

“THE RIGHT OF THE PEOPLE”: THE NSA, THE FISA AMENDMENTS ACT OF 2008, AND FOREIGN INTELLIGENCE SURVEILLANCE OF AMERICANS OVERSEAS

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In October 2008, two former National Security Agency communications analysts told reporters that the NSA used satellite technology to monitor the phone conversations of Americans living in the Middle East. This revelation highlighted an unresolved area of surveillance law—the privacy rights of U.S. citizens against their own government when they are outside the borders of the United States. Though the FISA Amendments Act of 2008 has created a procedure for the judicial review of this type of surveillance, this review is only a general oversight and judges on the Foreign Intelligence Surveillance Court are not required to individually review every surveillance request.

*This Note analyzes Fourth Amendment surveillance jurisprudence to decide what level of judicial review is necessary, if any, before engaging in surveillance of Americans overseas. First, this Note examines cases that have discussed the reach of the Fourth Amendment to see if its protections are available to Americans living outside the United States. Next, this Note analyzes the recent Second Circuit decision *In re Terrorist Bombings*, which held that the Fourth Amendment protects Americans overseas but does not require a warrant. Then, this Note investigates whether, if a warrant requirement does in fact exist, there is a “foreign intelligence exception” to this requirement. This Note concludes by deciding that the Fourth Amendment requires U.S. intelligence agencies to obtain a specific warrant before engaging in overseas surveillance of American citizens. To enforce this requirement, this Note advocates for further amendments to FISA, including a comprehensive and individualized warrant process that protects both privacy and national security.*

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INTRODUCTION

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹

On October 9, 2008, the ABC News program *Nightline* presented an investigative report alleging that the National Security Agency (NSA) monitored satellite phone calls between American civilians in the Middle East and persons in the United States.² The report's most serious allegations came from two former intelligence officers who worked in the top secret NSA program "Highlander,"³ an NSA surveillance program that monitors satellite phone transmissions on the Inmarsat network in the Middle East.⁴ The two former Highlander analysts Adrienne Kinne and

1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (dissenting from the majority's holding that the Fourth Amendment does not apply to wiretapping cases where there is no physical trespass).

2. Brian Ross et al., *Exclusive: Inside Account of U.S. Eavesdropping on Americans*, ABC NEWS, Oct. 9, 2008, <http://abcnews.go.com/Blotter/Story?id=5987804>. The report's allegations focused on surveillance in Iraq, but the range of surveillance spreads over much of the Middle East. See JAMES BAMFORD, *THE SHADOW FACTORY: THE ULTRA-SECRET NSA FROM 9/11 TO THE EAVESDROPPING ON AMERICA* 129 (2008).

3. See BAMFORD, *supra* note 2, at 127–34 (describing the Highlander program).

4. See *id.* at 127. The Highlander program tracked terrorist groups such as al Qaeda. Though Osama Bin Laden had stopped using his satellite phone by 2001, intelligence

David Murfee Faulk claimed they listened to and recorded hundreds of phone calls between American citizens in the Middle East and parties living inside the United States.⁵ Among these American citizens in the Middle East were “US military officers, American journalists and American aid workers.”⁶ The analysts alleged that this surveillance would often continue even if the callers were American and there was no indication that the conversations contained foreign intelligence, in violation of American intelligence law.⁷

In the years immediately prior to the start of the Highlander program, the NSA had diligently avoided eavesdropping on Americans.⁸ Kinne alleged that during her involvement in Highlander, however, the government continued to monitor the calls even after the callers were identified as aid organizations.⁹ The allegations, if true, are the first time that anyone with knowledge of the NSA’s foreign surveillance operations has accused the agency of spying on Americans overseas. President George W. Bush previously disclosed, in 2005, that the government had approved a domestic surveillance program as a part of its “War on Terror” and monitored suspect overseas phone calls coming into the United States.¹⁰ However, Bush claimed that the government limited this surveillance to known al Qaeda

officers believed that their surveillance might uncover communications by lower level al Qaeda operatives still using the satellite technology. *Id.* at 127–28. At Camp Doha in Kuwait, the National Security Agency (NSA) set up a mobile antenna to intercept communications from the satellite Inmarsat I-3 F1. *See id.* at 128. This interceptor antenna, likened to a “vacuum cleaner in the sky,” transmitted calls to a computer in the Highlander unit where they were stored in a queue awaiting an analyst’s review. *See id.*

5. *See* Ross et al., *supra* note 2. No other intelligence officers could corroborate the former Highlander analysts’ claims. *Id.* In fact, their supervisor John Berry says that Highlander never illegally eavesdropped on Americans. He declined to say whether Highlander ever monitored journalists, businesspeople, or humanitarians. *See* BAMFORD, *supra* note 2, at 132. However, even if the claims are revealed to be untrue, this Note’s core inquiry will still be beneficial to understanding the Fourth Amendment’s protection of Americans living overseas.

6. *See* Ross et al., *supra* note 2.

7. *See id.* Executive Order 12,333, prior to recent amendments to the Foreign Intelligence Surveillance Act (FISA), was the only law governing surveillance of Americans overseas and forbid surveillance when there was no probable cause that the surveillance target was an agent of a foreign power. *See* Exec. Order No. 12,333, 3 C.F.R. 200, at 212 (1982), *reprinted as amended* in 50 U.S.C. § 401 (2006).

8. *See* BAMFORD, *supra* note 2, at 131–32.

9. *See* Ross et al., *supra* note 2. However, the U.S. government may have a justified suspicion that charities are secretly aiding terrorist organizations. *See Morning Edition: Holy Land Convicted of Funneling Money to Hamas* (NPR radio broadcast Nov. 25, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=97439602> (describing a Muslim charity’s conviction for funneling money to Hamas). Adrienne Kinne also alleges that the intercepted calls came from throughout the Middle East and not just the Iraq and Afghanistan war zones. Posting of Kim Zetter to Threat Level, <http://www.wired.com/threatlevel/2008/10/kinne> (Oct. 10, 2008, 15:06 EST).

10. *See* Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A1.

operatives or members of al Qaeda affiliated terrorist organizations calling to or from the United States.¹¹

National security surveillance like the Highlander program inevitably invades the privacy of its monitored targets. This invasion is often justified when it is necessary to protect American interests. There is little doubt that the Highlander surveillance has greatly enhanced the safety of Americans. Kinne and Faulk both claim that the surveillance helped the military disarm improvised explosive devices (IEDs) and preemptively capture dangerous persons intending to harm U.S. servicemen in Iraq.¹² The United States also used the surveillance to help assassinate one of the al Qaeda operatives responsible for the USS Cole bombing.¹³

Despite these benefits, Kinne claims that the very utility of this type of intelligence only emphasizes how much eavesdropping on aid workers and other non-enemy combatants distracts intelligence officers from beneficial intelligence gathering.¹⁴ The surveillance can have far-reaching negative repercussions. The aid organizations that have been targeted by Highlander claim that the surveillance requires them to “take burdensome and costly measures” to protect confidentiality.¹⁵ It also discourages clients, journalistic sources, and victims of human rights abuses from sharing sensitive information with journalists and aid organizations out of fear for their own safety¹⁶ and undermines the ethical responsibility of confidentiality between humanitarian organizations and their clients.¹⁷

Answering these allegations, the Director of the NSA, Lieutenant General Keith B. Alexander, said the agency acted with “respect for the law.”¹⁸ The Fourth Amendment,¹⁹ the Foreign Intelligence Surveillance Act (FISA),²⁰ Executive Order 12,333,²¹ and U.S. Signals Intelligence Directive 18 (USSID 18)²² govern the NSA’s electronic surveillance

11. President George W. Bush, Press Conference of the President of the United States (Dec. 19, 2005), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv33a.pdf> (last visited Sept. 12, 2009) (“[T]his program is limited in nature to those that are known al Qaeda ties and/or affiliates.”).

12. *See* Ross et al., *supra* note 2.

13. *See* BAMFORD, *supra* note 2, at 135–36.

14. *See* Ross et al., *supra* note 2.

15. Complaint for Declaratory and Injunctive Relief at 17, *Amnesty Int’l USA v. McConnell*, No. 08-6259 (S.D.N.Y. July 10, 2008).

16. *Id.* at 26. Human Rights Watch is challenging the FISA Amendments Act of 2008 because it believes that the ease with which intelligence agencies may get approval to conduct surveillance upon human rights groups in the Middle East will discourage many potential clients from contacting them. *Id.*

17. *Id.* at 27.

18. Ross et al., *supra* note 2.

19. *See infra* Part I.B.1.

20. *See infra* Part I.C.4–5.

21. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 401 (2006).

22. Nat’l Sec. Agency/Cent. Sec. Serv., United States Signals Intelligence Directive 18 (July 27, 1993), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-02.htm> (declassified version with some language redacted). United States Signals Intelligence Directive 18 (USSID 18) states that the NSA may not intentionally intercept

activities. The Highlander surveillance draws attention to an unresolved Fourth Amendment legal question about the surveillance of American citizens living outside the United States. Specifically, there is a controversy over whether the warrant requirement to the Fourth Amendment applies to surveillance of American citizens overseas.²³ It is estimated that over six million American citizens, including members of the military, live overseas.²⁴ While many of the United States' greatest threats come from abroad, government surveillance outside the country still affects the privacy rights of a substantial number of Americans.

This Note explores the Fourth Amendment implications of warrantless foreign intelligence surveillance of Americans overseas by looking at statutes, cases, and scholarship about the surveillance approval requirements both before and after the enactment of FISA. Part I of this Note discusses the NSA's role in foreign and domestic security surveillance, the history of American surveillance jurisprudence, and the evolution of national security intelligence cases and statutes. Part II examines the Fourth Amendment rights of Americans abroad, the debate over whether there should be a warrant requirement for searches and surveillance conducted on Americans overseas, and the merits of allowing a foreign intelligence exception to a Fourth Amendment warrant requirement. In Part III, this Note decides whether a warrant should be required prior to NSA surveillance, such as the kind allegedly conducted on American civilians in the Middle East, and suggests a statutory solution for this type of surveillance that protects the Fourth Amendment privacy rights of American civilians overseas without compromising the United States' national security.

I. THE EVOLUTION OF U.S. SURVEILLANCE LAW

In Part I, this Note provides background on NSA surveillance, the Fourth Amendment, and surveillance law. Part I.A examines the history of the NSA and its surveillance of American citizens. Next, Part I.B discusses the Fourth Amendment and early surveillance law. Finally, Part I.C provides a history of foreign surveillance statutes, cases, and history.

communications by Americans. See David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice over Internet Protocol*, 47 B.C. L. REV. 505, 525–28 (2006) (providing some background information on USSID 18). However, if the NSA intercepts the communications of Americans “inadvertently” while trying to collect foreign communications, the NSA may still retain those intercepted communications. *Id.* at 525–26.

23. See *infra* Part II.A.3.

24. See Ann Binlot, *Why Is Voting Overseas So Difficult?*, TIME, Nov. 1, 2008, <http://www.time.com/time/nation/article/0,8599,1855717,00.html> (observing that nearly half the six million Americans living overseas voted in the 2004 presidential election).

A. *The NSA and Electronic Surveillance*

The NSA conducts foreign intelligence surveillance programs, like Highlander, to guard the United States' national security. The NSA's mission is to protect U.S. government information systems and electronically gather foreign intelligence information.²⁵ The history of the NSA begins during the Cold War when the Department of Defense created the Armed Forces Security Agency, the immediate predecessor to the NSA, in 1949.²⁶ Two years later, a Senate committee responding to a need for better coordination of communications intelligence recommended the establishment of an intelligence agency with increased autonomy from the armed forces.²⁷ In response to this recommendation, President Harry Truman created the NSA in 1952.²⁸

Because of the secretive nature of the NSA, the public knows little about the agency's achievements. Some of the few publicized NSA successes include the tracing of a Berlin disco bombing to a Libyan terrorist and the monitoring of Soviet pilots that shot down a South Korean airliner in 1983.²⁹ The agency's reputation soured after revelations surfaced in the 1970s of the NSA's illegal spying program on American citizens.³⁰ In response to this illegal surveillance, Congress passed FISA, creating a warrant procedure for foreign intelligence surveillance of Americans and prohibiting surveillance of any Americans that are not "agents of a foreign power."³¹ After the passage of FISA, the NSA's leadership reportedly became more cautious with their foreign intelligence surveillance out of fear that they would inadvertently eavesdrop on Americans illegally.³² Alongside other well-documented errors in coordination between

25. The NSA/CSS Mission, <http://www.nsa.gov/about/mission/index.shtml> (last visited Sept. 10, 2009).

26. JAMES BAMFORD, *THE PUZZLE PALACE* 47 (1982). The Armed Forces Security Agency analyzed foreign signals and delivered their work product to other United States intelligence agencies. *Id.* at 51.

27. See *The National Security Agency Declassified: History, Organization and Operations*, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/> (last visited Sept. 10, 2009).

28. See BAMFORD, *supra* note 2, at 13, 168.

29. *A Half-Century of Surveillance*, N.Y. TIMES, Dec. 16, 2005, at A16; Eben Kaplan, Council on Foreign Relations, Targeted Killings, <http://www.cfr.org/publication/9627/> (last visited Sept. 12, 2009) (describing President Ronald Regan's bombing of Libyan leader Muammar el-Qaddafi's villa in response to intelligence that linked Libya to a Berlin disco bombing); National Security Agency, <http://history.sandiego.edu/gen/20th/nsa.html> (last visited Sept. 12, 2009) (stating that the NSA released intercepts from Soviet pilots that shot down Korean Airlines flight 007).

30. See *A Half-Century of Surveillance*, *supra* note 29.

31. See *id.*

32. BAMFORD, *supra* note 2, at 31 (describing how known terrorists lived in San Diego with a listed phone number but the NSA did not intercept their international communications). *But see* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 353 (2004) [hereinafter 9/11 REPORT] (claiming the NSA listened to international transmissions by known terrorists but failed to inquire further about the threat they posed).

intelligence agencies,³³ journalist James Bamford implies that the NSA's failure to detect the 9/11 terrorists living in the United States was directly related to this overcaution.³⁴ To remedy this situation, President Bush signed a secret order in 2002 allowing the NSA to conduct warrantless surveillance of the e-mails and international phone calls of American citizens believed to be contacting suspected terrorists.³⁵

With this executive authorization, the U.S. government subsequently engaged in surveillance of Americans without seeking prior judicial approval.³⁶ When this domestic NSA program came to light in 2006, the press and public expressed outrage and questioned whether this surveillance was a proper use of executive power.³⁷ Some critics charged that the President violated the law by circumventing FISA's surveillance approval procedures.³⁸ Reports of the Highlander program's surveillance of American citizens overseas surfaced in 2008 and raised similar questions about the program's legality.³⁹

B. *Fourth Amendment Electronic Surveillance Cases and Legislation*

Part I.B of this Note provides some background on how electronic surveillance has been regulated by Fourth Amendment jurisprudence and statutes and informs the larger question this Note addresses. First, this section examines Fourth Amendment jurisprudence generally. Then, it traces the evolution of constitutional and statutory surveillance law.

33. See 9/11 REPORT, *supra* note 32, at 353–56 (finding that a lack of coordination between American intelligence agencies allowed the 9/11 hijackers to operate in the U.S. even after they had been detected by NSA intercepts).

34. BAMFORD, *supra* note 2, at 31–32.

35. See Eggen, *supra* note 10; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. Bush's secret order has never been made public. See ACLU v. NSA, 493 F.3d 644, 687–88 (6th Cir. 2007) (holding that plaintiffs did not have standing to bring their claim and could not compel disclosure of the secret order).

