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## Executive Authority for National Security Surveillance

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## Executive Authority for National Security Surveillance

## ARTICLES

EXECUTIVE AUTHORITY FOR NATIONAL  
SECURITY SURVEILLANCEWILLIAM C. BANKS\*  
M.E. BOWMAN\*\*

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#### INTRODUCTION

It may have been only an after thought, but the Bill of Rights more directly affects the personal lives of Americans than any other aspect of our law.<sup>1</sup> We cherish our right to speak, assemble and worship as we please.<sup>2</sup> We also cherish our privacy, one aspect of which stems from the Fourth Amendment,<sup>3</sup> our constitutional remedy for a perceived evil of British law—the general warrant.

The British general warrant was a search tool employed without limitation on location, and without any necessity to precisely describe the object or person sought.<sup>4</sup> British authorities were simply given license to “break into any shop or place suspected” wherever they

1. See MARJORIE G. FRIBOURG, *THE BILL OF RIGHTS: ITS IMPACT ON THE AMERICAN PEOPLE* 10 (1967) (calling the Bill of Rights America’s “most prized possession” for the personal rights it protects).

2. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

3.

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

U.S. CONST. amend. IV; see also FED. R. CRIM. P. 41(c)(1) (a magistrate “shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched”).

4. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 16 (1970) (describing the general warrant).

chose.<sup>5</sup> With that kind of unfettered discretion, the general warrant could be, and often was, used to intimidate.<sup>6</sup> General warrants executed during the reign of Charles I sought to intimidate dissidents, authors, and printers of seditious material by ransacking homes and seizing personal papers.<sup>7</sup> In 1765, the courts declared general warrants illegal, and Parliament followed a year later.<sup>8</sup>

In the colonies, complaints that royal officials were violating the privacy of colonists through the use of writs of assistance, equivalent to general warrants, grew.<sup>9</sup> Because English law did not, as yet, recognize a right of personal privacy, the crown's abuses in the colonies were not remediable at law.<sup>10</sup> It was thus no surprise that the new American Constitution and the government it created would respect a series of individual freedoms.

James Madison authored what would become the Fourth Amendment and proposed it to the Congress on June 8, 1789.<sup>11</sup> For the new nation, warrants would require specificity to physically invade the privacy of its citizenry.<sup>12</sup> Today, that same specificity is required to authorize electronic and physical invasions of privacy.<sup>13</sup>

Although the Fourth Amendment eliminated the abuses of general warrants, its commands remain unclear, especially in the face of technological progress.<sup>14</sup> Moreover, the Fourth Amendment was designed to protect against overreaching in investigations of criminal enterprises.<sup>15</sup> Investigations of politically motivated threats to our

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5. See William Cuddihy & Carmon B. Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY QTLY. 371, 381 (July 1980) (quoting a 1621 Privy Council general warrant).

6. See DAVID M. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 38 (1979) (describing the intimidation motives of the general warrant).

7. See *id.* (describing the motives for Charles I's use of general warrants).

8. See *Entrick v. Carrington*, 95 Eng. Rep. 807, 818 (K.B. 1765) (calling the general warrant "fatal to liberty"); see also O'BRIEN, *supra* note 6, at 38 (delineating the end of British general warrants).

9. See O'BRIEN, *supra* note 6, at 38-39 (noting the colonists disdain for writs for assisting); see also LASSON, *supra* note 4, at 28-29 (describing the historical emergency of the writ of assistance).

10. See LASSON, *supra* note 4, at 13 (stating that the many years of arbitrary and unrestricted powers of English government was one of the factors elevating reasonable search and seizure to constitutional significance in the United States).

11. See O'BRIEN, *supra* note 6, at 39 (quoting James Madison's initial draft of the Fourth Amendment).

12. See *id.* (noting Madison's initial demand for a particular description of the place to be searched).

13. See, e.g., *Katz v. United States*, 389 U.S. 347, 355 (1967) (upholding the "narrow and particularized" warrant requirement for electronic surveillance of conversations in a public telephone booth).

14. See generally James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 ALB. L.J. SCI. & TECH. 65, 69-70 (1997) (calling electronic surveillance the Fourth Amendment's greatest threat).

15. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.)

national security, such as terrorism or espionage, were simply not contemplated.

The Fourth Amendment concern in national security matters arises because the same techniques used in enforcing the criminal laws are used in gathering intelligence.<sup>16</sup> Likewise, some information gathered for intelligence purposes may subsequently be used in criminal prosecutions.<sup>17</sup> Thus, invasions of privacy that are accepted as necessary evils in enforcing the criminal laws may occur when the government seeks intelligence information.<sup>18</sup> Most Fourth Amendment challenges to intelligence gathering concern electronic surveillance and/or the physical entry required for the installation of electronic, audio or video equipment.<sup>19</sup> While secrecy may be an essential ingredient of successful national security surveillance, increasingly sophisticated forms of electronic eavesdropping may also threaten personal freedoms.<sup>20</sup>

Although many question the wisdom of the executive branch's authorization of intrusive surveillance techniques,<sup>21</sup> a traditional warrant acquired from a magistrate, according to Rule 41 of the Federal Rules of Criminal Procedure, could "unduly frustrate the efforts of Government to protect itself . . . ."<sup>22</sup> Several Rule 41 requirements may not be well-suited to the needs of intelligence gathering, including requiring that the target receive a copy of the

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272, 285 (1855) (finding Fourth Amendment search and seizure warrant requirements are limited to criminal and not to civil proceedings).

16. Intelligence gathering is the collecting of national security information. See generally NORMAN POLMAR & THOMAS B. ALLEN, *SPY BOOK: THE ENCYCLOPEDIA OF ESPIONAGE* (1998); JEFFREY T. RICHELSON, *A CENTURY OF SPIES: INTELLIGENCE IN THE TWENTIETH CENTURY* (1995).

17. See, e.g., Exec. Order No. 12,333, 3 C.F.R. 200, 211 (1982), reprinted in 50 U.S.C. § 401 note (1994) (allowing the dissemination of information incidentally obtained during intelligence gathering that indicates activities potentially violating any law).

18. See *id.* at 212 (requiring only the least intrusive collection techniques feasible).

19. See, e.g., *Dalia v. United States*, 441 U.S. 238, 248 (1979) (rejecting the contention that the Fourth Amendment prohibits per se physical entry to install electronic surveillance equipment); *Katz*, 389 U.S. at 353 (changing the law to declare that electronic surveillance without physical entry still falls under the limitations of the Fourth Amendment).

20. See, e.g., Dempsey, *supra* note 14, at 80 (discussing the privacy concerns of government monitoring email from remote sites).

21. See, e.g., Neil King, Jr. & Jess Bravin, *Corporate Spying Firms Thrive*, WALL ST. J., July 2, 2000, at B1 (reporting that European government officials accused the U.S. government of improper use of its electronic communications surveillance).

22. *United States v. United States Dist. Court*, 407 U.S. 297, 315 (1972) [hereinafter *Keith*] (finding national security interests may justify warrantless electronic surveillance despite a citizen's right to privacy and free expression). This case is commonly referred to by the name of the district court judge who first heard it, Damon J. Keith.

warrant and a receipt and inventory related to the seized property;<sup>23</sup> that “reasonable cause” be shown to justify serving the warrant other than in daylight hours;<sup>24</sup> that the object of the search be described with enough particularity to satisfy the magistrate that there is “probable cause” that a crime has been or is about to be committed;<sup>25</sup> and that the search will be for instrumentalities of a crime.<sup>26</sup>

By its nature, surveillance for intelligence depends upon stealth and secrecy.<sup>27</sup> Moreover, once an entity obtains intelligence information, the value of the information depends on keeping the target unaware of its acquisition.<sup>28</sup> The Rule 41 notice provisions could, thus, frustrate the purpose of the surveillance, as could the requirements for criminal probable cause and specificity.<sup>29</sup> It is neither the objective nor the likely result that the target of a foreign intelligence (FI) or foreign counterintelligence (FCI) search will be criminally prosecuted.<sup>30</sup> Because of those different objectives, the Supreme Court has recognized that the traditional criminal law warrant requirements might not apply in internal security

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23. See FED. R. CRIM. P. 41(d) (stating that the person conducting the search “shall give the person from whom or from whose premises the property was taken a copy of the warrant . . .”).

24. See *id.* at 41(c)(1) (describing how a magistrate finds probable cause to issue a search warrant).

25. See *id.* at 41(b)(4) (“A warrant may be issued under this rule to search for and seize any . . . person for whose arrest there is probable cause, or who is unlawfully restrained.”).

26. See *id.* at 41(b)(1)-(3) (allowing a search warrant for evidence, contraband, or other implements related to a crime or commission thereof).

27. See *Keith*, 407 U.S. at 319 (“Secrecy is the essential ingredient in intelligence gathering.”).

28. See William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97, 130 (1985) (noting that the secrecy requirement for foreign intelligence does not comport with Rule 41’s requirements).

29. See *id.* at 129-36 (discussing the various ways Rule 41 could frustrate the government’s attempts to protect itself, qualifying for a warrant clause exception).

30. In counterintelligence investigations, the primary objective is to thwart suspected threats to national security; prosecution is a secondary consideration. See *id.* at 133-34. For the most part, foreign intelligence investigations may be less focused than those undertaken for counterintelligence purposes, and they are often undertaken on a long-term and wide-ranging basis. See *id.* For purposes of this Article, there is no reason to distinguish between foreign intelligence and foreign counterintelligence. They are, however, defined differently. Foreign intelligence is “information relating to the capabilities, intentions and activities of foreign powers, organizations or person, but not including counterintelligence except for information on international terrorists activities.” Exec. Order No. 12,333, 3 C.F.R. 200, 215 (1982), reprinted in 50 U.S.C. § 401 note (1994). Foreign counterintelligence is “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.” *Id.*

surveillance.<sup>31</sup>

Whatever the surveillance technique, domestic security surveillance may also chill the free expression protected by the First Amendment.<sup>32</sup> The First Amendment, read literally, is unrealistically absolutist; it provides no equivalent to the “reasonableness” standard of the Fourth Amendment to guide official discretion.<sup>33</sup> Of necessity, First Amendment law has developed two analytic devices that continue to shape the intersection of domestic security and freedom of expression.

First, the courts isolated certain categories of expression as having little or no value and afforded them correspondingly little or no protection.<sup>34</sup> These categories include incitements to violence<sup>35</sup> and publication of information likely to cause irreparable harm to the national security.<sup>36</sup> Second, the courts have asked whether expressive interests were themselves targeted, or were affected as an incidental by-product of government operations.<sup>37</sup> This “purpose or effect” analysis thus sets up a subjective inquiry whenever surveillance activities are challenged. Unless surveillance intentionally is directed at chilling protected expression, the First Amendment may not be a barrier to government surveillance activity.<sup>38</sup> Despite such doctrinal limitations on expressive freedoms in domestic security, challenges to surveillance may also be based on the confluence of interests protected by the First and Fourth Amendments, specifically, where

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31. See *Keith*, 407 U.S. at 322 (stating that the unique nature and lack of “exact targets” of domestic security surveillance may warrant a special Fourth Amendment waiver).

32. See, e.g., Sarah Lyall, *Stripping E-mail Privacy*, Hous. Chron., July 19, 2000, at A17 (reporting British and American proposals to monitor emails as a way of combating modern terrorism despite First Amendment or privacy concerns).

33. Compare U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”), with U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”) (emphasis added).

34. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 800-01 (1997) (discussing the unprotected status of incitements of illegal activity, fighting words, and obscenity).

35. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (removing First Amendment protections for speech that exhorts others to “imminent lawless action”).

36. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (White, J., concurring) (discussing that speech infringes on the First Amendment only in situations where “direct, immediate, and irreparable damage to our Nation or its people” may result).

37. See, e.g., *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 100 F.3d 175, 183 (1st Cir. 1996) (allowing a ban of newspaper dispensers designed to enhance the aesthetic qualities of the historical district despite the incidental effect of hindering freedom of the press).

38. See *Keith*, 407 U.S. at 313-14 (proclaiming that unauthorized official eavesdropping must not “deter vigorous citizen dissent and discussion”).

intrusive surveillance is alleged to have chilled the exercise of protected expressive activities.

It is increasingly doubtful that a remedy that regulates criminal investigations will adequately serve similar objectives in national security investigations.<sup>39</sup> The reason is simple: criminal investigations and national security investigations are at spectral ends of societal evils.<sup>40</sup> One evil primarily harms individuals while the other strikes at the very foundation of the society.<sup>41</sup>

Crime is generally recognizable and definable. Even if it intrudes from abroad, crime normally is still a commonplace event directed at weaknesses in the group, usually at individuals.<sup>42</sup> The criminal investigation is normally directed at finding the criminal and bringing that person to justice.<sup>43</sup> National security investigations, on the other hand, proceed from threats that would undermine the entire social structure and are predicated on probable cause different from that which triggers criminal investigations.<sup>44</sup> Because of that fundamental difference, and to protect the rights of U.S. persons, national security threats today are considered to be threats arising from an external base of operations.<sup>45</sup> The Attorney General's Threat

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39. See, e.g., Daniel J. Malooly, Note, *Physical Searches Under FISA: A Constitutional Analysis*, 35 AM. CRIM. L. REV. 411, 423-24 (1985) (illustrating that the national security implications of the Aldrich Ames investigation impeded an application of traditional criminal investigation limitations).

40. See *id.* at 424 (recognizing the inherent conflict between the "government's duty to preserve the security of its citizens and the prohibition against government intrusion upon individual rights").

41. See *id.* (characterizing the dichotomy as one where America must protect its very existence or risk the ideals upon which it was founded).

42. National security crimes, however, do not always fit the traditional criminal model. Espionage, for example, despite its potential for devastating harm, is a less direct harm to an individual than is murder. Additionally, espionage occurs between sovereigns, not between individuals. See, e.g., John Walcott, *War of the Spies: Soviets Gain Heavily as New-Breed Agents Unlock U.S. Secrets*, WALL ST. J., Nov. 27, 1987, at 1 (discussing CIA and FBI attempts to stop Cuban and Russian espionage).

43. See, e.g., *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (implying that unlike national security investigations, criminal investigations involve "exact targets").

44. See, e.g., *id.* (recognizing that the government interests in national security investigations differ greatly from criminal investigations, thus justifying different warrant requirements).

45. See Federal Bureau of Investigation, *National Security Threat List* (last modified Apr. 6, 1998), available at <http://www.fbi.gov/programs/ansir/ansir.htm#threatlist> (disseminating a list of "national security threat issues" and "a classified list of foreign powers that pose a strategic intelligence threat to U.S. security interests" as part of a program to thwart various kinds of espionage based in foreign countries) [hereinafter *National Security Threat List*]. Security threats did not always arise from an external base of operations. Clearly the domestic crisis of the Civil War was a national security threat. See JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775-1980*, at 24-28 (1991) (discussing the development of internal security forces when Southern states began to secede). Moreover, threats of the nature of the Oklahoma City bombing may also be considered to undermine national security. See Frank J.

List is one source of reference for national security threats and it is the predicate source from which most national security investigations are authorized. Published annually, this list focuses investigative efforts on threats that could potentially cause significant and fundamental harm to the nation. As of April 1998, the National Security Threat List includes:<sup>46</sup>

- 1) Terrorism
- 2) Espionage
- 3) Proliferation
- 4) Economic Espionage
- 5) Targeting the National Information Infrastructure
- 6) Targeting the U.S. Government
- 7) Perception Management
- 8) Foreign Intelligence Activities

The difference between domestic criminal investigations and national security investigations is historically and legally significant.<sup>47</sup> For example, if the government intends to invade privacy to investigate a criminal enterprise, the Fourth Amendment has been interpreted to require that government officials show that its proposed actions will address the root problem.<sup>48</sup> Accordingly, the government has been required to show that a search or surveillance will expose criminal activity.<sup>49</sup>

In contrast, investigations of national security threats normally begin in advance of any criminal activity. Additionally, they often arise in the context of a vexing convergence of First and Fourth

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Gilluffo et al., *Bad Guys and Good Stuff: When and Where Will the Cyber Threats Converge?*, 12 DEPAUL BUS. L.J. 131, 133-34 (2000) (noting that “in the wake of bombings at the World Trade Center in New York and the Alfred P. Murrah Building in Oklahoma City[,] . . . the national security community realized that the U.S. was becoming more vulnerable to electronic attacks.”). The dividing line between the foreign and domestic threat has been artificially, but logically, pegged to foreign origin in order to accommodate intrusive investigative techniques that may not be constitutionally permitted in targeting U.S. persons. See *infra* notes 521-705 and accompanying text.

46. *National Security Threat List*, *supra* note 45 (listing various categories of threats to national security).

47. National security is sometimes referred to as domestic security. Although national security is the preferred terminology of the intelligence and law enforcement communities, domestic security is frequently the language found in case law and legal scholarship. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (using the term “domestic security”). With the understanding that domestic security does not mean domestic criminal investigation, the terms are used interchangeably herein.

48. This requirement is to safeguard an individual’s privacy interest against the unregulated exploratory searches of British experience which the Framers desired to prohibit. See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

49. See *Payton v. New York*, 445 U.S. 573, 586 (1980) (stating a “reasonable” search must be undertaken pursuant to a warrant, supported by probable cause).

Amendment values not present in criminal cases.<sup>50</sup> Finally, even when criminal activity arises from a national security investigation, it is usually an ancillary part of the threat and not the primary object. In the modern era, terrorism is the exception to this general rule. Terrorism looks to mayhem and individual harms as a primary, albeit intermediate, objective. However, the ultimate objective of terrorism is the quintessential national security threat—an attack on the United States as a sovereign nation.

Unlike criminal investigations, the investigative effort for national security threats is directed at preventing the threatened harm, not at securing a criminal conviction. Coupling the preventive purpose with the requirement that the threat be of foreign origin permits relatively intrusive investigations.<sup>51</sup> The probable cause requirements for obtaining surveillance authority for the two threats are fundamentally distinct. For criminal investigations, the probable cause requirement is “a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>52</sup> For national security investigations, the predicate is an external threat to the security of the nation.<sup>53</sup> The Fourth Amendment cannot, and does not, provide even-handed guidance to both types of probable cause.

Additionally, the government has never assumed that the Fourth Amendment applies equally to both criminal and national security threats. In large measure this belief stems from previous experiences in the United States and England that have shown that national security threats often have a close nexus to advocacy.<sup>54</sup> In England,

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50. See *Keith*, 407 U.S. at 313.

51. Because it is possible that a U.S. person (defined to include a citizen, a permanent resident alien, a U.S. corporation or an organization substantially composed of U.S. persons, see *infra* note 633) may serve as an agent of a foreign power, the law provides some additional protection for those to whom constitutional protections have been extended. See 50 U.S.C. § 1801(h) (1994) (providing “minimum procedures” to place limitations on electronic surveillance). The Foreign Intelligence Surveillance Act (FISA) guards against infringement of First Amendment rights by requiring that FISA authority be authorized for a U.S. person only if that person is knowingly engaged in particularized criminal behavior. See 50 U.S.C. § 1801(b)(2) (1994) (finding such individuals to be an “agent of a foreign power,” thus a potential electronic surveillance target under the Act).

52. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

53. See Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1863 (1994 & Supp. IV 1998), amended by Act of Dec. 3, 1999, Pub. L. No. 106-120, 113 Stat. 1606 (1999). FISA requires that the subject of a search or seizure be a foreign power or a person who is an agent of a foreign power. See 50 U.S.C. § 1802(a) (1994) (limiting who may be subject to electronic surveillance without a court order). The Act also provides additional qualifications not limited to whether one is an agent of a foreign power. See 50 U.S.C. § 1801(b)(2) (delineating the various scenarios where “any person,” even a citizen of the United States, would be subject to electronic surveillance without a court order).

54. See *Keith*, 407 U.S. at 314 (explaining that history demonstrates that

search and seizure issues were inexorably intertwined with free speech and press controversies.<sup>55</sup> In the United States, the Fourth Amendment has been a primary bulwark against abuse that can flow from efforts to dampen the ardor of free expression:

Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'<sup>56</sup>

This Article explores the parameters of executive authority for national security surveillance. We begin historically and survey the nation's experience with national security surveillance through the 19th century. In Part II, we review the developing twentieth century surveillance law contributed by the three branches. Included is a brief overview of the developing law of privacy, designed to demonstrate the relationship of emerging individual rights to legislative and regulatory changes. As privacy law matured in the 1960s and 1970s, we show that the judiciary spurred the development of contemporary national security law through decisions limiting executive discretion to conduct surveillance on its own terms. We then describe and assess the modern executive and legislative prescriptions for national security surveillance. In Part III, we apply the modern authorities to the problem of investigating terrorism in the United States. We review the World Trade Center and Oklahoma City bombings, and use those tragedies to examine the utility of the surveillance authorities in combating terrorist acts perpetrated by domestic and foreign sources. We then assess the legislative and regulatory reforms considered and implemented after these events. Finally, we apply all of the authorities in a case study of the investigation of a group of Palestinian activists in California—the L.A. Eight.

## I. NATIONAL SECURITY SURVEILLANCE: THE EARLY YEARS

The origins of national security law may be traced to 1775, when the Continental Congress created the Committee for Secret Correspondence, thus authorizing the first official intelligence

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Government, however benevolent or benign its motives, tends to view with suspicion those who most fervently dispute its policies).

55. *See id.* at 313 ("Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961))).

56. *Keith*, 407 U.S. at 314. *Keith* arose precisely because presidents frequently have authorized surveillance intrusions for domestic security purposes without an appreciable distinction between threats emanating from abroad and those arising from the citizenry. *See id.* at 316-17.

activity.<sup>57</sup> With the creation of the Secret Correspondence Committee, Congress classified (by deletion) the names of the individuals with whom it corresponded.<sup>58</sup> More noteworthy than the creation of the Committee, however, were the events that led the Continental Congress to contemplate a means of dealing with spies.

Paul Revere's ride is well known to every school child. Less well known, however, is the fact that he was captured by the British at Concord.<sup>59</sup> British troops, moving perhaps too hastily, released Revere but without his horse or funds.<sup>60</sup> Learning of his pecuniary plight, his wife, Rachael, attempted to send him a letter and one-hundred twenty-five pounds through Dr. Benjamin Church.<sup>61</sup> Unknown to the rebels, Dr. Church was a spy for the British.<sup>62</sup> Not surprisingly, then, Church promptly delivered the note to General Gage,<sup>63</sup> without the money.<sup>64</sup>

Subsequently, Church's mistress was caught placing one of Church's cipher letters to General Gage in a dead drop.<sup>65</sup> Church was soon apprehended and tried by court martial.<sup>66</sup> To the chagrin of colonial authorities, they learned too late that they had neglected to make espionage an offense for civilians. By order of the Congress,

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57. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 392 (Worthington C. Ford et al. eds., 1905) [hereinafter JOURNALS] (resolving "that a committee of five be appointed for the sole purpose of corresponding with . . . Great Britain, Ireland, and other parts of the world").

58. 4 JOURNALS, *supra* note 57, at 345 (explaining that before the Committee of Secret Correspondence lay their proceedings before the entire Congress, they were directed to withhold the names of persons they employed or with whom they corresponded).

59. See Univ. of Mich., *Take the Money and Run* (last modified May 13, 1999), at <http://www.clements.umich.edu/spies/stories-networks-1.html> (explaining that after Revere delivered a message of General Gage's plans for a midnight raid on the town of Concord to John Hancock and Sam Adams in Lexington, he continued on to Concord where he was captured and questioned by British Troops).

60. See *id.* (indicating that the British officers hurried to return to Concord and thus decided to release Revere).

61. See *id.* (noting that Rachel Revere entrusted the concerned letter to Benjamin Church so that her husband could receive it as he tried to make his way home, horseless and without funds).

62. See *id.* (asserting that Rachel and the rebel leaders did not know that Church was reporting rebel movements and strategies to the British General Gage).

63. See Univ. of Mich., *Sir Thomas Gage* (1721-1787) (last modified May 13, 1999), at <http://www.clements.umich.edu/spies/people.html> (stating that "[i]n 1774, . . . the British General was sent to America as both commander-in-chief and governor of Massachusetts, serving in his capacity during the events leading to the battles of Lexington, Concord, and Bunker Hill.").

64. See *Take the Money*, *supra* note 59 (noting that no mention was ever made of the money Rachel sent in Church's report to Gage and it is presumed that Church kept the money).

65. See *id.* (explaining that Church's "mistress was captured upon secreting one of Church's cipher letters to General Gage").

66. See *id.* (noting that Church was captured in 1775 after his mistress was caught).

Dr. Church was imprisoned until 1777 when he was allowed to set sail to the West Indies.<sup>67</sup> With an irony worthy of Aesop, neither the ship nor Dr. Church were ever seen again. Both presumably were lost at sea.<sup>68</sup>

To correct their oversight, the Continental Congress enacted the first espionage legislation, which made it a capital offense for “all persons, not members of, nor owing allegiance to any of the United States of America . . . [to be] found lurking as spies.”<sup>69</sup> The law was revised in 1778 to include “any inhabitant of these states” who, by giving intelligence, etc., should aid the enemy in the killing or capturing of loyal citizens.<sup>70</sup>

The desultory development of national security law continued in a similar manner after the Revolution. During the intrigues over the Spanish territories of the Floridas and Louisiana, the British Minister to the United States engaged in a complicated scheme of intelligence that involved a U.S. Senator and an American physician.<sup>71</sup> The Senator, William Blount of Tennessee, schemed to attack the Spanish territories with British naval assistance, in order to profit from his investments in western land speculation.<sup>72</sup> In order to avoid a diplomatic incident and maintain “plausible deniability,” Minister Robert Liston kept the scheme at arm’s length by employing Dr. Nicholas Romaine as his surrogate.<sup>73</sup> If the scheme had been discovered, the American and not the British diplomat would have been seen to be the schemer.<sup>74</sup>

Secretary of State Timothy Pickering, through means unknown, learned of the plotting and hired a secret agent to investigate.<sup>75</sup>

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67. *See id.*

68. *See id.*

69. 6 JOURNALS, *supra* note 57, at 345 (stating that the penalty for violation of this legislation was death by sentence of a court martial, or such other punishment as the court martial shall direct).

70. 10 JOURNALS, *supra* note 57, at 204 (subjecting inhabitants to the same penalties of death or other punishment that a citizen would incur for similar crimes).

71. *See* BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION’S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 93 (1998) (noting that Senator Blount journeyed to see Dr. Nicholas Romaine, a physician in New York, with whom he had collaborated to sell western lands to European customers).

72. *See id.* at 95 (summarizing the Blount Conspiracy, which consisted of three attacks that were planned to take place on the same day with English support in the form of money as well as a number of ships to blockade both Pensacola and New Orleans).

73. This plan was somewhat successful. When letters from Liston were found in Dr. Romaine’s possession, Secretary Pickering tried to deny the connection and shield Liston from culpability due to his affinity for England. *See id.* at 138.

74. *See id.* at 106 (explaining that the Secretary of State wanted to deny or downplay the English connection for fear of damaging Anglo-American relations).

75. *See* SAMUEL EDWARDS, BARBARY GENERAL: THE LIFE OF WILLIAMS H. EATON 54 (1968). Secretary of State Pickering asked the War Department to send him Captain

Pickering's agent baited Romaine with an offer to sell military secrets; Romaine took the bait and was immediately arrested.<sup>76</sup> The plot exposed, Romaine fled the United States and Blount fled to the frontier areas where he found safety.<sup>77</sup> Since the United States had never enacted criminal prohibitions on sedition or espionage that stopped short of aiding the enemy, Romaine soon returned to the United States—vilified, perhaps, but not a criminal.<sup>78</sup>

The newly independent Americans distrusted executive power, but they were realists.<sup>79</sup> Practical experience after independence had proved that a strong executive was a necessity.<sup>80</sup> Rather than opt for a weak executive, they sought means to limit a strong one.<sup>81</sup> By 1789, the former colonists already had extensive experience with government. They had experienced unrepresentative royal government from afar, disinterested governors both abroad and at home, and the occasional enlightened local government.<sup>82</sup> Many colonists had even lived under military law during the colonial rebellion.

Perhaps most importantly, after independence, all of the colonists experienced the vagaries of undisciplined legislatures and an ineffective Congress.<sup>83</sup> It took but little time to realize that

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Eaton to work on a confidential assignment that required a trustworthy and able man. *See id.* at 54. Captain Eaton's first assignment for Pickering was to expose a physician in New York, Dr. Nicholas Romaine, who was used as an intermediary by the British and French legions. *See id.* at 55.

76. *See id.* at 56 (describing how Captain Eaton was able to obtain incriminating documents and deliver the evidence as well as Dr. Romaine to the State Department).

77. *See* MELTON, *supra* note 71, at 127 (explaining that Blount escaped from custody and left Tennessee after satisfying demands as to bail and sureties).

78. *See id.* at 136 (explaining that after his arrest, Romaine was forced to become an informant and provided the committee presiding over impeachment proceedings considerable information about Senator Blount's conspiracy).

79. *See* GARY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 47 (1999) (explaining that from 1786-1787, Congress was both a legislative and an executive body as a result of the anti-government feeling that made the Framers reluctant to create a separate executive body with powers of its own).

80. *See* DAAN BRAVEMAN ET AL., *CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM* 197 (3d ed. 1996) (explaining that the weakness of the Articles of Confederation as well as an interest in improving the effectiveness of the government led to the agreement on a single executive).

81. *See id.* ("That the delegates were hard-pressed to agree on a design for the executive branch powers is evidenced by comparing the brief and relatively uncharitable grant of power in Article II with the detailed and expansive grant to the Congress in Article I.").

82. *See generally id.* at 2-3 (describing the period of England's neglect of the colonies and the end of that neglect with imposition of different taxes that sparked revolution in the different colonies).

83. *See id.* at 4 (noting that under the Articles of Confederation, which was the first plan the Continental Congress ratified after independence in 1781, Congress had no authority to regulate commerce or tax while the specific states reserved their "sovereignty, freedom, and independence").

capriciousness in government could arise as easily from homespun legislators as from distant royalty.<sup>84</sup> As Jefferson remarked: "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes the place of everything else."<sup>85</sup>

Jefferson also recognized that, under the Articles of Confederation, the lack of an executive could pose a threat to national security: "The want of power in the federal head was early perceived, and foreseen to be the flaw in our constitution which might endanger its destruction."<sup>86</sup> It also became evident that a government without power to govern cured no ills.<sup>87</sup> It was the objective of the drafters in Philadelphia to fill in the missing parts of government under the Articles, namely a separate executive branch and an independent judiciary.<sup>88</sup> Consequently, the founders intentionally created a government with both a system of shared and interdependent powers and a strong executive.<sup>89</sup> Madison described the separated powers as complementary, "to unite a proper energy in the executive with a proper stability in the legislative departments."<sup>90</sup>

From the beginning, it became evident that the power of the president would depend as much on personality as on the authority vested by the Constitution.<sup>91</sup> Over the next century, the strength of

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84. *See id.* (noting that calls for a general reform of the government began as early as 1783).

85. 11 THE PAPERS OF THOMAS JEFFERSON 679 (Julian P. Boyd et al. eds., 1955) (emphasizing the need for executive power separate and independent from Congress).

86. 7 THE PAPERS OF THOMAS JEFFERSON 630 (Julian P. Boyd et al. eds., 1953) (acknowledging that the American people were becoming universally sensible of the want of power in the federal land).

87. *See* BRAVEMAN, *supra* note 80, at 55 (asserting that the experience of the government under the Articles of Confederation, with dominant power delegated to the state legislatures, revealed itself as unstable and ineffective). The ills that existed under this weak government included the creation of many different sorts of paper money and schemes as well as the changing of laws so frequently that common citizens often complained that they did not know the law. *See id.*

88. *See id.* at 56-57 (noting that the inclusion of a judicial branch and the creation of an independent, popularly elected executive were two uniquely American contributions to separation theory).

89. Although the Founders created a government with separation of powers, they also recognized that "it is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 197 (Carolina Academic Press 1987) (1833).

90. 10 THE PAPERS OF JAMES MADISON 207 (William T. Hutchison et al. eds., 1962) (acknowledging that a primary objective at the Constitutional Convention was to create a government that consisted of separate Executive and Legislative bodies).

91. *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER 42-43 (1960) (asserting that the Constitutional Convention created a government of separate institutions sharing

the Executive, especially relative to the Congress, ebbed and flowed.<sup>92</sup> No president of the nineteenth century matched Washington's flair for intelligence, but all exercised prerogatives for intelligence. As military commander, Washington served as both analyst and spymaster.<sup>93</sup> As President, he took personal responsibility for foreign intelligence and requested a "competent fund" for intelligence operations in his first State of the Union Address.<sup>94</sup> Congress complied with the Act of July 1, 1790.<sup>95</sup> Washington also called out the militia to suppress the Whiskey Rebellion.<sup>96</sup>

Ironically, despite numerous British intrigues in this era, it was a French spy scare that prompted the next phase of American national security law.<sup>97</sup> The friendship with France that had blossomed with revolutionary fervor in 1776 withered soon thereafter as diplomatic relations were severed in 1796 and an undeclared naval war with France raged until 1800.<sup>98</sup> Moreover, the United States was host to more than twenty-five thousand Frenchmen who had fled tyranny at home.<sup>99</sup> Having displaced a royal tyranny, the new government (the

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powers and that a President's success largely depends on his ability to persuade).

92. See generally CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY 6-29 (1995) (detailing the intelligence actions taken by the early presidents and explaining how these actions built strength in the Executive).

93. See 1 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 492 (John C. Fitzpatrick ed., 1931) (detailing Washington's recommendations for strengthening the militia based on observations of the frontier lands).

94. His request was granted and his control over the funds complete. Disbursement was by certification and the President was not required to reveal either his purposes or the recipients of the funds. ANNALS OF CONG., 1st Cong., 2d Sess. 2232, 1 Stat. 128.

