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 PEMISES 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

the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminette* v. *United States*, 242 U.S. 470, 485 (1917). In my opinion, the language of the FISA clearly limits the authority of the judges designated to sit as judges of the FISC to the issuance of orders approving "electronic surveillance" as that term is defined in the act.

"Electronic surveillance" is defined in precise terms in sec. 101(f). It includes (1) the "acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication" by or to a U.S. person in the U.S., (2) the acquisition by such a device of the "contents of any wire communication to or from a person in the" U.S., (3) the acquisition by such a device of the "contents of any radio communication . . . if both the sender and all intended recipients are located within the" U.S., and (4) "the installation or use of" such a device "in the United State for monitoring to acquire information, other than from a wire or radio communication." [1]

The reference throughout this subsection is to "electronic, mechanical or other surveillance device." The purpose is the "*acquisition*" of "*the contents*" of a wire or radio communication or monitoring (par. 4) to "*acquire information*, other than from a wire or radio communication." (Emphasis added.) Clearly, the thrust is a search, by the use of surveillance devices, for words or other sounds to acquire "foreign intelligence information" as that term is defined in sec. 101(e). There is not a word in the definitions of "electronic surveillance" even remotely indicating that the term encompasses a physical search of premises or other objects for tangible items.[2]

The limiting terms of sec. 101(f) apply, of course, throughout the FISA. As noted above, 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 this Act" (sec. 103(a)); an "application for an order approving electronic surveillance shall be made," etc. (sec. 104(a)); "the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds," etc. (sec. 105(a)).

The legislative history of the FISA confirms what the statutory language so plainly teaches: the FISC has no jurisdiction in the area of physical searches. The committee reports deal specifically with the subjects of physical searches and the opening of mail; they make the same distinction between such searches and searches by electronic surveillance as is so clearly drawn in the very terms of the FISA.

H. Rep. 95–1283 of the House Intelligence Committee puts the distinction sharply (p. 53):

[1] It will be noted that these definitions limit the authority to conduct electronic surveillances to the U.S. in a geographic sense as defined in sec. 101(i). The drafters left to another day the matter of "broadening this legislation to apply overseas . . . [because] the problems and circumstances of overseas surveillance demand separate treatment." H. Rep. 95–1283, pp. 27–28. See also id., p. 51; S. Rep. 95–701, pp. 7, 34–35.

[2] Paragraph (4) of sec. 101(f) provides for the "installation or use" of a surveillance device "for monitoring to acquire information." "This is intended to include the acquisition or oral communications." H. Rep. 95–1283, p. 52. By implication, it encompasses the means necessary to make an installation. This is made clear by the requirement that an application to a judge of the FISC state "whether physical entry is required to effect the surveillance" (sec. 104(a)(8)) and the provision that an order approving an electronic surveillance shall specify "whether entry will be used to effect the surveillance." Sec. 105(b)(1)(D). But all that is authorized is "physical entry." Such an authorization cannot be bootstrapped into authority to search entered premises for tangible items. The "search" in such a sitation is limited to such observation of the premises as may be necessary to make an effective installation of the surveillance device.

> The committee does not intend the term "surveillance device" as used in paragraph (4) [of sec. 101(f)] to include devices which are used incidentally as part of a physical search, or the opening of mail, but which do not constitute a device for monitoring. Lock picks, still cameras, and similar devices can be used to acquire information, or to assist in the acquisition of information, by means of physical search. So-called chamfering devices can be used to open mail. This bill does not bring these activities within its purview. Although it may be desirable to develop legislative controls over physical search techniques, the committee has concluded that these practices are sufficiently different from electronic surveillance so as to require separate consideration by the Congress. The fact that the bill does not cover physical searches for intelligence purposes should not be viewed as congressional authorization for such activities. In any case, any requirements of the fourth amendment would, of course, continue to apply to this type of activity.

At the end of the paragraph the committee dropped a footnote stating: "It should be noted that Executive Order 12036, Jan. 24, 1978, places limits on physical searches and the opening of mail." That order (43 Fed. Reg. 3674, 3685) governs the conduct of physical searches without judicial warrant for foreign intelligence purposes pursuant to the constitutional authority of the President.