36. See, e.g., Eggen, *supra* note 10; Risen & Lichtblau, *supra* note 35.

37. See Editorial, *An Ever-Expanding Secret*, N.Y. TIMES, May 12, 2006, at A32 (urging Congress to pass legislation declaring the NSA's warrantless domestic spying program illegal); David Cole, *NSA Spying Myths*, THE NATION, Feb. 20, 2006, at 5, 5–7 (claiming that wiretapping was outside the accepted powers of the President and that it was possible to track terrorist groups without the NSA's domestic surveillance program); Jay Tolson, *Imbalance of Power: Just How Imperial Can the Commander in Chief Be During a Time of Crisis?*, U.S. NEWS & WORLD REP., Jan. 30–Feb. 6, 2006, at 58 (documenting the growing concern with the Bush administration's expansion of executive power and noting prominent American historical corollaries).

38. See ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 44 (2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (finding that the legal justification given by the Bush administration for the NSA surveillance was not well-grounded); Tom Daschle, Op-Ed., *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21 (rebutting the Bush administration's claim that Congress authorized this type of surveillance in the United States after 9/11).

39. See *supra* Introduction.

1. The Fourth Amendment and Its Ambiguities

The Fourth Amendment states,

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.⁴⁰

Protecting the people's privacy, an essential part of the Fourth Amendment, is an important component of a free society.⁴¹ The Fourth Amendment, deeply rooted in Anglo-American common law, protects against unreasonable physical search and seizure.⁴² The Amendment's original purpose was to protect homes and personal belongings from law enforcement using general warrants;⁴³ however, courts have been debating what protections the Fourth Amendment provides since its inception.⁴⁴

One point of contention is whether there is a relationship between the clause prohibiting unreasonable searches and the clause establishing the conditions under which the government may issue warrants.⁴⁵ The U.S. Supreme Court has held that a search without a warrant is generally unreasonable, with some well-established exceptions such as when police have probable cause or when there are exigent circumstances.⁴⁶ Other Supreme Court decisions have implied, however, that a warrant is not required at all and the Fourth Amendment only requires that a search be reasonable.⁴⁷ The controversy continues because the Fourth Amendment

40. U.S. CONST. amend. IV.

41. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (stating that protection from arbitrary police intrusion into a person's home is at the core of the Fourth Amendment).

42. See 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 3–4 (3d ed. 1996) (explaining early cases in English search law that led to the creation of the modern day Fourth Amendment).

43. J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 518 (2007) (discussing the meaning of the phrase “the people” during a historical analysis of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

44. 1 LAFAVE, *supra* note 42, at 5; see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–81 (1994) (comparing different interpretations of the Fourth Amendment's Warrant Clause).

45. 1 LAFAVE, *supra* note 42, at 5.

46. See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (stating that it remains a rule that searches conducted without prior judicial approval are unreasonable unless they fit within an exception); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (holding that it is a “cardinal principle” that all searches conducted without a warrant are per se unreasonable unless subject to an exception); *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating that warrantless searches are per se unreasonable unless subject to an exception).

47. See *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (stating that the warrant requirement of the Fourth Amendment can be supplanted by other elements that suggest the search is “reasonable”); *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (stating that the essential purpose of the Fourth Amendment is to impose a reasonableness requirement on searches); see also Amar, *supra* note 44, at 761 (claiming that the words of the Fourth Amendment do not require warrants for searches and seizures); Constance Pfeiffer, Note, *Feeling Insecure?: United States v. Bin Laden and the Merits of a Foreign-Intelligence*

does not explicitly state that the fruits of warrantless or unreasonable searches and seizures must be barred as evidence in courts of law.⁴⁸ Professor Akhil Reed Amar has written that both the exclusionary rule and the warrant requirement are not valid because the Fourth Amendment at the time of its adoption did not explicitly require warrants, probable cause, or the exclusion of illegally obtained evidence.⁴⁹ The justification for this view is that the actual text of the Fourth Amendment does not require a warrant, stating only that “no Warrants shall issue, but upon probable cause.”⁵⁰ Instead of a warrant requirement, Amar believes that the Fourth Amendment’s text only requires that a search is reasonable.⁵¹ According to Amar, the warrant requirement to the Fourth Amendment is a purely modern invention.⁵²

The Supreme Court, however, has repeatedly reaffirmed that there is a warrant requirement in the Fourth Amendment.⁵³ In his historical analysis of the Fourth Amendment, Professor Thomas Davies asserts that commentators on both sides of the debate have used historical commentary to support their assertions, yet the actual historical evidence does not corroborate either the reasonableness or the warrant requirement interpretations.⁵⁴ While neither approach exactly comports with the original intent of the Fourth Amendment, Davies believes that the warrant preference interpretation comes closest to the original vision of the Framers.⁵⁵ The Framers had a clear preference for specific warrants as a way to reduce the discretionary search authority of law enforcement

Exception for Searches Abroad, 23 REV. LITIG. 209, 215 (2004) (stating that the Fourth Amendment only requires reasonableness and not a warrant); Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-Examining the Fourth Amendment’s Warrant Clause and the Foreign Intelligence Exception Five Years After United States v. Bin Laden*, 55 DUKE L.J. 1059, 1062–63 (2006) (observing that the text of the Fourth Amendment does not actually require warrants).

48. However, the U.S. Supreme Court established that the product of an illegal search may not be admitted as evidence in a legal proceeding. See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

49. See Amar, *supra* note 44, at 757 (stating that a close reading of the text and history of the Bill of Rights does not support the modern reading of the Fourth Amendment).

50. U.S. CONST. amend. IV; Amar, *supra* note 44, at 758.

51. Amar, *supra* note 44, at 759.

52. See *id.* at 757 (stating that the modern pillars of the Fourth Amendment do not match the text and history of the Amendment).

53. See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (stating that searches conducted without a warrant are per se unreasonable); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (stating that the warrant requirement is the “most basic constitutional rule” in Fourth Amendment law); *Johnson v. United States*, 333 U.S. 10, 14–15 (1948) (stating that a warrant is always required unless there are exceptional circumstances).

54. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551, 736 (1999). Professor Thomas Davies has written extensively about the Framers’ intent during the drafting of the Bill of Rights, particularly the Fourth, Fifth, and Sixth Amendments. See The University of Tennessee, Knoxville, College of Law, Thomas Y. Davies, <http://www.law.utk.edu/faculty/davies/publications.shtml> (last visited Sept. 11, 2009).

55. Davies, *supra* note 54, at 738.

personnel.⁵⁶ However, no matter which approach is the closest to the original intent of the Fourth Amendment, over time the warrant procedure has proven to be an important way for an impartial party to weigh the benefit of a search against the cost of the intrusion on a citizen's privacy.⁵⁷

2. The Supreme Court's Earliest Electronic Surveillance Decisions and the Congressional Response

The Supreme Court had to struggle to determine whether it could apply the law of searches to law enforcement electronic surveillance. The application of Fourth Amendment doctrine to electronic surveillance began with the Supreme Court's 1928 decision in *Olmstead v. United States*.⁵⁸ In *Olmstead*, the Court held that warrantless wiretapping does not violate the Fourth Amendment because the U.S. Constitution only protected against warrantless searches of a person, a home, or personal possessions.⁵⁹ The petitioners in *Olmstead* had appealed their conviction for conspiracy to transport, import, and sell liquor in violation of the National Prohibition Act.⁶⁰ Federal prohibition officers obtained most of the information leading to the petitioners' arrest by intercepting phone conversations between the coconspirators.⁶¹ These wiretaps did not occur inside any of the petitioners' homes and did not necessitate law enforcement trespass.⁶²

The Court's majority held that the Fourth Amendment did not require a warrant for nontrespassory electronic surveillance and rejected any notion that the Fourth Amendment protected against anything but a physical search of a spatially limited area, such as a house or person.⁶³ Justice Louis Brandeis dissented, stating that the Constitution should be able to protect privacy even after technological advances make possible previously unfathomable invasions of privacy.⁶⁴ Wiretapping made the government capable of "[s]ubtler and more far-reaching means of invading privacy," so that it was possible "to obtain disclosure in court of what is whispered in

56. *See id.*

57. *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963) ("The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police . . ."); *Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.") (footnote omitted).

58. 277 U.S. 438 (1928).

59. *Id.* at 466.

60. *Id.* at 455.

61. *See id.* at 456–57.

62. *See id.* at 457 (finding that police intercepted the phone calls from telephone lines in the street near the house).

63. *Id.* at 464–65 ("The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office.").

64. *See id.* at 472–73 (Brandeis, J., dissenting).

the closet.”⁶⁵ Instead of focusing on the literal trespass to physical property, Brandeis argued that the Fourth Amendment fundamentally protected against “the invasion . . . of personal security, personal liberty and private property.”⁶⁶

Despite Brandeis’s impassioned dissent, the *Olmstead* majority allowed federal agencies to use warrantless wiretaps in criminal and intelligence investigations.⁶⁷ Congress responded to *Olmstead* by passing § 605 of the Federal Communications Act of 1934, making it a crime for any person to intercept wire or radio communications and then divulge or publish the contents of those communications.⁶⁸ Courts interpreted this law as prohibiting the introduction of information procured from warrantless wiretaps into evidence.⁶⁹ In *Nardone v. United States*,⁷⁰ the Supreme Court interpreted the Federal Communications Act as also applying to federal agents and held that evidence obtained in contravention of the Act was inadmissible.⁷¹ This legislation, however, did not address the validity of wiretaps in the name of national security.⁷²

3. *Katz v. United States* and its Effect on Electronic Surveillance Law

In *Katz v. United States*,⁷³ the Supreme Court finally held that electronic surveillance is subject to the requirements of the Fourth Amendment.⁷⁴

65. *Id.* at 473.

66. *See id.* at 474–75.

67. DONALD J. MUSCH, CIVIL LIBERTIES AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 5 (2003).

68. Pub. L. No. 73-416, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605(a) (2006)).

69. *See, e.g., Nardone v. United States (Nardone I)*, 302 U.S. 379, 385 (1937) (holding that the fruits of illegal wiretapping must be excluded as evidence at trial); *Zweibon v. Mitchell*, 516 F.2d 594, 617 (D.C. Cir. 1975) (“Section 605 was interpreted to prohibit the introduction into evidence of . . . conversations overheard on wiretaps installed by law enforcement officials”); *United States v. Coplon*, 185 F.2d 629, 636 (2d Cir. 1950) (holding that wiretapping is illegal and evidence retrieved by illegal means must be excluded at trial).

70. 302 U.S. 379.

71. *Id.* at 382–83 (holding that information obtained in contravention of § 605 of the Federal Communications Act is inadmissible in court); *Nardone v. United States (Nardone II)*, 308 U.S. 338, 343 (1939) (holding, after remand, that both of the intercepted transmissions were inadmissible, as well as any other evidence procured through knowledge gained from the illegally intercepted transmissions).

72. Brenton Hund, Note, *Disappearing Safeguards: FISA Nonresident Alien “Loophole” Is Unconstitutional*, 15 CARDOZO J. INT’L & COMP. L. 169, 177 (2007) (describing the congressional and executive response to surveillance laws passed after *Olmstead*).

73. 389 U.S. 347 (1967).

74. *Id.* at 359. By the time that *Katz* was decided, the underpinnings of *Olmstead* had been “eroded” by subsequent decisions. *See id.* at 353. Courts no longer saw property interest as controlling the government’s right to search. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967) (holding that a search may be unreasonable even if the government has a superior interest in the searched property at common law). The Court had also previously held that the Fourth Amendment applied to the recording of oral statements without any physical trespass. *See Silverman v. United States*, 365 U.S. 505, 511 (1961)

The petitioner, Charles Katz, appealed his conviction for illegal gambling in violation of the Federal Wire Wager Act.⁷⁵ Katz allegedly used a public phone in Los Angeles to place bets in Miami and Boston.⁷⁶ Katz's primary argument on appeal was that the police obtained recordings of his phone conversations by means that violated the Fourth Amendment.⁷⁷ The U.S. Court of Appeals for the Ninth Circuit rejected this argument because the recordings were made by an electronic listening device placed on the exterior of the phone booth used by Katz.⁷⁸

Prior Fourth Amendment surveillance cases, most prominently *Olmstead*, were based on a theory of physical trespass.⁷⁹ In *Katz*, the Supreme Court departed from this rationale, holding that what a person "preserve[s] as private, even in an area accessible to the public, may be constitutionally protected."⁸⁰ Therefore, the fact that the listening device did not physically penetrate the booth where the defendant made the call had "no constitutional significance."⁸¹

Congress supported the *Katz* decision by passing Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) one year later.⁸² Title III protects private communications from warrantless electronic surveillance by prohibiting electronic surveillance by private citizens and authorizing law enforcement only to use surveillance pursuant to a court order.⁸³ Title III explicitly did not affect the legality of warrantless

(holding that violations of real property law are not a prerequisite to invoking Fourth Amendment rights).

75. See *Katz*, 389 U.S. at 348.

76. See *id.*

77. See *id.* at 348–49.

78. See *Katz v. United States*, 369 F.2d 130, 133–34 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

79. See, e.g., *Goldman v. United States*, 316 U.S. 129, 134–35 (1942) (holding that use of a detectaphone was not a trespass and therefore it did not violate the Fourth Amendment); *Olmstead v. United States*, 277 U.S. 438, 457 (1928) (finding that the surveillance occurred without any trespass on the target's property); see also *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (noting that Fourth Amendment jurisprudence was tied to common law trespass well into the twentieth century).

80. *Katz*, 389 U.S. at 351–52.

81. See *id.* at 353.

82. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211–25 (1968) (codified at 18 U.S.C. §§ 2510–22 (2006)); H.R. REP. NO. 95-1283, pt. 1, at 17 (1978), available at <http://www.cnss.org/rpt%2095-1283pt1.pdf>. The U.S. Department of Justice had been pressing for legislation removing the limitations of § 605 of the Federal Communications Act in order to use electronic surveillance to combat crime. See *United States v. Butenko*, 494 F.2d 593, 598–60 (3d Cir. 1974) (describing the history of interpretation of § 605 of the Federal Communications Act).

83. 18 U.S.C. §§ 2510–22 (2006); Frederick M. Joyce & Andrew E. Bigart, *Liability for All, Privacy for None: The Conundrum of Protecting Privacy Rights in a Pervasively Electronic World*, 41 VAL. U. L. REV. 1481, 1486 (2007); Authorization of Applications for Wire, Oral, and Electronic Interception Orders—Overview and History of Legislation, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/7mcrm.htm#9-7.100 (last visited Sept. 11, 2009). In order to adapt to new computer and telecommunications technologies, Congress later passed the Electronic Communications Privacy Act of 1986, which extended wiretap protections to cellular phones, while continuing to provide the same

surveillance conducted for national security purposes.⁸⁴ Section 2511(3) of the Act stated that nothing in Title III or the Federal Communications Act limited

the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.⁸⁵

Title III, therefore, only applied to domestic electronic surveillance, but not national security surveillance, and “ha[d] no extraterritorial force.”⁸⁶ It also incorporated a statutory exigent circumstances exception for state and federal authorities during an emergency, contingent upon law enforcement entering an application for the surveillance within forty-eight hours.⁸⁷ Thus, by 1968, domestic surveillance law offered protection from arbitrary law enforcement intrusions but did not govern the activities of intelligence agencies engaging in national security surveillance.

