S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 8, 2009

Opinion No. 09-51

Constitutionality of House Bill 1961

QUESTION

Whether proposed legislation specifying that a search warrant may issue on reasonable suspicion of an act of terrorism, as defined in Tenn. Code Ann. § 39-13-803, would violate Article I, § 7 of the Constitution of Tennessee or the Fourth Amendment to the United States Constitution.

OPINION

Yes. The Fourth Amendment of the United States Constitution requires a showing of "probable cause" for issuance of a search warrant. Because "reasonable suspicion" is a less demanding requirement than "probable cause," legislation that allows the issuance of a search warrant based on "reasonable suspicion" would not satisfy either the federal constitution or Article I, § 7 of the Tennessee Constitution, which affords the same protection as the Fourth Amendment.

ANALYSIS

I. The Proposed Legislation

House Bill 1961/Senate Bill 2073 proposes to amend Tennessee Code Annotated, Title 38, Chapter 6 relative to acts of terrorism. In particular, the proposed legislation would amend four sections of the Chapter such that, in addition to a search warrant being issued on grounds of probable cause, a search warrant may also be issued "on reasonable suspicion of an act of terrorism, as defined in § 39-13-803 . . . ." Section 39-13-803 defines "act of terrorism" as:

> an act or acts constituting a violation of this part, any other offense under the laws of Tennessee, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States that contains all of the elements constituting a violation of this part or is otherwise an offense under the laws of such jurisdiction, that is intended, directly or indirectly, to:
>
> (A) Intimidate or coerce a civilian population;
>
> (B) Influence the policy of a unit of government by intimidation or coercion; or
>
> (C) Affect the conduct of a unit of government by murder, assassination, torture, kidnapping, or mass destruction

Tenn. Code Ann. § 39-13-803(1).

II. The Fourth Amendment

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The applicability of the Fourth Amendment depends on two things: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . " *United States v. District Court*, 407 U.S. 297, 323 (1972) ("*Keith*") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." (quoting *Chambers v. Maroney*, 399 U.S. 42, 51 (1970)). The Legislature may not constitutionally authorize a lesser degree of protection. *See Almeida-Sanchez*, 413 U.S. at 272 (stating that "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution," and holding unconstitutional a statute that purported to authorize automobiles to be stopped and searched, without a warrant and "within a reasonable distance from any external boundary of the United States").

Searches designed to uncover acts of terrorism—although requiring "sensitivity … to the Government's right to protect itself from unlawful subversion and attack"—do not per se fall outside the ambit of the Fourth Amendment. *See Keith*, 407 U.S. at 299. In a series of cases, the United States Supreme Court has considered whether the warrant procedure is required in situations involving national security. The high court initially left the question open in its landmark decision in *Katz v. United States*, holding that electronic surveillance unaccompanied by any physical trespass constituted a search subject to the Fourth Amendment's restrictions, including the Warrant Clause. *Katz*, 389 U.S. at 358 n.23; *compare id.* at 360 (Douglas, J., concurring) ("[S]pies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers. . . ."), with *id.* at 364 (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."). In 1972, however, the Court took up the Fourth Amendment claims of defendants accused of conspiring to bomb a Central Intelligence Agency office in Michigan who had been subjected to warrantless electronic surveillance. *Keith*,

407 U.S. at 299. Although the *Keith* Court gave considerable weight to the Government's interest in the national security in its domestic implications, it declined to depart from "the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance." *Id.* at 322. In this regard, the Court indicated that Congress has some latitude in fixing the standards governing warrant applications—including the circumstances that must be alleged—because "[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 323.

"*Keith* finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to the national security." *Mitchell v. Forsyth*, 472 U.S. 511, 534 (1985) (holding that the Attorney General was entitled to qualified immunity although he violated the Fourth Amendment when, without a warrant, he authorized electronic surveillance of members of an antiwar organization who were plotting to blow up tunnels in Washington, D.C. and to kidnap the National Security Advisor). Subsequently, lower courts have rejected the contention that an individual held in connection with an investigation of terrorist acts is ineligible for the protections of the Fourth Amendment. *See Lonegan v. Hasty*, 436 F. Supp. 2d 419, 436 (E.D.N.Y. 2006) (holding that persons of interest detained in the government's investigation of the September 11, 2001, terrorist attacks had a reasonable expectation of privacy in their communications with attorneys).

These cases address the requirement for prior judicial approval in national security cases, while the proposed legislation defines the threshold at which such approval may be obtained. Nevertheless, once the protections of the Fourth Amendment attach, probable cause is the "minimum requirement" against which a particular search must be judged. *Almeida-Sanchez*, 413 U.S. at 270. The benchmark specified by the proposed legislation—reasonable suspicion—is a lesser standard. *See Alabama v. White*, 496 U.S. 325, 330 (1990). The Legislature may express its view of "reasonableness" in defining the contours of warrant applications in situations involving acts of terrorism. *See Keith*, 407 U.S. at 323; *see also United States v. Watson*, 423 U.S. 411, 416 (1976) ("Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional." (internal quotation marks omitted)). It may not, however, dispense with the constitutional proscription that no warrants issue "but upon probable cause." *See Almeida-Sanchez*, 413 U.S. at 272; *see also Torres v. Puerto Rico*, 442 U.S. 465, 474 (U.S. 1979) ("Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.").

Accordingly, we conclude that House Bill 1961, as presently drafted, would violate the Fourth Amendment to the United States Constitution. Additionally, because Tennessee affords no less protection, the proposed legislation would violate Article I, § 7 of the state constitution as well. *See State v. Downey*, 945 S.W.2d 102, 106 (Tenn.1997) (observing that "article I, section 7 is identical in intent and purpose with the Fourth Amendment," and that federal cases applying the Fourth Amendment should be regarded as "particularly persuasive").

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JAMES E. GAYLORD
Assistant Attorney General

Requested by:

The Honorable Tony Shipley
State Representative
204 War Memorial Building
Nashville, TN 37243

The Honorable Eric Watson
State Representative
209A War Memorial Building
Nashville, TN 37243