95. See HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN FOREIGN RELATIONS 122 (1929) (explaining that the contingent fund, also called the secret fund, illustrates the manner in which Congress has recognized the authority of the President in foreign affairs).

96. See THOMAS A. BAILEY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 160-61 (1966) (explaining that Washington's actions in crushing the Whiskey Rebellion played an enormous role in substantially strengthening the new national government).

97. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 139 (1976) (recognizing that the military issues that arose during the Adams presidency almost all concerned the Quasi-War with France). All three branches of the government participated in military affairs. The executive formulated and implemented military measures; Congress debated and determined what military and fiscal means ought to be placed at the president's disposal; and the Supreme Court ruled on issues including the scope of the executive power to take military actions pursuant to specific legislative authorizations. See *id.*

98. See *id.* at 139-66 (noting that the deterioration of the friendship was due largely to French decrees that were issued between 1793 and 1796 making American trade increasingly difficult).

99. See 2 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 77 (1965) (asserting that legislation was produced as a result of fears that political refugees would engage in treasonable activities against the United States).

Directorship) was greatly favored by the French expatriates who were overwhelmingly supportive of the French cause.<sup>100</sup>

With spontaneity born of fear, in 1798 Congress acted to criminalize unpopular and unpatriotic actions and enacted the Alien and Sedition Acts.<sup>101</sup> Popular opposition focused on the sedition law, which prohibited citizens from criticizing the government.<sup>102</sup> By 1801, when Jefferson became president, federal judges had convicted dozens of people for violating the sedition law.<sup>103</sup> Jefferson rightly believed the measure unconstitutional and, on his inauguration, promptly pardoned all those so convicted.<sup>104</sup> The Alien and Sedition Acts expired by their own terms on March 3, 1801.<sup>105</sup>

In the area of intelligence and foreign policy, Jefferson's presidency was marked by a broad exercise of executive control.<sup>106</sup> Fearing foreign penetration, Jefferson authorized a wide spectrum of covert actions.<sup>107</sup> Jefferson sent naval forces to the Mediterranean to protect American shipping, refused a request by Congress for "secret"

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100. *See id.* at 77 ("Many [of the French refugees] were aristocratic émigrés, but most were proscribed Jacobins who wished to stand in well with the Directory.")

101. These included the Naturalization Act, 1 Stat. 566 (1798), the Alien Act, 1 Stat. 570 (1798), the Alien Enemies Act, 1 Stat. 577 (1798), and the Sedition Act, 1 Stat. 596 (1798). These Acts were enacted, in part, because Federalists feared the French as a potential source of Republican strength. *See* 2 MORISON, *supra* note 99, at 76-79. These statutes increased the period of residency required to become a citizen, authorized the President to deport aliens deemed dangerous, authorized incarceration of aliens in time of war and made it a crime to write or publish any false, scandalous, and malicious writing against the government, Congress, or the president. *See* WILLS, *supra* note 79, at 135.

102. *See* 2 MORISON, *supra* note 99, at 78 (providing that opposition to the Alien Act would have been futile because the power of expelling aliens belongs to the federal government, not the states; the Sedition Act was easier to attack because of the law's conflict with the First Amendment).

103. *See* WILLS, *supra* note 79, at 140 (stating that about two dozen men were tried under the Sedition Act, and of those convicted, all but one served under one year in prison).

104. *See* 2 MORISON, *supra* note 99, at 82-83 (explaining that Jefferson believed his election saved the country from militarism and monarchy when he let victims of the Sedition Act out of jail). "Jefferson's political object, as he wrote in a letter of 1802, was to prove that Americans were ripe for 'a government founded not on fear and follies of man, but in his reason; on predominance of his social over his dissocial passions.'" *Id.* at 83. *Cf.* WILLS, *supra* note 79, at 136-39 (admitting that these laws were clearly unconstitutional but that several factors undermined Jefferson's suspicion that the only explanation for the laws was a plot to create an American monarch).

105. *See* WILLS, *supra* note 79, at 135 (explaining that the Alien and Sedition Acts were passed as temporary measures during the crisis with France).

106. *See* STEPHEN F. KNOTT, SECRET AND SANCTIONED 83 (1996) ("Jefferson's employment of covert operations was not an example of a extraconstitutional abuse of power but a simple exercise of the president's prerequisite to implement foreign policy.")

107. *See id.* at 79 (remarking that Jefferson believed that the president alone had the authority to make the difficult, but often necessary, decision to employ surreptitious means to further American interests abroad).

information, and authorized a military expedition to topple a foreign ruler.<sup>108</sup>

Most early presidents, following the model set by Washington, assumed the authority to engage agents for intelligence matters.<sup>109</sup> In general, Congress was content to provide contingency money to the president and to leave the resultant intelligence matters in the hands of the executive.<sup>110</sup> For example, Lincoln exercised his authority for intelligence in much the same manner as had his predecessors.<sup>111</sup> Lincoln mobilized state militias, blockaded rebellious states and suspended the writ of *habeas corpus*.<sup>112</sup> Diffidence, more than obstinance, was sufficient to turn aside the occasional challenge to presidential authority.<sup>113</sup> On the whole, intelligence remained purely an executive matter and presidents successively did what they felt necessary to gain information.<sup>114</sup> This approach offended no one, because the nature of intelligence activities rarely touched the private lives of the citizenry.<sup>115</sup>

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108. See generally *id.* at 61-84 (elaborating on Jefferson's intelligence operations and policies throughout his presidency).

109. See generally Edward F. Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, 1 INT'L J. INTEL. & COUNTERINTEL. 1 (1986) (demonstrating that presidents, from the time of the American revolution to the present, typically have found secrecy and an intelligence operation essential when national security is threatened); ANDREW, *supra* note 92, at 29 (documenting presidential forays in intelligence, secrecy, and use of secret agents).

110. The process began with Washington, but was not codified. See WRISTON, *supra* note 95, at 219. In 1818, the issue of public appropriations for secret purposes was put squarely to Congress. See *id.* Henry Clay championed the argument that secret missions should be paid for from the contingency fund to keep them secret. See *id.* at 219-24. From time to time the issue arose, and even expanded, and legislators debated what matters should be publicly acknowledged and what should be paid from contingency funds. See *id.* at 221-22.

111. See generally ANDREW, *supra* note 92, at 14-23 (defining Lincoln's policies and activities regarding intelligence during his administration until his assassination in 1865).

112. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 157 (3d ed. 2000) (observing that Lincoln exercised military force without first obtaining congressional authorization). Subsequently, "Congress passed legislation 'approving, legalizing, and making valid all acts, proclamations, and orders of the President, etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.'" *Id.* at 166-67 (citing 12 Stat. 326 (1861)).

113. See Sayle, *supra* note 109, at 12-15 (addressing occasional challenges from Congress about secret agents and the sums to support them that were ultimately defeated).

114. See *id.* at 15 (noting that "President Polk, in defending the integrity of the President's Contingent Fund stated, 'The experience of every nation on earth demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures, the very object of which would be defeated by publicity . . .'").

115. See *id.* at 1 (noting that the secrecy involved conflicts with the ideological American view of an open society fostering a free flow of information, so the citizenry often turns away or separates itself from any evidence regarding intelligence).

Intelligence and national security were, however, important issues from the earliest days of the Republic.<sup>116</sup> Appropriations for the contingency fund demonstrated early on that Congress recognized the need for secret executive activity.<sup>117</sup> The need for intelligence was so well understood that the luminaries of the day frequently debated the need for secrecy.<sup>118</sup> In addition, both Washington and Jefferson exercised substantial presidential prerogatives in authorizing covert action.<sup>119</sup> The practice of limiting those officials with access to secrets was established early.<sup>120</sup> The Committee of Secret Correspondence (consisting of Franklin and Morris) wrote, on learning of projected French aid in the Revolution: “We find, by fatal experience, the Congress consists of too many members to keep secrets.”<sup>121</sup>

It was evident that intelligence had legal underpinnings in our nation’s early history. In general, Congress shied from these activities, not because they considered them unlawful, or even unsavory, but because they were activities vested in the executive.<sup>122</sup> Congress consistently deferred to the president when he withheld secret official records, when he employed secret agents, when he ransomed hostages, and even when he engaged in covert operations.<sup>123</sup> It was common for Congress to withdraw requests for official records when the president balked at providing them and to appropriate funds for secret purposes when the president requested them.<sup>124</sup>

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116. *See id.* at 5 (explaining that the origins of our foreign intelligence undertakings rest in the Continental Congress).

117. *See id.* at 9 (“When Washington asked for a ‘competent fund,’ the Congress understood, and on 1 July 1790, it gave the President the Contingent Fund of Foreign Intercourse, the so-called secret service fund.”).

118. John Jay, for example, argued that the need for secrecy when conducting foreign relations was the norm. *See THE FEDERALIST NO. 64*, at 188-89 (John Jay) (Roy P. Fairfield ed., 1966).

119. *See generally* KNOTT, *supra* note 106, at 48-84 (detailing the covert operations of the Washington and Jefferson administrations that set precedents for their successors).

120. *See* SOFAER, *supra* note 97, at 128 (indicating that President Washington also established practices respecting the control of information). Washington, for the most part, had no problem disclosing information, but he did withhold some material regarding “private” correspondence with agents and ministers. *See id.* at 128.

121. John S. Warner, *Where Secrecy is Essential*, 31 *STUDIES IN INTELLIGENCE* 47 (1987).

122. *See* SOFAER, *supra* note 97, at 129 (contending that the role of the presidency today is due in part to Congress’ decisions to allow or to require the executive to plan policy and to exercise broad policy-making discretion in implementing legislatively unarticulated but shared objectives).

123. *See id.* at 128 (acknowledging that Congress realized the danger and constitutional impropriety of broad delegations but still delegated broad discretion to the President and the departmental secretaries).

124. *See id.* (noting that there appears to be no occasion when any member of

## II. THE COMPONENTS OF MODERN NATIONAL SECURITY LAW

A. *Awakening to the Modern World*

For the next century, the presidential exercise of executive authority continued to shape national security law. Inexorably, however, as the technological and political sophistication of nations evolved, so did threats to the national security.<sup>125</sup> As the world edged toward war, the United States slowly began to realize that German hegemonic designs did not exclude our own territory.<sup>126</sup> In the early years of the new century, German naval officers created numerous plans for invasion of the United States.<sup>127</sup> These plans included invasions of New York, beachheads at Cape Cod, invasion of Puerto Rico, and blockade of the coast from Mexico to New England.<sup>128</sup> The German Admiralty levied specific intelligence tasking on their intelligence branches and attaches, and German officers came to the United States to assess beachhead sites.<sup>129</sup> Although the fledgling United States' Office of Naval Intelligence (ONI) understood the reality of the German threat, ONI's warnings were largely unheeded.<sup>130</sup>

Nevertheless, in 1915, President Wilson instructed the Secretary of the Treasury to put German and Austro-Hungarian delegations

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Congress accused Washington of abusing his discretion in withholding information). *See generally* WRISTON, *supra* note 95, at 224-39 (highlighting the early debates in Congress that recognized the President's power to appoint executive agents without the advice and counsel of the Congress).

125. *See* G.J.A. O'TOOLE, HONORABLE TREACHERY: A HISTORY OF U.S. INTELLIGENCE, ESPIONAGE, AND COVERT ACTION FROM THE AMERICAN REVOLUTION TO THE CIA 206 (1991) (explaining that between 1900 and 1903 the German threat grew serious as alarming reports of German advances in technology-advanced torpedoes, torpedo-boat destroyers, and experiments with the newly invented wireless telegraph were sent to Navy Intelligence).

126. *See id.* at 202 (discussing that Kaiser Wilhelm II was determined to make Germany ruler of the seas and a major colonial power at a time when the United States was also moving onto the world stage with overseas possessions in Puerto Rico, the Philippines, Hawaii, and Guam). "[N]avalists in both countries agreed that they were in direct competition and apparently on a collision course." *Id.*

127. *See id.* at 203-04 (acknowledging that a recent exploration of German naval archives disclosed that in 1897 the emerging naval power of the United States prompted the German naval staff officers to shift their focus to contingency planning for an American war).

128. *See id.* at 204 (detailing the German plans for American invasion, which included plans for the destruction of the United States Navy's North Atlantic Squadron off the eastern seaboard).

129. *See id.* (explaining that a German naval attaché in Washington, Lieutenant Hubert von Rebeur-Paschwitz, had personally inspected Cape Cod in 1899, and later examined all possible landing sites in the Boston-New York area to assess their feasibility as German beachheads).

130. *See id.* at 205 (reporting that the Navy was unable or unwilling to persuade the State Department to place any restrictions on the travels of attachés).

under surveillance.<sup>131</sup> Acting in furtherance of Wilson's instructions, the Secret Service also installed wiretaps on the German and Austro-Hungarian delegations.<sup>132</sup> Combining British intelligence with the confessions of a spy turned collaborator and American wiretaps, sufficient evidence of involvement in sabotage activities was gained to expel Captain Franz von Papen, Naval Attaché to the United States.<sup>133</sup> Soon thereafter, Secret Service agents raided the office of the remaining Attaché, arrested him despite his diplomatic immunity, and seized highly incriminating documents.<sup>134</sup>

Awakening slowly to the nuances of national security in a new era, presidential authorities were given, or assumed, for a variety of purposes. National security threats, both real and imagined, drove a variety of initiatives.<sup>135</sup> Heading the list of concerns were the varied threats of domestic subversion.<sup>136</sup>

The American psyche was prepared to accept the fact that Germany might have designs on the Caribbean, but not on the United States.<sup>137</sup> It would take one of the more intriguing episodes in

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131. See *id.* at 224 (noting that the sinking of the *Lusitania* in May 1915, which caused the deaths of American men, women, and children on board, prompted President Wilson to step up surveillance). This heightening of surveillance soon led to a scene, on July 24, 1915, that was reminiscent of a Keystone Cops sequence. A German diplomat, being followed by a Secret Service agent, left a briefcase on a New York train. The agent grabbed the briefcase only to see the German return to retrieve it. The agent then ran off with the briefcase, with the German in futile pursuit. Upon opening the briefcase, the agent discovered an extensive outline for a propaganda campaign, but nothing unlawful was recorded in those papers. See *id.* at 224-25.

132. See BARBARA TUCHMAN, *THE ZIMMERMAN TELEGRAM* 77 (1958) (recounting the testimony of Secret Service Chief William J. Flynn that he received a daily stenographic report of all conversations of the previous twenty-four hours, copies of which were given to the State Department in a procedure known to the president); see also ARTHUR LINK, *WILSON: THE STRUGGLE FOR NEUTRALITY* 563 (1960) (confirming in a letter written by President Wilson that he feared the Germans had thoroughly infiltrated the United States with agents of all kinds).

133. See generally HORST VAN DER GOLTZ, *MY ADVENTURES AS A GERMAN SPY* 207-11 (1917) (recounting the author's disclosure of several documents revealing the conspiracy involving Captain von Papen when Horst van der Goltz was arrested and brought to testify in front of a grand jury).

134. See JOHANN BERNSTORF, *MY THREE YEARS IN AMERICA* 262-63 (1920) (recounting that Count Bernstorff secured release of his diplomat and was offered return of the documents if he would claim them as official papers, which he declined to do).

135. See ANDREW, *supra* note 92, at 53 (noting that security threats sparked Secretary of State Robert Lansing to propose initiatives geared at solving the divorce between foreign and domestic intelligence and competition between the Secret Service and the Federal Bureau of Investigation).

136. See *id.* at 54 (noting that threat of domestic subversion was the primary target of United States wartime intelligence).

137. See O'TOOLE, *supra* note 125, at 203 ("While American strategists of the day feared that Germany might send a task force to the Caribbean to gain a foothold in the Western Hemisphere, few shared [Captain Charles] Sigsbee's estimate that the United States itself was the object of German invasion plans.").

intelligence history to convince even American policymakers that Germany might have bellicose intentions toward the United States.<sup>138</sup> Ironically, it was a peace effort by the United States that brought German designs to light.

In an effort to advance the peace effort, the State Department succumbed to the pressure of Bernstorff, the German ambassador, to transmit enciphered German telegrams between the Foreign Ministry and the German ambassador in Washington.<sup>139</sup> The Zimmerman telegram proposed a pact with Mexico which stipulated that if the United States could not be kept neutral, Mexico and Germany should ally and, on successful conclusion of the war, Mexico would regain the southwestern territories of the United States.<sup>140</sup> The British intercepted the telegram in United States channels and deciphered it.<sup>141</sup> Finally, after arranging a clever subterfuge so it would appear that the telegram had been intercepted in Mexico, over lines using a less secure cipher, the telegram was presented to the United States.<sup>142</sup> There was widespread isolationist belief that the telegram was a forgery until, on March 3, 1917, Foreign Minister Zimmermann confirmed that he had sent the telegram.<sup>143</sup>

As the war progressed, the industrial might of the United States engaged in feeding the belligerents.<sup>144</sup> In reality, however, since Great Britain controlled the seas, our industrial might fueled only the allied nations—a fact that the Axis meant to change.<sup>145</sup> Operations by Germany in the United States were neither extensive nor appreciably

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138. See ANDREW, *supra* note 92, at 40 (explaining that realization of Germany's bellicose intentions resulted from British naval intelligence's ability to intercept and decrypt German diplomatic and naval traffic).

139. See *id.* (explaining that this constituted Germany's second and more direct communication link with North America).

140. See TUCHMAN, *supra* note 132, at 146 (defining the text of the telegram and three different routes over which it was dispatched).

141. See DAVID KAHN, *THE CODEBREAKERS: THE STORY OF SECRET WRITING* 285 (1967) (detailing how Britain seized copy as it was sent from Berlin to Copenhagen and London before reaching Washington).

142. See TUCHMAN, *supra* note 132, at 156-58, 163-64 (indicating that the British obtained a copy of the telegram sent directly to Mexico by an Englishman operating a printing press in Mexico City in order to give the impression that it was intercepted in Mexico, not by cryptographic means).

143. See *id.* at 183 (noting that as stated in the opinion of Robert Lansing, Secretary of State, Zimmermann's admission illustrated his lack of astuteness and resourcefulness, as he forfeited the opportunity to discover how the telegram was obtained).

144. See ANDREW, *supra* note 92, at 31 (discussing that the primary objective of German espionage and sabotage was to prevent American industry from supplying Britain and its allies).

145. See *id.* (documenting that American exports to Britain and France rose from \$750 million in 1914 to \$2.75 billion in 1916, while exports to Germany fell from \$345 million to \$2 million during the same period).

effective, but sabotage, intelligence and propaganda operations did occur.<sup>146</sup> Without an adequate legal structure to address these issues, operational requirements and remedial measures continued to flow exclusively from the authority of the President.<sup>147</sup>

The specter of German subversion far surpassed reality, but the result, nevertheless, was reminiscent of the Alien and Sedition Acts.<sup>148</sup> Enacted on June 15, 1917, the Espionage Act authorized the government to confiscate property, wiretap, search and seize private property, censure writings, open mail and restrict the right of assembly.<sup>149</sup> Vague regulations took their aim not at German spies, but at agitators, while legions of informers, private investigators and federal agents combined to root out subversive elements.<sup>150</sup>

One significant concern of the era was the threat of subversion in the armed forces.<sup>151</sup> An early anti-draft movement prompted an initial concern, which evolved into a larger concern over German and Austro-Hungarian aliens in the military.<sup>152</sup> The concern was not unfounded as German agents were uncovered in the U.S. Army.<sup>153</sup> Of greater significance was the beginning of the "red scare."<sup>154</sup> Revolutionary unrest in Europe dominated the political scene abroad and industrial disruption in the United States added to the fear of socialism.<sup>155</sup>

146. See O'TOOLE, *supra* note 125, at 225-26, 241 (discussing German operations which included, for example, fires and explosions targeted at munitions industry).

147. See *id.* at 241-42 (explaining that Wilson's administration viewed German sabotage and subversion as a foreign relations problem; therefore, the State Department, rather than Justice Department, assumed leadership role).

148. See *id.* at 272-73 (discussing acts of sabotage and subversion that preceded passage of Espionage Act).

149. See *id.* at 272-73 (noting that the Act was the most brutal attack on free speech since the Sedition Act of 1798).

150. See generally PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 71-132 (1979) (discussing the beginning of the surveillance state); WILLIAM PRESTON, *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933*, at 208-37 (1963) (discussing the Red Raids and the FBI's program designed to target subversive aliens).

151. See SIDNEY FORRESTER MASHBIR, *I WAS AN AMERICAN SPY* (1953) (noting that a significant degree of treason stemmed from individuals who were unaware that they were dupes of the Kremlin; often, these people were a greater threat than the admitted traitors).

152. See THEODORE DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 93 (1957) (describing an emergency Socialist convention in St. Louis, which began a day after the declaration of war); see also O'TOOLE, *supra* note 125, at 271, 279 (contending that the passage of the Selective Service Act after declaration of war galvanized anti-war activists to new heights of resistance).

153. See, e.g., MASHBIR, *supra* note 151, at 18-21 (providing an account of the events leading to the discovery of a German officer in the U.S. Army).

154. See generally O'TOOLE, *supra* note 125, at 271-73 (discussing a series of incidents depicting a climate favorable for German subversion and the rise of the radical Left).

155. See ANDREW, *supra* note 92, at 63 (noting that the "Big Red Scare," which

When a spy scare swept the nation near war's end, the Justice Department's four hundred Bureau of Investigation agents, who had assumed domestic counter intelligence responsibilities, were quickly overwhelmed with investigative requirements.<sup>156</sup> Reacting to the constraint on resources, Attorney General Gregory accepted an offer of assistance from the American Protective League (APL), an army of unpaid volunteers.<sup>157</sup> After each volunteer was given a badge similar to a police shield, the APL waged a zealous campaign against disloyalty in any form.<sup>158</sup> Acting without police powers, volunteers conducted arrests, searches and seizures, tapped telephones and conducted "slacker raids" to root out draft dodgers.<sup>159</sup>

World War I also brought with it the "concept of a continuing war with an internal enemy composed of civilians who could no longer be trusted, even in peacetime[.]"<sup>160</sup> Although protests over the "slacker raids" reached the President's desk, he was assured by Attorney General Gregory that the breaches of the law occasioned by the raids were necessary.<sup>161</sup> Sparked by the Bolshevik revolution in 1917 and the eventual urging by the Bolshevik leaders that workers everywhere revolt against capitalism in favor of a socialist state, the U.S. Military Intelligence Division (MID) developed War Plans White, contingency plans for a war at home.<sup>162</sup> MID believed that the radical labor movement was allying itself with foreign ethnic groups sympathetic to

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began with a series of bombings in 1919, resulted from a combination of revolutionary unrest in Europe and industrial disruption in the United States).

156. See DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE* 32, 34 (1956) (acknowledging such requirements as policing enemy aliens, protecting harbors and war industry zones and locating draft evaders and deserters).

157. See *id.* at 35 (discussing the organization's evolution and snowballed expansion to include 250,000 members and divisions in every major city).

158. See O'TOOLE, *supra* note 125, at 275 (noting that the tin badge was to be displayed only when necessary to establish an agent's semi-formal status). Even if no law existed to punish "disloyal" acts, APL volunteers were often able to convince authorities to prosecute for other reasons. One person, for example, was arrested and sentenced to 90 days confinement for saying that the President is a "damned fool." *Id.* at 277.

159. See *id.* at 276 (noting that managers of telephone and telegraph companies, banks and office buildings, who were also APL volunteers, facilitated authorized behavior); see also WHITEHEAD, *supra* note 156, at 38 (detailing the tactics used to identify draft evaders). One operation in the New York metropolitan region involved 35 Bureau agents, 2,000 APL agents, 1,350 soldiers and National Guardsman, 1,000 sailors and several hundred policeman. Over three days, tens of thousands of men, most of whom simply were not carrying their draft cards, were rounded up and herded into public buildings for temporary incarceration. See O'TOOLE, *supra* note 125, at 278.

160. JENSEN, *supra* note 45, at 178.

161. See 49 *THE PAPERS OF WOODROW WILSON* 497-503 (Arthur S. Link ed., 1985) (documenting letters received by the President expressing concern over raids).

162. See JENSEN, *supra* note 45, at 178-79 (explaining that White targeted American civilians capable of causing civil disturbance that threatened government, primarily radicals, Bolsheviks, or internationalists who renounced nationalism).

the Russian revolution.<sup>163</sup>

The end of the war implied to General Churchill, Director of Washington's MID, that groups such as MID would be disbanded.<sup>164</sup> However, executive branch officials encouraged Congress to continue funding MID at a reduced level.<sup>165</sup> After racial violence erupted in Washington, D.C. and Chicago in 1919, Congress determined that "radicals" caused the unrest and permitted expanded MID domestic activities.<sup>166</sup> MID began to issue "weekly situation reports" in which it gathered and presented information about dissident groups.<sup>167</sup> As delusions about an imminent attempt to overthrow the government continued to guide army intelligence and the thinking of new Assistant Attorney General J. Edgar Hoover, MID engaged in raids on suspected radical groups and continued surveillance of a wide array of citizens.<sup>168</sup>

Wilson's last Attorney General, A. Mitchell Palmer, conducted a vigorous anti-Red campaign.<sup>169</sup> "Slacker raids" were displaced by "Palmer Raids" that targeted Communists and Communist labor parties across the United States.<sup>170</sup> Thousands of individuals were arrested without probable cause.<sup>171</sup> The Palmer Raids were the first

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163. *See id.* at 179 (indicating that the opposition to the government was now based on the idea that workers should control government rather than on mere opposition to war).

164. *See id.* at 180 (reasoning that war's end would also bring the end of civilian investigations within United States).

165. *See id.* at 180-82 (rationalizing that the current activity of "radicals" justified MID's continued existence).

166. *See id.* at 185 (noting that additional activities included gathering information on black communities and extending surveillance to include blacks).

167. *See id.* at 189 (explaining that such reports were issued using ad hoc field forces of intelligence and recruiting officers, both hired and volunteer).

168. *See id.* at 191-97 (discussing MID's reliance on volunteer groups, primarily the American Legion, for surveillance assistance). In 1921, General Pershing became the head of MID and, within a few months, he rescinded all orders allowing Army surveillance of civilians and turned over all law enforcement to the Justice Department. MID's name was changed to G-2 and, although its formal role in surveillance ended, abuses continued, kept underground out of concern for public sentiment. G-2 still reported on alleged communists and activities of labor groups, while it maintained Emergency Plan White. *See id.* at 197, 206-07.

169. *See* A. Mitchell Palmer, *The Case Against the Reds*, FORUM, Feb. 1920, at 73-76, reprinted in THE FEAR OF CONSPIRACY 226-27 (David Brion Davis ed., 1971) (maintaining that the Bureau of Investigation intelligence reports lead Palmer to envision 60,000 Trotskyites in the United States).

170. *See generally* FRED J. COOK, THE FBI NOBODY KNOWS 96-102 (1964) (discussing Palmer's raids and the impact on communists across the country); DRAPER, *supra* note 152, at 204 (noting that so many communists were indicted during the two years following the initial raids that everyone in the movement regarded himself or herself as a potential political prisoner); RICHARD GID POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 103-05, 138 (1987) (discussing the scope of raids and actions taken by agents and their auxiliaries).

171. *See* ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1910-1920, at 213 (1955) (noting that virtually every local and national leader of the movement

instance of a presidentially approved, even if tacitly so, campaign against domestic subversion.<sup>172</sup> Protests existed, but they were few and the perceived red threat loomed larger than life.<sup>173</sup> Extra-legal processes were employed with confidence, but in the climate of the day, they surely seemed less a governmental excess than they would today.<sup>174</sup>

In retrospect, despite the threats to protected constitutional liberties posed by the early intelligence institutions, dismantling the intelligence services was a significant error of policy.<sup>175</sup> Three international forces were building. First, of course, was the Bolshevik revolution.<sup>176</sup> The second, largely unrecognized at first, was the Fascist ascendancy in Europe.<sup>177</sup> Third, and largely ignored, was Japanese hegemonic militarism.<sup>178</sup> When these forces began to threaten U.S. interests, intelligence became a primary need and the pattern of extra-legal government activity and public acquiescence was repeated. Through the 1920s and 1930s, domestic intelligence became increasingly important.

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was arrested); *see also* Palmer, *supra* note 169, at 227 (noting that the government was “sweeping the nation clean” of tens of thousands of communist aliens). Lists were drawn up. Then, on the morning of January 2, 1920, some 4,000 people were rounded up and jailed awaiting deportation. There were no search or arrest warrants. This, reportedly, was the catalyst that launched the American Civil Liberties Union. *See* MURRAY, *supra*, at 213; *see also* JENSEN, *supra* note 45, at 296 (noting that the American Civil Liberties Union evolved during the war to defend dissenters from prosecution).

172. *See* ANDREW, *supra* note 92, at 65-66 (conceding that President Wilson had minimal personal interference with raids and had little idea of their extent).

173. *See* O'TOOLE, *supra* note 125, at 317 (acknowledging Assistant Secretary of Labor Louis Post's impact on the anti-communist campaign by declaring that membership in the Communist Party was no longer sufficient to support deportation); *see also* ANDREW, *supra* note 92, at 65-67 (indicating that the Bureau of Investigation reports of organized communist conspiracy sparked raids aimed at rounding up “alien filth”).

174. *See, e.g.,* O'TOOLE, *supra* note 125, at 317 (noting that the Bureau of Investigation deputized former APL members as temporary agents in order to circumvent their lack of authority to arrest). Cramped and unheated detention centers were set up to hold those snatched off the streets. Deportations were ordered on aliens who were members of the Communist Party until a federal judge stopped the practice. *See id.*

175. *See infra* Part II.D.1 (explaining factors contributing to the need for heightened intelligence efforts).

176. *See* MURRAY, *supra* note 171, at 15 (noting that during and after the war, the Bolshevik experiment presented one of the most crucial worldwide problems).

177. *See* ANDREW, *supra* note 92, at 63 (acknowledging that revolutionary unrest in Europe contributed to the “Big Red Scare”).

178. *See* O'TOOLE, *supra* note 125, at 329 (noting that Japan exited World War I more powerful than before and was viewed as America's chief potential adversary for two decades following the war).

*B. Assigning Responsibility for Domestic Intelligence*

Eventually, authority for domestic intelligence would include the Department of Defense and the Central Intelligence Agency.<sup>179</sup> However, in the early years, and for most of our history, responsibility was vested in the Federal Bureau of Investigation. The modern era of the FBI began with J. Edgar Hoover's appointment in 1924, first as acting Director, then as Director.<sup>180</sup> Operational policy for the Bureau, and the new Director, limited the FBI to investigations operating under the direction of the Attorney General for the purpose of gathering facts concerning violations of federal laws.<sup>181</sup>

Although those principles remain the essence of FBI investigative policy today, there was a period of time when official policy encouraged more open-ended investigations.<sup>182</sup> In 1936, J. Edgar Hoover made two visits to the White House during which Roosevelt charged him to gather information on Fascism and Communism.<sup>183</sup> The FBI understood its presidential mandate to be the investigation of all individuals engaged in activities detrimental to the internal security of the United States.<sup>184</sup> Therefore, it is not surprising that FBI files were eventually filled with information on private citizens and their private lives.<sup>185</sup> The resulting direction to FBI field offices

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179. *See id.* at 431 (documenting the creation of the National Security Act of 1947, which created the Department of Defense, the National Security Council, and the Central Intelligence Agency).

180. *See* WHITEHEAD, *supra* note 156, at 67 (noting that Hoover's acceptance was contingent upon the Bureau being divorced from politics, responsible to the Attorney General only, and appointments based on merit and promotions based on demonstrated ability).

181. *See id.* at 68 (discussing that the policy resulted from the agreement between Hoover and Attorney General Stone which was issued as a memorandum of instructions three days after Hoover's appointment). Lacking a legislative charter, the FBI operates on the basis of the Attorney General's authority to appoint officials: "(1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533 (1994).

182. *See, e.g.*, DIARMUID JEFFREYS, *THE BUREAU: INSIDE THE MODERN FBI* 170 (1995) (noting that investigations based purely on an individual's political beliefs no longer take place absent strong and justifiable suspicion that crime has taken or will take place, which was not the case during the Hoover era).

183. *See* ANDREW, *supra* note 92, at 88-89 (noting that Roosevelt was interested in obtaining a broad picture of movement and concerned with the movement's economic and political implications).

184. *See* JEFFREYS, *supra* note 182, at 65-66 (indicating that agents used Roosevelt's grant of authority to gather intelligence as means of violating civil and constitutional rights of individuals believed to threaten established order).

185. *See id.* at 69 (noting that files existed on thousands of Americans who had committed no crime and merely took stands contrary to those attitudes Hoover imposed on Bureau). In the early 1950s, Hoover granted Don Whitehead an unprecedented look behind to collect material for his book. *See* WHITEHEAD, *supra*

around the nation was to “obtain from all possible sources information concerning subversive activities conducted in the United States by Communists, Fascists, and representatives or advocates of other organizations or groups advocating the overthrow or replacement of the government of the United States by illegal methods[.]”<sup>186</sup> This presidential directive is significant for two reasons. First, the President by-passed his Attorney General and tasked the FBI directly. Second, the investigation he ordered was for intelligence purposes only and not for collection of evidence showing a violation of criminal law. A mere twelve years after the ground rules for FBI investigations had been established, they were displaced by this personal decision of President Roosevelt.

At the same time that the narrowly focused guidelines were displaced, the policy direction became open-ended, and was not restricted to foreign threats:

The executive orders upon which the Bureau based its intelligence activity in the decade before World War II were vague and conflicting. By using words like ‘subversion’—a term which was never defined—and by permitting the investigation of ‘potential’ crimes, and matters ‘not within the specific provisions of prevailing statutes’, the foundation was laid for excessive intelligence gathering about Americans.<sup>187</sup>

Throughout the 1930s the Justice Department utilized telephone wiretaps for intelligence investigations.<sup>188</sup> Authority for the use of those wiretaps was based solely on the personal approval of bureau chiefs.<sup>189</sup> This authority was employed in “exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type.”<sup>190</sup>

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note 156, at Preface (noting the tremendous amount of unpublished material that was made available to him). Material from this research revealed unpublished notes maintained by Hoover and Roosevelt and their personal direction of FBI programs regarding fascism and communism. See ANDREW, *supra* note 92, at 88-89 (discussing the legal loophole where the FBI could investigate matters referred to it by the State Department, which allowed the FBI to acquire general intelligence information).