C. *A Brief History of American Foreign Intelligence Surveillance Law*

In Part I.C, this Note reviews the constitutional and statutory restrictions on foreign intelligence surveillance of Americans. This Note first discusses the President’s constitutional power to engage in foreign intelligence surveillance and examines the history of executive authorization of national security surveillance. Next, this Note provides a summary of the events that led to the passage of FISA and that Act’s requirements, procedures, and implications for foreign surveillance law. Finally, this Note summarizes the recent FISA Amendments Act of 2008 and briefly discusses how this Act has changed FISA procedures and protections.

essential protections found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III). See Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848, 1860–73 (1986) (codified at 18 U.S.C. §§ 2510–22 (2006)).

84. See 18 U.S.C. § 2511(3) (1976), *repealed by* Act of Oct. 25, 1978, Pub. L. No. 95-511, § 201(c), 92 Stat. 1783, 1797.

85. *Id.* James Bamford contends that the NSA helped write Title III and inserted this provision “to remove any doubt as to the legality” of the NSA’s operations. BAMFORD, *supra* note 26, at 256 (internal quotation marks omitted) (quoting a July 24, 1968 memorandum written by NSA lawyer Roy Banner).

86. See *United States v. Barona*, 56 F.3d 1087, 1090 (9th Cir. 1995) (internal quotation marks omitted) (holding that it is undisputed that Title III does not apply outside of the United States).

87. 18 U.S.C. § 2518(7)(a)–(b) (2006). Acceptable emergencies under Title III include immediate death or injury to a person, national security threats, and organized crime conspiracies. *Id.*

1. The President's Constitutional Authority To Engage in Foreign Intelligence Surveillance

Under Article II of the Constitution, the President of the United States has the duty to “preserve, protect and defend the Constitution of the United States.”⁸⁸ Courts and commentators have interpreted this clause to mean that the President as Commander-in-Chief has the authority under the foreign affairs power to gather intelligence to protect the country.⁸⁹ However, the Supreme Court has never expressly decided whether the President has the power to authorize foreign intelligence surveillance without prior judicial approval.⁹⁰ Nevertheless, most of the lower courts that have heard this issue have held that the executive branch has the inherent power to use warrantless surveillance to gather foreign intelligence.⁹¹

2. Executive Authorization of Foreign Intelligence Surveillance

Progressively, from 1931 until the passage of FISA in 1978, the standard for executive approval of national security surveillance changed from only using surveillance to combat serious crimes to the subjective criterion that surveillance should only be used for the “national interest.”⁹² In 1931, Attorney General William D. Mitchell approved telephone wiretapping by the government when “the crimes are substantial and serious.”⁹³ After the *Nardone* decisions held that this type of warrantless surveillance was illegal,⁹⁴ the U.S. Department of Justice interpreted the Federal Communications Act to mean that only *divulgence* of wire and radio surveillance was illegal.⁹⁵ According to the Justice Department's rationale,

88. U.S. CONST. art. II, § 1, cl. 8.

89. See H.R. REP. NO. 95-1283, pt. 1, at 15–21 (1978); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936) (stating that the President is the “sole organ of the federal government in the field of international relations”); Hund, *supra* note 72, at 174 (asserting that the “Oath Clause” vests the President's right to engage in wiretapping).

90. See H.R. REP. NO. 95-1283, pt. 1, at 15 (1978) (noting that the Justice Department believed that the Federal Communications Act did not impede the executive's inherent ability to use intelligence to defend the nation in national security matters); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972) (stating that in order to preserve and protect the country, the President may choose whether or not to use electronic surveillance).

91. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (holding that a warrant requirement would “unduly frustrate the efforts of Government to protect itself” (quoting *Keith*, 407 U.S. at 315)); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (holding that the President has the power to conduct warrantless foreign intelligence surveillance). *But see* *Zweibon v. Mitchell*, 516 F.2d 594, 616 (D.C. Cir. 1975) (stating that even though the practice of executive authorization of warrantless surveillance for national security purposes has been used by Presidents since Roosevelt, unconstitutional practices should not be condoned by the judiciary).

92. H.R. REP. NO. 95-1283, pt. 1, at 15–21 (1978).

93. See *id.* at 15.

94. See *supra* note 71 and accompanying text.

95. H.R. REP. NO. 95-1283, pt. 1, at 15 (1978).

the government could conduct warrantless national security electronic surveillance if it only examined the resulting intelligence internally.⁹⁶

Subsequent Attorneys General similarly approved this type of surveillance. In a memo to Attorney General Robert Jackson in 1940, President Franklin D. Roosevelt authorized national security surveillance but requested that Jackson use these investigations sparingly and to “limit them insofar as possible to aliens.”⁹⁷ In a 1946 memorandum to President Harry Truman, Attorney General Tom C. Clark reiterated the necessity of domestic surveillance in “cases vitally affecting the domestic security.”⁹⁸ In the early 1950s, President Truman’s subsequent Attorney General, J. Howard McGrath, decided that the Justice Department would not approve or authorize national security telephone surveillance that required physical trespass.⁹⁹ However, in 1954 during President Dwight Eisenhower’s administration, Attorney General Herbert Brownell wrote in a memorandum that the FBI had broad discretion to use even trespassory electronic surveillance in the “national interest” without approval from the Justice Department.¹⁰⁰ In 1965, President Lyndon B. Johnson wrote a memorandum voicing his disapproval of the interception of phone conversations “except in connection with investigations related to the national security.”¹⁰¹ By this time, warrantless national security surveillance seemed to have become an accepted executive prerogative.

The Supreme Court remained silent on the legality of this surveillance because *Katz*, while applying the Fourth Amendment to electronic surveillance, refused to extend its holding to national security surveillance.¹⁰² The Court seemed split on this issue. Justice William O. Douglas stated in his concurrence in *Katz* that he did not “agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.”¹⁰³ Justice Byron White, in a separate concurrence, disagreed, stating that warrantless wiretapping in the name of national security should be allowed if the President or his Attorney General found that the

96. *Id.*; see also Herbert Brownell, Jr., *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 197–98 (1954); William P. Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792, 793 (1954).

97. *Zweibon v. Mitchell*, 516 F.2d 594, 674 (D.C. Cir. 1975) (Appendix A: Memorandum from President Franklin D. Roosevelt to Attorney General Robert Jackson).

98. *Id.* (Appendix A: Memorandum from Attorney General Tom C. Clark to President Harry S. Truman).

99. H.R. REP. NO. 95-1283, pt. 1, at 16 (1978).

100. *Id.*

101. *Zweibon*, 516 F.2d at 674–75 (Appendix A: Memorandum for the Heads of Executive Departments and Agencies from President Lyndon Johnson).

102. *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (“Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”).

103. *Id.* at 360 (Douglas, J., concurring).

surveillance was reasonable.¹⁰⁴ There was no clear consensus whether the *Katz* holding applied to national security surveillance.

3. Changes in Domestic National Security Surveillance Law

Restrictions on the government power to conduct intelligence surveillance of Americans increased during the 1970s in response to the Supreme Court's application of the Fourth Amendment's warrant requirement to domestic national security surveillance in *United States v. U.S. Dist. Court (Keith)*.¹⁰⁵ In *Keith*, the petitioners appealed their conviction for conspiring to destroy government buildings, including the CIA office in Ann Arbor, Michigan.¹⁰⁶ Although it did not have prior judicial approval, the government claimed that the surveillance evidence used in the prosecution was lawful because it was a reasonable exercise of presidential power to protect national security.¹⁰⁷ Specifically, the government asserted that Title III did not control the government's conduct because § 2511(3) of Title III stated that nothing in the Act disturbed power given to the President by the Constitution to protect the country.¹⁰⁸

Though the government was invoking the same rationale that the executive had used for years to justify warrantless surveillance, the Court held that, even if domestic national security surveillance is reasonably executed, the Fourth Amendment still requires prior judicial approval.¹⁰⁹ According to the Court, “[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.”¹¹⁰ The Court was careful to emphasize that its holding would not address foreign intelligence surveillance.¹¹¹ It limited its ruling to national security electronic surveillance of domestic subjects and not “the issues which may be involved with respect to activities of foreign powers or their agents.”¹¹² The Court merely “narrowed the scope of the possible exception to the warrant requirement” when responding to a domestic security threat.¹¹³

104. *See id.* at 364 (White, J., concurring).

105. 407 U.S. 297 (1972).

106. *See id.* at 299.

107. *See id.* at 301.

108. *See id.* at 302 (citing 18 U.S.C. § 2511(3) (2006)).

109. *See id.* at 317.

110. *Id.* at 320.

111. *See id.* at 308–09.

112. *See id.* at 322.

113. *Zweibon v. Mitchell*, 516 F.2d 594, 612 (D.C. Cir. 1975) (finding that the Court did not answer the national security surveillance question until *United States v. U.S. Dist. Court (Keith)*).

4. Enactment of the Foreign Intelligence Surveillance Act of 1978

After years of abstention from foreign intelligence surveillance matters, Congress finally decided in 1975 to examine the practices of the intelligence agencies after revelations surfaced of surveillance abuses against American citizens.¹¹⁴ Journalist Seymour M. Hersh had revealed that the CIA was conducting illegal surveillance of thousands of American citizens.¹¹⁵ The Watergate investigation had also uncovered evidence that President Richard Nixon authorized electronic surveillance in the name of national security to monitor the international communications of Americans involved in domestic dissent such as civil rights activists, student groups, and Vietnam War protest groups.¹¹⁶ A committee led by Senator Frank Church convened to conduct a study of intelligence operations to see if the U.S. government engaged in any illegal or improper surveillance of American citizens.¹¹⁷ The Church Committee conducted a thorough examination of intelligence operations in the United States and found that intelligence agents and members of the executive branch often ignored the statutory checks that were in place to prevent abuses of national security surveillance.¹¹⁸

In response to the Church Committee's report, Congress addressed the need for balance between national security interests and civil liberties protections with FISA.¹¹⁹ A guiding principle of FISA is that even if the President has an inherent constitutional power to authorize foreign intelligence surveillance, Congress may regulate this activity by requiring a reasonable warrant procedure.¹²⁰ FISA governed acquisition by electronic surveillance of any wire communication to or from a party in the United States when neither party had consented to the surveillance.¹²¹ The Act authorized the executive branch to conduct electronic surveillance when "a significant purpose of the surveillance is to obtain foreign intelligence information."¹²² FISA also amended § 2511(3) of Title III to unequivocally state that FISA was the exclusive means of conducting any type of foreign intelligence surveillance that targeted Americans.¹²³

114. Church Committee Created, http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm (last visited Sept. 11, 2009).

115. *Id.*; Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at A1.

116. S. REP. NO. 94-755, at (3)(b) (1976), available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm>.

117. See Church Committee Created, *supra* note 114.

118. *Id.* (stating that the committee interviewed 800 individuals, conducted 250 executive hearings, and held 21 public hearings); see Heidi Kitrosser, "Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1184 (2007) (describing the Church Committee's findings of surveillance abuses).

119. See MUSCH, *supra* note 67, at 9; Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-85c (2006)).

120. H.R. REP. NO. 95-1283, pt. 1, at 24 (1978).

121. 50 U.S.C. § 1801(f)(2) (2006).

122. *Id.* § 1804(a)(7)(B).

123. MUSCH, *supra* note 67, at 94.

FISA defined “foreign intelligence information” as information related to national security, foreign affairs, or potential attacks by “a foreign power” or “agents of a foreign power.”¹²⁴ The Act only protected “United States person[s],” defined as U.S. citizens, resident aliens, and certain corporations and unincorporated organizations, from surveillance.¹²⁵ A violation of FISA, by engaging in warrantless electronic surveillance or disclosing information obtained from electronic surveillance, was punishable by up to \$10,000 in fines and five years in prison.¹²⁶ FISA also empowered individuals targeted by illegal surveillance to bring civil claims for actual damages, punitive damages, and attorney’s fees.¹²⁷

Congress created the Foreign Intelligence Surveillance Court (FISC), a secret panel of eleven federal judges chosen by the Chief Justice of the Supreme Court, to review FISA warrant requests.¹²⁸ Prior to the most recent FISA amendments,¹²⁹ the process for requesting a FISA warrant required an intelligence agency or police department to submit a warrant application to the Justice Department.¹³⁰ This application had to describe the proposed surveillance or search, certify that the surveillance was for foreign intelligence purposes, and include a certification by the President or his designated official that the surveillance was for foreign intelligence information that could not be obtained by more traditional means.¹³¹ The Justice Department then reviewed the application before submitting it to the FISC.¹³² If an application met all of these requirements and there was probable cause, a FISC judge could then issue a warrant.¹³³ This warrant specifically stated information such as the target, “nature and location,” and duration of the surveillance.¹³⁴ FISA also allowed for emergency

124. 50 U.S.C. § 1801(e).

125. *Id.* § 1801(i).

126. *Id.* § 1809.

127. *Id.* § 1810.

128. *Id.* § 1803(a) (“The Chief Justice of the United States shall publicly designate 11 district court judges from seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States . . .”). Originally, the Foreign Intelligence Surveillance Court (FISC) had only seven judges. *See* 50 U.S.C. § 1803(a) (1982), *amended by* 50 U.S.C.A. § 1803(a) (West 2003 & Supp. 2009). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 increased the number of judges on the FISC to eleven. *See* Pub. L. No. 107-56, § 207, 115 Stat. 272, 283 (2001) (codified as amended in scattered titles and sections of the U.S.C.).

129. *See infra* Part I.C.5.

130. Hund, *supra* note 72, at 181.

131. 50 U.S.C. § 1804(a)(7) (2006); *see also* Hund, *supra* note 72, at 181.

132. Pfeiffer, *supra* note 47, at 224.

133. 50 U.S.C. § 1805(a). FISA is a much more lenient standard than Title III because national security surveillance under FISA requires a lesser showing of probable cause than Title III. *See* Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 Hous. L. Rev. 1421, 1438 (2001).

134. 50 U.S.C. § 1805(c)–(d). If the location of surveillance was unknown or was likely to change frequently, the applicant was required to provide information about the location of

exceptions to the warrant requirement in two situations. First, the Attorney General could authorize warrantless surveillance in an emergency where obtaining a warrant prior to commencing surveillance was not possible.¹³⁵ If surveillance began under this emergency exception, the Attorney General had to apply for a warrant within seventy-two hours of authorizing the surveillance.¹³⁶ Under the second emergency exception, the Attorney General could authorize electronic surveillance without a warrant for fifteen days after a declaration of war by Congress.¹³⁷

Many commentators believe that FISA has been a successful legislative solution to the foreign intelligence question left by the *Keith* decision.¹³⁸ Every circuit court that has queried whether FISA is an adequate safeguard for U.S. persons' Fourth Amendment rights has upheld the Act.¹³⁹ Critics have responded, however, that in practice FISA has not been a sufficient check on administrative requests for surveillance warrants.¹⁴⁰ For instance, records show that from 1979 to 2002 the FISC did not reject any FISA applications, though it has rejected nine applications since 2003.¹⁴¹ In

the surveillance within ten days of the beginning of the surveillance in each particular location. *Id.* § 1805(c)(3).

135. *Id.* § 1805(f).

136. *Id.*

137. *Id.* § 1811. The Attorney General could also authorize electronic surveillance of a foreign power as long as there was not a "substantial likelihood" that the surveillance would investigate a U.S. person. *Id.* §§ 1802(a)(1)(B), 1822(a)(1)(A)(ii). However, all intelligence obtained from this surveillance had to be submitted to a FISC judge immediately for review. *Id.* § 1802(a)(3).