Thus, the clearly expressed view of the House Intelligence Committee was (1) that the FISA does not authorize physical searches or the opening of mail for foreign intelligence purposes and (2) that until Congress legislates in those areas, the executive branch is relegated to the President's inherent authority in such matters or the procedures of F. R. Cr. P. 41.

The same view was articulated by the Senate Intelligence Committee in its earlier S. Rep. 95–701, p. 38. The language there is virtually the same as the language of the House Intelligence Committee quoted above. In addition, the Senate committee referred to the bill S. 2525, 95th Cong., the National Intelligence Reorganization and Reform Act of 1978, which, it said, "addresses the problem of physical searches within the United States or directed against U.S. persons abroad for intelligence purposes." [3] In the same vein, the Senate Judiciary Committee said (S. Rep. 95–604, p. 6); "the bill does not provide statutory authorization for the use of any technique other than electronic surveillance, and, combined with chapter 119 of title 18 [Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510] it constitutes the exclusive means by which electronic surveillance, as defined, and the interception of domestic wire and oral communications may be conducted. . . ."

We have seen that Congress decided to consider separately the subject or physical searches, including the opening of mail. This subject was covered by S. 2284 in the last Congress. Since it would have amended and supplemented the FISA; it must be considered as part of the legislative materials bearing on our question.

Title VIII of S. 2284, entitled, "Physical Searches Within the United States" (Cong. Rec., daily ed., Feb. 8, 1980, pp. S1325–S1327),

[3] S. 2525 was a precursor of S. 2284, 96th Cong., the National Intelligence Act of 1980, discussed below.

was the vehicle for the promised separate consideration of that subject. The section-by-section analysis stated that the "court order procedures of the [FISA] are extended to 'physical search', defined as any search of property located in the United States and any opening of mail in the United States or in the U.S. postal channels, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." *Id.*, p. S1333. In a statement joining in the introduction of S. 2284 (*id.*, p. S1334), then Chairman Bayh of the Intelligence Committee said (*id.*, p. S1335):

> . . . But perhaps the best way to bring overseas surveillance and search powers under the rule of law and within the constitutional system of checks and balances is through this Act. We must carefully consider these issues in the weeks to come.
>
> The same is true for the provisions that bring physical search in the United States within the framework of the Foreign Intelligence Surveillance Act of 1978. Current restrictions on physical search under the Executive order procedures are very stringent. Thus, the charter could result in the lifting of certain limitations. However, without the requirement in law to obtain a court order under a criminal standard for searches of Americans in this country, a future administration could abandon the Executive order procedures and assert "inherent power" to search the homes and offices of citizens without effective checks.

Title VIII contained 57 amendments of the FISA, beginning with the insertion of the words, "physical searches and" in the statement of purpose, so as to read, "To authorize physical searches and electronic surveillance to obtain foreign intelligence information," and changing the title of the Act to "Foreign Intelligence Search and Surveillance Act." *Id.*, p. S1325. The other amendments would have added similar appropripriate language to nearly every section of the FISA.

The foregoing review of the language of the FISA and the reports of the three committees which gave the legislation exhaustive consideration demonstrates that the FISC has no jurisdiction to authorize physical searches or the opening of mail. This conclusion is buttressed by the fact that Congress subsequently gave active consideration to the deferred question whether the FISA should be amended to extend the procedures of the Act to cover physical searches. That question has not yet been resolved by amending or other legislation.

In view of the clearly expressed intent of Congress to withhold authority to issue orders approving physical searches, it would be idle to consider whether a judge of the FISC nevertheless has some implied or inherent authority to do so. Obviously, where a given authority is denied it cannot be supplied by resort to principles of inherent, implied or ancillary jurisdiction.

GEORGE L. HART, Jr.,
Presiding Judge,
U.S. Foreign Intelligence Surveillance Court.

June 11, 1981.

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97TH CONGRESS
1st Session

SENATE

REPORT
No. 97-280

IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

(1980-81)

REPORT

OF THE

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

NOVEMBER 24 (legislative day, NOVEMBER 2), 1981.—Ordered to be printed

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