186. S. REP. NO. 94-755, at 560-62 (1976) [hereinafter CHURCH COMMITTEE]. Presumably this directive could be interpreted as targeting activities that violate espionage laws. As time passed, however, it appears to have been more broadly interpreted.

187. 2 CHURCH COMMITTEE, *supra* note 186, at 24.

188. See S. REP. NO. 95-604, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909 (quoting the Church Committee’s assertion that intelligence agencies tapped and bugged citizens without the benefit of judicial warrants).

189. See *id.* at 10 (noting that Attorney General William D. Mitchell made this authorization three years after the Supreme Court held that wiretapping was a search protected by the Fourth Amendment).

190. *Id.*

Congress soon recognized the threat to personal privacy that wiretapping occasioned. Consequently, in 1934 the Federal Communications Act placed the first restrictions on wiretapping.<sup>191</sup> Logically, if wiretapping were unlawful, it should not be permitted to generate evidence. Legally, the Supreme Court held in *Nardone v. United States*<sup>192</sup> that evidence obtained from the interception of wire and radio communications and the fruits of the evidence were inadmissible in court.<sup>193</sup> Nonetheless, the Justice Department interpreted the Federal Communications Act and the *Nardone* decision as prohibiting only the interception and divulgence of the contents of wiretaps conducted outside the authority of Federal law enforcement.<sup>194</sup> In short, the wiretaps continued.<sup>195</sup>

Beginning in 1940, President Roosevelt authorized the Attorney General to approve electronic surveillance where “grave matters involving defense of the nation”<sup>196</sup> were at stake. The President authorized and directed the Attorney General to:

... secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. . . . The Attorney General was requested to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.<sup>197</sup>

By 1954, J. Edgar Hoover announced to the FBI that the Bureau was authorized to enter private property for the purpose of installing electronic surveillance devices, without regard for surreptitious entry and without prior authorization from the Attorney General.<sup>198</sup> According to FBI policy, “[s]uch surveillance was simply authorized

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191. See Federal Communications Act, ch. 652, 48 Stat. 1103 (1934) (making it a crime for any person to divulge or publish the contents of wire and radio communications except through authorized channels of transmission to any person other than the authorized receiver).

192. 302 U.S. 379 (1937).

193. See *id.* at 380 (discussing whether evidence obtained by Federal Agents by means of tapping telephone wires is admissible in a criminal court).

194. See S. REP. NO. 95-604, at 10 (1977) (“[T]he Justice Department did not interpret the Federal Communications Act or the *Nardone* decision as prohibiting the interception of wire communications per se; rather only the interception and divulgence of their contents outside the Federal establishment was considered to be unlawful.”).

195. See *id.* (“[T]he Justice Department found continued authority for its national security wiretaps.”).

196. *Id.*; see also H.R. REP. NO. 95-1283, pt. 1, at 15 (1978) (House counterpart to Senate Report), reprinted in 1978 U.S.C.A.N. 1783, 1790-93.

197. S. REP. NO. 95-604, at 10; see also FROM THE SECRET FILES OF J. EDGAR HOOVER 134-35 (Athanasios ed., 1991) (showing written communication between President Roosevelt and Attorney General Robert Jackson).

198. See S. REP. NO. 95-604, at 11 (describing Attorney General Brownell’s 1954 memorandum to FBI Director Hoover giving him such authorization).

whenever the Bureau concluded that the ‘national interest’ so required.”<sup>199</sup> Through the 1940s and 1950s, an Interdepartmental Intelligence Conference (IIC) coordinated efforts by the FBI and military departments to implement the new instructions.<sup>200</sup> After the National Security Act of 1947<sup>201</sup> created the National Security Council, the IIC continued to function. Notably, the IIC chain of authority still continued to run directly to the President, bypassing the Attorney General.<sup>202</sup> Not until 1962, when President Kennedy transferred internal security administration to his brother, did the Attorney General regain control.<sup>203</sup>

Similar to the era of the Alien and Sedition Acts, and the hysteria in World War I, things foreign became suspect. For example, Congressmen called on constituents to hunt down “internal enemies,”<sup>204</sup> while the State of Georgia issued a declaration of war against aliens. Hoover, basking in the reflected glory of his Bureau, aligned himself with the Republicans when he found that he had little influence over President Truman.<sup>205</sup> He then precipitated a propaganda campaign against domestic Communists.<sup>206</sup> By the early 1950s, several Soviet spy rings had been uncovered in the United States, Communists had overrun China and Americans were dying in Korea.<sup>207</sup> During this time, the now infamous House Un-American Affairs Committee and the Smith Act emerged.<sup>208</sup> Once again the

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199. *Id.*

200. See W. Raymond Wannall, *Setting Straight the FBI's Counterintelligence Record*, WORLD & INTEL., Jan. 1987, at 176.

201. Ch. 343, 61 Stat. 495, 497 (1947) (codified at 50 U.S.C. § 402 (1994)) (stating the provisions for the National Security Council).

202. See 6 CHURCH COMMITTEE, *supra* note 186, at 573.

203. See ANDREW, *supra* note 92, at 276-78 (discussing Attorney General Robert Kennedy's relationship with the FBI and Director Hoover); Wannall, *supra* note 200, at 176 (There was no love lost between either Kennedy brother and Hoover, but, after more than thirty-five years as Director of the FBI, Hoover was an untouchable institution. Although there was apparently no thought given to replacing Hoover, Robert Kennedy quickly discarded Hoover's legendary anti-communist mission because he felt it was a waste of time pursuing an enfeebled United States Communist Party. Robert Kennedy recognized Communism as a threat to, but not in, the United States).

204. See ERNEST VOLKMAN & BLAINE BAGGETT, *SECRET INTELLIGENCE: THE INSIDE STORY OF AMERICA'S ESPIONAGE EMPIRE* 91-92 (1989) (stating that Hoover described “internal enemies” as “domestic Communists” whose intention was to “aid the Soviets during the approaching war between communism and capitalism in taking over the United States.”).

205. See *id.* at 92 (“In the 1946 congressional election campaign, the Republicans, sensing the public's alarm over communism, rode the issue for all it was worth, declaring that the election amounted to a choice between “Republicanism or communism.”).

206. See *id.* (discussing Hoover's belief of a “Communist internal security threat”).

207. See *id.* at 92-94 (discussing Truman's decreasing political power and the emergence of the public panic over communism).

208. See Smith Act, ch. 645, 62 Stat. 808 (1940) (codified as amended at 18 U.S.C.

nation was willing to accept extraordinary measures in the name of national security.<sup>209</sup> Foreign threats were targeted, but so was a domestic fifth column of Americans who were viewed as potential threats to the national security.<sup>210</sup>

The post-World War II years gave rise to investigative and intelligence techniques that would later be scrutinized and regulated by a combination of executive, legislative and judicial guidance.<sup>211</sup> Probably the most ambitious intelligence project, one that generated the most far-reaching activity and scrutiny, was Operation Shamrock.<sup>212</sup>

Shamrock arose because the cryptanalytic successes of the war years had proved vital to the outcome of World War II.<sup>213</sup> As the war came to an end, the Army Security Agency, a predecessor to the National Security Agency, sought a means to continue to receive foreign communications in order to maintain the cryptanalytic skills acquired in wartime.<sup>214</sup> Arrangements were made with major cable companies to gain access to all overseas cables to and from foreign embassies and consulates, and from U.S. persons and commercial firms.<sup>215</sup> Assurances were sought by the companies, and given by the government, that the activity was vital to national security and that they would not be prosecuted for their part.<sup>216</sup>

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§ 2385 (1994)) (making it illegal to advocate the overthrow of the government or to belong to a group which did).

209. See VOLKMAN & BAGGETT, *supra* note 204, at 90-92 (discussing the return of the "Red Scare" panic over two decades after the end of World War I).

210. See 28 C.F.R. § 0.85(d) (2000) (stating that the Code of Federal Regulations continues to direct the FBI to "[c]arry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the Federal Bureau of Investigation to take charge of investigative work in matters relating to espionage, sabotage, subversive activities and related matters."). Although ambiguity exists here concerning domestic targets, the Attorney General Guidelines (AGG) substantially reduce the risk of abuse by exhaustively describing both the circumstances and the methods by which the FBI can investigate domestic and foreign influences. See *id.* (showing the Attorney General's supervisory role over the FBI).

211. See JAMES BAMFORD, *THE PUZZLE PALACE* 1-4 (1982) (discussing the birth of the National Security Agency).

212. See generally *id.* at 302-08, 373 (describing Operation Shamrock).

213. See *id.* at 236 (stating that Operation Shamrock was established after World War II).

214. See *id.* at 237-39 (explaining the process by which Operation Shamrock was developed).

215. See *id.* at 238 ("By September 1, 1945, even before the Articles of Surrender were signed by Japan, the first batch of cables had been secretly turned over to the Agency.").

216. See *id.* at 237-42 (describing the government's attempts to ease companies' concerns regarding the possible illegality of the operation).

This operation continued into the early 1960s, when technology displaced paper communications with electronic media.<sup>217</sup> It was no longer necessary to hand sort paper copies of communications because computers could be programmed to look for words of interest.<sup>218</sup> With this technological advance, “watch lists” of names were developed without reference to foreign or domestic interests.<sup>219</sup>

As Attorney General, Robert Kennedy employed the watch lists against major crime figures to capture their communications.<sup>220</sup> A spin-off called Operation Minaret specifically targeted both cables and telephone calls for information about possible foreign influence on civil disturbances in the U.S. related to the Vietnam conflict.<sup>221</sup> The possibilities for the new technologies were virtually endless.

In the span of little more than a decade, the targeting evolved from paper copies focused primarily on foreign missions to include electronic watch lists focused on both intelligence and non-intelligence targets.<sup>222</sup> These lists included crime figures and dissidents engaged in speech otherwise protected by the First Amendment.<sup>223</sup> The expansive nature of these operations came to an end only when congressional interest in intelligence activities began to focus on privacy issues.<sup>224</sup> With public hearings a certainty, disclosure was imminent, so the Director of the National Security Agency aired the story of Shamrock.<sup>225</sup>

### C. *Legislative and Regulatory Change in the 1970s*

Only in recent history has Congress taken an active interest in intelligence matters. In 1956, Senator Leverett Saltonstall explained congressional inactivity this way:

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217. *See id.* at 244-45.

218. *See id.* at 245 (“In microseconds the full text of any telegram containing selected material could be reproduced.”).

219. *See id.* (stating that the computer “could be programmed to ‘kick out’ any telegram containing a certain word, phrase, name, location, sender, or addressee, or any combination”).

220. *See id.* at 247-48 (noting that the resulting intelligence contributed to several prosecutions).

221. *See id.* at 253-54 (describing the purpose and development of Operation Minaret).

222. *See id.* at 244-48 (showing the effect of new technologies on intelligence activities).

223. *See id.* at 248 (“Now, for the first time, NSA had begun turning its massive ear inward toward its own citizens.”).

224. *See id.* at 378-79 (addressing the Congress’ concern that the technological capabilities of the intelligence community could be used against the American people, thereby destroying all rights to privacy).

225. *See id.* at 302-05 (detailing the congressional investigations of Operation Shamrock).

It is not a question of reluctance on the part of CIA officials to speak to us . . . it is a question of our reluctance . . . to seek information . . . on subjects which I personally, as a member of Congress and as a citizen, would rather not have. . . .<sup>226</sup>

By the mid-70s, the political climate had markedly changed. With this change came the War Powers Resolution,<sup>227</sup> the Hughes-Ryan<sup>228</sup> and Boland amendments,<sup>229</sup> and intelligence oversight committees in Congress.<sup>230</sup> By 1975, activities of the intelligence community in general, and the CIA in particular, had been subject to an unprecedented public spotlight. The CIA was charged by many with violating the rights of private citizens through a pattern of domestic activity.<sup>231</sup> Responding to the allegations, on January 4, 1975, President Ford created the Commission on CIA Activities Within the United States.<sup>232</sup> This Commission was known as the Rockefeller Commission after its chairman, former Governor Nelson Rockefeller.<sup>233</sup> President Ford “directed the Commission to determine whether any domestic CIA activities exceeded the

226. 102 CONG. REC. 5924 (1956), *cited in* 1 CHURCH COMMITTEE, *supra* note 186, at 149.

227. *See* Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1994)) (“It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed forces into hostilities.”).

228. *See* Pub. L. No. 93-559, § 662, 88 Stat. 1795, 1804 (1974) (codified at 22 U.S.C. § 2422), *repealed by* Pub. L. No. 102-88, 105 Stat. 441 (1991) (amending the Foreign Assistance Act of 1961 to prohibit the expenditure of funds for covert operations unless, and until, the President formally made a finding that the proposed operation is important to the national security of the United States).

229. *See* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 57-60 (1994) (stating that there were actually a series of appropriations restrictions sponsored by Representative Boland, all generally designed to limit U.S. assistance to Sandinista forces in Nicaragua). The most restrictive of these, commonly referred to as Boland II, prohibited the use of any funds which would have the effect of supporting military or paramilitary operations in Nicaragua. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (stating that no funds available to agencies involved in intelligence activities “may be obligated or expended for the purpose or which would have the effect of supporting . . . military or paramilitary operations in Nicaragua.”).

230. *See* Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, § 501(a), 94 Stat. 1975, 1981 (1980) (codified as amended at 50 U.S.C. § 413 (1994)) (requiring that the Senate and House Permanent Intelligence Committees be kept “fully and currently informed of all intelligence activities. . .”).

231. *See generally* COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT at xi (1975) (reporting on the CIA’s role and authority with specific focus on domestic activity) [hereinafter ROCKEFELLER COMMISSION REPORT].

232. *See id.* at ix (“[T]he President took steps designed to ensure that the charges would be fully and impartially investigated and that necessary corrective actions would be taken.”).

233. *See id.* at x (describing the appointment of Vice President Rockefeller and the various other Commission members).

Agency's statutory authority and to make appropriate recommendations."<sup>234</sup>

The Rockefeller Commission undertook the first serious study in the United States of the propriety of intelligence activities.<sup>235</sup> The Commission studied several aspects of CIA domestic activity and found assorted abuses that have since been used by many to demonstrate the excesses of the intelligence community.<sup>236</sup> When the study was completed, the Commission found that the appropriate way to gauge the propriety of CIA activity was to determine its purpose:

The Commission finds that whether Agency activity is prohibited depends principally on the purpose for which it is conducted. If the principle purpose of the activity is the prosecution of crimes or protection against civil disorders or domestic insurrection, then the activity is prohibited. On the other hand, if the principal purpose relates to foreign intelligence or to protection of the security of the Agency, the activity is permissible, within limits, even though it might also be performed by a law enforcement agency.<sup>237</sup>

Although the Rockefeller Commission Report supplies one of the many explanations for the changed attitude of Congress, the driving force was undoubtedly the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, also created in 1975, and better known as the Church Committee.<sup>238</sup>

For fifteen months the Church Committee, spurred by allegations of wrongdoing within the national intelligence system, conducted the first major inquiry of the intelligence community.<sup>239</sup> The Committee found multiple shortcomings in intelligence operations,<sup>240</sup> adverse effects of secrecy,<sup>241</sup> failure by Congress to oversee intelligence activities,<sup>242</sup> and in some cases, seemingly unlawful actions.<sup>243</sup> More

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234. *Id.* at ix.

235. *See id.* at x-xi ("The Commission ha[d] been determined from its inception to make a thorough and vigorous investigation.")

236. *See id.* at 115, 149-50, 250 (stating that such abuses include mail openings, operation CHAOS and maintaining indices on American citizens).

237. *Id.* at 62.

238. *See* S. Res. 21, 94th Cong. (1975) (proving that even though other committees with similar purposes, notably the Pike and Abzug committees, also contributed to the change, the Church Committee stands alone for both its far-reaching consequences and its revelations).

239. *See* 1 CHURCH COMMITTEE, *supra* note 186, at 2 (noting that the committee's task was to "conduct an investigation and study governmental operations with respect to intelligence activities and of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government").

240. *See id.* at 425 (noticing that a lack of statutory guidelines surrounding intelligence activities significantly affected efficient operation of intelligence activities).

241. *See id.* (finding that "the operation of an extensive and necessarily secret intelligence system places severe strains on the nation's constitutional government").

242. *See id.* (stating that "[t]he Committee finds that Congress has failed to

often, they found that activities of the intelligence community had violated individual privacy.<sup>244</sup>

The Committee determined that secret government activities, while necessary to the effectiveness of government, were, nevertheless, a threat to democratic society.<sup>245</sup> They found duplication, waste and inertia.<sup>246</sup> The Committee believed control and accountability were lacking and that covert actions had been both excessive and a means of circumventing the democratic process.<sup>247</sup> Most importantly, they determined that intelligence efforts had violated the Constitution and that the reason was lack of legislation.<sup>248</sup> The remedy, they asserted, was to have Congress prescribe rules for intelligence activities.<sup>249</sup>

The Church Committee and several legislators proposed a charter for the intelligence community aimed at restricting the intelligence community.<sup>250</sup> Although the initial charter legislation was never enacted, a primary spin-off of this era of activism was the dawning of "intelligence law" and a first-time focus on the President's authority for national security surveillance.<sup>251</sup>

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provide the necessary statutory guidelines to ensure that intelligence agencies carry out their necessary missions in accord with constitutional processes").

243. *See id.* ("The Committee finds that covert action operations have not been an exceptional instrument used only in rare instances when the vital interests of the United States have been at stake.").

244. *See id.* (finding specifically that the NSA, existing without a congressional charter and statutory limitations, dangerously threatens individual privacy).

245. *See id.* at 424-25 (describing the continuing need for effective intelligence activities in light of challenges posed by "strong and potentially hostile" foreign powers while recognizing the need to conform those activities to democratic and constitutional principles).

246. *See id.* at 425 ("In addition, covert action has become a routine program with a bureaucratic momentum of its own.").

247. *See id.* (noting that covert action has become a "routine program" and that "intelligence programs should not be regarded as ends in themselves," but should be better organized and directed to ensure their consistency with legitimate foreign and national security policy).

248. *See id.* (noting that Congress must prescribe statutory guidelines for the intelligence community in attempting to ensure compliance with constitutional principles).

249. *See generally id.* at 424-74 (describing various statutory remedies to be implemented in regard to each federal intelligence agency).

250. National Intelligence Reorganization and Reform Act of 1978, S. 2525, 95th Cong. (1978). The goal of this legislation was to replace the National Security Act of 1947 with more specific lines of responsibility and limits on authority. In the midst of debate about charter provisions, the U.S. Embassy in Teheran was seized on November 4, 1979, and fifty-two American hostages were imprisoned. Due to a widespread impression that there had been an "intelligence failure" regarding Iran, the impetus for the charter quickly vanished. *See* JOHN OSETH, REGULATING U.S. INTELLIGENCE OPERATIONS 122-31 (1985) (noting that political resolve to curb intelligence operations weakened after failure to anticipate Iranian revolution).

251. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 432-35 (2d ed. 1997) (noting S. 2525's grant of authority to the President to suspend the provisions of the

The Church Committee's proposed charter for intelligence agencies would have regulated covert action and imposed a statutory ban on assassination.<sup>252</sup> President Ford quickly sought to displace those proposals by issuing Executive Order 11905, which implemented many of the Church Committee recommendations.<sup>253</sup> The Executive Order addressed the primary issues identified by the Committee and as a result, most ambitious legislative proposals withered thereafter.<sup>254</sup> Interest in intelligence activities persisted, however, both in Congress and with the public.

Public interest in intelligence and government information not only persisted, but also increased after publication of the Pentagon Papers, the Watergate scandal, and the revelations by the Church Committee of U.S. complicity in overseas and domestic intelligence abuses.<sup>255</sup> Congress responded by granting statutory rights to government information, and for the protection of private information.<sup>256</sup> It was only natural that with new awareness, the public began to challenge intelligence activities as never before.

#### *D. The Evolving Judicial Role*

Privacy law in the United States has always been about the breaching of boundaries. This section will show that, before the

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act during times of war and the bill's requirement that the President approve all special intelligence operations necessary to "the national defense or the conduct of the foreign policy of the United States").

252. See S. 2525, § 134 (prescribing punishments of up to life in prison for any officer or employee of the United States who conspires to kill, attempts to kill, or kills a foreign official).

253. See Exec. Order No. 11,905, 41 Fed. Reg. 7707 (1976). The Ford Executive Order was a template for future Executive Orders that would regulate the intelligence community. President Carter replaced Executive Order No. 11,905 with Executive Order No. 12,036, 43 Fed. Reg. 3678 (Jan. 24, 1978), and President Reagan replaced Executive Order No. 12,036 with the still current Executive Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (1994).

254. Congress did not become quiescent after the failure of charter legislation. The Intelligence Oversight Act of 1980 mandated that the Intelligence committees be kept "fully and currently informed" of all intelligence activities. See Pub. L. No. 96-450, § 501, 94 Stat. 1975, 1981 (1980) (codified as amended at 50 U.S.C. § 413(a)(1) (1994)).

255. See JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF* 331-34 (1996) (discussing that in light of recent public concern about covert intelligence operations, Congress' "lackadaisical" attitude toward monitoring intelligence operations, and the realization that of the approximately 274 legislative proposals intended to restrict the CIA's power, none had passed, effective congressional or executive action was necessary).

256. See Freedom of Information Act, 5 U.S.C. § 552 (1994) (guaranteeing public access to agency rules, opinions, orders, records, and proceedings); Privacy Act, 5 U.S.C. § 552a (1994) (protecting private and personal information that may be in the possession of a government agency from public dissemination).

Constitution was construed to recognize a right of privacy, the common law protected some dimensions of privacy by extending the law of personal property. In the late nineteenth century, some began to fear that expanding technologies would enable eavesdroppers to learn the contents of conversations.<sup>257</sup> As a consequence, common law and natural law sources evolved into constitutional doctrine, again based on protecting geographic and spatial boundaries.<sup>258</sup> In 1999, the Supreme Court confirmed the long maintained view that the right of residential privacy is at the core of the Fourth Amendment.<sup>259</sup>

1. *The conceptual bases for privacy*

There are several conceptual approaches to and definitions of privacy. These include a broad-based right to be let alone, an interest in seclusion, a right to protect personal information, an interest in making important personal choices free from governmental interference, and an interest in the autonomy of one's body.<sup>260</sup> In addition, for constitutional lawyers it matters whether privacy is a right or a liberty—the former carries more constitutional weight.<sup>261</sup> For political philosophers, privacy is valued for its intrinsic worth and is thus broader than either liberties or rights.<sup>262</sup> For those responsible for establishing the rules for national security surveillance, it is necessary to distill from the privacy caldron those aspects of privacy that may be threatened by national security surveillance.

Alan Westin's classic taxonomy of privacy facilitates an assessment of the privacy at stake in national security surveillance.<sup>263</sup> Westin first asserts the importance of an interest in personal autonomy, based on

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257. See, e.g., O'BRIEN, *supra* note 6, at 50-51 (discussing generally public concerns surrounding the development of modern technology and privacy).

258. See *id.* at 51 (noting that the Supreme Court has still applied traditional property notions of privacy even in the face of technological advances).

259. See *Wilson v. Lane*, 526 U.S. 603, 609-10 (1999) (holding that police officers who brought *Washington Post* reporters with them into a house while executing a valid warrant violated the expectation of privacy in one's home guaranteed by the Fourth Amendment).

260. See generally ALAN WESTIN, *PRIVACY AND FREEDOM* 33-38 (1967) (discussing how privacy protects the "core" elements of a person's own autonomy, which is often masked from the public while the individual interacts with others).

261. See generally *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990) (recognizing the existence of broad liberty interests that must be balanced against legitimate state interests in determining when the state may invade an individual's privacy interests in the context of a patient's right to refuse medical treatment).

262. See O'BRIEN, *supra* note 6, at 25 (recognizing that privacy is primarily a "non-legal" and "non-political" concept).

263. See WESTIN, *supra* note 260, at 32-39 (discussing four analytical models of privacy—personal autonomy, emotional release, self-evaluation, and limited and protected communication—in considering the "choices about individual privacy that Americans may have to make").

the Western idea of the worth and dignity of the individual in democratic societies.<sup>264</sup> To maintain individuality, people require autonomy—“the desire to avoid being manipulated or dominated wholly by others.”<sup>265</sup> The autonomy interest is threatened when a private person or government official penetrates an inner zone and learns intimate personal information.<sup>266</sup> The suffered harm is caused by stripping “the individual’s protective shell, his psychological armor [leaving] him naked to ridicule and shame.”<sup>267</sup> The autonomy interest “is also vital to the development of individuality and consciousness of individual choice in life.”<sup>268</sup>

A second relevant entry in Westin’s catalog of privacy is the interest in limited and protected communication.<sup>269</sup> All mature persons exercise discretion and reserve in our communications; we are not always completely candid.<sup>270</sup> This aspect of privacy provides each person with needed opportunities to share “confidences and intimacies with those he trusts.”<sup>271</sup> Disclosures are made because the individual expects the confidences to be maintained.<sup>272</sup> Societies that respect this aspect of privacy must then construct a set of boundaries, through law or otherwise, that define what is expected to remain in confidence and what may be shared with others in various relationships.<sup>273</sup>

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264. *See id.* at 33 (observing that “[i]n democratic societies, there is a fundamental belief in the uniqueness of the individual, in his basic dignity and worth as a creature of God and a human being, and in the need to maintain social processes that safeguard his sacred individuality”).

265. *Id.*

266. *See id.* (describing various theorists’ view that an individual has “zones of privacy” which surround and protect a “core-self” in an attempt to protect an individual’s “ultimate secrets—those hopes, fears, and prayers that are beyond sharing with anyone”).

267. *Id.* (recognizing the potential psychological effects of having one’s inner most zone of privacy, the “core-self,” penetrated by those people to whom the individual does not wish to expose his or her most private thoughts).

268. *Id.* at 34 (reflecting on the concept that one requires time alone to truly understand their own feelings and individuality).

269. *See id.* at 37-39 (reasoning that communication with others must be limited because “[t]he greatest threat to civilized social life would be a situation in which each individual was utterly candid in his communication with others, saying exactly what he knew or felt at all times”).

270. *See id.* at 37-38 (suggesting that limited communication is central to “psychic self preservation” when one is continually confronted with people unknown to the individual).

271. *Id.* at 38 (indicating that limited communication with strangers allows for a needed openness with intimate acquaintances such as spouses, family members, and close personal friends).

272. *See id.* (reasoning that personal privacy is still maintained when inner secrets are divulged to those people close to the individual because civilized society dictates against those acquaintances breaching that confidence).

273. *See id.* (discussing how law has provided privileges to intimate communications with attorneys, clergy, doctors, and psychologists so that people will

The potential clash of these variants of privacy and surveillance is easy to visualize. Individuals value the ability to move from place to place anonymously, to be alone or to commune with others. Yet surveillance may shadow the individual, even where she goes to be alone. Because national security surveillance is secret, conducted so that the target is not aware of the surveillance, the very uncertainty surrounding whether surveillance has occurred may compromise personal privacy.<sup>274</sup> In addition, surreptitious recording and filming of individual communication may impact freedom of expression, when individual communication is chilled by the suspicion, whether well-founded or not, that she is being recorded.<sup>275</sup>

Yet Westin also recognizes that Western democratic societies have long employed surveillance as a means of social control.<sup>276</sup> Although surveillance devices cause many to recoil because they invade individual privacy, those same devices are used to ensure the public safety, without which privacy becomes unattainable:

Parents watch their children, teachers watch students, supervisors watch employees, religious leaders watch the acts of their congregants, policemen watch the streets and other public places, and government agencies watch the citizen's performance of various legal obligations and prohibitions. . . . Without such surveillance, society could not enforce its norms or protect its citizens . . . and . . . the means of protecting society [must] keep pace with the technology of crime.<sup>277</sup>

## 2. *The development of privacy as property*

The conceptual separation of public and private spheres has been recognized since antiquity.<sup>278</sup> Aristotle expected the *polis*, the province of politics and government, to remain strictly separated from the *oikos*, the private sphere attached to the individual and the

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be able to feel protected when divulging the "core-self" to people who would normally fall outside the sphere of individuals to whom one might divulge extremely personal information).

274. *See id.* at 58 (describing the fact that one may not know that they are under surveillance as "psychologically taxing" because the individual does not know how to properly conform their behavior to the observing authority).

275. *See id.* at 62 (examining the unique privacy threat of surveillance with film media in that every aspect of a person's actions, including voice inflection, subtle body movements and other "private intercourse" are preserved for the observing authority).

276. *See id.* at 57 (recognizing the existence of societal surveillance since the days of the Greek city-state).

277. *Id.*

278. *See id.* at 22 (stating that no society "with a reputation for liberty" has failed to place limits on state sponsored surveillance).

home.<sup>279</sup> During ancient and medieval times, a range of activities involving individuals and family in the home were held free from public governance.<sup>280</sup> By the time of John Locke, the public/private dichotomy was firmly entrenched, but the relationship between the two spheres had become more complex.<sup>281</sup>

In Locke's social contract and in England, the state existed as a means of protecting the private sphere. The government was charged by individuals to maintain civic order as a means for protecting life, liberty, and property.<sup>282</sup> Still, as protector of the private sphere, government also had to respect boundaries. In 1604, an English judge observed that "the house of every one is to him as his castle and fortress, and well for his defence against injury and violence, as for his repose."<sup>283</sup> A century and a half later Blackstone found that:

[T]he law in England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private.<sup>284</sup>

The U.S. Constitution followed the Lockean principle that the powers of government were limited and that legal rules confined official discretion.<sup>285</sup> Intrusions into the personal life of a citizen may occur only pursuant to rules enacted with lawful authority.<sup>286</sup> Just as Locke's social contract complicated the relationship of the public and private spheres, the Constitution placed the government as both protector of individual liberties and as a threat to their enjoyment.

Although the text of the Bill of Rights does not incorporate a right of privacy, contextual evidence indicates that the Fourth Amendment

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279. See generally ARISTOTLE, THE POLITICS 1127-34 (Richard McKeon ed. & Benjamin Jowett trans., Random House 1941) (explaining the separation of the state from the family and the individual).

280. See WESTIN, *supra* note 260, at 11-18 (describing how personal activities in the "primitive world" were traditionally free from any type of governmental interference or invasion).

281. See *id.* at 22 (linking the complexity of the public/private dichotomy to western societal development).

282. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 70-71 (Thomas P. Peardon ed., 1952) (reasoning that men relinquish some of their natural freedom to government authority to protect their "lives, liberties & estates").

283. Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604).

284. 4 WILLIAM BLACKSTONE, COMMENTARIES \*223.

285. See LOCKE, *supra* note 282, at 75-82 (noting that governmental power is inherently limited in that it may not exceed the power granted to it by those who have freely chose to be governed and discussing generally the extent of legislative governmental power).

286. See *id.* (noting that the governmental structure embodied in a constitution is limited by the natural rights and surrendered freedoms of the governed).

was designed as a species of privacy protection.<sup>287</sup> In advocating the adoption of the Bill of Rights, Patrick Henry claimed that officials “may, unless the government is restrained by a bill of rights . . . go into your cellars and rooms, and search, ransack, and measure, everything you eat, drink, and wear.”<sup>288</sup> In more recent years, the Supreme Court noted that “it is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”<sup>289</sup> Due to the unspecific language of the Bill of Rights, it was left for the courts either to find privacy protections in the Fourth Amendment, or to fashion a right of privacy out of the constitutional whole cloth.

During the framing period and through most of the nineteenth century, individual communication occurred only through direct speech or by letter. Physical surveillance was, therefore, conducted with only eyes and ears. Legal protections, thus, addressed privacy in the home and the protection of the basic means of communication. Lacking significant Supreme Court interpretations of the First and Fourth Amendments before the Civil War, scholars offered insight into the interpretation of constitutional privacy.

In his 1833 *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote that the First Amendment’s protections were intended to secure the rights of private sentiment and private judgment.<sup>290</sup> In 1853, Francis Lieber added that the First Amendment embraced the right to form and conduct affairs in associations without surveillance by “the spy, the mouchard, the dilater, the informer, and the sycophant . . . [of] . . . police government.”<sup>291</sup> Story also wrote that the Fourth Amendment was “indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property.”<sup>292</sup>

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287. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .”).

288. 3 PATRICK HENRY, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448-49 (Jonathan Elliot ed., Ayer 1987) (1836).

289. *Payton v. New York*, 445 U.S. 573, 583-84 (1980) (discussing various versions of the Fourth Amendment considered by the House of Representatives while considering the Bill of Rights).

290. See STORY, *supra* note 89, at 722-46 (discussing the various personal liberty interests protected by the First Amendment in the context of religious expression, speech protection and libel, peaceable assembly and the right to petition the government).

291. FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF GOVERNMENT 1003-105 (1853).

292. STORY, *supra* note 89, at 1895.

The usual, but mistaken, date associated with the birth of privacy law in the United States is 1890, when Samuel Warren and Louis Brandeis published an influential law review article titled *The Right to Privacy*.<sup>293</sup> Warren and Brandeis acknowledged Judge Thomas Cooley's 1868 treatise, *Constitutional Limitations*, which described the citizen's "immunity in his home against the prying eyes of the government" alongside protection from "arbitrary control of the person" as the foundations of personal liberty.<sup>294</sup> Cooley elaborated:

[I]t is better sometimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons . . . . [It is unthinkable that] ministerial officers . . . take such liberties, in endeavoring to detect and punish offenders, as are even more criminal than the offenses they seek to punish.<sup>295</sup>

By the early twentieth century, technological breakthroughs such as the invention of the telephone, microphone, and dictograph recorder, and development of instantaneous photography, altered what had been a fairly simple balance between privacy and surveillance.<sup>296</sup> It was no longer sufficient for the law to protect only physical sites from invasion.<sup>297</sup> Although the new technologies made it clear that privacy was in fact an inherently personal attribute not dependent on the location of its exercise, constitutional law continued to treat privacy as a property idea connected to a physical place.<sup>298</sup>

As early as 1877, the Fourth Amendment was found to protect personal privacy from government surveillance.<sup>299</sup> In *Ex parte Jackson*,

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293. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

294. See THOMAS G. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 367 (4th ed. 1878) (introducing the author's analysis of unreasonable search and seizure).