138. Curtis A. Bradley et al., *February 2, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Whitepaper of January 19, 2006*, 81 IND. L.J. 1415, 1423 (2006) (stating that FISA has been used successfully for thirty years); Jed Rubinfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 159 (2008) (stating that FISA has been a successful answer to the *Keith* question); Juan P. Valdivieso, *Recent Developments: Protect America Act of 2007*, 45 HARV. J. ON LEGIS. 581, 589 (2008) (stating that FISA contributed to successes against al Qaeda after 9/11).

139. *See* *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) (holding that FISA meets constitutional requirements because it reasonably fulfills government surveillance needs and protects citizens' rights); *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984) (holding that FISA is a constitutionally adequate balance of Fourth Amendment rights and the government needs for foreign intelligence surveillance).

140. Martha Minow, *What Is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2154 (2005) (book review) (stating that the FISC has provided no check on administrative requests for surveillance warrants).

141. *See* Elec. Privacy Info. Ctr., *Foreign Intelligence Surveillance Act Orders 1979–2007*, http://www.epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Sept. 12, 2009). *But see* Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. & POL'Y REV. 531, 535 (2006) (stating that various post-9/11 inquiries into the FISA process indicate that the review procedure is far more rigorous than the low rejection numbers imply). After 9/11, the number of FISA applications increased dramatically. Valerie Caproni, *Surveillance and Transparency*, 11 LEWIS & CLARK L. REV. 1087, 1092 (2007) (stating that after 9/11 the number of FISA requests doubled from the pre-9/11 levels). The government response to the terrorist strikes against the World Trade Center and the Pentagon created a significant increase in the amount of foreign intelligence needed by U.S. military and intelligence services. *See id.* Congress passed the USA PATRIOT Act in part to facilitate easier foreign intelligence approval by amending FISA to only require that foreign intelligence information is a "significant purpose" for the surveillance rather than its

2007, out of 2371 applications, the FISC only denied four and made substantive modifications to an additional eighty-six warrant requests.¹⁴² Even with such a high approval rate, Congress has further eased FISA requirements in the past decade.

5. Enactment of the FISA Amendments Act of 2008

In 2006, after the U.S. government revealed that it had engaged in warrantless surveillance of American citizens,¹⁴³ a civil liberties group called the Electronic Frontier Foundation (EFF) sued the telecommunications company AT&T for assisting the NSA in conducting surveillance of its customers.¹⁴⁴ Senator John Rockefeller proposed FISA amendments that would grant retroactive immunity to telecommunications companies that assisted the NSA in warrantless surveillance of Americans.¹⁴⁵ The proponents of the bill argued that telecommunications companies should not be punished for assisting the government in its fight against terrorism.¹⁴⁶ Senators Russ Feingold and Christopher J. Dodd opposed the bill, arguing that it rewarded telecommunications companies for violating the law and betraying the privacy of their customers.¹⁴⁷ Despite this dissent, the bill passed and President Bush signed the FISA Amendments Act of 2008 into law on July 10, 2008.¹⁴⁸

An important addition to FISA under this Act was its expansion of FISA's coverage to include surveillance of Americans living overseas.¹⁴⁹ Under § 702(b) of FISA, the government may not "intentionally target a United States person reasonably believed to be located outside the United

"primary purpose." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles and sections of U.S.C.); see *In re Sealed Case*, 310 F.3d 717, 732-34 (FISA Ct. Rev. 2002) (holding that Congress intended to relax the standard of what the government had to show to get a FISA warrant); William Pollak, Note, *Shu'ubiyya or Security?: Preserving Civil Liberties by Limiting FISA Evidence to National Security Prosecutions*, 42 U. MICH. J.L. REFORM 221, 237-38 (2008) (stating that only six weeks after 9/11, President Bush signed the USA PATRIOT Act, changing FISA's requirements).

142. See Elec. Privacy Info. Ctr., *supra* note 141.

143. See *supra* note 36 and accompanying text.

144. John Markoff & Scott Shane, *Documents Show Link Between AT&T and Agency in Eavesdropping Case*, N.Y. TIMES, Apr. 13, 2006, at A17.

145. S. 2248, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.2248.RS>.

146. Editorial, *Compromising the Constitution*, N.Y. TIMES, July 8, 2008, at A20.

147. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (to be codified in scattered sections of 8, 18, and 50 U.S.C.); Eric Lichtblau, *Senate Votes for Expansion of Spy Powers*, N.Y. TIMES, Feb. 13, 2008, at A17.

148. Eric Lichtblau, *Senate Approves Bill To Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1.

149. Executive Order 12,333 previously gave the Attorney General the power to approve surveillance in any case where there is probable cause that the subject is an agent of a foreign power. Exec. Order No. 12,333, 3 C.F.R. 200, 212 (1982), *reprinted as amended in* 50 U.S.C. § 401 (2006).

States.”¹⁵⁰ Previously there was no procedure for obtaining a warrant for surveillance of Americans overseas because magistrate judges had no extraterritorial jurisdiction under the Federal Rules of Criminal Procedure.¹⁵¹ By placing Americans overseas under FISA, Congress created a procedure for protecting the privacy of all Americans subject to foreign intelligence surveillance.

Though this legislation resolved a long-disputed area of surveillance law, other controversial modifications to FISA in the Act overshadowed this change. Under the new amendments, the Attorney General does not need to specifically identify surveillance targets.¹⁵² Instead, the Attorney General only needs to provide a “written certification” that the targets are outside the United States.¹⁵³ The amended FISA also no longer requires the FISC to consider individual surveillance applications and instead the court only oversees whether intelligence agency surveillance adheres to FISA’s general procedural requirements.¹⁵⁴ These changes removed previous FISA requirements that required intelligence agencies to submit detailed information about the nature of the information sought and describing the person or place targeted in order to receive a warrant for that specific surveillance.¹⁵⁵

The new amendments also provide the government greater flexibility to conduct foreign intelligence surveillance with no warrant at all. It expanded the executive’s discretion to use warrantless surveillance under exigent circumstances to situations where information important to “national security” may be lost.¹⁵⁶ Under the amended FISA, even if the FISC denies a warrant request, intelligence agencies are allowed to conduct surveillance until a decision is made on appeal.¹⁵⁷ Critics of the Act have argued that the amendments weakened FISA and do not provide adequate judicial oversight.¹⁵⁸ President Bush claimed, however, that it was a necessary change to FISA to assist the intelligence agencies in fighting terrorism.¹⁵⁹

150. 50 U.S.C.A. § 1881a(b)(3) (West 2003 & Supp. 2009).

151. FED. R. CRIM. P. 41(b); *see also* United States v. Bin Laden, 126 F. Supp. 2d 264, 275–76 n.13 (S.D.N.Y. 2000) (stating that there is not a statutory provision for searches conducted overseas), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

152. 50 U.S.C.A. § 1881a(g)(4).

153. *Id.* § 1881a(g).

154. *Id.* § 1881a(i)(2).

155. *See* 50 U.S.C. § 1804(a) (2006).

156. 50 U.S.C.A. § 1881a(c)(2).

157. *Id.* § 1881a(i)(4)(B).

158. Editorial, *supra* note 146 (arguing that the bill “dangerously weakened” FISA); Press Release, American Civil Liberties Union, H.R. 6304, The FISA Amendments Act of 2008 (June 19, 2008), <http://www.aclu.org/safefree/nsaspying/35731res20080619.html> (claiming that the bill gives “sweeping wiretapping authority to the government with little court oversight”).

159. *See* George W. Bush, U.S. President, Address in the Rose Garden, *available at* <http://merln.ndu.edu/archivepdf/nss/WH/20080710-2.pdf> (last visited Sept. 12, 2009) (stating that the FISA Amendments Act of 2008 gives intelligence agencies “the tools they need to protect our country”).

Whether it is a benefit or not, the Act removed the individualized judicial review of the original FISA and replaced it with a system that emphasized efficient warrant approval based on reliance on the good faith of the executive.¹⁶⁰ This Note examines whether the Fourth Amendment requires a more rigorous review of warrant applications for surveillance of Americans overseas.

II. SHOULD COURTS REQUIRE WARRANTS PRIOR TO SURVEILLANCE OF AMERICANS OVERSEAS?

With foreign travel and working overseas more commonplace, Americans often spend time in foreign nations. It is a matter of some debate whether Americans should enjoy the same protection from surveillance when they are overseas as they do while within the borders of the United States. Part II examines whether the Fourth Amendment requires prior judicial approval before the U.S. government conducts surveillance of Americans living overseas. Part II.A is a comparison of cases deciding whether the Fourth Amendment warrant requirement applies to U.S. persons when they are outside the United States. Part II.B is an in-depth analysis of whether, if a warrant requirement in fact exists, there should be a foreign intelligence exception to this warrant requirement for surveillance of Americans overseas.

A. *Applying the Fourth Amendment Overseas: A Possible Warrant Requirement*

In Part II.A, this Note examines whether the Fourth Amendment is applicable to U.S. persons abroad. First, this Note examines whether the Fourth Amendment's protections are available to Americans living overseas. Next, it discusses the Fourth Amendment warrant requirement and whether it is applicable to foreign intelligence surveillance of Americans overseas.

1. Fourth Amendment Protections for Americans Overseas

There is no Supreme Court decision explicitly holding that the Fourth Amendment protects Americans living overseas.¹⁶¹ However, in *Reid v. Covert*,¹⁶² a plurality of the Supreme Court held that the Constitution generally applies to American citizens living abroad.¹⁶³ In *Reid*, a military tribunal convicted a woman of killing her husband while they were both

160. See *supra* note 153 and accompanying text.

161. See Pfeiffer, *supra* note 47, at 215 (discussing the warrant requirement abroad and stating that “the Supreme Court has never directly considered the applicability of the Fourth Amendment” to searches of Americans overseas).

162. 354 U.S. 1 (1957).

163. *Id.* at 5–6 (plurality opinion) (holding that civilians abroad may not be constitutionally tried by military authorities).

stationed at a U.S. Air Force base in England.¹⁶⁴ The United States had signed a treaty with the British government giving the U.S. military exclusive criminal jurisdiction over American servicemen and their dependents stationed in Great Britain.¹⁶⁵ The convicted woman appealed her conviction by a military tribunal on the grounds that, as a civilian, the Constitution forbade her trial by military authorities.¹⁶⁶ A plurality of the Court agreed, holding that the Constitution applies to American citizens living overseas and that “the shield which the Bill of Rights . . . provide[s] . . . should not be stripped away just because [Americans] happen[] to be in another land.”¹⁶⁷ Justice John Marshall Harlan II, in his concurrence, conceded that the protections of the Fifth and Sixth Amendments should sometimes be available to criminal defendants overseas but disagreed with the plurality opinion’s assertion that all the provisions of the Constitution are “automatically applicable to American citizens in every part of the world.”¹⁶⁸ Instead, Justice Harlan urged that constitutional protections should be given to American citizens overseas according to the circumstances of the case and in light of possible alternatives.¹⁶⁹

Though *Reid* is persuasive authority that the Constitution protects Americans overseas, the extent of the protection has subsequently been disputed.¹⁷⁰ In 1990, the Supreme Court held in *United States v. Verdugo-Urquidez*¹⁷¹ that non-U.S. citizens living in another country and searched by the American government are not entitled to the protections of the U.S. Constitution.¹⁷² In *Verdugo-Urquidez*, Mexican police arrested a suspected drug smuggler, extradited him to the United States, and then allowed the Drug Enforcement Administration to seize documents from the suspect’s home without a warrant.¹⁷³ The U.S. Court of Appeals for the Ninth Circuit held that the Fourth Amendment applied to the search and, agreeing with *Reid*, that the Constitution applies to the U.S. government when it acts abroad.¹⁷⁴ However, a plurality of the Court refused to follow the lower courts’ interpretation of *Reid*, stating in dicta that the *Reid* Court merely held that the Fifth and Sixth Amendments protected American citizens abroad.¹⁷⁵ Despite this dicta, the Court in *Verdugo-Urquidez* limited its

164. *Id.* at 3–4.

165. *Id.* at 15.

166. *Id.* at 4.

167. *Id.* at 6.

168. *Id.* at 74 (Harlan, J., concurring).

169. *Id.* at 75.

170. See M. Isabel Medina, *Exploring the Use of the Word “Citizen” in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1579 (2008) (stating that “it was hardly well-settled that the Fourth Amendment warrant requirement applied to searches of U.S. citizens’ foreign residences conducted in accordance with foreign law”).

171. 494 U.S. 259 (1990).

172. See *id.* at 274–75.

173. *Id.* at 262.

174. *Id.* at 263.

175. *Id.* at 270.

holding to precluding Fourth Amendment protections from applying to noncitizens when the government acts abroad.¹⁷⁶

In his dissent in *Verdugo-Urquidez*, Justice William J. Brennan, Jr., stated that nothing in the Court's opinion overturns the rule that the Fourth Amendment applies to American citizens subjected to searches by the American government acting abroad.¹⁷⁷ Justice Brennan cited two federal appellate decisions to support this claim.¹⁷⁸ In the first, *United States v. Conroy*,¹⁷⁹ the U.S. Coast Guard searched an American ship in Haitian waters.¹⁸⁰ The U.S. Court of Appeals for the Fifth Circuit held that the Fourth Amendment protects U.S. citizens outside the country "from unreasonable searches by [their] own government."¹⁸¹ The second case, *United States v. Rose*,¹⁸² held that an airport search of an American citizen by Canadian officials in a Canadian airport was not subject to the Fourth Amendment's exclusionary rule.¹⁸³ However, the court stated in dicta that if the U.S. government participated in the search to the extent that it was a joint effort, then the Fourth Amendment would apply to the search.¹⁸⁴

Most recently, in *United States v. Bin Laden*,¹⁸⁵ the U.S. District Court for the Southern District of New York looked at both *Reid* and *Verdugo-Urquidez* and held that an American citizen subjected to a search overseas could plausibly bring a Fourth Amendment challenge.¹⁸⁶ The defendants in *Bin Laden* were charged with various offenses relating to their involvement in the al Qaeda terrorist organization's bombing of U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya.¹⁸⁷ Beginning in 1996, American intelligence monitored telephone calls from al Qaeda affiliates in Kenya without prior authorization from the Attorney General, including two phones used by Wadih el-Hage, an American citizen.¹⁸⁸ After authorization by the Attorney General on April 4, 1997, the FBI targeted el-Hage and, working with Kenyan authorities, searched el-Hage's home in Nairobi.¹⁸⁹ After his arrest, el-Hage sought to suppress evidence gathered

176. *Id.* at 274–75.

177. *Id.* at 283 n.7 (Brennan, J., dissenting).

178. *Id.*

179. 589 F.2d 1258 (5th Cir. 1979).

180. *Id.* at 1263.

181. *Id.* at 1264.

182. 570 F.2d 1358 (9th Cir. 1978).

183. *Id.* at 1362.

184. *Id.*; see also *United States v. Callaway*, 446 F.2d 753, 755 (3d Cir. 1971) (holding that when a search occurs in a foreign country at the direction of a foreign police force the Fourth Amendment does not require exclusion of evidence acquired during the search).

185. 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

186. *Id.* at 270–71.

