubayyid*, F.Supp. 2d at 140; *Holy Land Foundation*, 2007 WL 2011319 at *5-6.

As *Sealed Case* points out, this holding is consistent with the Supreme Court's recognition in a variety of other contexts that conventional Fourth Amendment requirements do not apply to searches "that are designed to serve the government's 'special needs, beyond the normal need for law enforcement.'" 310 F.2d at 745 (quoting *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 653 (1995)). Thus, for example, the Supreme Court has sustained the constitutionality of warrantless, and even suspicionless, searches to secure the Nation's borders and to detect drunk drivers. *Michigan Department of State Police* v. *Sitz*, 496 U.S. 444 (1990); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). And the Court has allowed administrative searches to be carried out without particularized suspicion of misconduct. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *Seattle*, 387 U.S. 541 (1967). As the Seventh Circuit pointed out in *Wen*, these cases demonstrate that "the 'probable cause' of which the Fourth Amendment speaks is not necessarily probable cause to believe that any law is being violated." 477 F.3d at 898.

As noted above, the Government has no more special or more compelling need than protecting the country against attack by terrorist organizations or foreign powers and preventing espionage. FISA comes squarely within the logic of the "special needs" cases because its

overarching purpose is "to protect the nation against terrorists and espionage threats directed by foreign powers," and that purpose "has from its outset been distinguishable from ordinary crime control." *Sealed Case*, 310 F.3d at 746; *Cassidy* v. *Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006) ("Preventing or deterring large-scale terrorist attacks presents problems that are distinct from standard law enforcement needs and indeed go well beyond them"); *MacWade* v. *Kelly*, 460 F.3d 260, 272 (2d Cir. 2006) ("preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation"); see also *NTEU* v. *Von Raab*, 489 U.S. 656, 675 n.3 (1989) (approving of suspicionless searches of airline passengers to prevent hijacking or destruction of airplanes). Accordingly, FISA's probable cause standard is consistent with the Fourth Amendment.

3. FISA Does Not Violate the Sixth Amendment Right to Counsel

The Defendants' finally argue that the potential that the Government may have "intru[ded] into the attorney-client relationship" by intercepting communications between them and their attorneys "violates the Sixth Amendment." Defendants' Memorandum at 26. As Defendants note, however, to prevail on a claim that Government interference with the attorney-client relationship violated the Sixth Amendment they would have to show prejudice. *Id.* (citing *Weatherford v. Busey*, 429 U.S. 545, 558 (1977)). "[M]ere government intrusion into the attorney-client relationship, although not condoned by the court, is not itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant." *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980); *see also Lewis v. Johnson*, 359 F.3d 646, 654 n.7 (3rd Cir. 2004) (noting that a defendant must show prejudice to prevail on a claim that his Sixth Amendment right to counsel was

violated). Defendants have not shown, or even alleged, that they suffered substantial prejudice as a result of any communications between Defendants and their attorneys intercepted by the Government pursuant to FISA. Accordingly, Defendants have failed to articulate, let alone substantiate, a meritorious argument that the Government's foreign intelligence surveillance of Defendants violated the Sixth Amendment.

II. CONCLUSION

For all of the foregoing reasons, the Defendants' facial challenge to the constitutionality of FISA fails and their Motion should be denied.

Respectfully submitted,

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CERTIFICATION

I certify that on this date a true and correct copy of the foregoing document has been served upon the following counsel via electronic means:

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Date: November 23, 2009