295. See *id.* at 375 (referring to a statute that would "permit the breaking and entering [of] a man's house" by government authorities for investigative purposes).

296. See O'BRIEN, *supra* note 6, at 50-51 (discussing how the development of modern technology led to problems in discerning reasonable searches and seizures under the Fourth Amendment).

297. See *id.* (recognizing that new technology employed by law enforcement officials resulted in the destruction of the "constitutionally protected areas" doctrine).

298. See *id.* at 51 (noting that upon the advent of the ability of police to intercept telephone conversations, the Supreme Court in *Olmstead* still applied traditional property concepts in finding that intercepting such messages was not an invasion of personal privacy because there was no search of "constitutionally protected areas" and thus the Fourth Amendment did not apply).

299. See *Ex parte Jackson*, 96 U.S. 727, 736-37 (1877) (upholding the constitutionality of outlawing the use of the postal system for "the distribution of matter deemed injurious to the public morals").

Fourth Amendment warrant requirements were held applicable to a sealed letter entrusted to the mail.<sup>300</sup> In 1881, tort relief was granted in *Demay v. Roberts*<sup>301</sup> when the Court determined that observing childbirth without consent was a violation of privacy.<sup>302</sup> The court opined that the “plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation.”<sup>303</sup>

The courts continued to focus on privacy as a property concept, based on the content and area of governmental surveillance.<sup>304</sup> In 1886, the Supreme Court held in *Boyd v. United States*<sup>305</sup> that a person’s private papers were protected from seizure by the Fourth and Fifth Amendments.<sup>306</sup> The Court determined that a federal statute permitting the government to order the accused in a criminal case to produce shipping invoices of allegedly illegally imported goods violated the reasonableness clause of the Fourth Amendment.<sup>307</sup> Justice Bradley, relying on principles established by the King’s Bench in *Entrick v. Carrington*<sup>308</sup> in 1765, reasoned: “It is not the breaking of his doors, and rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of this indefeasible right of personal security, personal liberty and private property . . . which underlies and constitutes the essence of [the court’s] judgement.”<sup>309</sup>

In their article, Warren and Brandeis argued for an expansion of the common law: “political, social, and economic changes entail

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300. See *id.* at 733 (reasoning that the Fourth Amendment’s protection against unreasonable searches and seizures afforded to papers in a private home applied equally to letters in the postal system).

301. 9 N.W. 146 (Mich. 1881).

302. See *id.* at 149 (basing the right to personal privacy upon both the nature of the event, such as childbirth, and the location of the event, such as the plaintiff’s home).

303. *Id.*

304. See *United States v. Three Tons of Coal*, 28 F. Cas. 149, 158 (E.D. Wis. 1875) (No. 16,517) (upholding the constitutionality of a government order requiring the production of private papers because those papers pertained to the defendant’s distilling business and the government’s collection of revenues).

305. 116 U.S. 616, 638 (1885).

306. See *id.* at 633-34 (reasoning that the threat of a default judgment used to compel the production of records and papers affected an unreasonable seizure and also violated the Fifth Amendment by allowing those records to be used against the defendant).

307. See *id.* at 635 (noting the seizure in the instant case lacked “many of the aggravating incidents of actual search and seizure,” yet noting that allowing such seizures could justify future unconstitutional acts).

308. 98 Eng. Rep. 807, 817-18 (K.B. 1765) (setting forth the principle of unreasonable search and seizure as the injury to the person’s privacy rather than the physical trespass).

309. *Boyd*, 116 U.S. at 630 (locating the injury from unreasonable search and seizure outside the actual physical violation of property and instead focusing on the intangible injury to “the privacies of life”).

recognition of new rights and the common law . . . grows to meet the demands of society.”<sup>310</sup> Warren and Brandeis cited new technologies, such as high-speed presses and cameras that “have invaded the sacred precincts of private and domestic life.”<sup>311</sup> The privacy at stake was a right to control publicity about individuals as part of their right to personhood: the right of “inviolable personality.”<sup>312</sup> They argued that the common law of defamation and breach of trust already recognized the privacy principle and allowed judges merely to apply the principle to new facts to protect individuals from those who would record personal information.<sup>313</sup> The fact that Warren and Brandeis were concerned with private rather than official invasions of privacy helps explain why the logic of expanding common law categories did not catch on in the area of official surveillance.<sup>314</sup>

### 3. *From property to persons*

In a wooden application of the property-based conception of Fourth Amendment principles to electronic surveillance, the Supreme Court ruled in *Olmstead v. United States*<sup>315</sup> that Fourth Amendment protection did not extend to telephone conversations because of the lack of entry, search, and seizure involved in intercepting them.<sup>316</sup> Chief Justice Taft stressed that when authorities tapped the defendant’s phone from outside his home and office, such action did not constitute an “actual physical invasion” or the taking of “tangible material effects.”<sup>317</sup> Justice Brandeis dissented, and in drawing upon arguments from his 1890 law review article,<sup>318</sup> argued that:

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310. Warren & Brandeis, *supra* note 293, at 193 (describing the evolution of the common law principle of the “right to life” from the narrowly construed protection from only physical injury or deprivation, such as battery or theft, to the broadly construed protection from intangible injury, such as nuisance, slander or libel).

311. *Id.* at 195 (noting the ease with which photographs and newspapers permit the widespread distribution of information).

312. *Id.* at 201, 205 (arguing that private writings and “other personal productions” should be afforded legal protection against unwanted publication under the general principle recognizing “the right to be let alone” rather than the principle of private property).

313. *Id.* at 205 (suggesting the accepted legal protection provided the King under breach of trust and defamation as the axiomatic starting point for the extension of the common law to protect personal information).

314. *See id.* at 215 (“The general object in our view is to protect the privacy of private life . . .”).

315. 277 U.S. 438 (1928).

316. *See id.* at 464-65 (rejecting the argument that communications over wires are analogous to mailed letters, which receive Fourth Amendment protection).

317. *See id.* at 466 (stating that persons who install telephones intend “to project [their] voice to those quite outside” and noting that the government did not intercept the conversations “in the house of either party to the conversation”).

318. *See* Warren & Brandeis, *supra* note 293, at 148-99.

[T]he makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone . . . . To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>319</sup>

Brandeis noted that technological changes continued to permit the government to employ more subtle and expansive means of invading privacy.<sup>320</sup> For the near-term future, *Olmstead* insured that the courts would not view wiretapping as “search” and thus not subject even to the additional Fourth Amendment requirement that surveillance be “reasonable.”<sup>321</sup>

As new surveillance technologies continued to emerge<sup>322</sup> and changing threats to national security clashed with the civil libertarian backlash against surveillance of citizens during the Civil Rights movement and Vietnam War,<sup>323</sup> the law of privacy and surveillance by government was forced to modernize.<sup>324</sup> The courts were forced finally to develop a legal theory of privacy in the surveillance context that did not depend upon the outmoded property model.<sup>325</sup> As part of this basic re-design, the judges were required to shed their preoccupation with the existence of a “search” of tangible things.<sup>326</sup>

The first signs of a maturing constitutional base for privacy

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319. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (disagreeing with Chief Justice Taft’s narrow reading of the Fourth Amendment).

320. *See id.* at 473 (emphasizing that at the time of the Fourth and Fifth Amendment’s adoption, the government’s means of effecting seizure and/or compelling testimony rested primarily upon direct and coercive measures, such as breaking and entering a home or torture).

321. *See, e.g.*, *United States v. Weiss*, 103 F.2d 348, 351 (2d Cir. 1939) (citing *Olmstead* as authority to allow use of evidence obtained by wiretapping for a conviction of mail fraud); *Smith v. United States*, 91 F.2d 556, 557 (D.C. Cir. 1937) (citing *Olmstead* as authority to permit the trial court to use evidence obtained through wiretapping to convict for the sale of non-taxed alcohol); *Kerns v. United States*, 50 F.2d 602, 602 (6th Cir. 1931) (citing *Olmstead* to allow use of evidence obtained by wiretapping for a conviction of violating the National Prohibition Act).

322. *See WESTIN, supra* note 260, at 67-168 (discussing the government’s increased use of new surveillance technologies).

323. *See JENSEN, supra* note 45, at 230-67 (discussing post-World War II national security concerns, the corresponding increase in surveillance of civilians by government agencies, and the public’s subsequent response).

324. *See O’BRIEN, supra* note 6, at 203-38 (discussing the increasing importance of personal privacy and the resulting impact on public policy and lawmaking).

325. For a discussion of how the Court has allowed a charge of unreasonable search and seizure without evidence of actual physical trespass, *see infra* note 347 and accompanying text.

326. *See Katz v. United States*, 389 U.S. 347, 351-52 (1967) (emphasizing the expectation of privacy rather than actual place of alleged unreasonable search and seizure as controlling).

occurred in the area of associational privacy.<sup>327</sup> In *NAACP v. Alabama*, the Court struck down an Alabama law that required the NAACP to turn over its membership lists in order to be admitted as an out-of-state corporation.<sup>328</sup> Justice Harlan acknowledged “the vital relationship between freedom to associate and privacy in one’s associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>329</sup> The idea that associational privacy provides an individual “breathing space”<sup>330</sup> has often been an issue in national security surveillance case law since the late 1950s,<sup>331</sup> albeit not always the basis for overturning government surveillance.<sup>332</sup>

In *Watkins v. United States*,<sup>333</sup> the Supreme Court recognized a right of “political privacy” in assessing the pertinence of congressional demands for information in an investigation.<sup>334</sup> Justices Frankfurter and Harlan espoused political privacy more broadly when concurring in *Sweezy v. New Hampshire*,<sup>335</sup> which reviewed questions directed at a guest lecturer at the University of New Hampshire by a state official investigating alleged subversive activities in New Hampshire.<sup>336</sup> The Justices’ rationale for reversal balanced “two contending principles—the right of a citizen to political privacy . . . and the right of the State to self-protection.”<sup>337</sup>

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327. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (setting forth bases for recognizing constitutional protection for freedom of association).

328. See *id.* at 466 (ruling NAACP’s membership list protected from state scrutiny by the Fourteenth Amendment).

329. *Id.* at 462.

330. See *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) (emphasizing that standards for allowing vague statutory language are narrower for First Amendment freedoms).

331. See generally Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793 (1989) (discussing jurisprudence of electronic surveillance and the Fourth Amendment viewed through the development and application of the Foreign Intelligence Surveillance Act).

332. See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 115 (1961) (upholding a Federal statute that required the Communist Party to register with the government as “Communist-action organization” because the court’s record demonstrated the Communist Party operated primarily at the behest of a foreign government).

333. 354 U.S. 178 (1957).

334. See *id.* at 215-16 (reversing petitioner’s conviction for contempt of Congress for refusing to answer questions regarding petitioner’s former associates and their political activities with the Communist Party).

335. 354 U.S. 234 (1957).

336. See *id.* at 236-44 (outlining proceedings during which the petitioner was interrogated about his involvement with various political parties that espoused communist or socialist ideologies).

337. *Id.* at 266-67 (Frankfurter, J., concurring).

Finally, in 1965 when the Court decided the Connecticut contraceptives case, *Griswold v. Connecticut*,<sup>338</sup> many thought that the stage was set for wide application of modern privacy.<sup>339</sup> In locating a constitutional right of privacy outside the historical and doctrinal lineage of the Fourth Amendment,<sup>340</sup> the Court struck down a Connecticut statute that banned the use of contraception and the distribution of any information related to contraception.<sup>341</sup> The constitutional possibilities for privacy protection multiplied in *Griswold* when four opinions offered different articulations of the privacy right that the contraceptive law threatened.<sup>342</sup> Justice Douglas's opinion for the Court was ridiculed as unprincipled and impossible to apply.<sup>343</sup> Still, his emphasis on the "penumbral" aspects of privacy, the zones of privacy that may apply in different contexts and are protected by several of the Constitutional provisions, reflects much of the still-evolving constitutional law of privacy.<sup>344</sup> In addition, Douglas's linkage of the First, Fourth, and Fifth Amendments provides an early sign of connection between the shared values of privacy and free expression.<sup>345</sup>

The constitutional law of privacy and surveillance advanced in 1967, when the Supreme Court held in *Katz v. United States*<sup>346</sup> that the

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338. 381 U.S. 479 (1965).

339. *See id.*

340. *See generally* Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 109-37 (1983) (discussing the Supreme Court's review of constitutional questions by applying values outside those recognized and/or declared constitutional by the Framers).

341. *See Griswold*, 381 U.S. at 485-86 (noting the Connecticut statute violated the "familiar principle"—that the government's means to achieve regulatory objectives cannot be so broad as to improperly infringe on protected rights).

342. *See id.* Justice Douglas, delivering the opinion of the Court, stated the statute violated the right to privacy long afforded to married couples. *Id.* at 486. Justice Goldberg, Chief Justice Warren, and Justice Brennan, concurring, reasoned that the statute should be struck down because the Fourteenth Amendment protects both enumerated and unenumerated fundamental rights. *Id.* at 486-87 (Goldberg, J., concurring). Justice Harlan, concurring in the judgment, reversed the statute because "the enactment violates basic values 'implicit in the concept of ordered liberty . . .'" *Id.* at 500 (Harlan, J., concurring) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice White, also concurring in the judgment, concluded that the statute deprived married couples of their liberty without due process. *Id.* at 502 (White, J., concurring).

343. *See* Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (1976) (writing "Justice Douglas . . . skipped through the Bill of Rights like a cheerleader . . ." and arguing that *Griswold* dealt not with privacy but with the denial of access to information).

344. *See Griswold*, 381 U.S. at 484 (discussing the "zones of privacy" of the First, Third, Fourth, Fifth and Ninth Amendments).

345. *See id.* at 483-85 (noting the Fourth and Fifth Amendment's protection against the state's infringement on one's home and life coincided with the extension of First Amendment protection to association).

346. 389 U.S. 347 (1967).

Fourth Amendment's warrant provision applied to electronic surveillance.<sup>347</sup> The FBI, therefore, violated Katz's rights when its agents listened in on his calls from a public telephone by means of a device attached to the outside of the booth.<sup>348</sup> For the first time, the Supreme Court explicitly ruled that the Fourth Amendment protects people, not places.<sup>349</sup> Katz had a justifiable expectation of privacy with respect to his telephone conversation even though the conversation took place in a public phone booth.<sup>350</sup> The Court thus accepted Brandeis's assertion forty years earlier that surveillance can disrupt one's privacy outside the home.<sup>351</sup>

As articulated by Justice Harlan, concurring in *Katz*, an individual must assert an actual expectation of privacy of the sort that society is willing to recognize as "reasonable."<sup>352</sup> While this standard is far from precise, it reflects a continuing effort by the courts to fashion limits to government surveillance out of respect for individual privacy.<sup>353</sup>

Notwithstanding the Fourth Amendment's advance in *Katz*,<sup>354</sup> the smorgasbord approach to privacy in *Griswold*<sup>355</sup> foreshadowed a fractured and incomplete privacy jurisprudence that has evolved little since 1965.<sup>356</sup> Perhaps the most revealing and comprehensive effort by the Court to define the right of privacy since *Griswold* came in 1977, in *Whalen v. Roe*.<sup>357</sup> In upholding a New York statute that

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347. See *id.* at 353, 359 (removing the necessity of actual physical trespass to find the unwarranted search and seizure unconstitutional).

348. See *id.*

349. See *id.* Compare *id.* at 351 (applying Fourth Amendment protection against unwarranted search and seizure to wire-tapping), with *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (ruling that there is no Fourth Amendment protection afforded to telephone calls).

350. See *Griswold*, 381 U.S. at 351-52 (emphasizing the intention or expectation of privacy rather than the location as the controlling factor for Fourth Amendment protection).

351. See *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting) (focusing on the actual invasion of privacy resulting from a wiretap rather than the actual physical location of the wiretap); see also Warren & Brandeis, *supra* note 293, at 206 (articulating possible privacy invasion and the loss of control over the dissemination of one's personal information from "the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.").

352. See *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (defining the "reasonable" standard as not only a consideration of the expectation of privacy but also the place where that expectation arises).

353. See *id.* (Harlan, J., concurring).

354. See *Katz*, 389 U.S. at 353, 359 (removing a required showing of physical trespass to hold the unwarranted search and seizure unconstitutional).

355. See *supra* note 342 and accompanying text (describing that the four opinions of Chief Justice Warren and Justices Douglas, Goldberg, Brennan, and Harlan differ in analysis but agree in result).

356. See generally Symposium, *The Right to Privacy One Hundred Years Later*, 41 CASE W. RES. L. REV. 643 (1991) (discussing the evolution of privacy rights and the law).

357. 429 U.S. 589 (1977).

required centralized computer records of the names and addresses of patients who were prescribed lawful yet dangerous drugs,<sup>358</sup> the Supreme Court found that security provisions in the statutory scheme showed “proper concern” for privacy protection.<sup>359</sup>

According to the Court, privacy embraces an “individual interest in avoiding disclosure of personal matters”<sup>360</sup> and an “interest in independence in making certain kinds of important decisions.”<sup>361</sup> However, the Court in *Whalen* did not describe freedom from governmental intrusion, but freedom from governmental regulation.<sup>362</sup> As Louis Henkin observed, the post-*Griswold* privacy cases, despite being “swept together into the basket labeled ‘right of privacy,’”<sup>363</sup> are not about “official intrusion into my home, my person, my papers, my telephone; about my right to be free from official surveillance.”<sup>364</sup>

In *Katz*, the Supreme Court acknowledged that the President had claimed special authority for warrantless surveillance in national security investigations.<sup>365</sup> The Court explicitly declined to extend its holding to cases “involving the national security.”<sup>366</sup> In 1968, Congress responded to *Katz* by enacting Title III of the Omnibus Crime Control and Safe Streets Act.<sup>367</sup> Title III established the conditions for judicial authorization of electronic surveillance for the investigation of specified crimes, based in part on findings in each case that traditional surveillance methods were ineffective.<sup>368</sup> Like the Supreme Court in *Katz*, however, Congress explicitly stated that:

[N]othing in Title III shall . . . be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against

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358. *See id.* at 603-04 (finding a statute that mandated the recordation of the prescriptions of potentially addictive drugs, such as opium, cocaine, and methadone to be constitutionally permissible).

359. *See id.* at 594 (“Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation.”) (footnote omitted).

360. *Id.* at 599 (footnote omitted).

361. *Id.* at 599-600 (footnote omitted).

362. *See id.* at 603-04 (focusing on recordation of the prescription of dangerously addictive drugs).

363. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424 (1974).

364. *Id.*

365. *See Katz v. United States*, 389 U.S. 347, 358 (1967) (noting the government requested an exception to normal prior legal authorization for surveillance involving national security issues).

366. *Id.* at 358 n.23.

367. Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522 (1994 & Supp. V 1999)).

368. *See id.*

any other clear and present danger to the structure or existence of the Government.<sup>369</sup>

#### 4. *The Keith decision*

The Supreme Court first confronted the tensions between unmonitored executive surveillance and individual freedoms, in the national security setting, in a 1972 case, *United States v. United States District Court* (hereinafter *Keith*).<sup>370</sup> *Keith* arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property.<sup>371</sup> One defendant was also charged with the dynamite bombing of a CIA office in Ann Arbor, Michigan.<sup>372</sup> Defendants sought electronic surveillance information, held by the prosecution, that the CIA obtained during a potentially illegal wiretap.<sup>373</sup> The defendants wanted to determine whether such information formed any part of the information on which the government relied in the indictment or in the government's case for conviction, and thereby suppress any tainted evidence at trial.<sup>374</sup>

The Attorney General admitted that a warrantless wiretap had intercepted conversations involving the defendants.<sup>375</sup> After an *in camera* review of the surveillance logs and a review of an affidavit, the district court was not persuaded that the surveillance was a reasonable exercise of the President's national security powers.<sup>376</sup> The Court found that this surveillance violated the Fourth

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369. *Id.* § 802.

370. 407 U.S. 297, 299 (1972) (noting that this is the first case in which the Supreme Court addressed issues regarding the President's power to approve electronic surveillance weighed against a citizen's right to privacy).

371. *See id.* (stating that the charge of conspiracy to destroy government property violated 18 U.S.C. § 371); *see also* 18 U.S.C. § 371 (1994) (defining the charge, punishment, and exceptions involved in conspiracy to commit an offense or defraud the United States).

372. *See Keith*, 407 U.S. at 299 (distinguishing conspiracy to destroy government property—the charge against all the defendants—from a dynamite bombing, the charge against Plamondon).

373. *See id.* at 299-300 (noting that the defendants filed a motion to compel evidence obtained by the government through electronic surveillance in the pretrial phase of litigation).

374. *See id.* (adding that the defendants also sought a hearing to determine if the government's information gained through electronic surveillance constituted tainted evidence).

375. *See id.* at 300-01 (examining the Attorney General's affidavit and deposition, which conceded that government agents overheard certain conversations involving defendant Plamondon through the use of wiretaps approved by the Attorney General).

376. *See United States v. Sinclair*, 321 F. Supp. 1074, 1080 (E.D. Mich. 1971) (ordering the government to disclose defendant Plamondon's monitored conversations and ordering a hearing to decide whether such information tainted evidence used in the indictment and to be used at trial).

Amendment, and ordered disclosure of the overheard conversations to defendant Plamondon.<sup>377</sup> On appeal, the Sixth Circuit Court of Appeals affirmed the decision.<sup>378</sup>

Before the Supreme Court, the government defended its actions on the basis of the Constitution and the national security disclaimer in the Crime Control Act.<sup>379</sup> Justice Powell, writing for the Court, rejected the statutory argument.<sup>380</sup> Although Justice Powell conceded that the statutory provision may constitute “an implicit recognition”<sup>381</sup> of the President’s constitutional authority to protect the nation’s security, he concluded the “language is essentially neutral”<sup>382</sup> concerning the President’s electronic surveillance power: “Congress . . . simply did not legislate with respect to national security surveillances.”<sup>383</sup>

The Court first emphasized that it was deciding only the right of the government to engage in warrantless electronic surveillance of a domestic organization with no alleged connection to a foreign government.<sup>384</sup> Justice Powell framed the constitutional inquiry as a

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377. *See id.* at 1079-80 (adopting the holding in *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), which emphasized that the government is not exempt from the Fourth Amendment warrant requirement in domestic national security cases); *see also* U.S. CONST. amend. IV (mandating the right to be secure against unreasonable searches and seizures, and the rule that warrants be issued only upon a showing of probable cause); *see also Smith*, 321 F. Supp. at 425 (clarifying that the President is subject to the restrictions of the Fourth Amendment, regardless of statutory exceptions).

378. *See Keith*, 444 F.2d 651, 669 (6th Cir. 1971) (affirming District Judge Keith’s finding that defendant Plamondon’s telephone conversations were illegally intercepted and therefore, the government’s petition for writ of mandamus was denied).

379. *See Keith*, 407 U.S. at 302-03 (stating that the government relied on section 2511(3) of the Omnibus Crime Control and Safe Streets Act, which emphasizes the President’s inherent constitutional power to protect national security free of any limitations); *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (reiterating that the President may authorize necessary steps void of judicial approval in cases of national security).

380. *See Keith*, 407 U.S. at 303 (concluding that neither the language of section 2511(3) of the Crime Control Act, nor the legislative history of the statute, support the government’s argument that the President’s power to authorize national security surveillance is limitless); *see also* Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (noting the pertinent language: “Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect . . .” against specified dangers).

381. *Keith*, 407 U.S. at 303 (acknowledging that the President has “certain powers” to protect against hostile acts or attacks by foreign powers).

382. *Id.* (explaining that the language’s neutrality does not confer upon the President additional power to unilaterally order or permit electronic surveillance).

383. *Id.* at 306 (acknowledging parts of the Crime Control Act in which Congress explained in detail permissible exceptions and conditions, and concluding that Congress would have exercised similar care in drafting sections related to national security surveillance had it intended to legislate on this issue).

384. *See id.* at 321-22 (clarifying the scope of the decision as only involving domestic threats to national security and refusing to address matters of foreign

determination of the “reasonableness” of the surveillance in light of the Fourth Amendment Warrant Clause.<sup>385</sup> He found that the authority for the surveillance was implicit in the President’s Article II Oath Clause, which includes the power “to protect our Government against those who would subvert or overthrow it by unlawful means.”<sup>386</sup> He further found this power to be sufficient justification for electronic surveillance of would-be subversives.<sup>387</sup> However, the “broader spirit” of the Fourth Amendment, as expressed in *United States v. Katz*,<sup>388</sup> and “the convergence of First and Fourth Amendment values”<sup>389</sup> in national security wiretapping cases, made the Court especially wary of possible abuses of the national security power.<sup>390</sup>

The Court proceeded to balance “the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.”<sup>391</sup> Justice Powell found that waiving the Fourth Amendment probable cause requirement could lead the executive to “yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.”<sup>392</sup> Justice Powell stated that maintaining separation of powers and protecting individual freedoms requires a judicial role in issuing warrants.<sup>393</sup>

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powers or foreign agents).

385. *See id.* at 322-23 (recognizing that different means may not violate the Fourth Amendment if such means are reasonably related to a legitimate government interest and protect citizens’ rights).

386. *Id.* at 310 (citing the President’s fundamental and constitutional duty under Article II, Section 1, to “preserve, protect and defend the Constitution of the United States”); *see also* U.S. CONST. art. II, § 1 (mandating the Presidential Oath: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”).

387. *See Keith*, 407 U.S. at 310 (conceding that the President, through the Attorney General, may find it essential to utilize electronic surveillance regarding the plans of those persons who intend to commit unlawful acts against the United States).

388. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (insisting that a warrant is absolutely necessary under the Fourth Amendment in the surveillance of crimes distinct from those involving national security, and expanding this protection to include speech as well as tangible property and physical items).

389. *Keith*, 407 U.S. at 313 (observing that this connection between the First and Fourth Amendments is unique to national security cases and is generally not at issue in common criminal cases).

390. *See id.* (realizing that although the executive may find a greater need for more in-depth investigative techniques in national security cases, there is also greater risk of infringing on constitutionally protected speech).

391. *See id.* at 314-15 (recognizing that a balance is necessary because the stipulations of the Fourth Amendment are not absolute).

392. *Id.* at 317 (explaining that Fourth Amendment protections are based on a historical review, which indicates that unchecked executive discretion may often infringe on individual freedoms).

393. *See id.* (asserting that the constitutional protections of individual rights will

The government argued for an exception to the warrant requirement, citing the unique characteristics of ongoing national security intelligence gathering, the complexity of the factors involved in such surveillance, and the fear that leaks could endanger sources and methods of intelligence gathering.<sup>394</sup> The Court, however, determined that the potential for abuse of the surveillance power in this context, along with the regular dealings of courts with highly complex matters and their ability to protect sensitive information in an *ex parte* proceeding, weighed against granting the exception.<sup>395</sup> Justice Powell wrote that the inconvenience to the government is “justified in a free society to protect constitutional values.”<sup>396</sup>

Before concluding, Justice Powell emphasized that this case involved only the domestic aspects of national security: “We . . . express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”<sup>397</sup> Finally, the Court left open the possibility that different warrant standards and procedures than those required in a normal criminal investigation might be applicable in a national security investigation.<sup>398</sup> Thus, the Court implicitly invited Congress to promulgate a set of standards for such surveillance.<sup>399</sup>

The Court avoided resolving the tension that pervades the overlap between the collection of *foreign* intelligence information and domestic law enforcement activities, although its opinion preserved the traditional legal distinctions between intelligence gathering and law enforcement. The Court similarly acknowledged the existence of

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best be preserved through a division of powers among the governmental branches, including the judiciary); see also John M. Harlan, *Thoughts on a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 943-44 (1963) (commenting that the founders were wary of centralized authority and thus, formed a governmental structure based on the separation of executive, judicial, and legislative powers).

394. See *Keith*, 407 U.S. at 318-19 (admitting that the government’s arguments are legitimate and require the most vigilant consideration because they involve both the President’s authority and the nation’s security).

395. See *id.* at 319-20 (specifying the risk of infringing on protected speech and noting that federal judges will understand the differences in national security cases and common criminal cases, and continue to handle sensitive information with the conscientious abilities they exercise in all proceedings).

396. *Id.* at 321 (recognizing that although it is justified to require a warrant for electronic surveillance, the Attorney General may face additional burdens in obtaining a warrant prior to surveillance).

397. *Id.* at 321-22 (limiting the scope of the decision to domestic matters of national security).

398. See *id.* at 322 (recognizing that national security surveillance can be more long term, involve more sources, require more types of information, present more difficulties in identifying exact targets of surveillance, focus more on prevention or preparedness, and generally lack the precision of ordinary criminal cases).

399. See *id.* (encouraging Congress to consider establishing different standards for ordinary criminal surveillance and national security surveillance).

presidential authority to authorize national security surveillance, but did not spell out the scope or limits of such power.<sup>400</sup>

5. *Case law after Keith—electronic surveillance*

Many constitutional issues concerning warrantless wiretapping remain unsettled, although statutory and regulatory developments since *Keith* have muted the debate. *Keith* sharpens the issues but does not resolve them.<sup>401</sup> For example, the Court's analysis leaves unresolved the proper approach to the warrant question when the origins of the threat cannot be determined in advance. Indeed, finding out whether a domestic organization has any significant connection with a foreign power is often a primary objective of surveillance.

Although undecided by the Supreme Court in *Keith*, several lower courts have addressed the important question of surveillance of foreign sources. In *United States v. Brown*,<sup>402</sup> the Fifth Circuit upheld the legality of surveillance when the defendant, an American citizen, was incidentally overheard as a result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes.<sup>403</sup> The Court found that, on the basis of "the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."<sup>404</sup> Similarly, in *United States v. Butenko*,<sup>405</sup> the Third Circuit upheld electronic surveillance conducted without a warrant after finding that the primary purpose of the surveillance was to

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400. *See id.* at 323-24 (stating that the Court's opinion does not establish precise guidelines for domestic national security warrants, but does establish the necessity of prior judicial approval for domestic security surveillance such as wiretaps).

401. *See id.* at 321-24 (clarifying the requirement of judicial approval of warrants for domestic national security surveillance, yet failing to clarify policies for foreign national security surveillance or specify procedures for domestic warrants).

402. 484 F.2d 418 (5th Cir. 1973).

403. *See id.* at 427 (citing the reasoning of *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), in holding that the information obtained by a wiretap regarding the defendant's conversation had no relevance to the crime at issue in the case); *see also Clay*, 430 F.2d at 170 (holding that when surveillance is authorized regarding persons other than the defendant, for the purpose of gathering foreign intelligence, the executive branch has acted reasonably and legally).

404. *Brown*, 484 F.2d at 426 (reaffirming the holding of *Clay*); *see also Clay*, 430 F.2d at 170 (allowing wiretaps in order to obtain foreign intelligence); *Zweibon v. Mitchell*, 363 F. Supp. 936, 943-44 (D.D.C. 1973) (holding that the President can act through the Attorney General to constitutionally obtain intelligence relating to foreign affairs and national security matters).

405. 494 F.2d 593 (3d Cir. 1974) (en banc).

obtain foreign intelligence information.<sup>406</sup>

In *Zweibon v. Mitchell*,<sup>407</sup> the D.C. Circuit insisted that a warrant be obtained before a wiretap can be installed on a domestic organization that has no arguable connection with a foreign power.<sup>408</sup> The Court also questioned whether any national security exception to the warrant requirement would be constitutionally permissible.<sup>409</sup> The Court considered and rejected all the government arguments for judicial deference addressed by the Supreme Court in *Keith*.<sup>410</sup> It also dismissed the following arguments: (1) the standard of probable cause might be more difficult to meet in a prior judicial proceeding;<sup>411</sup> (2) a judge's error before surveillance occurs would more likely harm the national security than an error in post-surveillance proceedings;<sup>412</sup> and (3) pre-surveillance review could deny the government the benefits it would gain from the fact that most individuals would not challenge surveillance after-the-fact "on the mere possibility that they were the subject of an unreasonable wiretap."<sup>413</sup>

The plurality similarly rejected the fear of leaks as a rationale to avoid warrant proceedings.<sup>414</sup> The Court applied the *Keith* Court's assessment that the *ex parte* warrant proceeding before a judge, whom the government may select on the basis of a reputation for discretion and loyalty, poses little security risk.<sup>415</sup> In addition, the Court

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406. *See id.* at 606.

407. 516 F.2d 594 (D.C. Cir. 1975).

408. *See id.* at 614 (limiting the holding to only require a warrant for wiretaps used to monitor domestic organizations with no ties to a foreign power and failing to address electronic surveillance on a broader level).

409. *See id.* at 654 (concluding that any activity could be said to relate to national security matters involving foreign affairs and, therefore, such a broad exception to the warrant rule would potentially endanger individual rights against warrantless searches and seizures).

410. *See id.* at 624 (emphasizing that the judiciary, as a body of neutral officials, is the appropriate branch to oversee and, when necessary, limit the power of the executive branch to authorize and conduct electronic surveillance).

411. *See id.* at 645 (concluding that as a matter of law, the standard for probable cause is the same as a prior or post hoc judicial proceeding and suggesting that judges are likely to give great deference to the executive branch regarding the necessity of a wiretap due to the national security interest at stake); *see also* Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 984 (1974) [hereinafter *Foreign Security Surveillance*] (suggesting that judicial errors in warrant proceedings would likely favor the government, not the individual, as judicial officers will recognize their own lack of knowledge on national security matters and defer to the executive branch).