187. See *id.* at 268.

188. See *id.* at 269.

189. See *id.*; Douglas Waller, *Inside the Hunt for Osama*, TIME, Dec. 21, 1998, at 32, 34. The government also conducted surveillance of his Texas home, pursuant to a FISA warrant. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 160 (2d Cir. 2008).

during searches and surveillance of his Kenyan home.¹⁹⁰ The court held that the Fourth Amendment applied to el-Hage, an American citizen, after the government conceded this point of law in its argument.¹⁹¹ However, the court held that there is a foreign intelligence exception to the Warrant Clause of the Fourth Amendment, and thus it decided not to exclude the evidence gathered during the warrantless searches and surveillance.¹⁹²

2. *In re Terrorist Bombings of U.S. Embassies in East Africa* and the Warrant Requirement Abroad

It took eight years for the U.S. Court of Appeals for the Second Circuit to release a decision in the *Bin Laden* appeal.¹⁹³ Answering the Fourth Amendment challenges, the court held that only the Fourth Amendment's reasonableness requirement governs extraterritorial searches because the Warrant Clause of the Fourth Amendment is inapplicable overseas.¹⁹⁴ The court acknowledged that "the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens."¹⁹⁵ However, the court stated that while the Fourth Amendment requires "reasonable" searches, there have been many exceptions to the warrant requirement.¹⁹⁶ The court agreed with the Supreme Court's rationale in *Verdugo-Urquidez* that the inability of magistrates to issue warrants means that the warrant requirement should not apply to searches of noncitizens overseas and applied the same argument to Americans overseas.¹⁹⁷

The court's argument listed four reasons for not requiring a warrant for surveillance of Americans overseas. First, it found no authority stating that warrants are required for searches abroad by U.S. law enforcement because none of the other circuits or the Supreme Court had yet ruled on this particular issue.¹⁹⁸ Second, the court believed that if there should be any restrictions on the use of search and surveillance by the government abroad, those restrictions should be imposed by the "political branches through diplomatic understanding, treaty, or legislation."¹⁹⁹ Third, even if U.S. judges issued search warrants intended to have extraterritorial effect, they would probably have no legal significance in the country where they were

190. *Bin Laden*, 126 F. Supp. 2d at 269.

191. *Id.* at 270–71.

192. *See id.* at 277, 288; *infra* note 264 and accompanying text.

193. *See In re Terrorist Bombings*, 552 F.3d at 159.

194. *Id.*

195. *Id.* at 167 (quoting *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974)).

196. *Id.* at 168; *see also supra* note 46.

197. *In re Terrorist Bombings*, 552 F.3d at 169 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring)).

198. *Id.*

199. *Id.* at 170 (quoting *Verdugo-Urquidez*, 494 U.S. at 275) (internal quotation marks omitted).

used.²⁰⁰ Lastly, the court was not satisfied that judicial officers could be empowered to issue warrants for overseas searches.²⁰¹

3. Case for a Warrant Requirement for Searches of Americans Overseas

Despite the Second Circuit's unanimous decision in *In re Terrorist Bombings* that the Warrant Clause has no extraterritorial application, there are countervailing reasons that it should apply. Although no court has yet stated that there is a warrant requirement for searches of Americans overseas, this fact alone does not establish that this requirement should not exist. Novel issues of law always lack precedence in the courts.²⁰² The *In re Terrorist Bombings* court found support in the fact that "nothing in our history or our precedents suggest[s] that U.S. officials must first obtain a warrant before conducting an overseas search."²⁰³ However, the occurrence or nonoccurrence of this requirement is not alone dispositive of its validity.²⁰⁴ "[A]n unconstitutional practice, no matter how inveterate, cannot be condoned by the judiciary."²⁰⁵ Historically, the courts have not explored certain provisions of the Bill of Rights for years before a question presented itself.²⁰⁶ Lack of precedent alone is not enough to foreclose the adoption of new requirements.²⁰⁷

There is certainly some merit, however, to the separation of powers argument that the *In re Terrorist Bombings* court used to justify only allowing the executive to decide policy decisions that are intertwined with foreign policy.²⁰⁸ Foreign affairs are an area of executive expertise, and the Constitution grants the executive power over this area of government.²⁰⁹

200. *Id.* at 171.

201. *Id.*

202. See F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349, 359–60 (2008) (stating that constitutional law has often adopted new and unprecedented principles).

203. *In re Terrorist Bombings*, 552 F.3d at 169.

204. See Hubbard, *supra* note 202, at 359–60.

205. *Zweibon v. Mitchell*, 516 F.2d 594, 616–17 (D.C. Cir. 1975) (stating that though warrantless surveillance has been historically authorized by Presidents, that fact alone does not justify an unconstitutional practice). Courts often make entirely novel pronouncements to protect constitutional rights. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008) ("[N]othing in our precedents forecloses our adoption of the original understanding of the Second Amendment."); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792 (1973) (stating that historical acceptance without more does not justify finding that a law is constitutional).

206. See *Heller*, 128 S. Ct. at 2816 (noting that it was not until 1931 that the Court found that a law violated the First Amendment's guarantee of free speech).

207. See *id.*

208. See *In re Terrorist Bombings*, 552 F.3d at 170 n.7; see also *infra* notes 285–92 and accompanying text.

209. See Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1316 n.257 (2008) (stating that according to *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), separation of powers requires the acknowledgement that foreign intelligence surveillance is primarily the President's responsibility); *infra* note 274 and accompanying text.

Yet, while the executive makes decisions about the United States' foreign affairs, all of the powers granted in the Constitution are subject to checks and balances.²¹⁰ Though treaties negotiated by the executive would help protect the rights of non-Americans overseas, the judiciary has an obligation to protect American citizens from unreasonable privacy invasions.²¹¹

A major hindrance to the ability of courts to require a warrant for this type of surveillance is the lack of a warrant procedure for Americans overseas.²¹² Though the Court in *Verdugo-Urquidez* stated that any warrant "would be a dead letter outside the United States," this rationale does not acknowledge that one of the warrant's most important functions is requiring judicial review of the search's reasonableness before it is conducted.²¹³ The warrant is both a "key," allowing law enforcement access to private spaces, and a "shield," protecting citizens from arbitrary intrusions by their government.²¹⁴ The *In re Terrorist Bombings* court focused on the "key"-like aspects of the warrant by claiming that a warrant is not necessary because it would have no effect in another country.²¹⁵ This argument ignored the important function of warrants as a "shield" that protects Americans by ensuring that any search is subjected to judicial review prior to approval.²¹⁶ Even if a warrant cannot provide both these functions abroad, it is still a valuable safeguard of American citizens' rights.²¹⁷

210. See THE FEDERALIST No. 51 (James Madison); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732 (1996) (stating that the idea of separation of powers can be traced back as far as ancient Greece).

211. See Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. HAW. L. REV. 477, 481 (1997) (writing that the Supreme Court has affirmed that "the judiciary has an obligation to protect citizens' constitutional rights").

212. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 276-77 (S.D.N.Y. 2000) (stating that although it is theoretically possible for judges to issue warrants for surveillance of Americans overseas, the lack of a statutory procedure for the acquisition of these warrants makes it unreasonable to require the government to obtain one), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157 (2d Cir. 2008). Additionally, the Federal Rules do not grant jurisdiction for magistrates to issue extraterritorial warrants. See *supra* note 151 and accompanying text. However, FISA now requires judicial approval before this type of surveillance occurs. See *supra* note 149 and accompanying text.

213. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990); *id.* at 296 (Brennan, J., dissenting) ("[A] warrant serves the same primary function overseas as it does domestically: it assures that a neutral magistrate has authorized the search and limited its scope.").

214. See Pfeiffer, *supra* note 47, at 234-35 (comparing the warrant to both a "key" and a "shield").

215. *In re Terrorist Bombings*, 552 F.3d at 171 ("A warrant issued by a U.S. court would neither empower a U.S. agent to conduct a search nor would it necessarily compel the intended target to comply.").

216. See Pfeiffer, *supra* note 47, at 234.

217. *Id.* at 235.

B. *Foreign Intelligence Exception to the Fourth Amendment's Warrant Requirement*

Courts that have analyzed whether the Fourth Amendment's warrant requirement applies to foreign intelligence surveillance have identified a "foreign intelligence exception" to this requirement. The *In re Terrorist Bombings* court refused to follow the foreign intelligence exception rationale of the pre-FISA circuits.²¹⁸ The court did not need to address the question of an exception to the warrant requirement because the court believed there was no warrant requirement for this type of surveillance.²¹⁹ However, assuming that there is a warrant requirement for surveillance of Americans overseas, it is important to also ask whether that warrant requirement would be subject to a foreign intelligence exception. Part II.B asks whether there is a foreign intelligence exception to the warrant requirement of the Fourth Amendment and what implications this exception would have on warrantless foreign surveillance targeting U.S. persons abroad.

1. The "Foreign Intelligence Exception" in the Circuits

When the Supreme Court decided the *Keith* case in 1972, it limited its holding to domestic security surveillance and did not decide whether a warrant would be required for foreign intelligence surveillance of U.S. persons.²²⁰ Before 1978, when FISA established a warrant procedure for this type of surveillance, five circuit courts of appeals answered the question.²²¹ Four of these circuits held that there is a foreign intelligence exception to the warrant requirement of the Fourth Amendment.²²² However, a plurality of the U.S. Court of Appeals for the D.C. Circuit stated, in extensive dicta, that there should not be such an exception.²²³ All of these courts were examining the problem as it related to the surveillance of American citizens generally. This Note analyzes the rationale of these courts to decide whether a warrant should be required before the United States conducts foreign intelligence surveillance of Americans overseas.

a. *Fifth Circuit*

In *United States v. Brown*,²²⁴ the Fifth Circuit held that the President may authorize warrantless wiretaps for foreign intelligence purposes.²²⁵ The petitioner, H. Rap Brown, appealed his conviction for transporting a

218. *In re Terrorist Bombings*, 552 F.3d at 172.

219. *Id.* at 171–72.

220. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321–22 (1972). *See supra* note 111 and accompanying text.

221. *See infra* notes 224–61 and accompanying text.

222. *See infra* notes 224–53 and accompanying text.

223. *See infra* notes 251–60 and accompanying text.

224. 484 F.2d 418 (5th Cir. 1973).

225. *Id.* at 426.

firearm while under indictment.²²⁶ Brown challenged the legality of three warrantless wiretaps authorized by the Attorney General.²²⁷ Though Brown appeared on these undisclosed foreign intelligence wiretaps, according to the court they had no relevance to his case and were conducted pursuant to executive authority.²²⁸ The Fifth Circuit held that the executive has power “over and above the Warrant Clause of the Fourth Amendment” to conduct warrantless electronic surveillance to protect against foreign threats to national security.²²⁹

b. *Third Circuit*

In *United States v. Butenko*,²³⁰ the U.S. Court of Appeals for the Third Circuit held that, though the Fourth Amendment applies to a President acting pursuant to his foreign affairs powers, the foreign intelligence exception removes the need to secure a search warrant before conducting surveillance of agents of a foreign power.²³¹ The petitioners, a Soviet national and an American citizen, appealed their conviction for transmitting highly sensitive information about the United States’ Strategic Air Command to the Soviet Union.²³² Because the government did not obtain a search warrant prior to conducting its surveillance, the surveillance had to fall within an exception to the warrant requirement of the Fourth Amendment to be admissible as evidence.²³³ Though the court acknowledged that there are benefits to requiring prior judicial approval for this type of surveillance, on the balance the court believed that to maintain a “continuous flow of information” the court should defer to the “good faith of the executive” in foreign intelligence matters.²³⁴ Therefore, the court held that the surveillance did not violate the petitioners’ Fourth Amendment rights because it fit within a foreign intelligence warrant exception.²³⁵

c. *Ninth Circuit*

The Ninth Circuit, in *United States v. Buck*,²³⁶ held that “[f]oreign security wiretaps are a recognized exception to the general warrant requirement.”²³⁷ The petitioner, Marilyn Buck, appealed her conviction for furnishing false information in the acquisition of ammunition.²³⁸ Buck was

226. *Id.* at 420–21.

227. *Id.* at 425.

228. *Id.* at 426–27.

229. *Id.* at 426.

230. 494 F.2d 593 (3d Cir. 1974).

231. *Id.* at 606.

232. *Id.* at 596.

233. *Id.* at 604.

234. *Id.* at 605.

235. *Id.* at 606.

236. 548 F.2d 871 (9th Cir. 1977).

237. *Id.* at 875.

238. *Id.* at 873.

a gunrunner for the Black Liberation Army (BLA),²³⁹ an American “leftist terrorist organization[.]”²⁴⁰ Though the BLA was apparently a domestic organization, some of the evidence used to prosecute Buck came from undisclosed foreign intelligence surveillance.²⁴¹ The trial court decided not to disclose the test it used to determine the legality of one of the government’s wiretaps because the wiretap was executive-authorized foreign intelligence surveillance.²⁴² Buck appealed this decision.²⁴³ The trial court and circuit court agreed that a wiretap approved by the Attorney General and used for foreign intelligence gathering was lawful because of a foreign intelligence exception to the Fourth Amendment warrant requirement.²⁴⁴

d. Fourth Circuit

In *United States v. Truong Dinh Hung*,²⁴⁵ the U.S. Court of Appeals for the Fourth Circuit held that the foreign intelligence needs of the executive are so compelling that a warrant requirement would “unduly frustrate” the President’s ability to carry out his foreign affairs powers.²⁴⁶ In *Truong*, a Vietnamese man living in the United States surreptitiously smuggled classified documents and diplomatic cables to representatives of the Socialist Republic of Vietnam.²⁴⁷ American intelligence monitored Truong’s telephone continuously for 268 days without court authorization before arresting Truong and charging him with espionage and conspiracy to commit espionage.²⁴⁸ On appeal, Truong challenged his conviction for these charges because he claimed that the government violated the Fourth Amendment by not acquiring prior court authorization to conduct the surveillance.²⁴⁹ The government and the court agreed that a warrant was unnecessary since the surveillance fit within a foreign intelligence exception to the warrant requirement of the Fourth Amendment.²⁵⁰

e. D.C. Circuit

In *Zweibon v. Mitchell*,²⁵¹ a plurality of the D.C. Circuit held that, absent exigent circumstances, all warrantless surveillance of domestic

239. See *Woman Is Jailed As a Gunrunner*, N.Y. TIMES, Oct. 28, 1973, at 18.

240. Sean Wilentz, *Bombs Bursting in Air, Still*, N.Y. TIMES, June 25, 1995, (Magazine), at 40.

241. See *Buck*, 548 F.2d at 875.

242. *Id.*

243. *Id.*

244. *Id.*

245. 629 F.2d 908 (4th Cir. 1980).

246. *Id.* at 913.

247. *Id.* at 911–12.

248. *Id.* at 912.

249. *Id.*

250. *Id.* at 912–13.

251. 516 F.2d 594 (D.C. Cir. 1975).

organizations that are not agents of a foreign power is unreasonable and unconstitutional, even if conducted under presidential directive in the name of foreign intelligence gathering.²⁵² The appellants in *Zweibon* were sixteen members of the Jewish Defense League (JDL) who sued Attorney General John Mitchell and nine FBI agents for electronic surveillance of their telephone calls in violation of Title III and the Fourth Amendment.²⁵³ The Attorney General authorized the wiretaps to monitor JDL activities considered antagonistic toward the Soviet Union.²⁵⁴ The government again claimed that there was a foreign intelligence exception to the warrant requirement of the Fourth Amendment, but the D.C. Circuit disagreed with the other circuits that had analyzed this same question.²⁵⁵ The court found that the other circuits had not adequately balanced the competing interests of national security and privacy rights.²⁵⁶ After a long analysis, the court stated that the warrant procedure would not hinder legitimate intelligence surveillance and opined that “absent exigent circumstances, *no* wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny.”²⁵⁷ However, as the court was not required to make such a broad holding, it instead limited its holding to requiring a warrant for surveillance of domestic organizations that attack foreign powers rather than organizations acting in concert with a foreign power or its agents.²⁵⁸

2. Post-FISA Foreign Intelligence Exception for U.S. Persons Abroad in *United States v. Bin Laden*

After FISA created a warrant procedure for foreign intelligence surveillance that could affect U.S. persons, the foreign intelligence exception argument seemed settled.²⁵⁹ However, FISA originally only applied to surveillance conducted on U.S. persons residing in the United States and provided no guidance for the review of surveillance conducted on U.S. persons abroad.²⁶⁰ Because of this gap in FISA, the *Bin Laden* court had to employ a common law analysis to determine whether there was a foreign intelligence warrant exception for surveillance of Americans overseas.²⁶¹ No court had previously considered the applicability of the foreign intelligence exception to this type of surveillance.²⁶²

252. *Id.* at 614.

253. *Id.* at 605–06.

254. *Id.* at 608–09. These activities included peaceful demonstrations as well as violent attacks such as the bombing of the Amtorg and Intourist-Aeroflot offices in New York City. *Id.* at 608.

255. *See id.* at 613–14; *supra* notes 224–53.

256. *See Zweibon*, 516 F.2d at 628–59.

257. *Id.* at 651.

258. *Id.*

259. *See supra* notes 119–44 and accompanying text.

260. *See* 50 U.S.C. § 1801(f)(2) (2006).

261. *See United States v. Bin Laden*, 126 F. Supp. 2d 264, 274–88 (S.D.N.Y. 2000), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157 (2d Cir. 2008).

262. *Id.* at 272.

The *Bin Laden* court agreed with *Keith* that there is no warrant exception for domestic security surveillance²⁶³ but held there is a clear foreign intelligence exception for surveillance of foreign powers and their agents.²⁶⁴ For surveillance of U.S. citizens living abroad, the court held that, while a warrant is irrefutably a better safeguard for Fourth Amendment rights than a process without judicial approval, a warrant requirement would impose an undue burden on the executive branch.²⁶⁵ The court stated that the drawbacks of a warrant requirement included decreased response time to critical events, possible security breaches, and the need to cooperate with foreign intelligence agencies to secure a local warrant.²⁶⁶

For all these reasons, the court held that there is an exception to the warrant requirement for foreign intelligence surveillance when there is authorization by the President or Attorney General.²⁶⁷ The court also reaffirmed that the reasonableness of a warrantless search may be challenged in court after the fact.²⁶⁸ However, unlike *Keith*, the *Bin Laden* court did not weigh personal privacy rights against national security needs while conducting its analysis.²⁶⁹

3. Foreign Intelligence Exception to the Warrant Requirement for Surveillance of U.S. Persons Overseas

Since the *Bin Laden* decision, the FISA Amendments Act of 2008 extended FISA protections to Americans overseas.²⁷⁰ However, these amendments have also rolled back some of the judicial review procedures

263. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321–22 (1972).

264. See *Bin Laden*, 126 F. Supp. 2d at 277; see also *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) (“Foreign security wiretaps are a recognized exception to the general warrant requirement”); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (holding that a court should not interfere with the efficient operation of the executive’s foreign policy apparatus); *United States v. Clay*, 430 F.2d 165, 171 (5th Cir. 1970) (holding that there is a presidential prerogative to obtain foreign intelligence information preserved in § 605 of Title III).

265. See *Bin Laden*, 126 F. Supp. 2d at 273–74.

266. See *id.* at 275. However, the court seemed to be skeptical that a local warrant was absolutely necessary and relied on cases that suggested courts had general jurisdiction to issue warrants in conformity with the Fourth Amendment. See *id.* at 276–77 n.16; see also *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 168 n.14, 169 (1977) (holding that warrants do not have to relate to tangible things and a warrant can be issued for a pen register); *United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994) (holding that the district court has the inherent power to issue warrants authorizing silent video surveillance); *United States v. Torres*, 751 F.2d 875, 878–79 (7th Cir. 1984) (stating that the power to issue a warrant was historically an inherent power of a court of general jurisdiction). But see *Weinberg v. United States*, 126 F.2d 1004, 1006 (2d Cir. 1942) (holding that U.S. district judges possess no extraterritorial jurisdiction); Then, *supra* note 47, at 1073–74 (stating that Congress and the Supreme Court have had opportunities to explicitly extend the jurisdiction of federal judges).

267. See *Bin Laden*, 126 F. Supp. 2d at 277.

268. See *id.*

269. See *id.* at 273 (stating that a warrant better safeguards the Fourth Amendment rights of citizens but should not be required when it presents a disabling burden on the executive).

270. See *supra* note 149 and accompanying text.

found in the original FISA.²⁷¹ Thus, there is still some dispute whether a more comprehensive judicial warrant review procedure is necessary prior to surveillance of Americans overseas.²⁷² This Note considers the merits of a warrant application process similar to the original FISA.

In *Zweibon v. Mitchell*, the D.C. Circuit looked at five possible factors that would justify forgoing prior judicial approval of foreign intelligence surveillance: judicial competence in foreign affairs, security leaks, evidentiary use of foreign intelligence information, possible delays in warrant approval, and the administrative burden on the courts.²⁷³ This section examines the arguments surrounding whether there should be a warrant exception for foreign intelligence surveillance in light of these factors as well as the President's constitutional authority to conduct foreign affairs.

a. *The President's Constitutional Authority To Conduct Foreign Intelligence Surveillance*

Most of the circuit courts that have held that there is a foreign intelligence exception have based their decisions, at least in part, on the President's expertise in foreign affairs.²⁷⁴ The executive branch unquestionably has greater expertise in foreign intelligence matters than the judiciary.²⁷⁵ In *United States v. Curtiss-Wright*,²⁷⁶ the Court stated that the President's authority in foreign affairs is paramount and "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries."²⁷⁷ However, although the Constitution implies that the President has the authority to conduct foreign intelligence surveillance to protect national security, nowhere does the Constitution suggest that the Fourth Amendment does not apply in the area of foreign affairs.²⁷⁸ Even in conducting constitutionally granted foreign affairs

271. See *supra* notes 152–61 and accompanying text.

272. The FISA Amendments Act's removal of many of FISA's original judicial review features renews the foreign intelligence exception debate. However, this Note is limited to exploring whether warrants should be required for surveillance of Americans overseas.

273. *Zweibon v. Mitchell*, 516 F.2d 594, 641 (D.C. Cir. 1975).

274. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (stating that the executive branch is constitutionally designated as the government authority on foreign affairs); *United States v. Butenko*, 494 F.2d 593, 601 (3d Cir. 1974) (stating that the Constitution empowers the President to conduct foreign affairs); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (relying for their holding on the President's inherent power in conducting foreign affairs).

275. See *Truong*, 629 F.2d at 914; Justin M. Sandberg, Comment, *The Need for Warrants Authorizing Foreign Intelligence Searches of American Citizens Abroad: A Call for Formalism*, 69 U. CHI. L. REV. 403, 405 (2002) (stating that because of the executive's expertise in foreign affairs matters, the courts have shown deference to foreign intelligence surveillance).

276. 299 U.S. 304 (1936).

277. *Id.* at 320.

278. See *Butenko*, 494 F.2d at 603; Maclin, *supra* note 209, at 1306 ("The Supreme Court has never held that the President is free to ignore the Bill of Rights whenever Executive Branch functions concern foreign affairs.").

powers, the President is still “constrained by other provisions in the Constitution.”²⁷⁹ Thus, even when the executive believes that certain activities implicate national security, it still must adhere to the requirements of the Fourth Amendment.²⁸⁰

Though cases have often relied on *Curtiss-Wright* to show the President’s ability to conduct foreign affairs, the Court in *Curtiss-Wright* still warned that “like every other governmental power, [the President’s plenary power over foreign relations] must be exercised in subordination to the applicable provisions of the Constitution.”²⁸¹ Thus, the unquestioned executive prerogative for gathering foreign affairs intelligence that some courts have found when holding that there is a foreign intelligence exception is not actually written into the text of the Constitution.²⁸² In *Truong*, the Fourth Circuit held that the foreign intelligence needs of the executive are so compelling that a warrant requirement would unduly frustrate the President’s ability to carry out his foreign affairs.²⁸³ However, the *Truong* court overlooked the fact that the President’s foreign affairs decisions are subject to the same checks and balances as all other powers of the federal government.²⁸⁴ The *Truong* court also reasoned that under the separation of powers doctrine, the executive has been entrusted with the safety of the country and foreign intelligence surveillance.²⁸⁵ The *Butenko* court stated that foreign intelligence needs often cannot be anticipated and, if courts required a warrant to carry out foreign intelligence, the President might have to act illegally in order to fulfill the constitutional duties of the office.²⁸⁶ While this is a valid concern, Congress has previously regulated

279. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000) (finding that the Supreme Court has held that the executive using its foreign affairs powers is still constrained by other parts of the Constitution), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157 (2d Cir. 2008); *see also* Maclin, *supra* note 209, at 1306.

280. *See United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 308 (1972).

281. *Curtiss-Wright*, 299 U.S. at 320; *see also* Britta A. Schnoor, Note, *International Law, the Power of the Purse, and Speaking with One Voice: The Legal Cacophony Created By Withholding U.S. Dues from the United Nations*, 92 IOWA L. REV. 1133, 1175 n.250 (2007) (stating that Congress has some role in foreign affairs).

282. *See Butenko*, 494 F.2d at 628 (Gibbons, J., dissenting in part) (“The majority’s awesome executive prerogative for gathering foreign affairs intelligence cannot be found in the text of the Constitution.”); Jeffrey C. Goldman, Note, *Of Treaties and Torture: How the Supreme Court Can Restrain the Executive*, 55 DUKE L.J. 609, 633 (2005) (stating that even though the Constitution grants the President primary authority over foreign affairs, the President is “not the ‘sole organ’ of foreign affairs” with unchecked power).

283. *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980).

284. *See Butenko*, 494 F.2d at 634 (Gibbons, J., dissenting in part) (“No reason suggests itself to me why the fourth amendment should be considered as applicable to the foreign affairs or external powers of the central government in any lesser or different manner than to all its other powers.”); *see also* Kitrosser, *supra* note 118, at 1183–84 (stating that in the years prior to the Church Committee Report, the government failed to provide adequate checks and balances on intelligence operations).

285. *See Truong*, 629 F.2d at 914 (citing *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 316–18 (1972)).

286. *Butenko*, 494 F.2d at 605.

the activities of foreign intelligence agents.²⁸⁷ Checks and balances help combat the human tendency to abuse power.²⁸⁸ It does not appear that the Framers wanted to suspend checks and balances when they affect the President's foreign affairs power.²⁸⁹

The *Bin Laden* court reasoned that there is great precedent for a foreign intelligence exception to the warrant requirement because Presidents have conducted warrantless foreign intelligence collection for much of the twentieth century.²⁹⁰ However, precedent alone does not eschew the need for a constitutional inquiry into the legality of warrantless foreign intelligence surveillance.²⁹¹ After all, it was not until 1967 that the Supreme Court decided that nontrespassory electronic surveillance violated the Fourth Amendment.²⁹² The presidential memos addressing electronic surveillance authorized "wiretapping," a nontrespassory surveillance that was still constitutionally allowed under *Olmstead* without a warrant.²⁹³ The *Zweibon* court did not believe this presidential authorization justified a constitutional exception because the judgments were not based on current Fourth Amendment jurisprudence.²⁹⁴ Further, since 1978, FISA has made warrantless foreign intelligence surveillance illegal when at least one party is in the United States.²⁹⁵

287. The National Security Act of 1947 and the Central Intelligence Agency Act of 1949 both placed limits on foreign intelligence activities. *Id.* at 629 (Gibbons, J., dissenting in part).

288. See THE FEDERALIST No. 51 (James Madison); see also Kitrosser, *supra* note 118, at 1184 (observing that the definition of "national security" is often stretched to justify government operations).

289. *Butenko*, 494 F.2d at 634 (Gibbons, J., dissenting in part). The *Butenko* dissent includes a textual exegesis of foreign affairs power in the Colonial era, the Articles of Confederation, and the U.S. Constitution. In particular, since all federal government powers under the Articles of Confederation were vested in the legislature, Judge John Gibbons stated it was apparent that any of these powers then transferred to the executive branch under the Constitution would be subjected to checks and balances that formed the core of the compromise of 1787. See *id.*; see also Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 7 (2006) ("[N]o Supreme Court case in American history has ever approved presidential actions that violate the Constitution, statutes, or treaties based on inherent executive powers.").

290. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000) (stating that executive-authorized foreign intelligence collection has been practiced for decades), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

291. *Zweibon v. Mitchell*, 516 F.2d 594, 616–17 (D.C. Cir. 1975) (stating that the Supreme Court has never approved this warrantless foreign intelligence surveillance).

292. *Katz v. United States*, 389 U.S. 347, 353 (1967) ("[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

293. See *Zweibon*, 516 F.2d at 617–18 (describing the executive's interpretation of § 605 of the Federal Communications Act).

294. *Id.* at 619–20.

295. See 50 U.S.C. § 1801(f)(2) (2006); *supra* note 121 and accompanying text.

b. *Judicial Competence To Analyze Foreign Intelligence Matters*

Some courts have questioned whether courts are capable of approving foreign intelligence surveillance warrants.²⁹⁶ The *Bin Laden* court, for instance, stated that the judiciary is ill suited to oversee foreign intelligence collection.²⁹⁷ The executive has more expertise in foreign intelligence, diplomacy, and military affairs than the judiciary.²⁹⁸ However, there is evidence that Congress believes the judiciary is capable of making these determinations because, by creating FISA, they sanctioned a successful process for judicial review of foreign intelligence warrants.²⁹⁹ Congress has also recently entrusted the FISC to do the same with surveillance of Americans overseas, though with a more limited judicial review.³⁰⁰

It is true, in general, that the judiciary is less knowledgeable about foreign diplomacy matters than the executive because judges do not adjudicate foreign affairs matters frequently.³⁰¹ The *Bin Laden* court believed it would be difficult for judges to understand all the foreign policy implications of their decision in a judicial review of a warrant request.³⁰² It is important to note, however, that the President and Attorney General do not individually analyze each scenario that requires foreign intelligence surveillance.³⁰³ Executive approval of foreign intelligence surveillance relies on the recommendations and analysis of many lower-level employees in the Justice Department and intelligence agencies.³⁰⁴ Any information the Attorney General receives from experts in foreign intelligence could also be provided to judges to secretly review.³⁰⁵ After all, the President chooses an Attorney General for her skills as a lawyer.³⁰⁶ A federal judge

296. See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 171 (2d Cir. 2008) (“[I]t is by no means clear that U.S. judicial officers could be authorized to issue warrants for overseas searches”); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 274 (S.D.N.Y. 2000) (stating that *Keith* and FISA have weakened this argument but it is still valid with respect to overseas warrants), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157 (2d Cir. 2008).

297. *Bin Laden*, 126 F. Supp. 2d at 274; see also Sandberg, *supra* note 275, at 415–16 (stating that courts are ill-suited to foreign policy questions because they cannot identify foreign relations interests).