412. *See Zweibon*, 516 F.2d at 646 (deciding that the prevention of erroneous denials of intelligence information is not more important than erroneous invasions of personal privacy resulting from a lack of pre-surveillance judicial review).

413. *Id.* at 646-47 (emphasizing that even if individuals fail to dispute wiretaps post-surveillance, all searches and seizures remain subject to judicial review).

414. *See id.* at 647.

415. *See id.* at 647-48 (refuting the government's argument regarding security

reasoned that the risk of leaks are no greater in after-the-fact review, unless a leak were to thwart the tap itself.<sup>416</sup> The judge is only required to find probable cause before authorizing surveillance, thus, the government will ordinarily be able to avoid disclosing most of its data.<sup>417</sup>

In *Zweibon*, the Court dismissed the argument that internal security information is “strategic” and thus unlike the information obtained for use in a criminal prosecution.<sup>418</sup> The Court stated that national security information often *is* used in the criminal context.<sup>419</sup> The Court also noted that warrantless surveillance risks imposing a burden on constitutionally protected speech and privacy “whether its purpose be criminal investigation or ongoing intelligence gathering.”<sup>420</sup>

As for the concern about risking the loss of essential intelligence information by delay, the Court reiterated that exigent circumstances may justify departures from prior judicial approval if irreparable harm may ensue from the warrant requirement.<sup>421</sup> Again, the availability of such an exception turns on the exigency, not the origin of the threat.<sup>422</sup> The Court recognized the Fourth Amendment principle that “[a]bsent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional.”<sup>423</sup> A similar recognition occurred in *Berlin*

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leaks by noting that warrant proceedings are conducted *ex parte*, and therefore, information can be restricted to judges “whose loyalty and discretion [the government] considers unimpeachable”); *see also Keith*, 407 U.S. 297, 321 (1972) (emphasizing an enhanced judicial responsibility in cases of espionage, sabotage, and treason involving both domestic and foreign security matters).

416. *See Zweibon*, 516 F.2d at 648 (noting that it is only a “possibility” and not a likelihood that judicial review would ruin the wiretap and further noting that this risk would still exist during post hoc review due to continuing surveillance or similar surveillance situations as those under review).

417. *See id.* (raising the possibility that the government could withhold the name or other facts which would identify an agent or information, thereby protecting valuable data).

418. *See id.* at 648.

419. *See id.* (noting that incriminating evidence used in criminal proceedings is often discovered through the use of electronic surveillance and often asserted by the executive branch in criminal cases).

420. *Id.* at 649 (quoting *Keith*, 407 U.S. at 320).

421. *See id.* at 649-50 (extending the rule regarding exigent circumstances and warrantless searches to cover electronic surveillance).

422. *See id.*

423. *Id.* at 614 (recognizing this policy but limiting the holding to only require warrants before wiretaps are installed to monitor domestic organizations that have no relation to foreign powers and failing to establish any further standards for issuing such warrants); *see also* S. REP. NO. 95-604, at 14, 15 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3914 (stating that *Zwiebon* “involves only the domestic aspects of national security”).

*Democratic Club v. Rumsfeld*,<sup>424</sup> where a warrant was required to wiretap Americans living in West Germany despite Department of Defense arguments about dangers to United States forces and to American foreign policy.<sup>425</sup>

Thus, the *Zweibon* and *Berlin Democratic Club* results favor the use of a warrant and discourage the application of the national security exception.<sup>426</sup> The *Brown* and *Butenko* cases accepted the exception to the warrant requirement, where the facts clearly indicate the need for foreign intelligence.<sup>427</sup> On balance, the result in *Keith* and the application of the *Keith* reasoning in *Zweibon* suggest that, in the absence of a known direction by a foreign power, the Constitution requires some form of judicial approval before engaging in electronic surveillance of domestic organizations.<sup>428</sup>

Although “exigent circumstances,” mentioned in *Zweibon*, could affect the need for a warrant, the likely exigency—an imminent internal security threat—does not require the foreign versus domestic threat distinction.<sup>429</sup> In addition, the domestic organizations’ activities’ connection to U.S. foreign policy interests in *Zweibon* and *Berlin Democratic Club* suggest careful nuances that the Court must address in sorting out the origin of the internal security threat.<sup>430</sup> The proper balance between the First and Fourth Amendment rights of

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424. 410 F. Supp. 144 (D.D.C. 1976).

425. See *id.* at 157-59 (supporting the decision to require a warrant because the American citizens living in Berlin had no involvement with a foreign power).

426. See *Zweibon*, 516 F.2d at 673 (holding the warrantless electronic surveillance conducted in this case to be illegal and unconstitutional); see also *Berlin Democratic Club*, 410 F. Supp. at 157-59, 164 (holding for plaintiffs because the government conducted warrantless electronic surveillance of American citizens living abroad with no links to a foreign power).

427. See *United States v. Brown*, 484 F.2d 418, 427 (5th Cir. 1973) (holding that a warrant was not required because the information disclosed by electronic surveillance was irrelevant to the crime in question); see also *United States v. Butenko*, 494 F.2d 593, 608 (3d Cir. 1974) (affirming the district court’s judgment, which denied disclosure of government information obtained by electronic surveillance).

428. See *Keith*, 407 U.S. 297, 323-24 (1972) (holding that judicial approval is required prior to electronic surveillance in domestic national security situations); see also *Zweibon*, 516 F.2d at 612-13 (relying on the reasoning employed in *Keith*, which concluded that no exceptions exist to the requirement of prior judicial approval in domestic national security matters).

429. See *Zweibon*, 516 F.2d at 649-50 (explaining that exigent circumstances, under which delay would cause irreparable harm, can justify a warrantless use of electronic surveillance regardless of whether it is a domestic or foreign national security matter).

430. See *id.* at 605-07 (noting that plaintiffs were members of the Jewish Defense League (JDL) and that the government conducted electronic surveillance of the group’s U.S. headquarters based on the belief that the JDL’s activities threatened peaceful relations between the United States and the Soviet Union); see also *Berlin Democratic Club*, 410 F. Supp. at 147-48 (stating that plaintiffs, who were electronically monitored by the United States government, were American citizens and members of the Berlin Democratic Club living in Berlin, Germany).

the individual and the government's interest in surveillance to protect the national security is still invariably resolved in the first instance by the FBI, on the basis of fact-sensitive inquiries, without clear judicial criteria for deciding when a prior judicial warrant is required.

6. *Case law after Keith—physical searches*<sup>431</sup>

Before 1966, the FBI conducted over two hundred warrantless surreptitious entries for intelligence purposes, in addition to microphone installation, such as physically searching and photographing or seizing documents.<sup>432</sup> Although the Attorney General apparently was not informed, the FBI Director or his deputy authorized these operations in writing.<sup>433</sup> Most records of surreptitious entries were destroyed soon after a completed entry.<sup>434</sup> The use of warrantless searches against domestic targets declined radically after J. Edgar Hoover banned such "black bag jobs" in 1966.<sup>435</sup>

The Supreme Court has not recognized a national security

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431. Like many legal issues of national security, the authority of the executive to carry out warrantless physical searches is, in part, dependent upon congressional power (whether or not exercised) over the same subject, and upon the limits imposed by the Bill of Rights. *See* U.S. CONST. amend. IV (mandating the right to be secure against unreasonable searches and seizures, and the rule that warrants be issued only upon a showing of probable cause). Part II.F.2 of this Article will assess the 1994 amendments to the Foreign Intelligence Surveillance Act (FISA), in which Congress legislated an exemption from traditional Fourth Amendment requirements and provided authority to employ substitute procedures in carrying out some physical searches for national security purposes. *See* Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3443 (codified as amended in 50 U.S.C. §§ 1821-1829 (1994)). Although this statutory authority affects the constitutional calculus of national security searches, Article II and Bill of Rights issues remain. It is possible, for example, that Congress may have violated the First or Fourth Amendments in extending statutory authority for certain types of warrantless searches. Similarly, neither pre- nor post-FISA congressional authority is necessarily determinative of the President's power to act on the basis of his independent Article II authority. *See* U.S. CONST. art. II, § 1 (stating the Presidential Oath). As a practical matter, the enactment and amendment of FISA may have diminished the practical importance of the purely constitutional scope and limits questions. Nonetheless, because the constitutionality of the FISA procedures for physical searches has not been settled, and because constitutional authority and its limits provide the backdrop for the consideration of FISA's constitutionality, it remains essential to understand the constitutional issues.

432. *See* 3 CHURCH COMMITTEE, *supra* note 186, at 355 (citing a staff report entitled "Warrantless Surreptitious Entries: FBI 'Black Bag' Break-Ins and Microphone Installations," which questions the legality of warrantless surreptitious entries).

433. *See id.* (noting that several Attorneys General knew that the FBI conducted break-ins to install microphones; however, there is not evidence suggesting that these Attorneys General knew that the FBI conducted break-ins for purposes other than installing microphones).

434. *See id.* (specifying the practice of destroying records of surreptitious entries as the "Do Not File" procedure).

435. *See id.*

exception to the warrant clause for physical searches. Nor has it decided a physical search case akin to *Keith*, where it could begin to sort the law of national security searches on the basis of the origins of the surveillance target. In 1960, the Supreme Court considered the possibility of a national security exception to the warrant requirements for a search in *Abel v. United States*.<sup>436</sup> In an opinion upholding the espionage conviction of a KGB agent, based in part on a warrantless search incident to a valid deportation arrest, the Court rejected the notion that national security justified an exception to Fourth Amendment requirements.<sup>437</sup>

The Government has argued only twice for an exception to the warrant clause in support of an internal security physical search.<sup>438</sup> First, in *United States v. Ehrlichman*,<sup>439</sup> Nixon assistants John Ehrlichman and Charles Colson were among five defendants accused of conspiring to deprive Los Angeles psychiatrist, Dr. Lewis Fielding, of his Fourth Amendment rights through a surreptitious entry and physical search of his office.<sup>440</sup> During the summer of 1971, following the publication of the Pentagon Papers,<sup>441</sup> a decision was made to establish a unit within the White House to investigate leaks of classified information.<sup>442</sup> This "Room 16" unit was composed of Earl Krogh, David Young, G. Gordon Liddy, E. Howard Hunt, and operated under the general supervision of John Ehrlichman.<sup>443</sup> The unit was instructed to obtain information on Daniel Ellsberg, who was under indictment for disclosing the Pentagon Papers.<sup>444</sup> After Dr. Fielding refused to be interviewed by FBI agents about his former patient, the unit decided to obtain copies of Ellsberg's medical

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436. 362 U.S. 217 (1960) (holding that items seized without a warrant to be constitutionally admissible).

437. *See id.* at 219 ("Of course . . . the fact that [the case] was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence."). Agents found the evidence of espionage in a hollow pencil in a trash basket after Abel had paid his bill and left his hotel room. *Id.* at 225. The Court ruled that Abel had no reasonable expectation of privacy in the room or the pencil after he had left them in the room. *Id.* at 241.

438. *See* cases cited *infra* notes 439-71.

439. 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976).

440. *See Ehrlichman*, 546 F.2d at 913 (discussing the charges against Ehrlichman and the procedural posture of the case).

441. A case study of the Pentagon Papers litigation is presented in DYCUS, *supra* note 251, at 811-42; *see also* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (explaining the factual background of the Pentagon Papers case).

442. *See Ehrlichman*, 546 F.2d at 914 (describing the origin and activities of the "special investigations" unit).

443. *See United States v. Barker*, 546 F.2d 940, 943 (D.C. Cir. 1976).

444. *See id.* (describing in detail the operations of the "special investigations unit" of the White House).

records by covert operation.<sup>445</sup> Hunt had enlisted Watergate foot soldier Bernard Barker, who in turn recruited Eugenio Martinez and Felipe deDiego.<sup>446</sup>

On September 2, 1971, Hunt and Liddy met Barker, Martinez, and deDiego at a hotel in Beverly Hills.<sup>447</sup> Hunt instructed the team “to enter an office, search for a particular file, photograph it, and replace it.”<sup>448</sup> The next evening, the burglars entered Dr. Fielding’s office and, contrary to their plan, used force to effect the break-in.<sup>449</sup> As instructed, they spilled pills on the floor to make it appear that the break-in had been a search for drugs.<sup>450</sup> No Ellsberg file was found.<sup>451</sup>

Ruling on the defendants’ discovery motions, District Court Judge Gesell found the warrantless search “clearly illegal under the unambiguous mandate of the Fourth Amendment.”<sup>452</sup> The defendants claimed none of the traditional exceptions to the warrant requirement, nor was there any argument that the break-in had to be carried out before a warrant was sought.<sup>453</sup> In response to the defendants’ principal assertion that the President may suspend Fourth Amendment requirements when exercising his “special responsibilities” concerning national security, Judge Gesell maintained that Fourth Amendment rules apply “even when known foreign agents are involved . . . except under the most exigent circumstances.”<sup>454</sup> According to Judge Gesell, if there is an exception to Fourth Amendment rules for intelligence collection, the exception is limited to wiretapping, “a relatively nonintrusive search.”<sup>455</sup> To expand this exception to physical searches “would give the Executive a blank check to disregard the very heart and core of the Fourth Amendment.”<sup>456</sup>

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445. *See id.* at 943.

446. *See id.* (describing how members of the special investigations unit were recruited).

447. *See id.*

448. *Id.* at 944

449. *See id.* at 944.

450. *See id.*

451. *See id.*; *see also* Martin Arnold, *Ellsberg Lawyers Weigh New Motion for Dismissal*, N.Y. TIMES, Apr. 30, 1973, at A1 (reporting on the eve of district court proceedings that “the judge will be presented with an affidavit tomorrow confirming that the psychiatrist’s office was in fact broken into; that his file cabinets were forced open, including the one containing Dr. Ellsberg’s records; that the files were scattered about the office . . . . None of Dr. Ellsberg’s records were missing, so it is assumed that the burglars copied or photographed them.”).

452. *United States v. Ehrlichman*, 376 F. Supp. 29, 33 (D.D.C. 1974).

453. *See id.* at 33-35.

454. *Id.* at 33.

455. *Id.* (discussing the differences between wiretapping and physical searches).

456. *Id.* at 34 (discussing why exceptions to the warrant requirement should not be expanded).

Judge Gesell also concluded that the President had not authorized the break-in.<sup>457</sup> The defendants made a fall-back argument that, whether or not the President specifically authorized the break-in, such authority was delegated to the defendants.<sup>458</sup> Judge Gesell responded that even if the President had the authority to authorize such an act, he could not have delegated it to any of the defendants, as they were not law enforcement officers and their claims for delegated authority were based on “vague, informal, inexact terms.”<sup>459</sup> The defendants were convicted following a jury trial.<sup>460</sup>

The D.C. Circuit affirmed Ehrlichman’s conviction.<sup>461</sup> The panel, however, was more circumspect than Judge Gesell. The court merely held that no “national security” exception to the warrant requirement could be invoked without specific authorization by the “President or Attorney General in a particular case.”<sup>462</sup> Judge Wilkey elaborated:

The danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out “national security” information is patent, and is indeed illustrated by the intrusion undertaken in this case, without any more specific Presidential direction than that ascribed to Henry II vexed with Becket. As a constitutional matter, if Presidential approval is to replace judicial approval for foreign intelligence gathering, the personal authorization of the President—or his alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President’s prerogative.<sup>463</sup>

In a split and internally inconsistent decision, the same panel reversed the convictions of burglars Barker and Martinez.<sup>464</sup>

Because of the controversy surrounding it, the *Ehrlichman* precedent is hardly one on which the government would rely today in making an argument for a national security exception for a warrantless search. There was no accusation that Ellsberg or his psychiatrist had any relationship to a foreign power.<sup>465</sup> John N.

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457. *See id.* (stating that the President both “lacked the authority to authorize” the break-in and did not give any directive to allow such break-ins generally).

458. *See id.* at 34 (holding the President had no authority to delegate approval of national security break-ins).

459. *Id.*

460. *See* *United States v. Ehrlichman*, 546 F.2d 910, 913 (D.C. Cir. 1976).

461. *See id.* at 914 (upholding the conviction on all counts).

462. *Id.* at 925 (discussing why executive authorization was needed for a “national security exception”).

463. *Id.* at 926.

464. *See* *United States v. Barker*, 546 F.2d 940, 954 (D.C. Cir. 1976) (containing divergent majority, concurring, and dissenting opinions).

465. *See generally Ehrlichman*, 546 F.2d at 940 (describing the factual background of

Mitchell, the Attorney General at the time of the Fielding break-in, subsequently was sent to prison for perjury and conspiracy in connection with efforts to cover up the burglary of the Democratic National Committee headquarters at the Watergate in Washington.<sup>466</sup> President Richard M. Nixon was named an unindicted co-conspirator in the same affair.<sup>467</sup> At the Watergate hearings, when Ehrlichman defended the warrantless Fielding break-in as the right of the President to exercise his national security powers, Senator Talmadge asked, "Isn't there an ancient sacred principle we all learned in law school about a man's home being his castle?"<sup>468</sup> Ehrlichman arrogantly replied, "Well Senator, I believe that principle has eroded in America recently."<sup>469</sup> Talmadge erupted, "Not where I come from, Mr. Ehrlichman."<sup>470</sup>

The second judicial review of warrantless physical searches carried out for national security purposes arose out of the investigation, and eventual criminal conviction, of Ronald Humphrey and Truong Dinh Hung.<sup>471</sup> Humphrey and Dinh Hung were convicted of several espionage-related offenses for transmitting classified U.S. government information to representatives of the government of North Vietnam.<sup>472</sup>

In 1976, after living in the United States for more than a decade, Vietnamese citizen David Truong met Dung Krall, a Vietnamese-American wife of an American Naval Officer who had many contacts among Vietnamese living in Paris.<sup>473</sup> Truong persuaded Krall to carry packages for him to the Vietnamese in Paris at the time of the 1977 Paris negotiations between North Vietnam and the United States.<sup>474</sup> The packages contained copies of U.S. diplomatic cables and other classified papers dealing with Southeast Asia.<sup>475</sup> Truong obtained the materials from Ronald Humphrey, an employee of the United States Information Agency, who

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Ehrlichman and his psychiatrist and their relation to the Pentagon Papers).

466. See *United States v. Haldeman*, 559 F.2d 31, 51 (D.C. Cir. 1976) (describing the fate of the various participants in the Watergate scandal).

467. See *id.* (listing eighteen individuals as coconspirators).

468. *Physical Searches for Foreign Intelligence Purposes, Hearing Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence*, 101st Cong. 15 (1990) [hereinafter *Hearing on Physical Searches*] (statement of Professor Samuel Dash).

469. *Id.* (statement of John Ehrlichman).

470. *Id.* (statement of Senator Talmadge).

471. See *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), *aff'd sub nom. United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

472. See *Truong Dinh Hung*, 629 F.2d at 911 (upholding Humphrey's and Truong's convictions).

473. See *id.*

474. See *id.*

475. See *id.*

surreptitiously copied, removed classification markings, and delivered the stolen materials to Truong.<sup>476</sup> Humphrey later stated that his motive was to improve United States/North Vietnam relations so that he could be reunited with a woman imprisoned by the North Vietnamese government.<sup>477</sup>

Krall, however, was a CIA and FBI informant.<sup>478</sup> After the intelligence agencies first learned from Krall that Truong was transmitting classified documents to Paris, President Carter and Attorney General Bell authorized warrantless physical searches of the packages.<sup>479</sup> After presenting the packages Truong had given her to the FBI for inspection, copying and approval, Krall was permitted to carry the documents to Paris.<sup>480</sup> During this time the FBI monitored Truong and Humphrey closely, from approximately September, 1976, until January 31, 1978.<sup>481</sup>

The package searches led to the secret installation of closed-circuit television equipment in Humphrey's government office, the placement of a wiretap on Truong's telephone, and a microphone bugging device in Truong's apartment.<sup>482</sup> Truong's phone was tapped and his apartment was bugged from May 1977 to January 1978.<sup>483</sup> The telephone interception continued for 268 days; nearly every conversation was monitored and virtually all were taped.<sup>484</sup> The eavesdropping device was operative for approximately 255 days and it ran continuously.<sup>485</sup> The FBI never sought or obtained court authorization for the installation and maintenance of the telephone tap or the bug.<sup>486</sup>

After their indictment, Truong and Humphrey moved to suppress the evidence obtained by the government without a warrant.<sup>487</sup> Following the rationale of the decisions in *Brown*<sup>488</sup> and *Butenko*,<sup>489</sup> the District Court determined that because the surveillance was "for the

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476. See *id.* at 911-12.

477. See *id.* at 911.

478. See *id.* at 912.

479. See *id.* at 911 (discussing the need for executive authorization for warrantless searches).

480. See *id.* (describing the extensive surveillance procedures used by the FBI and CIA).

481. See *id.* at 912 (same).

482. See *id.* at 912-16 (same).

483. See *id.* at 912 (same).

484. See *id.*

485. See *id.*

486. See *id.* at 912 (asserting that the FBI surveillance was secret and lacked outside authorization).

487. See *id.* at 911 (setting forth the defendants' multiple grounds for their motion to suppress).

488. 484 F.2d 418 (5th Cir. 1973).

489. 494 F.2d 593 (3d Cir. 1974).

primary, or even sole, purpose of foreign intelligence gathering,”<sup>490</sup> a foreign intelligence exception to the warrant requirement applied.<sup>491</sup> On the basis of this standard, the Court upheld most of the electronic surveillance, but agreed to suppress a portion that had been collected after the investigation shifted its focus from intelligence gathering to criminal prosecution.<sup>492</sup>

The Court independently considered the constitutionality of the searches of packages Truong sent to Paris with Krall.<sup>493</sup> A letter and package searched with executive authorization but without a warrant before the date at which the surveillance became, in the Court’s view, criminal in nature, were treated as governed by the foreign intelligence warrant exception.<sup>494</sup> According to the court, another package, which was searched without executive authorization or a warrant, was not covered by the foreign intelligence exception to the warrant requirement, but was nonetheless constitutional because Truong had no reasonable expectation of privacy in the package.<sup>495</sup>

In sustaining the bulk of the surveillance, the Fourth Circuit agreed “that the Executive Branch need not always obtain a warrant for foreign intelligence surveillance”<sup>496</sup> where its primary purpose is to gather foreign intelligence:

We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.<sup>497</sup>

The *Truong* investigation concerned surveillance for a clear foreign intelligence purpose, which the Court said enabled it to reconcile its decision with *Keith*.<sup>498</sup> The Court apparently considered the physical

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490. *United States v. Humphrey*, 456 F. Supp. 51, 58 (E.D. Va. 1978) (discussing the requirements for a “foreign intelligence” warrant exception to apply).

491. *See id.* at 57-58.

492. *See id.* at 58-59 (describing the point in time at which the focus of the surveillance shifted from foreign intelligence gathering).

493. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 916-17 (4th Cir. 1980) (discussing the packages searched without executive authorization).

494. *See id.* (asserting that the subject package search was for intelligence gathering purposes only).

495. *See id.* (asserting that Truong had not made a diligent effort to conceal the contents of the package).

496. *Id.* at 913 (employing the analytical approach the Supreme Court formulated in *Keith*).

497. *Id.* at 915 (rejecting the government’s assertion that the executive may ignore the warrant requirement if surveillance is directed at gathering foreign intelligence).

498. *See id.* (noting that because there was ample evidence showing collaboration on the part of Truong, the surveillance satisfied the foreign intelligence exception to

searches analytically indistinct from the electronic surveillance in the case because it concluded that all of the surveillances that occurred before the investigation became primarily prosecutive in nature and were lawful.<sup>499</sup> The court did not attach any significance to the fact that the searches in question were of packages and personal property rather than searches of the person or residence.<sup>500</sup>

In its assessment and eventual approval of the warrantless surveillance, the Fourth Circuit reasoned that:

[A]ttempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. . . . Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. . . . Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance. . . .<sup>501</sup>

The reasons the *Truong* Court provided for allowing warrantless surveillance were thus as applicable to physical searches as to electronic surveillance.

The Court, however, sought to limit warrantless surveillance to situations in which the executive interests are “paramount,”<sup>502</sup> and where the surveillance is conducted “primarily” for foreign intelligence purposes.<sup>503</sup> The Court indicated that it found the “primary purpose” test an effective compromise between the

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the warrant requirement).

499. *See id.* at 916-17 (analyzing the reasonableness of the electronic surveillance and the package search).

500. *See id.* (concluding that package searches were lawful because *Truong* had no reasonable expectation of privacy).

501. *Id.* at 913-14 (citations omitted).

502. *Id.* at 915 (defining “paramount” to include only those instances where the target of the surveillance is a foreign power or an agent of a foreign power).

503. *See id.* (adopting the lower court’s test).

government's assertion that any foreign intelligence connection ought to exempt surveillance from the warrant clause, and the defendants' claim that surveillance should be free from the warrant only when the surveillance is conducted "solely" for foreign intelligence purposes.<sup>504</sup> Balancing the privacy interests of the target and the prerogatives of the executive in foreign intelligence matters, the court was unwilling to impose the "solely" test "because almost all foreign intelligence investigations are in part criminal investigations."<sup>505</sup> Thus, agreeing with the district court that July 20, 1977, represented the date that the Criminal Division of the Justice Department took a "central role" in the investigation, the surveillance before that date was properly exempted from the warrant requirement.<sup>506</sup>

#### 7. *A summary of the evolving judicial role*

The *Keith* Court's objection to the wiretap as a species of "search" was influenced by the "convergence of First and Fourth Amendment values"<sup>507</sup> and the evolving societal expectations of privacy.<sup>508</sup> Fitting

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504. *See id.* at 915-16 (rejecting the "solely" test because it would require the executive to obtain a warrant for almost all foreign intelligence surveillance).

505. *Id.* at 915.

506. *See id.* at 916. FISA was enacted in 1978 to provide a special procedure for conducting electronic surveillance in national security settings. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1863 (1994 & Supp. IV 1998)); *see also* Act of Dec. 3, 1999, Pub. L. No. 106-120, 113 Stat. 1606 (to be codified at 50 U.S.C.) (adding further amendments to FISA). Before it was amended in 1994 to extend physical search authority, Congress' failure to prohibit or regulate warrantless searches may have constituted acquiescence in presidential authority in the area. Thus, FISA may have "invite[d] . . . measures on independent presidential responsibility." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)). While congressional acquiescence may enable the development of customary law, the requirements for the creation of custom are stringent; there must be a long-standing, knowing, and unbroken chain of acquiescence by Congress to the executive practice. *See* Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848-56 (1994) (analyzing the role of custom and congressional acquiescence in the evolution of national security law). Warrantless physical searches for intelligence purposes likely will fail to meet the requirements for customary law. First, the history of their use is, like much intelligence gathering, murky and not widely known or even acknowledged to Congress or to the people. *See* Brown & Cinquegrana, *supra* note 28, at 106-07 n.46 (noting the power of the President to issue warrantless searches without congressional authorization or knowledge). Second, the two judicial decisions reviewed above are the only pre-FISA cases where the government expressly sought to legitimate warrantless physical searches for intelligence purposes. Third, the judiciary upheld the warrantless search in only one case, and then only incident to the authority to conduct warrantless electronic surveillance. *See* *Truong Dinh Hung*, 629 F.2d at 916. If any residual customary authority had been created over time, it was curtailed by the 1994 amendments to FISA. *See* Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3443 (codified as amended at 50 U.S.C.).

507. *Keith*, 407 U.S. 297, 313 (1972).

18th century concepts of search and seizure into the realities of modern society required the Court's examination of the "broader spirit" of the Fourth Amendment, although the telephonic expression obviously implicated First Amendment freedoms.<sup>509</sup> This combination of privacy and expressive freedom—protecting freedom of expression through electronic media—may be critical to sheltering the most intimate and important thoughts and feelings of citizens. In our society, it is often argued that uninhibited expression is the core freedom, that which makes our other rights meaningful and enables a participatory democracy to function.<sup>510</sup>

The internal security law that emerges from *Keith* and the subsequent decisions of lower courts also reflects the importance of knowing the origins of the threats to national security. Unlike executive branch claims of unilateral authority to act for the nation when the threat is urgent,<sup>511</sup> the reason to depart from traditional law enforcement procedures to conduct internal security surveillance derives from the perceived existence of a foreign-based threat. Thus, suppose that individuals were planning to blow up CIA offices in various locations around the United States. If an informant provided this tip to the FBI less than a day before the bombings were supposed to occur, should the FBI be required to obtain a warrant before eavesdropping on a suspect's phone conversations to learn the where and when of the attacks? If time is of the essence, the warrant requirement could interfere with the surveillance objective. The successful bombings could result in loss of life, injuries, and property damage. Yet, it is not so much national security as the immediate danger that leads to legitimating the warrantless surveillance in this hypothetical instance.

If the basis of the Government's efforts to avoid law enforcement mechanisms is the foreign origin of the domestic security threat, rather than the urgency of the situation, the calculus for determining Fourth Amendment "reasonableness" may change.<sup>512</sup> The foreign

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508. See *id.* at 317 (stating the fear that unreviewed executive discretion could overlook potential invasions of privacy and protected speech).

509. See *id.* at 313 (noting that the Fourth Amendment also protects speech from unreasonable surveillance).

510. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970) (discussing the system of freedom of expression in a democratic society).

511. See *supra* Part II.D.3 (discussing Title III of the Omnibus Crime Control and Safe Streets Acts giving the President unlimited discretion to protect the United States against any "clear and present danger").

512. See 68 AM. JUR. 2D *Searches & Seizures* § 10 (2000) (observing that in evaluating the reasonableness and scope of the Fourth Amendment, the Supreme Court looks to the traditional protections afforded by the common law at the time of the framing of the Constitution and Bill of Rights).

threat justification assumes that the foreign origin of the threat may be determined in advance of the surveillance. In addition, by the time of *Keith*, legal analyses increasingly had begun to suggest that more precise distinctions may be required between surveillance of groups that are controlled from afar, and those with domestic operatives whose foreign connections are concealed.<sup>513</sup>

In light of the potentially greater intrusiveness of electronic surveillance, it may be reasonable to expect greater executive discretion to conduct warrantless searches than warrantless wiretaps. According to the courts, however, the logical difference has not created a legal distinction. In fact, the judges who have compared the two forms of surveillance have continued to embrace the historical regard for the sanctity of the home and the related experience of governmental intrusions in England and in the colonies, and have not acknowledged that electronic surveillance may be the more pernicious form.<sup>514</sup> It has been maintained that “[t]he loosening of Fourth Amendment standards for purposes of electronic surveillance should not in any way affect the clear and unambiguous standards well in place for physical searches and seizures.”<sup>515</sup> Similarly, Judge Leventhal argued that “the safeguard against [the] chief evil is not to be whittled away on abstract grounds of symmetry.”<sup>516</sup> Although symmetry is hardly a compelling reason to give similar legal status to potentially different activities, it is not merely the degree of the intrusion that should be the measure for applying the warrant clause.<sup>517</sup> Judge Leventhal also noted that while long-term, continuous electronic surveillance for foreign intelligence gathering might not be amenable to a judicial warrant requirement, physical entries should require a warrant because of the more serious individual interest threatened by an intrusion, *and* because such a

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513. See *Foreign Security Surveillance*, *supra* note 411, at 987-88 (arguing that domestic political activity might consequently be subject to warrantless wiretapping under the guise of foreign intelligence surveillance); see also Peter E. Quint, *The Separation of Powers under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 23 n.101 (noting that a distinction between foreign and domestic security surveillance is not easy to draw or apply).

514. See *Keith*, 407 U.S. at 313-17 (discussing the historical evolution of the Fourth Amendment); *United States v. Ehrlichman*, 546 F.2d 910, 934-35 (D.C. Cir. 1976) (Leventhal, J., concurring) (same).

515. *Hearing on Physical Searches*, *supra* note 468, at 37 (prepared testimony and statement for the record of Morton H. Halperin & Gary M. Stern, American Civil Liberties Union).

516. *Ehrlichman*, 546 F.2d at 937-38 (Leventhal, J., concurring).

517. *But see* FINAL REPORT OF THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 46 (1976) (noting that the warrant requirement depends on both “the purpose and degree of intrusion”) (quoting Attorney General Levi).

search is more limited in time and target.<sup>518</sup>

In retrospect, it is clear that the political imperatives suggested by the Church Committee and the greater attention to the legal issues by the judiciary were harbingers of change.<sup>519</sup> As the Church Committee urged the enactment of legislation to regulate the intelligence community, President Ford sought to forestall new legislation with surveillance rules developed by the executive branch.<sup>520</sup> By the mid-1970s, the issues were far from settled.

### *E. Executive Branch Regulation*<sup>521</sup>

Both criminal and national security investigations are premised on the duty to protect the public against dangers, whether foreign or domestic.<sup>522</sup> While there is an absolute duty to protect, “that duty must be performed with care to protect individual rights and to insure that investigations are confined to matters of legitimate law enforcement interest.”<sup>523</sup> As with most governmental activities, procedures have been created for both types of investigations to ensure the protection of personal liberties.<sup>524</sup> In the years since President Ford’s initiative, the Attorney General has promulgated procedures for domestic, criminal investigations<sup>525</sup> and separate, classified procedures for national security investigations involving foreign agency or support.<sup>526</sup>

The modern versions of these procedural safeguards stem from guidelines promulgated by Attorney General Edward Levi in 1976.<sup>527</sup> The most pertinent Levi Guidelines focused on freedom of speech

518. See *Ehrlichman*, 546 F.2d at 938 (discussing how the importance of the interest protected has bearing on the permissibility of warrantless intrusions).

519. See *supra* Part II.C (discussing Church Committee).

520. See United States Foreign Intelligence Activities, Exec. Order No. 11,905, 41 Fed. Reg. 7701 (1976) (establishing policies for national security intelligence operations).

521. See *infra* Part III (updating and applying the executive branch rules in Part III of the Article).

522. See *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, 32 CRIM. L. REP. (BNA) 3087 (Mar. 2, 1983) [hereinafter *Criminal AGG*] (stating that it is the duty of the FBI to protect the public against general and organized criminal activity).

523. *Id.*

524. See *id.* (setting forth procedures designed to assure the public that the FBI is acting properly under the law).

525. See *id.* (promulgating guidelines to provide guidance for all FBI criminal investigations).

526. Press Release, Department of Justice, Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (Apr. 18, 1983) [hereinafter *FCI AGG*].

527. See *FBI Oversight, Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 257-62 (1976) [hereinafter *FBI Oversight Hearings*] (statement of Attorney General Levi).

and freedom of the press.<sup>528</sup> First, investigations based solely on unpopular speech, where there is no threat of violence, were prohibited.<sup>529</sup> Second, techniques designed to disrupt organizations engaged in protected First Amendment activity, or to discredit individuals would not be used in any circumstance.<sup>530</sup>

At the same time, Attorney General Levi emphasized that the Guidelines were intended to permit domestic security investigations where the activities under investigation “involve or will involve the use of force or violence and the violation of criminal law.”<sup>531</sup> He testified at the time that “the purpose of the investigation must be the detection of unlawful conduct and not merely the monitoring of disfavored or troublesome activities and surely not of unpopular views.”<sup>532</sup> To accommodate the inevitable reality that First Amendment concerns would be raised, Levi also required “compendious reporting” to the Department of Justice and limited the techniques that could be used for various types of inquiries.<sup>533</sup>

By 1982 it had become clear that the threats of domestic violence against which the Levi Guidelines were directed had not remained static; both the sophistication of the threats and technology in general had evolved.<sup>534</sup> On March 7, 1983, Attorney General William French Smith revised the Guidelines regarding domestic security investigations.<sup>535</sup> A press release accompanying the revision stated that “the revisions are needed to ensure protection of the public from the greater sophistication and changing nature of domestic groups that are prone to violence.”<sup>536</sup>

The Smith Guidelines were intended to increase the investigative avenues available to the FBI in domestic terrorism cases.<sup>537</sup> Where the

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528. *See id.*

529. *See id.*; *see also* *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (holding that the comment “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” was protected speech because the remark was uttered during a political debate and there was no indication that the President was actually threatened).

530. *See FBI Oversight Hearings*, *supra* note 527, at 278-80.

531. *Id.*

532. *Id.* at 258.

533. *See id.* (requiring more involvement by the Department of Justice and the Attorney General in reviewing FBI domestic security investigations).

534. *See* John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 792 (1984) (stating that the largest number of FBI investigations in 1982 involved international terrorism).

535. *See Criminal AGG*, *supra* note 522, at 3087-93 (revising guidelines relating to criminal enterprises).

536. Press Release, Department of Justice (Mar. 7, 1983), *reprinted in Attorney General's Guidelines for Domestic Security Investigations, Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong. 47 (1983).

537. The effect of the Levi Guidelines was dramatic. In March 1976, the FBI

Levi/Civiletti Guidelines had established a predicate investigative standard of “specific and articulable facts,” the Smith version lowered the threshold to require only a “reasonable indication” as the legal standard for opening a “full” investigation.<sup>538</sup> The Smith Guidelines also established that the authority to conduct these investigations is “separate from and in addition to the general crimes investigative authority.”<sup>539</sup> The “reasonable indication” standard is significantly lower than the Fourth Amendment standard of probable cause required in law enforcement.<sup>540</sup> To balance the lowered threshold for opening an investigation, Attorney General Smith emphasized that investigations would be regulated and would “not be based solely on activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution.”<sup>541</sup>

Nonetheless, the Smith Guidelines authorized FBI Headquarters to approve the use of informants to infiltrate a group “in a manner that may influence the exercise of rights protected by the First Amendment.”<sup>542</sup> The Smith Guidelines also stated: “In the absence of any information indicating planned violence by a group or enterprise, mere speculation that force or violence might occur during the course of an otherwise peaceable demonstration is not sufficient grounds for initiation of an investigation.”<sup>543</sup>

The Smith Guidelines were judicially tested in 1984 in *Alliance to End Repression v. City of Chicago*.<sup>544</sup> A consent decree prohibited the

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conducted 4,868 “domestic security” investigations per month; however, by December 1981, the average was reduced to only 26 per month. Geoffrey R. Stone, *The Reagan Administration, the First Amendment and FBI Domestic Security Investigations*, in *FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S* 272, 276-77 (Richard O. Curry ed., 1988).

538. *Criminal AGG*, *supra* note 522, at 3091-92. An additional safeguard was built into the full investigation standards. The revised guidelines steer away from using a single actor as a predicate for a lowered threshold for investigation, but rather require that “two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States.” *Id.*

539. *Id.* at 3092.

540. *See id.* (delineating factors the FBI must consider in determining whether an investigation should be conducted).

541. *Id.* at 3088. For example, the Attorney General said that “when persons advocate crime, particularly violent crime—such as blowing up a building or killing a public official—those persons cannot expect law enforcement agencies to refrain from making reasonable further inquiry to ensure protection of the public.” *Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong. 99 (1983). Assistant Attorney General Jensen further qualified this position when he stated that “[i]f it is apparent, from the circumstances or context in which the statements are made, that there is no prospect of harm, then further inquiry would not be authorized.” *Id.*

542. *Criminal AGG*, *supra* note 522, at 3093.

543. *Id.* at 3092.

544. 742 F.2d 1007 (7th Cir. 1984).

FBI from conducting investigations in Chicago “solely on the basis of activities protected by the First Amendment.”<sup>545</sup> The challenge to the Guidelines was based on a comparison between the standards for opening a domestic security investigation and the standards established in the consent decree.<sup>546</sup> Plaintiffs argued that, notwithstanding the Smith Guidelines, the consent decree was a more stringent standard applicable to the limited geographical area.<sup>547</sup>

The Seventh Circuit found no inconsistency between the decree and the Guidelines.<sup>548</sup> The Court pointedly noted that the FBI “need not wait till the bombs begin to go off, or even till the bomb factory is found.”<sup>549</sup> The Court further found that the FBI “has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obliged to wear blinders until it may be too late for prevention.”<sup>550</sup>

At the time the Attorney General Guidelines were changing, so too were Presidential Executive Orders.<sup>551</sup> President Ford’s Executive Order regulating intelligence activities<sup>552</sup> was replaced with President Carter’s Order,<sup>553</sup> which was eventually replaced with President Reagan’s Order.<sup>554</sup> The Reagan Order contained specific requirements for the protection of “United States Persons” (USP) and each intelligence agency was required to implement those requirements with procedures approved by the Attorney General.<sup>555</sup> The FBI chose to implement these requirements by combining the

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545. *Id.* at 1010.

546. *See id.* at 1017 (interpreting language in the consent decree and Levi Guidelines).

547. *See id.* at 1010.

548. *See id.* at 1019-20 (finding that the critical sentence in the decree prohibits improperly motivated investigations and thus maintains a proper separation of powers).

549. *Id.* at 1015.

550. *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1015 (7th Cir. 1984) (citing *Socialist Workers Party v. Attorney Gen.*, 510 F.2d 253, 256 (2d Cir. 1974) (per curiam)).

551. *See, e.g.*, Exec. Orders of Presidents Ford, Carter, and Reagan, *infra* notes 552-54 (stating Presidential policies on foreign intelligence activities).

552. *See* Exec. Order No. 11,905, 41 Fed. Reg. 7701 (1976) (exercising Presidential authority to amend U.S. policy on foreign intelligence activities specifically with respect to the duties and responsibilities of the various intelligence organizations).

553. *See* Exec. Order No. 12,036, 43 Fed. Reg. 3675 (1978) (placing new restrictions on intelligence activities by the various intelligence agencies).

554. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (1994) (redefining goals, directions, duties, conduct and responsibilities of the intelligence community).

555. *See id.* at 59,950 (requiring that authorized intelligence organizations “collect, retain, or disseminate” USP information in accordance with procedures approved by the Attorney General).

Executive Order's mandatory USP protections with regulatory guidance for national security investigations, similar to that followed for criminal investigations.<sup>556</sup> Although the national security procedures are classified, they appear to follow the general purpose and parameters of the unclassified criminal procedures. An unclassified portion of the national security guidelines establish that:

The FBI may collect foreign intelligence, foreign counterintelligence, international terrorism and other information as permitted by these guidelines. Such collection shall be accomplished by the least intrusive means that will provide information of the quality, scope and timeliness required and in a manner that is consistent with the Constitution and laws of the United States, these guidelines and Executive Orders.<sup>557</sup>

Although classified, the criminal guidelines provide insight as to the manner in which investigations are conducted. According to the criminal guidelines, a full investigation may be opened where there is "reasonable indication" that two or more persons are engaged in an enterprise<sup>558</sup> for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and are a violation of the criminal laws of the United States.<sup>559</sup>

Additionally, if the "reasonable indication" standard is not met, but the FBI receives information indicating the possibility of criminal activity for which "responsible handling requires some further scrutiny," a preliminary inquiry may be appropriate.<sup>560</sup> A preliminary inquiry authorizes limited, non-intrusive investigation of initial leads that must be complete within ninety days.<sup>561</sup> Moreover, if it is

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556. *See id.*; *see also* FCI AGG, *supra* note 526, § I.A.

These guidelines are established by the Attorney General to govern all foreign intelligence, foreign counterintelligence, foreign intelligence support activities, and intelligence investigations of international terrorism conducted by the FBI pursuant to Executive Order 12,333. They also govern all FBI investigations of violations of the espionage statutes and certain FBI investigations requested, or FBI assistance to investigations conducted, by foreign governments.

*Id.*

557. FCI AGG, *supra* note 526, § III.A.1.

558. *See Criminal AGG*, *supra* note 522, at 3091-92 (explaining that if the target of the investigation is not an enterprise, but an individual, a general crimes inquiry may be triggered).

559. *See id.* (cautioning that the Bureau must consider all circumstances including: (1) the magnitude of the potential harm; (2) the likelihood it will occur; (3) the immediacy of the threat; and (4) the danger to privacy and free expression posed by an investigation).

560. *See id.* at 3088.

561. *See id.* at 3089 (approving examples of non-intrusive techniques such as: (1) examination of FBI indices and files; (2) examination of public records and public sources of information; (3) interview of the complainant, informant or others knowledgeable of the subject; and (4) physical or photographic surveillance of any

apparent from the circumstance or context in which the allegedly incriminating statement was made that there is no prospect of harm, a preliminary inquiry is deemed inappropriate.<sup>562</sup>

In order to determine whether an investigation should be opened, the FBI must also take into consideration the magnitude of the threat, the likelihood that the threat will come to fruition, and the immediacy of the jeopardy.<sup>563</sup> In addition to physical danger, the FBI must consider the danger to privacy and free expression posed by an investigation.<sup>564</sup> For example, unless there is a reasonable indication that force or violence might occur during the course of a demonstration, initiation of an investigation is not appropriate.<sup>565</sup>

Of course, even when the threshold standards for investigation are met, the manner in which the investigation is conducted is of equal importance.<sup>566</sup> Every technique used for investigation must meet constitutional, statutory, regulatory, and policy standards.<sup>567</sup> These standards include the Fourth Amendment, statutory warrant requirements for electronic surveillance, and the Attorney General Guidelines.<sup>568</sup>

Because investigations may be opened based on levels of suspicion lower than those required for prosecution, the FBI must exercise caution to ensure that an investigation does not intrude unacceptably on personal liberties.<sup>569</sup> One method of restraint is achieved when jurisdiction is only authorized for an initial period of 180 days.<sup>570</sup> If the investigation is proposed for continuation beyond 180 days, the proposal must be reviewed by senior officials to determine whether the particular facts and circumstances warrant continued inves-

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person).

562. *See id.* at 3088 (denouncing the initiation of investigations based solely on statements receiving First Amendment or other legal protection).

563. *See id.* at 3091-92 (requiring that the FBI carefully balance all relevant competing interests).

564. *See id.* at 3091-92 (maintaining that First and Fourth Amendment rights must be considered in determining whether the initiation of an investigation is appropriate).

565. *See id.* at 3092 (declaring that "mere speculation that force or violence might occur" during an otherwise peaceful protest is insufficient ground for triggering an investigation).

566. *See id.* at 3092-93 (admonishing that use of any FBI technique must comply with appropriate legal restrictions).

567. *See id.*

568. *See id.*

569. *See id.* at 3092 (contending that damage to individual reputation and personal privacy are key factors in judging the intrusiveness of a potential investigation).

570. *See id.* at 3091-92 (setting criteria for the initial length of authorization for domestic security and terrorism investigations and the process for extension).

tigation.<sup>571</sup> If the investigation fails to meet the threshold level of causation and a practical test for the allocation of resources, the investigation cannot be renewed and is terminated.<sup>572</sup>

The executive branch rules continue to serve as the primary source of authority for national security surveillance. Controversy about the rules increased in the 1990s, as terrorist threats again emerged in the United States. The application of the Guidelines to the surveillance of potential terrorist activity in the United States will be considered in Part III of this Article.

### F. *Foreign Intelligence Surveillance Act*

#### 1. *The constitutional parameters for regulation*

The *Keith* Court recognized the Executive's power to obtain intelligence information through electronic surveillance "of those who plot unlawful acts against the Government."<sup>573</sup> This power is implicit in the President's duty to "preserve, protect, and defend the Constitution under the Article II Oath Clause."<sup>574</sup> Yet, the *Keith* Court was unwilling to permit warrantless surveillance of precisely such threats due to "the convergence of First and Fourth Amendment values."<sup>575</sup> While the Oath Clause may provide the authority for the president to act in a national security emergency,<sup>576</sup> the Clause, alone, is hardly sufficient to support warrantless surveillance merely on the basis of the foreign origin of the threat.<sup>577</sup>

The Executive's implied foreign relations powers are shared with Congress and may support the authority to collect foreign intelligence information as a means of conducting the nation's foreign relations, subject to congressional regulation and the Bill of Rights.<sup>578</sup> Of course, Article II does not explicitly distinguish between

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571. *See id.*

572. *See id.* (providing that closed investigations may be reopened upon a showing of "reasonable indication" that the enterprise is involved in activities that involve force or violence contrary to federal criminal law).

573. *Keith*, 407 U.S. 297, 310 (1972).

574. *Id.* (discussing the historical use of electronic surveillance by Presidents and Attorneys General since 1946).

575. *Id.* at 313 (noting that national security cases often involve First and Fourth Amendment issues not raised in "ordinary" criminal cases).

576. *See supra* note 386 and accompanying text (noting that the President's Oath Clause duty has been deemed sufficient to justify the use of electronic surveillance to protect against those who plot unlawful acts against the government).

577. *See Keith*, 407 U.S. at 319-20 (rejecting the government's attempt to gain a complete exemption to the Fourth Amendment's warrant requirement based on the argument that the President's constitutional duties would be obstructed by obtaining a warrant).

578. Although it has been argued that the "executive power" Clause of Article II,

domestic and foreign national security threats.<sup>579</sup> Additionally, as Justice Sutherland acknowledged in the *Curtiss-Wright* case, all federal power is subject to the restraints imposed by the Bill of Rights.<sup>580</sup>

In *Keith*, the Court recognized that Congress did not intend to regulate every aspect of the executive branch's constitutional authority to conduct warrantless electronic surveillance for national security purposes under the Crime Control Act of 1968.<sup>581</sup> Instead, Justice Powell obliquely extended an invitation to Congress to create a framework for judicial review of internal security surveillance, parallel to its system for domestic law enforcement.<sup>582</sup> Although Congress did not react immediately to the *Keith* Court's prescription for a flexible, Fourth Amendment standard in internal security investigations, it provided an important impetus for the development of such legislation.<sup>583</sup>

Through trial-and-error, the Executive and Congress sought to find a legislative solution to the problem of warrantless searches.<sup>584</sup> In 1976, President Ford submitted a bill to the Senate that would have codified existing executive branch practices, and Attorneys General William Saxbe and Edward Levi pledged their cooperation to work with Congress to create legislation to regulate electronic

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Section 1 of the Constitution was intended to reflect the existence of unenumerated executive powers, the Clause has not been construed to include powers not listed or implied elsewhere in Article II. As Justice Jackson maintained in the steel seizure case, "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (holding that the President exceeded his constitutional authority in ordering the seizure of the nation's steel mills by the Secretary of Commerce).

579. See U.S. CONST. art. II, § 1, cl. 8 (granting the executive branch power to the President to "preserve, protect, and defend" the constitution without distinguishing between domestic and foreign threats to security).

580. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (emphasizing that every exercise of federal authority is subject to constitutional scrutiny, even where, as is the President's case, all power has been vested "in the field of international relations").

581. See *Keith*, 407 U.S. at 306 (concluding that Congress did not intend to speak to national security surveillance because "it would have been incongruous for Congress to have legislated with respect to [such an] important and complex area in a single brief and nebulous paragraph").

582. See *id.* at 322 (suggesting that Congress enact "protective standards" for domestic security surveillance based on the policy and practical differences between such specialized surveillance and "ordinary crime").

583. See *id.* at 323 (encouraging and instructing Congress as to various ways it could address the issue, while declining to order "precise standards for domestic security warrants").

584. See Cinquegrana, *supra* note 331, at 794-95 (arguing that FISA was the product of decades of effort by the Supreme Court, Congress and the President and discussing these efforts).

surveillance.<sup>585</sup> Debate and discussion centered on the extent of the executive's inherent authority and whether the traditional criminal law standard should be included in the legislation.<sup>586</sup>

Senator Kennedy introduced a bill in 1977 that would have specifically repealed the disclaimer in the 1968 Crime Control Act and thus expressly eliminated congressional recognition of inherent executive power in this sphere.<sup>587</sup> During hearings on the Kennedy bill, the most controversy centered on the appropriate standards for targeting Americans who were not accused of criminal acts.<sup>588</sup> The Carter administration supported the legislation in principle, and after hearings in the House and Senate Intelligence Committees, both chambers approved the amended Kennedy proposal to drop the disclaimer repeal.<sup>589</sup> The proposal included a "quasi-criminal" targeting standard and more limited protections for aliens representing foreign governments in the United States.<sup>590</sup> In this climate of reform and inter-branch compromise, Justice Powell's invitation was finally accepted when Congress passed, and President Carter signed into law, the Foreign Intelligence Surveillance Act of 1978 (FISA).<sup>591</sup>

## 2. *Categories of surveillance*

FISA defines four categories of electronic surveillance that may be conducted, some of which go beyond conventional telephone taps and hidden microphones.<sup>592</sup> Wiretaps may be utilized in the United States (as long as at least one party is in the United States) to obtain voice communications, teleprinter, telegraph, facsimile, and digital communications.<sup>593</sup> In addition, FISA was intended to provide the

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585. *See id.* at 809-11 (characterizing President Ford's 1976 proposed legislation on foreign surveillance as a "sizeable step" toward the ultimate enactment of FISA in 1978).

586. *See id.* (observing that proponents of the criminal law standard argued that electronic surveillance should be limited to the criminal context because of the inherent intrusiveness of such surveillance).

587. *See id.* at 810 (explaining the differences between Senator Kennedy's proposed legislation in 1977 and that of President Ford a year earlier).

588. *See Hearings on S. 743, S. 1888, S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the United States Judiciary Comm.*, 94th Cong. 71, at 12 (1976).

589. *See Cinquegrana, supra* note 331, at 811.

590. *See id.* (describing the "quasi-criminal" standard as permitting surveillance of Americans only if their conduct was both of "foreign intelligence interest" and had the potential for violating U.S. criminal law).

591. *See* Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811 (1994 & Supp. IV 1998)), *amended by* Act of Dec. 3, 1999, Pub. L. No. 106-120, 113 Stat. 1606.

592. *See* 50 U.S.C. § 1801(f)(1)-(4) (1994) (defining the four categories of electronic surveillance under FISA).

593. *See id.* § 1801(f)(2).

exclusive means for authorizing some categories of foreign intelligence surveillance, including the interception of “international radio or wire communications to or from a particular United States person in the United States in circumstances where that person has a reasonable expectation of privacy and a warrant would be required if the interception or monitoring were undertaken for law enforcement purposes.”<sup>594</sup> The same rule applies to “a wholly domestic radio communication, and the installation or use of any monitoring device (such as a television camera or pen register) to acquire information about a person’s activities other than the contents of the communications,” and to the “interception . . . of a wire communication to or from any person in the United States without the consent of the party to the communication.”<sup>595</sup>

In developing and “implementing the FISA, the Justice Department had not supported the extension of FISA procedures to physical searches.”<sup>596</sup> However, “after CIA spy Aldrich Ames<sup>597</sup> pleaded guilty to espionage charges in April 1994, the Clinton administration actively sought to extend the FISA to such searches.”<sup>598</sup> A warrantless search of Ames’s office was used to develop the government’s case against him, and, according to Ames’s lawyer, a challenge to the constitutionality of this particular warrantless search was planned.<sup>599</sup> Although Ames’s guilty plea mooted the constitutional challenge, the threat prompted the change of stance by the Justice Department.<sup>600</sup> According to Deputy Attorney General Jamie Gorelick,<sup>601</sup> “[o]ur seeking legislation in no way should suggest

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594. Cinquegrana, *supra* note 331, at 811 (discussing the FISA authorized methods of electronic surveillance).

595. *Id.* at 812.

596. DYCUS ET AL., *supra* note 251, at 665 (discussing the Department of Justice’s change in stance on the extension of FISA to security-related physical searches due in part to a constitutionally questionable, warrantless search of Ames’s office).

597. Aldrich Hazen Ames, a CIA case officer specializing in Russian intelligence services, began spying for the Russians in 1985. He was arrested by the FBI in Arlington, Virginia on espionage charges on February 24, 1994, and sentenced to life in prison without the possibility of parole. See PETER MAAS, KILLER SPY: THE INSIDE STORY OF THE FBI’S PURSUIT AND CAPTURE OF ALDRICH AMES, AMERICA’S DEADLIEST SPY 224-34 (1995).

598. *Id.* (positing that the spy scandal involving Aldrich Ames “prompted serious consideration of counter-intelligence reforms” because of the feud it caused between the CIA and the FBI over the handling of the investigation).

599. See *id.* (explaining that the constitutionality of the Ames warrantless search was never litigated).

600. See *id.*; see also Benjamin Wittes, *Surveillance Court Gets New Powers*, LEGAL TIMES (D.C.), Nov. 7, 1994, at 21 (noting that Associate Attorney General Gorlick conceded that Ames’s lawyer’s threat to litigate the constitutionality of the search played a role in the Department of Justice’s decision to support the extension of the FISC’s power to issue warrants for physical searches).

601. Ms. Gorelick was the Deputy Attorney General of the United States from

that we do not believe we have inherent authority . . . . We do . . . but as a policy matter, we thought it was better to have Congress and the judiciary involved.”<sup>602</sup>

The pre-1994 history regarding the extension of FISA to searches illuminates, in part, the context of this amendment. In 1980, Attorney General Civiletti determined that approval of the special FISA court—Foreign International Surveillance Court (“FISC”)—should be sought for national security-related physical searches where judicial review would not frustrate national security interests, although he continued to maintain that the President retained the constitutional authority to approve such searches without judicial review.<sup>603</sup> The Attorney General’s decision was based upon the belief “that the FISC provided a judicial forum with the security and expertise necessary to review such matters.”<sup>604</sup> When the Justice Department sought approval from the FISC for three physical searches in 1980, the Department acknowledged that FISA does not provide jurisdiction over physical search requests.<sup>605</sup> Instead, the Department argued that the FISC judges could determine requests for national security related physical searches based upon the inherent power of federal judges to ensure the integrity of the judicial process, the obligation to protect the Fourth Amendment interests of the targets of searches, and the All Writs Act.<sup>606</sup> The judges granted the three requests before they received a memorandum from the clerk of the FISC, which concluded that FISA did not provide jurisdiction to determine requests for physical searches and any inherent power or authority derived from the All Writs Act did not extend to the specialized FISC.<sup>607</sup>

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March 1994 to May 1997.

602. Wittes, *supra* note 600, at 21 (reporting that the FISC was invested with new authority over national security-related physical searches as a direct result of the Aldrich Ames spy scandal).

603. See Cinquegrana, *supra* note 331, at 821 (reaching the conclusion that “those who argued that the creation of the Foreign International Surveillance Court (“FISC”) would blur constitutional lines of responsibility” for national security were vindicated by Attorney General Civiletti’s decision, which required approval of such physical searches by the FISC where national security interests would not be undermined).

604. *Id.* (discussing the logic behind the Attorney General’s decision that requests for electronic surveillance under FISA should be submitted to the FISC for judicial review).

605. See *id.* (discussing the Department of Justice’s three 1980 requests to the FISC for physical searches).

606. See *id.* at 821; see also 28 U.S.C. § 1345 (1994) (stating that “except as otherwise provided by an Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress”).

607. See Cinquegrana, *supra* note 331, at 821-22 (describing how uncertainty by

After the inauguration of President Reagan in 1981, William French Smith, his new Attorney General, submitted a fourth application for a national security physical search to the FISC.<sup>608</sup> In this instance, the Justice Department apparently decided to send a different message from the one conveyed by Civiletti, which was that the President does not need congressional approval to conduct warrantless searches, or, perhaps, Congress lacks the authority to limit the President's conduct of such searches.<sup>609</sup> Thus, the Department asked that the application be rejected on the basis that the FISC had no jurisdiction to approve such an application.<sup>610</sup> In the only published opinion of the FISC, the Court held that it had no jurisdiction over physical searches.<sup>611</sup> Judge Hart, however, embraced the Department's statutory rather than constitutional argument.<sup>612</sup>

In 1994, as part of the Intelligence Authorization Act for Fiscal Year 1995,<sup>613</sup> Congress amended FISA to authorize the submission of applications to the FISC for orders approving physical searches of the "premises, property, information or material of a foreign power or agent of a foreign power" in the United States, conducted for the purpose of collecting "foreign intelligence information."<sup>614</sup> The prerequisites for a FISA search thus parallel those for electronic surveillance.

In 1998, again as part of the Intelligence Authorization Act for Fiscal Year 1999,<sup>615</sup> Congress amended FISA to permit FBI use of pen registers<sup>616</sup> and trap and trace devices<sup>617</sup> that followed FISA procedures

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congressional intelligence committees led to the clerk's legal memorandum, which limited FISC authority).

608. *See id.* at 822 (outlining the new administration's desire to conduct physical searches without FISC approval).

609. *See id.* (arguing "on the face of the statute that FISA contemplated only electronic surveillance applications" and that Congress intended to deal with physical searches at a later date).

610. *See id.*

611. In the Matter of the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (1981), reproduced in DYCUSET AL., *supra* note 251, at 469.

612. *See* Cinquegrana, *supra* note 331, at 821-23 (rejecting any authority to approve physical searches by relying "solely on the language and purposes of FISA").

613. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3423 (1994) (codified as amended at 50 U.S.C. § 1822 (Supp. IV 1998)).

614. *Id.* § 302(a)(1). Pursuant to the 1994 amendment, applications may be submitted only if the President has, by prior written authorization, empowered the Attorney General to approve such submissions. *Id.* § 309; *see also* Exec. Order No. 12,949, 60 Fed. Reg. 8169 (Feb. 1995) (providing authorization for such approvals by the Attorney General).

615. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 601, 112 Stat. 2396, 2404 (1998) (to be codified at 50 U.S.C. § 1842).

616. A pen register records the dialed numbers identifying outgoing calls on a surveilled line. *Id.*

617. A trap and trace device records the number of origin for incoming calls. *Id.*

in counterintelligence and international terrorism investigations.<sup>618</sup> The same act authorized FISA surveillance procedures that regulate government access to hotel, car rental, bus, airline, and other business records.<sup>619</sup> The statutory pen register and trap and trace authority requires that the requesting agency “demonstrate” that the line to be tapped has been or is about to be used in activities that “involve or may involve a violation of the criminal laws.”<sup>620</sup> Ironically, this standard asks more of the agency than the traditional criminal law enforcement rule for using the same surveillance techniques.<sup>621</sup> Similarly, the government asked Congress to grant the equivalent of an administrative subpoena, allowing FBI officials to demand business records without judicial intervention.<sup>622</sup> The 1998 amendment to FISA instead requires that business record requests obtain approval from the FISC, like all other surveillance permitted by FISA.<sup>623</sup> In criminal cases, conversely, it is possible for a grand jury to issue subpoenas without judicial approval.<sup>624</sup>

### 3. *Surveillance target*

FISA authorizes the Attorney General to approve applications for warrants to conduct electronic surveillance or physical searches within the United States for the purposes of foreign intelligence,<sup>625</sup> if

618. *Id.* (adding Title IV to FISA).

619. *Id.* § 602 (adding Title V to the Foreign Intelligence Surveillance Act).

620. *Id.* § 601.

621. The criminal law enforcement standard requires that an attorney for the government, or a state law enforcement or investigative officer, certify that the information likely to be obtained is relevant to an ongoing criminal investigation. *See* 18 U.S.C. § 3123(a) (1994) (outlining who may request the installation of a pen register or trap device).

622. *See* JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 143 (1999).

623. *See* Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2410 (1998) (to be codified at 50 U.S.C. § 1861).

624. DEMPSEY & COLE, *supra* note 622, at 144.

625. 50 U.S.C. § 1801(e) (1994).

‘Foreign intelligence information’ means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave or hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States. . . .

*Id.*

the target is a “foreign power”<sup>626</sup> or “agent of a foreign power.”<sup>627</sup> If the Attorney General approves an application for a warrant pursuant to FISA, the request is then submitted to any of the judges who sit on a specially constituted court. In enacting FISA, Congress relied on its Article III power to “ordain and establish” the lower federal courts to create the FISC. The FISC consists of seven United States district court judges designated by the Chief Justice who meet in secret and are empowered “to hear applications for and grant orders approving electronic surveillance and physical searches anywhere within the United States under the procedures set forth” in FISA.<sup>628</sup> Similarly, FISA authorizes a three-judge appellate panel, designated by the Chief Justice. This special Court of Appeals consists of three district

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626. *Id.* § 1801(a).

‘Foreign power’ means—

- (1) a foreign government or any component thereof, whether or not recognized by the United States; . . .
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.

*Id.*

627. *Id.* § 1801(b), *amended* by Act of Dec. 3, 1999, Pub. L. No. 106-120, 113 Stat. 1606, 1619-20.

‘Agent of a foreign power’ means—

- (1) any person other than a United States person, who—
  - (A) acts in the United States as an officer or employee of a foreign power . . .
  - (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or
- (2) any person who—
  - (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
  - (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
  - (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; . . .

*Id.*

628. *See id.* § 1803(a). Although each FISC judge may hear any FISA application, the FISC meets two days monthly, and two of the judges are routinely available in the Washington, D.C. area on other days. The FISC also has a legal adviser, a clerk, and a security officer. *Statement of Mary C. Lawton, Counsel for Intelligence Policy, Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, June 8, 1983, at 8.

or court of appeals judges who hear appeals by the government when its applications are denied.<sup>629</sup> From this panel decision, the government may appeal to the Supreme Court.<sup>630</sup>

Surveillance of an official foreign power, a foreign government, terrorist group or political organization controlled by a foreign government, may be permitted by the FISC after a request that need not describe the communications sought, the means for accomplishing the surveillance, or the surveillance devices to be employed.<sup>631</sup> Examples of groups that would meet the definition of "foreign power" include high-profile candidates such as the Irish Republican Army, Hezbollah, and the PFLP.<sup>632</sup> Targeting an "agent of a foreign power" is easier for the government to accomplish if an individual is not a "United States person" (USP) as defined in FISA.<sup>633</sup> These agents may be targeted if they "act on behalf of a foreign power" that carries on intelligence activities in the United States and the "circumstances . . . indicate that such person may engage . . . or . . . aids or abets . . . or conspires" in "intelligence activities in the United States contrary to the interests of the United States."<sup>634</sup> FISA expressly provides that no USP may become a target of FISA surveillance "solely upon the basis of activities protected by the First Amendment."<sup>635</sup> Applications for surveillance of USPs may be approved if the judge finds that certification indicating that the information sought is "necessary to"<sup>636</sup> further U.S. defense or foreign affairs interests, or the ability of the United States to protect against hostile acts of a foreign power, is not "clearly erroneous."<sup>637</sup> An order of the FISC may approve surveillance of an agent of a foreign power for ninety days. The FISC may approve surveillance of a foreign power for a year.<sup>638</sup> Additional periods may be granted according to the same terms, except that targets who are foreign powers may be subject to surveillance for an additional year if there is probable

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629. See 50 U.S.C. § 1803(b) (1994) (providing a three-judge court of review for application denials).

630. See *id.*

631. See *id.* § 1804(b) (outlining which requirements are not necessary to conduct electronic surveillance of facilities or places that are owned, based, or exclusively used by a foreign power).

632. See generally DAVID E. LONG, *THE ANATOMY OF TERRORISM* (1990) (providing a detailed discussion of profiles of known international terrorist groups).

633. See 50 U.S.C. § 1801(i) (1994) (defining U.S. person to include any U.S. citizen, permanent resident alien, group composed largely of such persons, and U.S. corporation).

634. *Id.* § 1801(b)(1)(B).

635. *Id.* § 1805(a)(3)(A).

636. *Id.* § 1801(e)(1).

637. *Id.* § 1805(a)(5).