298. See *supra* note 275 and accompanying text.

299. See *supra* notes 138–41 and accompanying text.

300. See *supra* notes 149–58 and accompanying text.

301. See Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 983 (1974) (stating that the adjudication of foreign affairs matters increases the likelihood of judicial error).

302. *Bin Laden*, 126 F. Supp. 2d at 274 (stating that foreign policy decisions often have a significant impact on foreign relations).

303. See *Zweibon v. Mitchell*, 516 F.2d 594, 643 (D.C. Cir. 1975) (describing the process of executive authorization of foreign intelligence surveillance).

304. See *id.*

305. *Id.* at 644 (stating that judges can be briefed in camera in the same manner as the Attorney General is briefed on the necessity of foreign intelligence surveillance).

306. *Id.* (stating that the Attorney General is chosen based on legal skills rather than diplomatic skills).

should not be any less competent than a skilled lawyer in evaluating surveillance requests.³⁰⁷

The executive has directed foreign policy throughout U.S. history.³⁰⁸ It was because of the particular difficulties of overseas foreign intelligence collection and the sensitive nature of relations between nations that *Keith* limited its holding to domestic cases.³⁰⁹ Often foreign intelligence decisions have a significant impact on the relationship between the United States and foreign governments.³¹⁰ However, the executive could also persuade a court to allow certain surveillance without jeopardizing this sensitive relationship.³¹¹ The judiciary seems competent enough to weigh several complicated factors because “[c]ourts regularly deal with the most difficult issues of our society.”³¹²

c. *Secrecy*

Because of the secrecy of many foreign affairs matters, some commentators and courts believe it is improper for parties outside the executive to view many classified documents.³¹³ Some leaks of secret information could pose a threat to national security and the lives of agents and confidential sources.³¹⁴ However, there are countervailing reasons to believe the courts are equally capable of handling sensitive foreign affairs information. First, there is no reason to believe that the executive is less

307. *See id.* (stating that it is unlikely that a judge would incorrectly deny a legitimate request for a surveillance warrant).

308. *See supra* notes 274–80 and accompanying text.

309. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 274 (S.D.N.Y. 2000) (stating that *Keith* and FISA did not address overseas foreign intelligence collection), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

310. *See id.*

311. *See Sandberg, supra* note 275, at 419 (stating that the executive can convince the judiciary that surveillance is necessary but by deferring to the executive in foreign affairs matters the judiciary would be avoiding their responsibility to uphold the Fourth Amendment).

312. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972) (refuting the government’s argument that internal security matters are too complex for judicial competence).

313. *See United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); Then, *supra* note 47, at 1076 (stating that allowing judicial scrutiny of overseas foreign surveillance could increase the risk of security breaches). Justice Robert Jackson wrote in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.* that “[t]he President . . . has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.” 333 U.S. 103, 111 (1948).

314. *See Zweibon v. Mitchell*, 516 F.2d 594, 647 (D.C. Cir. 1975); Edward L. Xanders, Note, *A Handyman’s Guide To Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals To Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759, 779–80 (1989) (noting that reducing national security leaks would minimize harm to security policy).

susceptible to leaks than the judiciary.³¹⁵ Government secrets are always capable of leaking, no matter which branch of government holds them.³¹⁶ Second, leaks from the judiciary are less likely because FISA has solved many of the executive's concerns about security leaks with its strict secrecy requirements.³¹⁷

While involving the judiciary in foreign intelligence approval may not necessarily lead to an increase in security leaks, the *Bin Laden* court suggested that the perception that leaks are more likely may discourage intelligence agencies from acting with the required prior judicial approval.³¹⁸ There is at least the potential for an intelligence agent to decide that some information is too risky to disseminate within the government, and decide to forego potentially beneficial surveillance or to conduct the surveillance without review. While this will remain a risk, there are tangential benefits to be reaped from fostering a government environment in which some reasonable disclosure of secrets is encouraged. The Church Committee's report found that the intelligence agencies themselves often kept secrets from the executive and Congress.³¹⁹ Of course, sensitive government and foreign affairs secrets should not be made public.³²⁰ However, secrets are less valuable if they are held entirely within one part of government rather than shared with other departments that might benefit from the information.³²¹

Former Attorney General Alberto Gonzalez argued that even allowing terrorists to know that there is a procedure for procuring foreign intelligence warrants would hurt the government's ability to gather intelligence because terrorists would be more careful with their communications if they knew the United States could be listening and would be aware of a necessary delay in

315. See *Keith*, 407 U.S. at 320–21 (stating that the judiciary has long been entrusted with sensitive information in criminal matters); see also Sandberg, *supra* note 275, at 408–09 n.37 (noting that *Keith* dismissed the notion that allowing the judiciary to review intelligence matters would increase leaks).

316. See Rubinfeld, *supra* note 138, at 160 (“State secrets have a way of leaking out.”). The NSA's warrantless domestic surveillance program first came to light in 2005 because of a leak by a top official in the Justice Department. See Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 42.

317. Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1052 (2008) (“Warrant applications must be made to the Foreign Intelligence Surveillance Court under provisions that facilitate much secrecy.”).

318. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 275 (S.D.N.Y. 2000), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

319. See Kitrosser, *supra* note 118, at 1184.

320. See Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 933 (2006) (“Effective executive power and the president's success as commander-in-chief sometimes depend on discretion to withhold information from general circulation.”).

321. See 9/11 REPORT, *supra* note 32, at 353 (finding that secrecy and lack of communication between government agencies was one reason why the United States' intelligence agencies failed to stop the 9/11 attacks).

responding to threats.³²² It seems unlikely, however, that it would be dangerous for terrorists and enemies to merely know that there is a procedure for authorizing spying.³²³ In the case of immediate threats, exigency is a recognized exception to the warrant requirement.³²⁴ If terrorists knew of a review procedure for foreign intelligence surveillance of Americans overseas they would certainly also know of the exigent circumstances exception. A foreign intelligence warrant requirement would not necessarily result in a strategic disadvantage for the United States.

d. *Nonevidentiary Use of Foreign Intelligence Surveillance*

The *Truong* court stated that because most foreign intelligence is conducted for internal use and not to be used in a criminal case, a warrant is not necessary.³²⁵ The executive has argued that the reasons for invasions of privacy in foreign affairs cases are different than in criminal cases because the surveillance is not conducted to obtain evidence to be used in a trial and thus a warrant requirement would be impracticable.³²⁶ However, foreign intelligence has been admitted as evidence in criminal cases.³²⁷ All of the cases recognizing a foreign intelligence exception were criminal cases.³²⁸

322. *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11 (2006), available at http://www.fas.org/irp/congress/2006_hr/nsasurv.html.

323. See Kitrosser, *supra* note 118, at 1200–01 (“[I]t is difficult to imagine why knowledge of the precise legal framework for conducting covert surveillance would advantage terrorists who already know that they can be spied on covertly.”).

324. See *supra* note 46 and accompanying text; *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (“Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.”); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967) (“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.”).

325. *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (stating that if the surveillance is done primarily for foreign intelligence purposes then the government should not have to get a warrant). The Justice Department used a similar rationale in interpreting the effect of the Federal Communications Act of 1934 on government warrantless security surveillance. See *supra* notes 95–96 and accompanying text.

326. *United States v. Butenko*, 494 F.2d 593, 635 (3d Cir. 1974) (Gibbons, J., dissenting in part).

327. See *Zweibon v. Mitchell*, 516 F.2d 594, 647 (D.C. Cir. 1975) (“[G]iven the fact that judicial review of Executive-ordered surveillance would be proper in any event after it occurs, the judicial competence argument has no substantial merit as a rationale for abrogating the warrant procedure.”).

328. See, e.g., *Truong*, 629 F.2d 908 (affirming a conviction for espionage and conspiracy to commit espionage); *United States v. Buck*, 548 F.2d 871 (9th Cir. 1977) (affirming a conviction for furnishing false information in connection with the acquisition of ammunition); *Butenko*, 494 F.2d 593 (affirming a conviction for conspiring to transmit to foreign government information relating to the United States’ national defense); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973) (affirming conviction for interstate transportation of a firearm while under indictment); *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (convicting multiple defendants of assorted crimes associated with the bombing of U.S. embassies in East Africa), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

Even if foreign intelligence surveillance is not admitted in a criminal trial, Fourth Amendment privacy concerns do not diminish.³²⁹ The Fourth Amendment “reaches all alike, whether accused of crime or not.”³³⁰ Historically, courts have only required warrants in criminal investigations and not to permit ongoing foreign intelligence surveillance.³³¹ However, the warrant requirement serves an important function by reassuring citizens that illegal surveillance is not tolerated.³³²

e. *Delay*

The *Truong* court stated that foreign intelligence needs are different from domestic security surveillance needs because responses to foreign threats require great speed.³³³ Often foreign intelligence needs cannot be anticipated, and the response to these intelligence needs must be fast and efficient.³³⁴ The *Bin Laden* court stated that when a warrant presents a disabling burden, it should not be required.³³⁵ A warrant requirement, however, is not necessarily a disabling burden.³³⁶ The risk of delay has historically been solved by the exigent circumstances exception to the warrant requirement.³³⁷ FISA incorporated two emergency exceptions to accommodate particularly hasty surveillance needs.³³⁸ Warrantless electronic surveillance may be justified in exigent circumstances such as the imminent threat of harm to national security.³³⁹ Courts would only hold that surveillance conducted under this exception is illegal if a warrant would not have been issued had the intelligence agency submitted to prior judicial review and there were found to be no exigent circumstances.³⁴⁰

329. *Zweibon*, 516 F.2d at 649 (stating that Fourth Amendment privacy interests are not decreased because there is no criminal prosecution).

330. *Id.* at 649 n.173 (quoting *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting)).

331. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 318–19 (1972) (describing one of the government’s arguments for recognizing an exception to the warrant requirement for domestic security surveillance).

332. *Id.* at 321 (stating that one of the most important functions of a warrant is “the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur”); *see also supra* notes 216–20 and accompanying text.

333. *Truong*, 629 F.2d at 913.

334. *See id.* at 915 (stating that foreign intelligence collection requires great “speed, stealth, and secrecy”).

335. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

336. *See supra* notes 135–39 and accompanying text.

337. *See supra* note 46 and accompanying text.

338. *See supra* notes 135–39 and accompanying text.

339. *See Zweibon v. Mitchell*, 516 F.2d 594, 649–50 (D.C. Cir. 1975) (stating that the threat of imminent harm to national security or loss of important intelligence information is often used to justify forgoing a warrant requirement for foreign intelligence surveillance); *see also supra* note 46 and accompanying text.

340. *United States v. Butenko*, 494 F.2d 593, 637 (3d Cir. 1974) (Gibbons, J., dissenting in part) (“The only instance where executive action could not be approved by the courts

f. *Administrative Burden*

A practical problem with requiring a warrant for foreign intelligence surveillance of Americans overseas is there is currently no statutory procedure for approving specific warrants for this type of surveillance.³⁴¹ Title III has no extraterritorial effect³⁴² and FISA no longer requires individualized warrant review for surveillance of Americans overseas.³⁴³ The Federal Rules of Criminal Procedure do not grant judges the power to approve warrants in another country because under Rule 41(b) magistrates are not empowered to issue international warrants.³⁴⁴

The *In re Terrorist Bombings* court cited the courts' inability to issue warrants with extraterritorial effect as a major reason why the Warrant Clause does not apply overseas.³⁴⁵ However, Justice Brennan said in his dissent in *Verdugo-Urquidez* that "Congress cannot excise the [Warrant] Clause from the Constitution" simply by not creating procedures that allow foreign intelligence agents to obtain warrants.³⁴⁶ The fact that there is not currently a procedure for individually reviewing warrant requests for Americans overseas is not alone dispositive as to whether there should be a specific warrant requirement.³⁴⁷

Requiring a warrant for all foreign surveillance of Americans overseas would be more burdensome than the current system. However, Justice Lewis Powell stated in *Keith*, regarding domestic security cases, that "[a]lthough some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values."³⁴⁸ Similarly, Justice John Marshall once said, "[q]uestions may occur, which [courts] would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."³⁴⁹

would be where there were no exigent circumstances or where no court could legally have issued a warrant.").

341. See *supra* notes 149–58 and accompanying text.

342. See *United States v. Barona*, 56 F.3d 1087, 1090 (9th Cir. 1995) (stating that Title III has no extraterritorial effect).

343. See 50 U.S.C.A. § 1881a(g) (West 2003 & Supp. 2009).

344. FED. R. CRIM. P. 41(b).

345. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 171 (2d Cir. 2008).

346. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 295 (1990) (Brennan, J., dissenting).

347. *Zweibon v. Mitchell*, 516 F.2d 594, 640 (D.C. Cir. 1975) ("Instead of following the proper analysis of determining whether a warrant proceeding would frustrate the legitimate need of the Executive to acquire foreign intelligence information, these courts treated the need itself as determinative of the legality of warrantless surveillance.").

348. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321 (1972); see also Sandberg, *supra* note 275, at 408–09 (stating that *Keith* formulated a balancing test that determined whether the burden of a warrant requirement was justified by the warrant's protection of constitutional values).

349. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (stating that the judiciary must take a case if it is within the court's jurisdiction); see also Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30

In practice, requiring a warrant when the United States conducts foreign intelligence surveillance of U.S. persons overseas should not be a significant added burden.³⁵⁰ There is little to suggest that the process would be fundamentally different than granting a warrant in the domestic intelligence context.³⁵¹ First, this burden would only occur when the government knew the target was a “United States person.”³⁵² Second, American courts have the authority to issue warrants for foreign searches that satisfy the Fourth Amendment.³⁵³ Several cases have held that the courts have the power to issue warrants even for subjects not covered by any statute.³⁵⁴ Even if a warrant created in the United States has no force in a foreign jurisdiction, the process of acquiring a warrant protects Americans from arbitrary invasions of privacy by the government.³⁵⁵ Finally, FISA now covers surveillance of Americans overseas, nullifying the criticism that U.S. judges cannot approve this type of surveillance.³⁵⁶

III. A STATUTORY WARRANT REQUIREMENT FOR SEARCHES AND SURVEILLANCE OF AMERICANS OVERSEAS

Having weighed the arguments, Part III suggests that a warrant requirement for foreign intelligence surveillance conducted on Americans overseas exists and should be enforced. Part III.A explains why a warrant requirement for this type of surveillance would be beneficial. Part III.B describes FISA procedures that would make this warrant approval procedure safe and effective.

CARDOZO L. REV. 1, 82 (2008) (“While the judiciary may invalidate laws that are unconstitutional, judges may not ignore laws that they find unwise or inconvenient.”).

350. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 971 n.108 (2003) (stating that “probable cause” for a FISA warrant is a much lower standard than in the criminal context).

351. See Carrie Truehart, Comment, *United States v. Bin Laden and the Foreign Intelligence Exception to the Warrant Requirement for Searches of “United States Persons” Abroad*, 82 B.U. L. REV. 555, 591 (2002) (stating that FISA already has a process for approving foreign intelligence surveillance and the *Bin Laden* court wrongly assumed that a court would have to contact the country where they issue the warrant).

352. See *id.* at 590 (stating that foreign intelligence searches of Americans presumably occur far less often than searches of non-Americans).

353. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277 n.16 (S.D.N.Y. 2000), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges), 552 F.3d 157 (2d Cir. 2008).