638. See *id.* § 1805(d)(1).

cause to believe that no communication of any USP will be acquired.<sup>639</sup>

#### 4. *Surveillance trigger*

On the basis of the application, a FISC judge must find probable cause that the target is a foreign power or agent of a foreign power, and the facilities where the surveillance is directed are or will be used by the target.<sup>640</sup> For USPs, the FISC judge must find probable cause that one of four conditions has been met: (1) the target knowingly engages in clandestine intelligence activities on behalf of a foreign power which “may involve” a criminal law violation; (2) the target knowingly engages in other secret intelligence activities on behalf of a foreign power pursuant to the direction of an intelligence network and his activities involve or are about to involve criminal violations; (3) the target knowingly engages in sabotage or international terrorism or is preparing for such activities; or (4) the target knowingly aids or abets another who acts in one of the above ways.<sup>641</sup>

As noted, courts have attached conditions to the executive’s use of warrantless surveillance, including the requirement that the President or Attorney General authorize the search, the search targets a foreign power or its agents, and the primary purpose of the search is to gather foreign intelligence information.<sup>642</sup> It remains unclear whether substitution of the FISA review process assures satisfaction of the *Keith* Court’s first measure of the reasonableness of warrantless surveillance—whether the citizens’ interest in privacy and free expression are better served by a warrant requirement.<sup>643</sup> The second element of the reasonableness inquiry framed in *Keith*—whether a judicially imposed law enforcement warrant requirement would “unduly frustrate the efforts of Government to protect itself”<sup>644</sup>—may be more easily met in the foreign intelligence setting because of the concern that detected surveillance would cause the target to alter its activities, likely rendering the intelligence useless.<sup>645</sup>

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639. *See id.* § 1805(d)(2). This standard permits targeting of foreign missions and the like, where direct lines of communication are employed with parent nations or organizations. Targeting direct lines raises no reasonable expectation that USPs will be inadvertently overheard.

640. *See* 50 U.S.C. § 1805(a) (1994).

641. *See id.* § 1801(b)(2) (defining an agent of a foreign power).

642. *See* Brown & Cinquegrana, *supra* note 28, at 128; *see also* Exec. Order No. 12,333, § 2.5, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (1994) (requiring the approval of the attorney general for warrantless searches).

643. *See Keith*, 407 U.S. 297, 315 (1972).

644. *Id.*

645. *See* Brown & Cinquegrana, *supra* note 28, at 131 (defending the need for secrecy attached to foreign intelligence gathering).

### 5. *Surveillance purpose*

One question unresolved by FISA is the extent to which the FBI can use FISA surveillance to obtain evidence for criminal prosecution. Ordinarily, law enforcement investigations have a criminal prosecution purpose from the start. In contrast, FISA surveillances must have an intelligence purpose.<sup>646</sup> Courts that have allowed evidence gathered during the surveillance to support a criminal conviction have required that intelligence be the “primary” purpose of the surveillance,<sup>647</sup> or at least a purpose, if not necessarily primary.<sup>648</sup>

Both the FISA applications and the accompanying internal review process contain assurances that the intelligence sought is foreign intelligence or foreign counterintelligence. Nonetheless, some maintain that the rights of one accused of a crime are arguably threatened by the introduction of evidence obtained *ex parte* and on the basis of something less than probable cause.<sup>649</sup> In addition to these hurdles placed in the path of one accused of a crime based in part on evidence obtained through FISA surveillance, the government retains the procedures of the Classified Information Protection Act (CIPA)<sup>650</sup> to restrict the accused’s access to intelligence sources and methods and information.<sup>651</sup>

The individual rights questions generated by FISA have arisen in judicial challenges by criminal defendants, based on assertions that the FISC-approved surveillance was not for the primary purpose of foreign intelligence collection. In each such challenge to date, the lower federal courts have sustained the FISA-based surveillance under the “primary purpose” test of the *Truong* decision.<sup>652</sup> Although the

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646. See 50 U.S.C. § 1804(a)(7)(B) (1994).

647. See *United States v. Megahey*, 553 F. Supp. 1180, 1189-90 (E.D.N.Y. 1982) (affirming *Truong Dinh Hung* by requiring that foreign intelligence be a primary purpose of an investigation to excuse a warrant).

648. See *United States v. Falvey*, 540 F. Supp. 1306, 1313 (E.D.N.Y. 1982) (“Several courts have ruled that . . . warrantless electronic surveillance is permissible when the purpose of the surveillance is to obtain foreign intelligence information.”).

649. See David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611, 629-44 (“The scales tip decisively in favor of the warrant requirement. Any inconvenience imposed on the executive by the warrant requirement is substantially outweighed by the protection of the privacy expectations.”).

650. See 18 U.S.C. App. § 6.

651. See *United States v. Fernandez*, 913 F.2d 148, 163 (4th Cir. 1990) (stating that government’s use of CIPA to exclude evidence deemed essential to the defense in a criminal case merits dismissal of the indictment).

652. See *Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980). See, e.g., *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982) (demonstrating that lower federal courts have sustained the “primary purpose” test of *Truong*); *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982) (same).

surveillance in each such case was conducted by the FBI, rather than one of the pure intelligence agencies, the government's defense of its surveillance was aided by the prophylactic protection afforded by a FISC judge's prior approval of the surveillance.

For example, in *United States v. Megahey*,<sup>653</sup> the defendants unsuccessfully sought to suppress evidence derived from FISA-authorized electronic surveillance as part of an FBI counterintelligence investigation.<sup>654</sup> Defendants were convicted of violating firearms and munitions statutes in support of the Provisional Irish Republican Army.<sup>655</sup> In response to the defendants' assertion that the surveillance had been carried out exclusively to obtain evidence for the criminal prosecution, the Court determined that the phrase "primary purpose" is the guidepost for FISA-derived surveillance.<sup>656</sup> The Court based this determination in part on a ruling that "Congress clearly viewed arrest and criminal prosecution as one of the possible outcomes of a foreign intelligence investigation."<sup>657</sup> The Court of Appeals agreed, noting that, it is foreseeable that collected intelligence may be used in a criminal proceeding and "Congress recognized that in many cases the concerns of government with respect for foreign intelligence will overlap with those with respect to law enforcement."<sup>658</sup>

Had Aldrich Ames gone forward with the claim that the search of his office was unconstitutional, his argument would have been based on the primary purpose standard from *Truong* and would have argued that the investigation's primary purpose was no longer to collect foreign counterintelligence, but was instead to gather evidence of a crime.<sup>659</sup> Ms. Gorelick is almost certainly correct in her assessment that "it was better to have Congress and the judiciary

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653. See 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff'd sub nom.* *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

654. See *id.* at 1185 (stating the defendants' claim that surveillance violated their Fourth Amendment rights).

655. See *id.* at 1182 (stating that defendants were further accused of being illegal aliens and receiving, possessing, and transporting firearms in interstate commerce).

656. See *id.* at 1189-90.

657. *Id.* at 1189-90.

658. *Duggan*, 743 F.2d at 78. Other courts have followed suit. See *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (holding that the fact that the terrorist activity was directed at Northern Ireland was of no consequence to the legality of the FISA surveillance); *United States v. Pelton*, 835 F.2d 1067, 1076 (4th Cir. 1987) (concluding that "FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . in a criminal trial").

659. See *Truong Dinh Hung*, 629 F.2d at 915-16 (granting surveillance targets protection under the warrant requirement if the government is primarily building a criminal prosecution).

involved”<sup>660</sup> in such searches, although, notwithstanding the amendment to FISA, the constitutional question remains unresolved.<sup>661</sup>

6. *FISA surveillance of First Amendment activities*

Although FISA states that surveillance of USPs may not be based “solely” on protected First Amendment activities,<sup>662</sup> and the 1978 Senate Judiciary Committee Report stated that activities protected by the First Amendment may not “form any part of the basis” for identifying a FISA target,<sup>663</sup> the executive branch could construe “activities that are in preparation” for terrorism to include protected advocacy or fundraising. Similarly, another portion of the “agent of a foreign power” definition that applies only to persons within the United States who are neither citizens nor permanent residents permits surveillance of a person who “acts in the United States . . . as a member” of a “group engaged in international terrorism or activities in preparation therefor.”<sup>664</sup> FISA surveillance based upon such activities would, standing alone, violate the First Amendment and be inconsistent with the spirit, if not the letter of FISA.<sup>665</sup> Membership in, and activities in support of, an organization that advocates even the violent overthrow of the government of the United States are protected by the First Amendment, absent a showing that the person specifically intends to further the organization’s unlawful objectives.<sup>666</sup> Congress also recognized that

660. Wittes, *supra* note 600, at 22.

661. See Malooly, *supra* note 39, at 417 (maintaining that despite Gorelick’s assertion that “the extension of the FISA to include physical searches is not an admission of the lack of inherent executive power, but rather an indication that as a matter of policy ‘it was better to have Congress and the judiciary involved,’ . . . there is no constitutional basis for the notion that there is a national security exception to the Fourth Amendment warrant requirement based on the ‘inherent powers’ of the President.”).

662. See 50 U.S.C. § 1805(a)(3)(A) (1994) (“No United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution of the United States.”); *United States v. Falvey*, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982) (maintaining that FISA explicitly admonishes that no Americans may be considered agents of a foreign power solely for First Amendment protected activities).

663. See *Foreign Intelligence Surveillance Act of 1978: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong. 13, 23 (1977), reprinted in 1978 U.S.C.A.N. 3904, 3924.

664. 50 U.S.C. § 1801(b)(1)(A), (a)(4) (1994).

665. See *United States v. Megahey*, 553 F. Supp. 1180, 1184 (E.D.N.Y. 1982) (acknowledging Senate report notes, which stated that the purpose of FISA was to strike a balance between the need for surveillance and the protection of civil liberties).

666. See *Healy v. James*, 408 U.S. 169, 187 (1972) (holding that a group’s philosophy of destruction is immaterial and would not justify the denial of their First Amendment rights); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (finding

FISA surveillance could not be based on mere association with terrorist groups.<sup>667</sup> The secrecy that attends FISC proceedings, and the limitations imposed on judicial review of FISA surveillance, may insulate unconstitutional surveillance from any effective sanction.<sup>668</sup> If such a situation arises, the officials that review FISA applications, including the judges of the FISC, should construe FISA to avoid the constitutional problem.<sup>669</sup>

A more subtle problem with FISA and the Bill of Rights may arise when the phrase “agent of a foreign power” is defined to include USPs who engage in lawful activities in support of foreign political groups that may engage in both lawful and unlawful terrorist activities. Because FISA merely requires “probable cause to believe that the target” of surveillance is an agent of a foreign power,<sup>670</sup> the failure to also require a finding of probable cause to believe that the target has engaged in criminal activity may fall short of Fourth Amendment requirements.<sup>671</sup> Suppose, for instance, that following the FISA definitions, the “agent of a foreign power” is someone who “aids or abets” in “activities that are in preparation” for terrorism.<sup>672</sup> If the government has labeled the “foreign power” assisted by the agent as a terrorist by the government, the agent/fundraiser may be subject to FISA surveillance, even where there is no probable cause to believe that the person intends to further the unlawful terrorist objectives of the foreign power, as opposed to the group’s lawful aims.<sup>673</sup> Consider the example of a Palestinian-American who engages in fundraising for Palestinian causes. If some of the cash supported terrorist activities, would the Attorney General be required under

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that “mere knowing membership without a specific intent to further unlawful aims of organization is not adequate. . . .” for imposing sanctions); *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974) (determining that Indiana state law forbidding groups that advocate overthrowing the government from being listed on an election ballot was unconstitutional).

667. See S. REP. NO. 95-604, at 24, 28-29 (1997), *reprinted in* 1978 U.S.C.C.A.N. 3925, 3929-30 (stating that the government must establish probable cause that a prospective surveillance target knew of secret intelligence activities of a foreign state and acted in furtherance of these activities).

668. See *infra* Part III.E.

669. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

670. See 50 U.S.C. § 1805(a)(3)(A) (1994).

671. See *United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987) (noting that appellant argued that the FISA is deficient under the Fourth Amendment). *But see* *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) (finding that the government’s legitimate need for intelligence information overrides the potential infringements of an individual’s Fourth Amendment rights).

672. See 50 U.S.C. § 1801(b)(2)(C), (E).

673. See *infra* Part III.E.

FISA to demonstrate that the fundraising Palestinian-American had a specific intent to engage in “activities that are in preparation” for terrorism?”<sup>674</sup> In *United States v. Falvey*,<sup>675</sup> a federal district court found implicit in FISA a requirement that the agent of a foreign power be engaged in, or conspiring with, others who are engaged in terrorism.<sup>676</sup>

#### 7. *Minimization and other application requirements*

For potential targets of surveillance, an application to obtain an electronic surveillance order must include the following: The name of the officer making the application; statements showing the Attorney General’s approval of the application, identification and description of the surveillance target, and affirmative support that the target is an agent of a foreign power; a description of the information sought and types of communications to be monitored, as well as the procedures that will be employed to confine the boundaries of the surveillance; and a statement by the National Security Advisor that the information sought is foreign intelligence information not obtainable through normal investigative means.<sup>677</sup> The application must also describe any past applications involving the target, the surveillance devices to be employed, the means of installation (including whether physical entry will be required), and the period of time for conducting the surveillance.<sup>678</sup>

In an effort to reduce the risk that FISA surveillance could interfere with the rights of U.S. citizens, the Act prescribes “minimization procedures” that must be adopted by the Attorney General and followed to the satisfaction of a FISC judge in order to “minimize the acquisition and retention, and prohibit the dissemination” of nonpublic information about USPs.<sup>679</sup> Lawyers are heavily involved in this and other parts of the FISA process. When

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674. 50 U.S.C. § 1801(b)(2)(C) (1994); *see also* *United States v. Falvey*, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982) (holding that “to obtain a FISA surveillance order, the Government must provide the FISA judge with something more than the target’s sympathy for the gods of the particular group. . .”). *Cf.* *Brandenburg v. Ohio*, 395 U.S. 444, 448-91 (1969) (ruling that advocacy of violence short of incitement is protected by the First Amendment).

675. 540 F. Supp. 1306 (E.D.N.Y. 1982).

676. *See id.* at 1315 (emphasizing that it is the duty of the judge, not of the Executive branch, to make a finding of probable cause that the target of surveillance is an agent of foreign power).

677. *See* 50 U.S.C. § 1804(a) (1994).

678. *See id.*

679. *See id.* § 1801(h); *see also id.* § 1805(a)(4) (stating that a judge may enter an ex parte order approving electronic surveillance if § 1801(h) is followed); *id.* § 1805(b)(2) (explaining what an order approving electronic surveillance should direct).

initiated by the FBI, and before the FISC acts, the applications and accompanying materials are drafted by lawyers, reviewed by other lawyers, passed on to the Justice Department's Office of Intelligence Policy and Review, and then briefed to the Attorney General.<sup>680</sup> The minimization procedures adopted by the FBI are classified, although the internal review mechanisms include standard goals for all applications, as well as for situation-specific assessments for individual applications. FISA prohibits the disclosure of information obtained from FISA surveillance, except in accordance with the minimization procedures.<sup>681</sup> There is no requirement to supply notice that surveillance was conducted to any surveillance target.<sup>682</sup> The minimization procedures, however, permit "dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes."<sup>683</sup> Executive Order 12,333 also required "agencies within the intelligence community" to follow minimization procedures.<sup>684</sup>

#### 8. *Emergency surveillance*

In emergency circumstances, the President is permitted, through the Attorney General, "[n]otwithstanding any other law," to authorize electronic surveillance without a court order "for periods up to one year" upon a written certification that such surveillance is either "solely directed" at communications between or among foreign powers, or focused on a technical intelligence from property or premises "under the open and exclusive control of a foreign power."<sup>685</sup> These emergency powers may be exercised only where there is "no substantial likelihood"<sup>686</sup> that a communication involving a U.S. citizen will be acquired, and where the Attorney General meets minimization requirements, reports them to the Intelligence Committees, and transmits her certification of such surveillance under seal to the FISC.<sup>687</sup> Such certifications remain sealed unless an application for the surveillance is made pursuant to ordinary FISA

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680. See generally James E. Meason, *The Foreign Intelligence Surveillance Act: Time for Reappraisal*, 24 INT'L LAW. 1043, 1048-50 (1990) (describing the review process).

681. See 50 U.S.C. § 1806(a) (1994).

682. See *id.* § 1806(j) (stating that on an ex parte showing of good cause, the court may forego ordering service of notice).

683. *Id.* § 1801(h)(3).

684. See Exec. Order No. 12,333, § 2.3, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 note (1994).

685. 50 U.S.C. § 1802(a)(1)(A)(i), (ii) (1994).

686. *Id.* § 1802(a)(1)(B).

687. See *id.* § 1802(a)(1) (providing the terms for the President, through the Attorney General, to authorize electronic surveillance without a court order).

processes, or unless the certification is “necessary to determine the legality of surveillance” upon judicial review of FISA surveillance.<sup>688</sup>

A similar provision is made for emergency employment of electronic surveillance. Pursuant to FISA, in order to obtain “foreign intelligence information,”<sup>689</sup> before an order from the FISC is obtained, the following criteria must be met: The Attorney General must certify that “an emergency situation exists” that requires surveillance before an order “can with due diligence be obtained;” the “factual basis for issuance of an order” exists; and a FISC judge will be informed of the surveillance.<sup>690</sup> The emergency grant of authority cannot extend for more than twenty-four hours from the time authorization is supplied by the Attorney General until the information sought is obtained, or until the FISC denies an application for surveillance, whichever is earliest.<sup>691</sup>

#### 9. *The constitutionality of the FISC*

Challenges brought to the FISC on the basis that its *ex parte* proceedings fail to meet the case or controversy requirements of Article III of the U.S. Constitution<sup>692</sup> have been rejected, partly on the basis that substantial precedents for specialized Article III courts exist.<sup>693</sup> Challengers of FISA surveillance orders also have asserted that the FISC violates the separation of powers<sup>694</sup> and principles of judicial independence<sup>695</sup> in Article III because the FISC judges’ appointments may be revoked during their seven-year terms, thus potentially influencing a judge’s conduct on the FISC. This attack on

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688. *See id.* § 1805(e).

689. *See id.* § 1804(a)(7)(B).

690. *See id.* (noting the requirements of the Attorney General for authorizing emergency employment of electronic surveillance).

691. *See id.* § 1805(e), (f).

692. *See* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases . . . [and] Controversies . . .”).

693. *See* *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) (holding that FISA proceedings before the FISC “involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them. . .”); *see also* *United States v. Cavanagh*, 807 F.2d 787, 791-92 (9th Cir. 1987) (emphasizing that FISA requires judicial approval); *In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986) (“The Act contains strict requirements as to the conditions which must be satisfied before surveillance may be authorized.”); *United States v. Falvey*, 540 F. Supp. 1306, 1313 (E.D.N.Y. 1982) (articulating the requirement of the FISA judge to find that the target is actually involved in the terrorist acts).

694. *See Cavanagh*, 807 F.2d at 791 (stating that an Article III judge acts in a judicial capacity when deciding FISA applications); *see also* *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“The law of Article III standing is built on a single basic idea—the idea of separation of powers.”).

695. *See Cavanagh*, 807 F.2d at 791 (noting that an Article III judge acts in a judicial capacity when deciding FISA application).

the FISC has also been overturned.<sup>696</sup> Courts that have reviewed challenges to FISA surveillance orders have not been persuaded that the political question doctrine bars review of the orders, holding that the surveillance decision is for the President alone to make. Instead, reviewing courts have determined that the FISC engages in day-to-day fact-finding like that performed regularly by judges.<sup>697</sup> Any fears that FISA and the FISC would undermine executive powers have vanished in light of the fact that not a single request for an electronic surveillance order has been denied by the FISC.<sup>698</sup> Moreover, raw executive power arguments are likely perceived within the executive branch as a poor substitute for the power conferred by FISA. If anything, the *Keith* and *Steel Seizure* decisions cast doubt on any claim that the President may act alone in this sphere, especially in defiance of statute.

Although the Supreme Court has not considered the constitutionality of FISA,<sup>699</sup> the lower courts have uniformly followed the conclusion in *United States v. Duggan*<sup>700</sup> that FISA is a “constitutionally adequate balancing of the individual’s Fourth Amendment rights against the nation’s need to obtain foreign intelligence information.”<sup>701</sup> FISA does not resolve the *Truong* problem—whether the primary purpose standard satisfies the Fourth Amendment—yet *Truong* has guided the courts in deciding whether to uphold the use of FISA-derived surveillance. The FISA procedures would have likely been upheld in *Truong* because of the similarity between the facts in that case and the continuing instances in which FISA orders are sought. An alternative to recognizing a foreign intelligence exception to the warrant requirement has been

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696. *See id.* at 792 (stating that temporary assignment within the federal judicial system is common and does not undermine judicial independence).

697. *See United States v. Duggan*, 743 F.2d 59, 74-75 (2d Cir. 1984) (finding that a limited judicial role in determining whether the target of a warrant is properly subject to the prescribed procedure is not a political question and does not inject courts into the making of foreign policy).

698. *See Wittes*, *supra* note 600, at 23.

699. *See In re Kevork*, 634 F. Supp. 1002, 1010 (C.D. Cal. 1985) (stating that the “Supreme Court has not yet considered the constitutionality of FISA and declined to define the Fourth Amendment’s requirements for national security electronic surveillance”).

700. 743 F.2d 59 (2d Cir. 1984).

701. *Id.* at 73; *see also United States v. Johnson*, 952 F.2d 565, 575 (1st Cir. 1991) (concluding that FISA satisfies Fourth Amendment requirements); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) (same); *United States v. Ott*, 827 F.2d 473, 475-77 (9th Cir. 1987) (holding that *ex parte* review procedures do not violate the Fourth or Fifth Amendment); *Cavanagh*, 807 F.2d at 790 (determining that FISA satisfies the Fourth Amendment); *see generally Cinquegrana*, *supra* note 331, at 816-17 (discussing the constitutionality of FISA’s targeting and procedural standards under the Fourth and Fifth Amendments).

suggested. Following precedent outside the national security context, Gregory Birkenstock suggests that such surveillance be treated as akin to an administrative search involving special governmental needs.<sup>702</sup> Although FISA surveillance shares elements—the non-criminal law enforcement objective, the need for stealth in situations such as searches of munitions plants and the like—with some administrative searches, the intrusiveness of FISA surveillance and the overlap of FISA surveillance and enforcement of the criminal laws weakens the analogy.<sup>703</sup>

In 1988, in an effort to prevent the executive branch from bypassing the FISA procedures, Congress enacted an amendment to Title III.<sup>704</sup> The Amendment expressly eliminated the § 2511(3) disclaimer central to the *Keith* decision and stated that FISA and Title III are intended to be “the exclusive means” for the conduct of electronic surveillance by the government.<sup>705</sup>

Although the repeal of the disclaimer did not eliminate the constitutional issue, Congress’ action did sharpen any eventual separation of powers contest between Congress and the President in this sphere. The clear intention of Congress to prescribe “the exclusive means” for the conduct of surveillance would relegate the President to Article II arguments in support of warrantless surveillance.

### III. NATIONAL SECURITY SURVEILLANCE TODAY: INVESTIGATION OF TERRORIST THREATS

Terrorism presents a unique set of challenges in the United States.<sup>706</sup> First, current criminal laws and traditional law enforcement processes cannot provide absolute protection against terrorist acts.<sup>707</sup>

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702. See Gregory E. Birkenstock, Note, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843, 866-71 (1992) (adding that some courts, when addressing FISA’s relaxed standard of probable cause, have been reluctant to refer explicitly to the administrative search doctrine).

703. Brown & Cinquegrana, *supra* note 28, at 134-37 (noting that complexity of the issues, the need for security, and the risks associated with delay support a national security exception to the warrant clause).

704. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 1797 (codified as amended at 18 U.S.C. § 2511(2)(f) (1994)).

705. See *id.* (stating that the “procedures in this chapter or chapter 121 and the [FISA] shall be the exclusive means by which electronic surveillance is conducted”).

706. See generally *Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Responses*, Senate Judiciary Comm., 104th Cong. 155 (1997) [hereinafter *Terrorism in the United States*] (prepared statement of James X. Denspey).

707. See Counterterrorism Threat Assessment and Warning Unit, National Security Division, Federal Bureau of Investigation, U.S. Department of Justice, *Terrorism in the United States: 1997*, available at <http://www.fbi.gov/library/terror/terr97.pdf> (last visited July 26, 2000) (discussing the formidable threat of terrorism).

While arrest, prosecution, and incarceration serve well to help prevent most crimes from occurring, the risk of catastrophic harm from terrorist attacks forces us to consider other means of prevention.<sup>708</sup> Moreover, *traditional Fourth Amendment requirements may thwart many investigations* of terrorism, which depend on stealth to prevent terrorist plans before they are carried out.<sup>709</sup>

Second, while terrorism is at its core a national security problem,<sup>710</sup> it represents an unusual confluence of phenomena for the investigative community—the primary purpose of the investigation may be simultaneously and in equal measure law enforcement and national security.<sup>711</sup> With few exceptions, the rules for gathering intelligence about terrorism in the United States are no different from the rules for ordinary criminal investigations.<sup>712</sup>

Third, most prognostications are for more threats of terrorism in the United States in coming years, largely due to the perception that our defenses against conventional attacks are so formidable.<sup>713</sup> Greater threats thus place an additional premium on greater intelligence resources and successes.<sup>714</sup>

The tradition of liberty in the United States casts a shadow over all national security surveillance, and is an overriding problem in addressing terrorism concerns. The core openness of our society permits all of us, including the potential terrorist, considerable freedom to move about, to associate with others, and to act in furtherance of political aims.<sup>715</sup> As recent terrorist incidents in the United States have created a sense of urgency among citizens and government officials to find better preventive strategies, reflection has also reminded us that hasty actions to thwart terrorism may

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708. See RICHARD A. FALKENRATH ET AL., *AMERICA'S ACHILLES HEEL: NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK* 12 (1998) (suggesting increased funding and effort to contain and prevent terrorist acts).

709. See *id.* at 8 (commenting on the difficult balancing of investigative techniques and civil liberties).

710. See *id.* at 9 (noting that national security policy is mainly concerned with protecting national citizens and national institutions from attack).

711. See *id.* at 265 (discussing the need for rational planning that crosses jurisdictional lines of law enforcement and national security). Instances where the two purposes might not coincide include the potential terrorist suspected of credit card fraud.

712. See *id.* at 8 (maintaining that law enforcement has maintained the lead in addressing terrorist crimes).

713. See *id.* at 261-64 (discussing the United States' vulnerability to terrorism due to a lack of attention and resources paid toward developing an organized strategy to deal with a covert attack).

714. See *id.* (emphasizing the need for an overarching U.S. strategy and program for gathering intelligence resources).

715. See *id.* at 8 (discussing the openness and freedoms of American society that are significant in the anti-terrorism context).

threaten the freedoms that permit an open society.<sup>716</sup> Thus, in seeking ways to investigate potential terrorist activity, just as in fashioning better responses to terrorist incidents, the measures adopted must not undermine our basic freedoms.<sup>717</sup>

Even as the United States began to mobilize resources to fight terrorism in the 1980s and 1990s, the terrorist threats themselves were evolving.<sup>718</sup> Instead of the classic political terrorist, seeking support for a political cause, terrorists of late have included religious or cult terrorists, seeking far more calamitous outcomes.<sup>719</sup> While the threats themselves are changing, new technologies, such as the widespread availability of information on the Internet, have made access to bomb-building instructions, and to chemical, biological, and nuclear weapons of mass destruction, more widely available.<sup>720</sup> Even without this new technology, ordinary and easily available farming chemicals can kill and maim hundreds of people in a few seconds, as the devastating attack on the Oklahoma City federal building in 1995 reminded us.<sup>721</sup>

This section will begin by briefly reviewing the authorities available to the government for conducting domestic terrorism investigations. Next, we will assess two prominent terrorist incidents in the United States in recent years, the World Trade Center and Oklahoma City Federal Building bombings, to determine whether existing investigative authorities could have thwarted these tragedies. Then, we will revisit the authorities and constitutional limits and consider the status of the government's national security surveillance authority today. Finally, an investigation of supporters of the Popular Front for the Liberation of Palestine (PFLP) will serve as a case study of the authorities and unsolved problems presented in surveillance of potential terrorist activities.

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716. *See id.* (arguing that counterintelligence activities run the risk of infringing on valued U.S. freedoms).

717. *See id.* at 8-9 (emphasizing the importance of finding ways to combat covert terrorist attacks without undermining the basic freedoms and rights that U.S. citizens enjoy).

718. *See id.* at 29-44 (giving a historical perspective of the threat of covert nuclear, biological, and chemical attack).

719. *See id.* at 13-26 (citing examples of terrorist groups and attacks, including that of the Japanese Aum Shinriko cult that released nerve gas in the Tokyo subway in 1995).

720. *See id.* at 100 (asserting that terrorist weapons are now more accessible and easier to build).

721. *See An "Indelible Trail of Evidence Cited": Witness Says McVeigh Sped Away*, STAR-TRIB. (Minneapolis), Apr. 28, 1995, at A1 [hereinafter *Indelible Trail*] (giving an account of the Oklahoma City bombing).

A. *The Investigators and Their Authority*

In one sense, the problems of investigating terrorism in the United States are no different from those encountered generally in domestic security investigations. Judicial decisions, legislation, and executive rules have shown that the origin of the threat is the largest distinction between domestic law enforcement and internal security investigations.<sup>722</sup> Even the primary purpose standard, directed to the distinction between law enforcement and intelligence gathering, presumes that the intelligence gathering operation has targeted a foreign source.<sup>723</sup> The rules are thus more relaxed upon a showing that the surveillance targets one or more foreign powers or their agents.<sup>724</sup> Yet experience demonstrates three harsh realities: first, it is often difficult to isolate U.S. persons from one or more foreign surveillance targets in a place or through electronic monitoring; second, it is often impossible to determine the relationship of a potential terrorist to a foreign power early in an investigation; and third, that U.S. persons are as capable as any other of wreaking catastrophic havoc.<sup>725</sup>

Terrorist incidents on U.S. soil have increased dramatically in the last few years. Between 1985 and 1995, only two incidents of international terrorism occurred on U.S. soil: the World Trade Center bombing in 1993, and the occupation of the Iranian Mission to the United Nations by opponents of the Iranian regime in 1992.<sup>726</sup> From 1990 through the first days of 1997, however, twenty-five terrorist incidents occurred that were carried out by U.S. persons.<sup>727</sup> They ranged from the highest profile news, such as the Unabomber and the Atlanta Olympics pipe bomb, to numerous arsons in department stores by animal rights activists.<sup>728</sup> In recent years, the FBI has annually engaged in approximately two dozen full domestic terrorism investigations.<sup>729</sup> Since the adoption of the 1983

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722. See *supra* Parts II.D.4-7 (addressing judicial decisions), II.E (addressing executive rules), and II.F (addressing legislation).

723. See *supra* notes 471-506 (discussing *Truong* decision).

724. See *id.*

725. See *infra* notes 766-83 and accompanying text (discussing the Oklahoma City Bombing and the two U.S. citizens who perpetrated the terrorist act).

726. See Center for National Security Studies, *Recent Trends in Domestic and International Terrorism* (Apr. 26, 1995), available at <http://www.cdt.org/policy/terrorism/cnss.trends.html> (discussing the decline in the number of terrorist incidents and the increase in the lethality of these incidents).

727. See *Terrorism in the United States*, *supra* note 706, at 22-23 (reviewing terrorist incidents from 1990 to 1997).

728. See *id.*

729. *Counter Terrorism Intelligence Gathering: Hearings before U.S. Senate, Committee on the Judiciary*, 104th Cong. 155 (1995) (statement of James X. Dempsey, Deputy Director, Center for National Security Studies) (discussing the low threshold

Guidelines, about two-thirds of these full investigations were opened before the commission of any crime.<sup>730</sup> Among the successes was a 1993 effort that resulted in the arrest of several skinheads in Los Angeles after an investigation determined that the group had been planning to attack black, Jewish, and other religious targets.<sup>731</sup>

The Justice Department, through the FBI, has been the lead agency for terrorism investigations in the United States since 1982.<sup>732</sup> By 1983, Attorney General William French Smith noted that threats of terrorism originating from purely domestic sources had grown more sophisticated, as the technology to inflict terrorist acts had evolved.<sup>733</sup> Thus, the standard for opening a "full" investigation pursuant to the Guidelines for domestic security investigations was revised from "specific and articulable facts" to "when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws."<sup>734</sup> The 1983 Guidelines also emphasized that the domestic security investigative authority is different from general crimes authority.<sup>735</sup> Nevertheless, traditional Fourth Amendment and other statutory and regulatory procedures protect investigations of a USP.<sup>736</sup>

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required for the FBI to open a full terrorism investigation).

730. *See id.* (explaining that the FBI can open a full investigation whenever it reasonably believes from the facts or circumstances that two or more persons are engaged in these types of activities).

731. *See id.* (describing the FBI's successful preventative intervention).

732. *See* National Security Decision Directive 30, Apr. 20, 1982 (unclassified version), reprinted in CHRISTOPHER SIMPSON, NATIONAL SECURITY DIRECTIVES OF THE REAGAN AND BUSH ADMINISTRATIONS: THE DECLASSIFIED HISTORY OF U.S. POLITICAL AND MILITARY POLICY, 1981-1991, at 113. The Department of State coordinates federal responses to terrorism abroad, and the Federal Aviation Administration is concerned with terrorism aboard aircraft in the United States. *See* Center for Non-Proliferation Studies, Monterey Institute of International Studies, *Federal Structure for Terrorism Response*, available at <http://cns.miis.edu/research/cbw/response.htm> (last visited July 26, 2000) (outlining the responsibilities of the federal agencies dealing with terrorism). The Federal Emergency Management Agency is the lead agency for consequence management, and provides a support role in crisis management in the federal responses to terrorism. *See* Exec. Order No. 12,148, 3 C.F.R. 412 (1980) (outlining the functions of the Federal Emergency Management Agency).

733. *See supra* text accompanying notes 534-36.

734. *Criminal AGG*, *supra* note 522, at 3091 (outlining the Attorney General's Guidelines on Investigations).

735. *See id.* at 3092.

736. *See id.* at Part IV.

*B. Terror in the Heartland: Bombings of the World Trade Center and the Oklahoma City Federal Building*

*1. The bombing of the World Trade Center*<sup>737</sup>

At lunchtime on February 26, 1993, a 1,200-pound bomb enclosed in a rented van exploded in the parking garage beneath the World Trade Center complex in downtown Manhattan.<sup>738</sup> The blast killed six, injured over one thousand and immeasurably harmed America's notions of security from terrorism.