354. See, e.g., *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 168 n.14 (1977) (recognizing an inherent judicial power to issue warrants conforming to the Fourth Amendment); *United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994) (stating that a court of general jurisdiction has the right to issue warrants conforming to the Fourth Amendment); see also Thomas M. Messina, Note, *Ricks v. State: Big Brother Has Arrived in Maryland*, 48 MD. L. REV. 435, 446–47 (1989) (stating that *United States v. New York Telephone Co.* was based on a broad reading of Rule 41 of the Federal Rules of Criminal Procedure).

355. Pfeiffer, *supra* note 47, at 234.

356. See 50 U.S.C.A. § 1881a(b)(3) (West 2003 & Supp. 2009).

A. *Reasons To Require a Warrant for Searches and Surveillance of Americans Overseas*

1. Americans Often Travel and Live Overseas

There should be a warrant requirement for searches and surveillance conducted by the U.S. government against American citizens overseas. Six million Americans live outside the United States.³⁵⁷ Many U.S. citizens who live outside the country require privacy for their work.³⁵⁸ A plurality of the Supreme Court has interpreted the U.S. Constitution as providing protection to American citizens wherever they may be.³⁵⁹ Just as travelers should not be required to relinquish their passports when they leave the country, they should also not lose important constitutional protections just because they are no longer on American soil.

2. Warrants Protect Against Arbitrary Government Intrusions

One reason why the Middle Eastern satellite phone surveillance is such an egregious violation of privacy rights is that some of the surveillance seems to provide little benefit to intelligence agencies.³⁶⁰ Instituting a warrant procedure would offer an opportunity for intelligence agencies or the executive to explain exactly why proposed surveillance is necessary and beneficial. Allowing the executive to decide whether to conduct surveillance does not effectively protect the rights of Americans.³⁶¹ As Justice Douglas wrote in his *Katz* concurrence, the government cannot adequately protect Fourth Amendment rights when it assumes the role of both prosecutor and judge.³⁶² Since most intelligence officers would not attempt to justify unnecessary intelligence, requiring that officers explain surveillance would help eliminate the least important surveillance before it is submitted to a judge. However, when no justification is required, there is a temptation to err on the side of overinclusiveness, even if the surveillance is unnecessary.³⁶³

There is a risk that some agents will not submit to judicial review out of fear of a warrant-request denial for seemingly necessary surveillance.³⁶⁴ This fear is unfounded, however, as there is every indication that judges would be deferential to the field experience of intelligence workers and the

357. *See supra* note 24 and accompanying text.

358. *See supra* notes 15–17 and accompanying text.

359. *See supra* note 167 and accompanying text.

360. *See supra* Introduction.

361. *See supra* notes 115–18 (discussing when the executive, with no oversight over its surveillance activities, had used surveillance for impermissible purposes).

362. *See supra* note 103 and accompanying text.

363. *See supra* Introduction. The Highlander program's surveillance of humanitarian organizations does not seem to have been particularly important surveillance. *See supra* note 14 and accompanying text.

364. *See supra* note 118 and accompanying text.

foreign affairs expertise of the executive.³⁶⁵ There is also an overwhelmingly high approval rate for FISA warrant applications.³⁶⁶ Despite this deference, judicial scrutiny is essential because it gives an impartial party an opportunity to weigh the intrusion of privacy against the benefit to be gained from the intrusion.³⁶⁷ The ideal warrant procedure would protect constitutional rights while helping law enforcement and intelligence agents protect the country.³⁶⁸

3. Specific Warrants Better Protect Americans from Privacy Intrusions

Many of the benefits of warrants are lost when the FISC gives generalized approval for surveillance.³⁶⁹ Specific warrants conform better to the Fourth Amendment, which states that warrants should “particularly describ[e] the place to be searched, and the persons or things to be seized.”³⁷⁰ Specifically stating the subject and place of surveillance decreases the amount of law enforcement discretion in carrying out searches.³⁷¹ For this reason FISA, as currently amended, does not adequately protect the rights of Americans living abroad.³⁷²

As originally drafted, FISA represented Congress’s best answer to the abuse of surveillance privileges by the executive branch and intelligence agencies.³⁷³ This response incorporated many safeguards to protect the sensitive information that FISC judges review, including specific warrants for surveillance.³⁷⁴ This version of FISA did not require a warrant or judicial review for foreign intelligence surveillance conducted on American citizens overseas.³⁷⁵ However, the FISA Amendments Act of 2008 has changed FISA to cover this large group of American citizens.³⁷⁶ While extending this important protective statute to cover surveillance of Americans overseas, Congress also rolled back much of the individualized judicial review of surveillance that made FISA a satisfactory compromise between national security interests and privacy protections.³⁷⁷ To best protect all of these important interests, FISA should once again be amended to provide specific warrant review for all foreign intelligence surveillance of Americans.

365. *See supra* note 311 and accompanying text.

366. *See supra* notes 141–44 and accompanying text.

367. *See supra* note 110 and accompanying text.

368. *See supra* notes 119–22 and accompanying text.

369. *See supra* note 158 and accompanying text.

370. U.S. CONST. amend. IV.

371. *See supra* note 56 and accompanying text.

372. *See supra* note 158 and accompanying text.

373. *See supra* notes 119–22 and accompanying text.

374. *See supra* notes 128–36 and accompanying text.

375. *See supra* note 149 and accompanying text.

376. *See supra* note 149 and accompanying text.

377. *See supra* notes 152–58 and accompanying text.

B. *A Specific Warrant Procedure for Conducting Surveillance of Americans Overseas*

This Note proposes modest changes to the current procedure for approving foreign intelligence surveillance. When the Church Committee issued its report and recommendations on the intelligence operations of the United States, they created FISA, a compromise that provided judicial review of foreign intelligence surveillance targeting Americans while also protecting the secrecy of sensitive national security information.³⁷⁸ FISA is based upon the belief that, though the executive may protect the country through reasonable surveillance practices, the legislature may regulate this surveillance with a warrant process.³⁷⁹

Between the years 1978, when Congress first passed FISA, and 2002, when President Bush authorized a surveillance program that circumvented FISA, FISA was an effective judicial review process for foreign intelligence surveillance.³⁸⁰ While it is tempting to blame the inconvenience of FISA for the failure of U.S. intelligence agencies to detect foreign terrorists operating in the United States in the years prior to the 9/11 attacks, the FISC has given great deference to the needs of intelligence agencies and did not hinder intelligence gathering that would have prevented the 9/11 attacks.³⁸¹

The challenges and threats facing the United States are arguably greater than those that the country faced in 1978. As more years pass since the deadly 9/11 attacks, there is a danger of tipping the scales too far back toward the direction of privacy and civil liberties without allowing intelligence agencies the freedom to pursue legitimate threats and protect the national security.³⁸² There is still much international turmoil and there are many active national security threats. However, it is misguided to say that the wars in Iraq and Afghanistan and the constant threat of international terrorism require the government to give more power to the President while infringing citizens' civil liberties.³⁸³ The U.S. courts and legislature should be allowed to regulate executive overreaching even during perilous times. It is the position of this Note that allowing intelligence agencies and the executive to be controlled by only self-imposed restrictions is not an adequate safeguard for the rights of Americans.³⁸⁴ Therefore, this Note recommends that FISA, with specific warrant review renewed, and covering surveillance of American citizens living overseas, would more adequately protect the rights of Americans worldwide than the current version of FISA.

378. See *supra* note 119 and accompanying text.

379. See *supra* note 120 and accompanying text.

380. See *supra* note 138 and accompanying text.

381. See *supra* notes 141–44 and accompanying text.

382. MUSCH, *supra* note 67, at 3.

383. There have always been external threats facing the country, but civil liberties must be protected despite these problems. See Kitrosser, *supra* note 118, at 1201 (noting that the Founders were aware that their new nation could collapse at any moment because of strife and because of foreign sympathizers living among them).

384. See *supra* note 103 and accompanying text.

1. The Court

The FISC satisfies many of the concerns that the executive and courts had with allowing judicial review of foreign intelligence surveillance. The Chief Justice of the Supreme Court selects the members of the FISC from the pool of federal judges appointed by the President.³⁸⁵ The executive is allowed to brief judges on the necessity of a FISA warrant and thus is able to help judges in their decisions.³⁸⁶ Complicated foreign affairs analysis should not be beyond the capabilities of the experienced federal judges appointed to the FISC.³⁸⁷ Because they are chosen by the Chief Justice, leaks can be somewhat prevented by choosing judges who are considered particularly trustworthy. Thus, the FISC removes many of the executive's concerns about submitting warrant applications to a federal court.

2. The Warrant Procedure

Because FISA, as amended in 2008, created a warrant-approval procedure for surveillance of Americans overseas, it is possible for the FISC to issue warrants for searches and surveillance overseas.³⁸⁸ These warrants act as a "shield" rather than a "key" and would have no efficacy in a foreign jurisdiction.³⁸⁹ However, warrants do provide protection from arbitrary intrusions by the U.S. government against American citizens living overseas.³⁹⁰

FISA's procedure for reviewing foreign intelligence surveillance, prior to the 2008 amendments, was an effective method for facilitating beneficial intelligence collection while also protecting Americans from the most egregious invasions of privacy.³⁹¹ By requiring intelligence or law enforcement agencies to submit warrant requests to the Justice Department, the government solved some potential problems.³⁹² First, it provided an extra check on the legitimacy of surveillance requests.³⁹³ Second, it removed some of the most unnecessary warrant requests, minimizing the administrative burden on the FISC.³⁹⁴

A FISA warrant request should accurately and specifically describe the necessity, the target, and the means of the surveillance.³⁹⁵ The specificity of the warrant serves a few functions. First, historical evidence suggests that one purpose of the Fourth Amendment was to eliminate general

385. *See supra* note 128 and accompanying text.

386. *See supra* note 131 and accompanying text.

387. *See supra* note 307 and accompanying text.

388. *See supra* note 201 and accompanying text.

389. *See supra* note 213 and accompanying text.

390. *See supra* note 214 and accompanying text.

391. *See supra* note 138 and accompanying text.

392. *See supra* note 130 and accompanying text.

393. *See supra* notes 130–35 and accompanying text.

394. *See supra* Part II.B.3.f.

395. *See supra* note 131 and accompanying text.

warrants and the concomitant privacy abuses that these warrants enabled.³⁹⁶ Thus, by requiring specific warrants, the government is conforming with the likely intent of the Framers.³⁹⁷ Second, when a warrant request is specific, it prevents overinclusive searches that go beyond the scope of their necessity.³⁹⁸ The government should use surveillance only when it is necessary and minimize the scope of the surveillance to reduce privacy intrusions.³⁹⁹ The Highlander surveillance in the Middle East is an example of beneficial surveillance that is overbroad and unnecessarily invades privacy.⁴⁰⁰ Specific warrants tailor the scope of surveillance and provide a clear directive to surveillance analysts.⁴⁰¹

Next, it is important that the FISC subjects each search warrant to judicial review. Under the FISA Amendments Act of 2008, Congress removed this important step in the FISA process in favor of more generalized judicial oversight.⁴⁰² This type of judicial scrutiny is inadequate. It essentially replaces judicial review with the type of executive good faith certifications that proved to be an inadequate protection of Americans' privacy rights prior to FISA's enactment.⁴⁰³ Judicial scrutiny of warrant requests provides a proper check on executive-surveillance authorization and better protects Americans' privacy rights.⁴⁰⁴

3. The Effect of the Warrants

One practical concern is, if the government issues warrants for searches and surveillance overseas, which governments do these warrants bind?⁴⁰⁵ The most likely answer to this question is that the warrants are binding only on the U.S. government itself.⁴⁰⁶ A warrant acts as both a "shield" and a "key."⁴⁰⁷ The "key" function seems unrealistic in a foreign jurisdiction because the United States cannot expect that other countries with different governments and different legal systems will honor warrants issued in the United States.⁴⁰⁸ The only way to create legally effective warrants in a foreign nation would be through a treaty negotiated by the executive.⁴⁰⁹ However, obtaining permission to enter a home or to conduct surveillance is not the only function of a warrant. A warrant also acts effectively against the United States, protecting the privacy of American citizens.⁴¹⁰ This type

396. *See supra* note 56 and accompanying text.

397. *See supra* note 55 and accompanying text.

398. *See supra* note 56 and accompanying text.

399. *See supra* Introduction.

400. *See supra* Introduction.

401. *See supra* Introduction.

402. *See supra* note 154 and accompanying text.

403. *See supra* note 118 and accompanying text.

404. *See supra* note 210 and accompanying text.

405. *See supra* note 215 and accompanying text.

406. *See supra* note 215 and accompanying text.

407. *See supra* note 214 and accompanying text.

408. *See supra* note 200 and accompanying text.

409. *See supra* note 199 and accompanying text.

410. *See supra* note 214 and accompanying text.

of warrant would be an effective safeguard against unnecessary intrusions of Americans' privacy.

4. Exceptions to a FISA Warrant Requirement for Americans Overseas

A warrant requirement is always subject to exceptions.⁴¹¹ It is logical that the warrant requirement for surveillance of Americans overseas should also be subject to many of the same exceptions. The most important warrant exception for foreign intelligence surveillance is the exigent circumstances exception.⁴¹² The United States' intelligence agencies, military, and law enforcement personnel must be able to respond to national security threats with speed and efficiency. Therefore, any FISA warrant requirement should include an exigent circumstances exception.⁴¹³

Beginning surveillance under this exception should not end the judicial scrutiny of foreign intelligence surveillance. There should still be accountability when the government uses the exigent circumstances exception. Though the threat may be imminent enough that it necessarily means that the delay of seeking prior judicial approval is unreasonable, once the necessary surveillance begins it should be easy to have the FISC quickly review the surveillance's necessity and minimization precautions. The original FISA rules required approval of surveillance initiated under the exigent circumstances exception within seventy-two hours.⁴¹⁴ However, the most recent FISA amendments have extended the period for approval of surveillance begun under exigent circumstances to seven days.⁴¹⁵ A period of warrantless surveillance should be minimized because there is a significant risk that warrantless surveillance unnecessarily invades Americans' privacy. This risk is necessary where there is a dire threat to national security. But it is important that an impartial party assesses whether this threat actually exists and if the surveillance is beneficial.

Another necessary exception to the warrant requirement should be surveillance conducted as part of an American war effort. The rules of surveillance of civilians should not apply when the government is acting to obtain surveillance for the war efforts of the United States military. In this scenario there should be few situations where Americans are surveillance targets of the U.S. military. To the extent that the Highlander surveillance was necessary military surveillance confined to Iraq and Afghanistan and conducted to protect American troops, the surveillance was justifiable. NSA surveillance targeting Americans in other parts of the Middle East, when not responding to an immediate threat, however, is unreasonable unless the NSA submits to prior judicial review of the surveillance.

411. *See supra* note 46 and accompanying text.

412. *See supra* notes 337–43 and accompanying text.

413. *See supra* notes 337–43 and accompanying text.

414. *See supra* note 136 and accompanying text.

415. *See supra* note 156 and accompanying text.

CONCLUSION

It is not enough for a country to state its intention to uphold certain basic rights. The Founders knew that a government must include internal checks and balances to ensure the protection of important constitutional rights. Privacy is a basic right, protected by the laws and Constitution of the United States. While national security is an immensely important interest, the government should not sacrifice all else while trying to protect it.

Warrantless foreign intelligence surveillance of Americans overseas is not an evil act. It is the act of a government working hard to keep the country safe. However, a better balance between the competing interests of privacy and national security is necessary to preserve a truly free nation. It will take a vigilant and conscientious government to achieve this balance. Yet by looking to the Constitution for guidance, it is possible for the United States to come closer to this essential equilibrium.