The individuals charged with engineering the bombing immigrated to the United States by using false passports, false visas, or by claiming political asylum.<sup>739</sup> Their base, the Al-Salam Mosque in Jersey City, had been, since 1990, a center for the teachings of Sheik Omar Abdel Rahman, an Egyptian cleric who had earlier adopted the most violent strands of Islamic thought.<sup>740</sup> Sheik Rahman, along with eventual co-conspirator Ramzi Yousef, a highly trained terrorist from Pakistan and veteran of the Afghan jihad, were on a State Department list of persons suspected to have been involved in politically motivated violence and were thus excludable from the United States pursuant to statute.<sup>741</sup> Rahman entered using a visitor's visa from Sudan.<sup>742</sup> By the time the mistake was realized, he had claimed political asylum.<sup>743</sup> Rahman was released, at least partly due to the overcrowding of detention centers, and he was told to appear for a hearing on his asylum application within eighteen months.<sup>744</sup> Yousef also entered with an Iraqi passport and sought asylum on the basis that he would face persecution by Iraq if ordered to return.<sup>745</sup> He also was released due to a lack of detention space.

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737. This account is drawn from Gail Appleson, *Sixth Suspect Indicted in the World Trade Center Blast*, REUTERS LIMITED, May 19, 1993, BC Cycle; Ralph Blumenthal, *The Bombing: Retracing the Steps*, N.Y. TIMES, May 26, 1993, at B1; Alison Mitchell, *U.S. Widens Charges in Trade Center Bombing*, N.Y. TIMES, May 27, 1993, at B4; Nancy Reckler, *After Eight Months, Massive Terrorism Case Goes to Jury in New York*, WASH. POST, Sept. 24, 1995, at A11; Benjamin Weiser, "Mastermind" and Driver Found Guilty in 1993 Plot to Blow up Trade Center, N.Y. TIMES, Nov. 13, 1997, at A1.

738. See *This Time, It Didn't Go Off, Tale of Terror from Feb. 26 to Yesterday*, NEWSDAY (N.Y.), June 25, 1993, at A10 (chronicling the World Trade Center bombing).

739. See Robert D. McFadden, *Law is Satisfied, but Answers Don't Cover Every Question*, N.Y. TIMES, Nov. 13, 1997, at A1.

740. See *id.*

741. See Immigration Act of 1990, 8 U.S.C. § 1182(a)(3)(B) (1994) (barring aliens who have engaged in terrorist acts entrance to the United States).

742. See Lynn Duke, *Trail of Tumult on U.S. Soil*, WASH. POST, July 11, 1993, at A1 (exploring Rahman's activity in the United States).

743. See *id.*

744. See *id.*

745. See Blumenthal, *supra* note 737, at B1.

Once released, the perpetrators made preparations for the bombing. On November 30, 1992, Mohammed A. Salemah, Yousef's roommate, rented a locker under an alias.<sup>746</sup> FBI agents would testify later that this locker had contained chemicals and bomb-making devices. On February 23, 1993, Salameh and Nidal Ayyad, a chemical engineer, rented a van from a Ryder rental office in Jersey City. On Thursday, February 25, Mohammad Salameh visited the rented locker.

Post-bombing activities further implicated the individuals.<sup>747</sup> Less than two hours after the explosion on the 26th, Mohammad Salameh appeared at the Ryder agency, claiming that his van had been stolen. Salameh returned repeatedly over the next few days in an attempt to reclaim his deposit. Meanwhile, FBI agents recovered the vehicle identification number on part of the van that carried the explosives and then traced the piece to the Ryder office in Jersey City. Federal agents waited for Salemah's return to the Ryder agency, watched him complete paperwork regarding the missing van, and then arrested him when he left the agency. FBI agents then searched Salemah's rented locker and found chemicals, (including sulfuric acid and shotgun powder), beakers, tubing and fuse.

The other actors fled the country. Yousef, thought to have planned the bombing, fled to Pakistan the day of the bombing, and continued to engage in terrorist activities.<sup>748</sup> Eyad Ismoil, a childhood friend of Yousef and the driver of the bomb-carrying van, fled to Jordan the same day. After a two-year pursuit, Yousef was apprehended in Pakistan and Ismoil was arrested in Jordan in 1995.<sup>749</sup> In the interim, two related trials were held. On March 4, 1994, Mohammad Salameh, Nidal A. Ayyad, Mahmud Abouhalima and Ahmad Ajajfour were convicted of various offenses related to the bombing of the World Trade Center. On October 1, 1995, ten defendants, including Sheik Rahman and Yousef, were found guilty of charges related to a thwarted plan to blow up the United Nations headquarters and to bomb other New York buildings, bridges and tunnels. Evidence at this trial also included statements in Yousef's computer about a coordinated plan to bomb twelve U.S. jetliners in forty-eight hours.

Periodically throughout its investigation of terrorist groups before and after the World Trade Center bombing, the FBI employed

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746. *See id.*

747. *See id.*

748. *See* McFadden, *supra* note 739, at A19.

749. *See id.*

wiretaps and an informant, Emad A. Salem, an Egyptian ex-intelligence officer.<sup>750</sup> FBI infiltration of the group planning to bomb the New York City landmarks thwarted the plot and led to the 1995 convictions.<sup>751</sup> Although Salem did not penetrate the cell of individuals who were convicted of the World Trade Center bombing, his testimony was critical in the 1995 trial.<sup>752</sup> The government paid \$1.5 million in exchange for Salem's testimony against the ten defendants in the 1995 trial,<sup>753</sup> but had previously decided against using him as an informant after he failed a series of lie detector tests.<sup>754</sup>

The culminating trial of Yousef and Ismoil was held in 1997 in New York.<sup>755</sup> After a three-month trial, a jury convicted Yousef of directing and helping carry out the World Trade Center bombing and Ismoil of driving the Ryder van that carried the bomb into the underground garage of the Trade Center.<sup>756</sup> Both received life sentences for offenses involving the use of explosives to kill people.<sup>757</sup>

Although the government developed much of its case against Yousef in the earlier trials, new testimony was admitted from a Secret Service agent who accompanied Yousef on his flight to the United States from Pakistan in 1995.<sup>758</sup> According to the testimony, Yousef not only admitted to and explained in detail his role in the plot, but he expressed regrets that more death and destruction had not been caused.<sup>759</sup> According to the Secret Service agent, Yousef stated that the goal of the explosion had been to cause one of the towers to topple into the other, killing up to 250,000 people.<sup>760</sup> Yousef also reportedly told the agent that he had recruited the conspirators, picked the target, directed the making and delivery of the bomb, and set its fuse, all to avenge the Palestinian people and to retaliate against the United States for its support of Israel.<sup>761</sup> Moreover, Yousef

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750. Because the terrorist acts had already occurred, the investigations of the World Trade Center bombing focused on the crime and were conducted pursuant to the criminal Guidelines. Investigations of terrorist groups are more likely to be conducted pursuant to the FCI Guidelines, to the extent they have a foreign origin. See *supra* notes 736-37 and accompanying text (explaining the guidelines).

751. See Reckler, *supra* note 737, at A11.

752. See *id.*

753. See *id.*

754. See James C. McKinley, Jr., *Witness in Bombing Plot Once Failed Lie-Detector Tests*, N.Y. TIMES, Mar. 3, 1995, at B3 (stating that the FBI broke relations with Salem after he failed several lie-detector tests in 1992).

755. See McFadden, *supra* note 739, at A19 (discussing the trial).

756. See *id.*

757. See *id.*

758. See *id.*

759. See *id.*

760. See *id.*

761. See *id.*

apparently confessed to plans for a suicide attack on CIA headquarters, and an attempt to assassinate President Clinton with phosgene gas.<sup>762</sup> Ismoil also admitted to authorities that he had driven the van that carried the bomb, although he claimed that he thought he was delivering cartons of shampoo.<sup>763</sup>

Despite the extensive evidence amassed during the World Trade Center bombing trials, it remains unknown who financed the plot, and who, if anyone, directed Yousef.<sup>764</sup> Although no evidence at trial ever indicated that Yousef was working for a foreign power, as would be traditionally defined, or for an organized terrorist group, some investigators maintained that Yousef's ability to move easily around the world as a fugitive made it unlikely that he acted on his own.<sup>765</sup>

## 2. *The Oklahoma City bombing*

On April 19, 1995, a Ryder Rental Company truck parked in front of the Alfred P. Murrah Building in Oklahoma City.<sup>766</sup> At 9:02 a.m., the truck, burdened with 4,800 pounds of ammonium nitrate, exploded.<sup>767</sup> The resulting blast destroyed the Federal Building, killed 168 people and wounded more than 500 others.<sup>768</sup>

After locating a partial vehicle identification number among the rubble of the explosion, FBI officials traced the vehicle to a Ryder Rental agency in Junction City, Kansas.<sup>769</sup> Based on a description of the men that rented the van, the FBI made composite drawings.<sup>770</sup> A motel manager in Junction City recognized the composite drawing as a guest who was driving a Ryder truck and had registered under the name Timothy McVeigh.<sup>771</sup> On April 21, investigators entered McVeigh's name into the National Crime Information Center computer and learned that he was jailed for a traffic violation in Noble County, Oklahoma only an hour and twenty minutes after the

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762. *See id.*

763. *See id.*

764. *See id.*

765. *See id.*

766. *See Indelible Trail, supra* note 721, at A1. The Murrah Building housed several agencies, including: the Bureau of Alcohol, Tobacco and Firearms; the Departments of Agriculture, Housing and Urban Development, Labor, and Veterans Administration; Drug Enforcement Administration; Federal Highway Administration; General Accounting Office; General Services Administration; Social Security Administration; U.S. Marine Recruiting; U.S. Army Recruiting; and Secret Service. *See Alfred P. Murrah Building History, at* <http://www.fireprograms.okstate.edu/OCFD/htm/murrhist/htm> (last visited July 26, 2000).

767. Dale Russakoff, *An Ordinary Boy's Extraordinary Rage*, WASH. POST, July 2, 1995, at A1 (giving an account of the Oklahoma City bombing).

768. *See id.*

769. *See McVeigh's Conviction*, DENV. POST, June 4, 1997, at B7.

770. *See Search for the Truth*, ST. PETERSBURG TIMES, Mar. 31, 1997, at A6.

771. *See id.*

bombing.<sup>772</sup> The Bureau contacted the jail where McVeigh was being held and notified the district attorney not to release the prisoner on bail.<sup>773</sup>

The nature and extent of any ties McVeigh may have had to militia or other organized groups remains unclear, although his acquaintances reported that McVeigh had growing and obsessive anger and distrust for the federal government.<sup>774</sup> In addition, McVeigh is known to have attended the same meetings as members of right-wing militia groups, and to have been a true believer in Andrew Macdonald's *The Turner Diaries*, which tells of a group of white supremacists who blow up FBI headquarters in Washington.<sup>775</sup> McVeigh gave copies of the book to friends, sold it at gun shows, and had a photocopy of a passage from the book in his car when he was arrested following the Oklahoma City bombing.<sup>776</sup> It was also noteworthy that the bombing took place on the second anniversary of the fire at the Branch Dividians compound in Waco, Texas.<sup>777</sup>

Following his arrest, McVeigh listed James Nichols as a reference.<sup>778</sup> James Nichols' brother, Terry Nichols, a friend of McVeigh's, surrendered to police when he learned that he was wanted in conjunction with the bombing.<sup>779</sup> Nichols, who claimed to be a member of the Michigan Militia, was indicted along with McVeigh for murder and other charges.<sup>780</sup> Despite Nichols' alleged militia activity and accusations that he had detonated explosives on his farm, there was no specific threat, by Nichols or any group, to the Murrah building or its employees before the explosion.<sup>781</sup>

McVeigh and Nichols were convicted of the bombing in federal court in Denver.<sup>782</sup> Critical to the prosecution was the success of the FBI in charging Michael Fortier, an acquaintance of both suspects, with misprision of felony to induce Fortier's cooperation against

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772. See Peter Annin Evan Thomas, *Judgment Day*, NEWSWEEK, Mar. 24, 1997, at 42.

773. See *id.*

774. See Lois Romano & Tom Kenworth, *McVeigh Guilty on All Counts*, WASH. POST, June 3, 1997, at A1.

775. See *id.*

776. See Michael Fleeman, *The McVeigh Trial: Suspect Had 'Earplugs, Gun'; Witnesses Detail Items Found in Search*, CHI. SUN-TIMES, Apr. 29, 1997, at 15 (describing the contents of McVeigh's car).

777. See *Supremacist Takes Fifth During Oklahoma Questioning*, DENV. POST, July 17, 1997, at A1.

778. See *Indelible Trail*, *supra* note 721, at A1.

779. See *United States v. Nichols*, 897 F. Supp. 542, 548 (W.D. Okla. 1995).

780. See *Terror in the Heartland*, CHI. TRIB., Apr. 26, 1995, at 1.

781. See *id.*

782. See Karen Abbot, *Nichols Wants Cases Merged for Appeal*, ROCKY MOUNTAIN NEWS, Aug. 6, 1998, at A21.

McVeigh and Nichols.<sup>783</sup>

### 3. *Similarities and differences*

In many respects, the World Trade Center and Oklahoma City bombings were similar. First, the bombers were members of or at least believers in radical social networks that were outside the mainstream political spectrum.<sup>784</sup> Second, both groups had the knowledge and access to materials needed to make bombs.<sup>785</sup> Third, both were able to gain access to powerfully symbolic targets. Fourth, both were caught up in the urgings of others to take violent actions against the U.S. government. Fifth, both investigations were successfully conducted, albeit after the fact, working with existing rules of investigation, including extensive and meticulous work at the crime scene.<sup>786</sup> Finally, both bombings illustrate U.S. vulnerability to politically motivated violence, within its borders and by its citizens.

Nevertheless, the differences between the two episodes are equally striking and perhaps more noteworthy for the purposes of investigations of terrorist activity. The World Trade Center bombers were part of a structured group that had support abroad, possibly including state sponsorship.<sup>787</sup> The history of politically violent radical Islam provided a powerful base of support.<sup>788</sup> This made the perpetrators all the more dangerous, potentially requiring great efforts to locate and detain suspects throughout the world.<sup>789</sup> Of course, the group's notoriety made it possible to prevent members from entering the United States, making it possible to place an informant inside the group, and to more easily locate suspects after

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783. See *Search for the Truth*, *supra* note 770, at A6.

784. See HARVEY W. KUSHNER, *TERRORISM IN AMERICA* 49-50 (describing the World Trade Center bombers' radicalism); Beverly Allen, *Talking "Terrorism": Ideologies and Paradigms in a Postmodern World*, 22 SYRACUSE J. INT'L L. & COM. 7, 10-11 (1996) (describing the expulsion of the Oklahoma City bombers from the body politic).

785. See KUSHNER, *supra* note 784, at 50 (noting that the World Trade Center bombers purchased most of the materials for the bomb for less than \$9,000).

786. See Symposium, *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime*, 21 MICH. J. INT'L L. 527, 559 (1999) (remarks of Prof. Kate Martin) (referring to the FBI's response to both bombings as traditional and successful law enforcement activity).

787. See JIM DYWER ET AL., *TWO SECONDS UNDER THE WORLD* 239-40 (1994) (detailing a confession of one of the bombers linking the terrorist act to several organizations); see also *supra* note 765 and accompanying text (discussing the possibility of foreign involvement).

788. See Steven Emerson, *Unholy War*, NEW REPUBLIC, Sept. 14, 1998, at 1, 2 (noting that the writings of radical Islamic fundamentalists advocating violence are widely read throughout the Muslim world).

789. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996) (discussing the international nature of the conspiracy and difficulty using traditional law enforcement and prosecutorial tactics to combat terrorism).

the bombing.<sup>790</sup>

Another large difference is the scope of potential follow-up investigations. Both incidents were investigated pursuant to the Attorney General criminal guidelines.<sup>791</sup> The Oklahoma City bombing was a criminal act involving no foreign actors; the Attorney General criminal guidelines dictated the only possible investigative procedures related to that investigation.<sup>792</sup>

The World Trade Center was a more complex matter. The post-bombing circumstances led authorities to demand a speedy and efficient criminal investigation. The foreign element, however, yielded the possibility of an investigation pursuant to the counterintelligence guidelines.<sup>793</sup>

Oklahoma City bombing suspect Timothy McVeigh gave no indications that he was involved in a terrorist organization, although his personal history made him a likely candidate for violent behavior.<sup>794</sup> Unlike the World Trade Center bombing, there was no group to infiltrate. In this respect, McVeigh was more like Unabomber Theodore Kaczynski than the Islamic World Trade Center bombers.

#### 4. *Lingering questions*

The FBI lacked the intelligence needed to anticipate either of the two bombings. While the FBI employed wiretaps and an informant to infiltrate the group responsible for the World Trade Center bombing, neither the electronic surveillance nor the informant was able to penetrate the particular cell that carried out the act.<sup>795</sup>

Preventing the Oklahoma City bombing was even more difficult. No information credibly obtained to date indicates that there was even an “enterprise” of “two or more persons” to investigate, pursuant to criminal guidelines, prior to the Oklahoma City bombing.<sup>796</sup> Moreover, no information has connected the bombing to an organization, militia, terrorist group or foreign power, the latter two of which might merit investigation under counterintelligence

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790. See Malcolm Gladwell, *Sheik, 9 Others Convicted in N.Y. Bomb; 10 Convicted in NY Conspiracy Case*, WASH. POST, Oct. 2, 1995, at A1 (detailing the FBI investigation of the terrorist group, use of informants, and the volume of evidence obtained).

791. See *Criminal AGG*, *supra* note 522, at 3091.

792. See *id.* at 3087 (explaining the requirement that all criminal investigations must be undertaken in accordance with these regulations).

793. See *FIA AGG*, *supra* note 525 (providing counterintelligence guidelines).

794. See Russakoff, *supra* note 767, at A1 (discussing McVeigh's history).

795. See *supra* note 752 and accompanying text.

796. See *Criminal AGG*, *supra* note 522, at 3091 (indicating the need for a group, not individual, object of investigation).

guidelines.<sup>797</sup>

Indeed, as terrorists such as Yousef and Usama bin Ladin illustrate, a primary threat from terrorism today appears to have evolved from large, highly-organized state sponsored terrorist groups to loosely organized but technically competent persons affiliated through common goals, not national origin. This new phenomenon, which the FBI has labeled International Radical Terrorism ("IRT"), includes any extremist movement or group, international in nature, that conducts acts of crime or terrorism under the banner of personal beliefs in furtherance of political, social, economic, or other objectives.<sup>798</sup> Because of the influence they wield, and their ability to act globally, IRT groups now exercise the type of destructive power historically held solely by nations and large, hierarchically structured organizations.<sup>799</sup> Today, practical reality displaces preconceived notions of "foreign power."<sup>800</sup>

Another problem with counterterrorist investigations concerns ethnic or racial stereotyping. For example, naturalized U.S. citizen Abraham Ahmad left Oklahoma City for Chicago shortly after the bombing on April 19, 1995.<sup>801</sup> He planned to fly to Jordan via Rome.<sup>802</sup> When he landed in Chicago, federal agents detained him and searched his carry-on baggage.<sup>803</sup> The interrogation caused Ahmad to miss his flight to Rome, so he flew instead to London.<sup>804</sup> There, British immigration officials, upon discovering that Ahmad had arrived from Oklahoma City, handcuffed him and questioned

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797. *See id.* at 3087 (noting that investigations involving foreign intelligence, foreign counterintelligence and international terrorism matters are subject to separate guidelines); *see also* FIA AGG, *supra* note 525 (providing counterintelligence guidelines).

798. *See* TERRORISM RESEARCH AND ANALYTICAL CENTER, NATIONAL SECURITY DIVISION, FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 7 (1994); *see also* COUNTERTERRORISM THREAT ASSESSMENT & WARNING UNIT, NATIONAL SECURITY DIVISION, U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES 18 (1996) (listing a current international terrorist threat as "loosely affiliated international radical extremists").

799. *See, e.g.*, FALKENRATH, *supra* note 708, at 167-71.

800. *See, e.g.*, Bruce B. Auster, *An Inside Look at Terror Inc.*, U.S. NEWS & WORLD REP., Oct. 19, 1998, at 34 (providing a perspective into Osama bin Laden's organization, Al Qa'ida). Al Qa'ida has no host nation, lacks a significant hierarchy, has considerable financial backing, and is capable of supplying the means for carrying out terrorist threats around the world. *See id.* For more on the bin Laden organization, *see* Stephen Emerson, *Inside the Osama Bin Laden Investigation*, J. COUNTERTERRORISM & SECURITY INT'L, Fall 1998, at 16 (describing the elaborate organization's decade-long mission of terrorist attacks).

801. *See* William Booth, *A Nightmare of a Stopover in London*, WASH. POST, Apr. 24, 1995, at A12 (describing in great detail Ahmad's detention).

802. *See* Paul Dean, *It's Just Your Look, Your Look*, L.A. TIMES, Apr. 28, 1995, at E1 (reporting the incident and providing quotations from Ahmad).

803. *See id.*

804. *See id.*

him for four to five hours, refusing to feed him.<sup>805</sup> Then the British authorities sent Ahmad under armed guard back to the United States. When he arrived at Dulles Airport near Washington, he was taken in a closed van to an office, fingerprinted, and asked to sign a statement that he had been read his rights.<sup>806</sup> Ahmad refused to sign the statement.<sup>807</sup> After several hours, FBI agents released him without charges.<sup>808</sup> Ahmad returned to Oklahoma City, only to find that his wife and daughters had fled their house under the intense media scrutiny and abuse from passersby.<sup>809</sup>

Officials apparently detained Ahmad solely on the basis of his ethnicity, name, and physical appearance.<sup>810</sup> In the first few days after the Oklahoma City bombing, before the FBI linked suspects McVeigh and Nichols to the incident, the *New York Post* published a cartoon with caricatures of Middle Eastern men laying siege to the Statue of Liberty.<sup>811</sup> Also, commentators opined in the print and broadcast media that the bombing had all the characteristics of “a Middle Eastern trait,” and that “the fundamentalists . . . [were] targeting us.”<sup>812</sup> In the days after the bombing, an anti-defamation group reported 222 attacks against Muslims.<sup>813</sup>

The problems of racial or ethnic stereotyping and guilt by association are long-standing and not unique to national security settings.<sup>814</sup> However, national security consequences are significant if law enforcement agents were to make the opposite mistake to the one made with Mr. Ahmad—failing to detain a culpable suspect because positive information was unavailable. When balancing between requiring authorities to detain or otherwise interfere with individual liberties only on the basis of firm information or positive identification, and permitting the government to act based on some reasonable suspicion, the government should receive greater deference when the risks to internal security are greater.

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805. See Booth, *supra* note 801, at A12.

806. See *id.*

807. See *id.*

808. See *id.*

809. See *id.*

810. See *id.* (portraying the Ahmad incident as ethnic-based profiling, as Ahmad was the only passenger who appeared Middle Eastern, and the only one stopped).

811. See generally Mohammed Bazzi, *The Arab Menace*, THE PROGRESSIVE, Aug. 1995.

812. See *id.* at 40 (quoting Steven Emerson of the CBS Evening News).

813. See James Brooke, *Attacks on U.S. Muslims Surge Even as Their Faith Takes Hold*, N.Y. TIMES, Aug. 28, 1995, at A1 (providing statistics of reported attacks on American Muslims).

814. See *id.* (explaining that physical characteristics are commonplace factors used to profile suspects); see also Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, 83 A.B.A. J. 48 (1997).

To further complicate intelligence efforts, some self-styled citizen militias have promoted “leaderless resistance” by confining the planning of terrorist activities to individuals or small groups to prevent infiltration by law enforcement agencies.<sup>815</sup> There is increasing evidence that terrorism in the United States, and bombings of government installations in particular, do not fit the stereotype of foreign agents seeking vengeance.<sup>816</sup> Instead, “the face of domestic terrorism is a bomber next door.”<sup>817</sup> While the media has concentrated on the two attacks described above, as well as Unabomber Theodore Kaczynski’s activities, small towns and suburban neighborhoods have suffered a significant increase in bombings and attempted bombings.<sup>818</sup> In a decade, the number of such explosions tripled from 1,103 in 1985 to 3,163 in 1994.<sup>819</sup>

For example, in July 1996, FBI agents arrested members of the Arizona Vipers, a paramilitary group, on charges of conspiring to blow up government buildings, after an undercover agent infiltrated the group and recorded some conversations between members.<sup>820</sup> At about the same time, the United States indicted nine people, including a leader of the Washington State Militia, in Seattle on federal charges of conspiring to make bombs for use against the U.S. government and the United Nations.<sup>821</sup> Members of the Washington group included a chimney sweep, a mason, Boeing Company workers, a religious teacher, and a television repairman.<sup>822</sup> An FBI agent infiltrated this group, recording some of its meetings.<sup>823</sup> The group possessed pipe bombs, increasingly popular weapons that terrorists use against intended targets.<sup>824</sup> The number of pipe bomb explosions has doubled in the last ten years, and bombs aimed at government installations increased from seventeen in 1990 to fifty-one in 1994.<sup>825</sup>

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815. See Keith Schneider, *Bomb Echoes Extremists’ Tactics*, N.Y. TIMES, Apr. 26, 1995, at A22 (describing “leaderless resistance” and its promotion and use by militant citizen organizations).

816. See Timothy Egan, *Terrorism Now Going Homespun as Bombings in the U.S. Spread*, N.Y. TIMES, Aug. 25, 1996, at A1 (acknowledging that today’s terrorist threats no longer fit the stereotype of foreign militant zealots).

817. *Id.* (intimating that it is no longer possible to identify a terrorist by nationality).

818. See *id.* (providing statistics to show heightened numbers of reported bombing incidents throughout the non-urban United States).

819. See *id.* (quoting a Bureau of Alcohol, Tobacco, and Firearms report).

820. See *id.* (using the Vipers as an example of terrorist groups operating within U.S. communities).

821. See *id.* (describing the Seattle-based conspirators).

822. See *id.*

823. See *id.*

824. See *id.*

825. See *id.* (providing FBI statistics on terrorist bombs).

*C. Recent Antiterrorism Reforms*

Following the World Trade Center bombing, Congress introduced bills to expand the federal government's capacity to combat international terrorism.<sup>826</sup> After the Oklahoma City bombing, the Justice Department officials and members of Congress expanded the reform agenda to include domestic terrorism.<sup>827</sup> The Senate bill passed by a lopsided vote in June 1995,<sup>828</sup> and the House Judiciary Committee approved a House version in the same month.<sup>829</sup> The House slowed the legislation down, however, after August and September hearings left many members of Congress with the impression that government agencies, particularly the FBI, had overstepped their bounds in raids on the Branch Davidian Cult near Waco, Texas, as well as in its shootout with white separatist Randall C. Weaver at Ruby Ridge, Idaho.<sup>830</sup> Ultimately, an "unusual coalition of conservative Republicans and civil libertarian Democrats in the House of Representatives" persuaded House leaders not to bring the bill to the floor.<sup>831</sup>

After the Oklahoma City bombing, Justice Department officials, including the FBI leadership, considered changes to the 1983 FBI Guidelines.<sup>832</sup> For example, Clinton administration officials considered a proposal that would permit FBI infiltration of domestic organizations or the use of informants to keep track of such groups' activities.<sup>833</sup> The proposal would allow such investigative techniques without any indication that the targeted group was planning to commit criminal acts of violence.<sup>834</sup>

At a May 3, 1995 hearing of the House Judiciary Committee's Subcommittee on Crime, FBI Director Louis J. Freeh and Deputy Attorney General Jamie S. Gorelick indicated that, rather than

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826. See Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong. (1995); Omnibus Counterterrorism Act of 1995, S. 390, 104th Cong. (1995) (House and Senate bills introduced to combat terrorism).

827. See DEMPSEY & COLE, *supra* note 622, at 108-09.

828. See S. REP. NO. 104-735 (1995) (reporting that the Senate bill passed by a vote of 98 to 1).

829. See Stephen Labaton, *Bill on Terrorism, Once a Certainty, Derailed in House*, N.Y. TIMES, Oct. 3, 1995, at A1 (providing the legislative history of the bill).

830. See *id.* (describing the impetus of Congress' intention to combat domestic terrorism through legislation).

831. *Id.* (providing reasons for the bill's failure to receive House approval).

832. See Neil A. Lewis, *Clinton Plan Would Let FBI Infiltrate Menacing Groups*, N.Y. TIMES, Apr. 25, 1995, at A19 (indicating that private talks within the FBI following the Oklahoma City bombing included an expressed need for more investigative authority).

833. See *id.* (reporting the Clinton administration's plan to permit the FBI to exercise more of its own discretion in conducting investigations, even at the expense of citizens' liberty interests).

834. See *id.*

rewrite the 1983 Guidelines, the administration had decided to reinterpret them.<sup>835</sup> The new interpretation would permit broad investigations of “a domestic terrorism group if that group advocated violence or force with respect to achieving any political or social objectives.”<sup>836</sup> Instead of finding an “imminent violation” of the law, as the existing Guidelines required, the DOJ would permit an investigation if it detected any potential conduct that “might violate federal law.”<sup>837</sup> According to the accompanying interpretive memorandum prepared by the Justice Department, the FBI may authorize a full investigation if there are statements threatening or advocating the use of violence, and an apparent ability to carry out the violence in a way that would violate federal law.<sup>838</sup>

If the FBI conducted full domestic security investigations whenever it found any conduct that “might violate federal law,” it may be difficult to reconcile the new guidelines with the portions of the 1983 Guidelines. The 1983 guidelines require consideration of the magnitude of the threat, its likelihood and immediacy, and the danger to individual freedoms posed by an investigation.<sup>839</sup> The reinterpretation may authorize investigations that would violate individual rights.<sup>840</sup>

Freeh also explained that the FBI could open a preliminary investigation based on “partial information” and that “any lawful investigative technique may be used in a preliminary inquiry . . . [except] mail covers, mail openings, and nonconsensual electronic surveillance. . . . [A preliminary inquiry may include] the planting of undercover agents in the [suspect] organization.”<sup>841</sup> As a result of the broader guidelines, the number of open security investigations increased dramatically from about 100 in 1995 to more than 800 in 1997.<sup>842</sup>

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835. See Stephen Labaton, *U.S. is Easing Restrictions on Monitoring Some Groups*, N.Y. TIMES, May 4, 1995, at B14 (illustrating the domestic counterterrorism plan to allow the FBI more freedom in its investigative actions).

836. *Id.*

837. *Id.*

838. *Combating Domestic Terrorism: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.*, 104th Cong. 12, 20 (1995) [hereinafter *Freeh testimony*] (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (presenting the FBI's proposed investigative authorizations, but highlighting its limits as well).

839. See *Criminal AGG*, *supra* note 522, at 3091-92 (discussing FBI's basis for conducting domestic security and terrorism investigations).

840. See Labaton, *supra* note 835, at B14 (noting civil liberty interest groups' opposition to the FBI's plan as it would reduce citizens' rights against unwarranted searches and seizures).

841. *Freeh testimony*, *supra* note 838.

842. See Jim McGee, *The Rise of the FBI*, WASH. POST MAG., July 20, 1997, at 10, 25 (attributing the rise in investigations to a focus on individuals instead of groups).

Eventually, in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996.<sup>843</sup> The Act contained few of the original Clinton Administration proposals. Congress dropped the proposals for enhanced surveillance capabilities for terrorism investigations made after the World Trade Center and Oklahoma City bombings from the bill.<sup>844</sup> Unfortunately, the Antiterrorism and Effective Death Penalty Act further complicated what was already a potential clash of First Amendment interests and terrorism prevention goals. Among other provisions, the Act permits the Secretary of State to designate any “foreign terrorist organizations”<sup>845</sup> as supporters of “terrorist activity” that threatens U.S. national security.<sup>846</sup> If the Secretary makes such a designation, the State Department would forbid anyone from providing any form of assistance to the designated foreign organization, and would make fundraising for such an organization a serious felony.<sup>847</sup> Although the labeled organization may seek judicial review of its designation, the reviewing judge may permit the attorney general to release privately to the court any information that the department believes would, if released, potentially harm the national security.<sup>848</sup> In addition, the original designation decision is made by an administrative official—the Secretary of State.<sup>849</sup> Her decision may only be reversed by a judge if it fails to satisfy the deferent “arbitrary and capricious” standard of the Administrative Procedure Act.<sup>850</sup>

At the same time Congress created the designation process, it also

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843. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending the Immigration and Nationality Act).

844. See Holly Idelson, *Terrorism Bill is Headed to President's Desk*, 54 CONG. QTLY. WKLY. 1044 (1996).

845. See 8 U.S.C. § 1189 (Supp. V 1999) (authorizing the secretary to designate organizations as terrorist).

846. See *id.* § 1182(a)(3)(B) (identifying and defining terrorist activities); see also *id.* § 1189(a)(1), (c)(2) (enumerating right to identify terrorists in the interest of national security).

847. Section 303 of the Antiterrorism Act and Effective Death Penalty Act of 1996 provides: “Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.” Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996) (codified at 18 U.S.C. § 2339B(a)(1) (Supp. V 1999)).

848. See 8 U.S.C. § 1189(b)(1)-(2) (Supp. V 1999) (restricting judicial review to the administrative record and providing for ex parte submissions by the government).

849. See *id.* § 1189(a)(1) (vesting in the Secretary of State the power to designate foreign terrorist organizations).

850. See *id.* § 1189(b)(3) (defining the appropriate standards for reviewing the Secretary of State's determination); see also Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994) (providing the appropriate standards for reviewing any administrative act).

permitted the deportation from the United States of any aliens belonging to organizations deemed to be engaged in terrorism.<sup>851</sup> The Antiterrorism and Effective Death Penalty Act thus eliminated any requirement that an alien be shown to have any personal connection to terrorist activities,<sup>852</sup> and it permits deportation on the basis of associational activities otherwise protected by the Constitution.<sup>853</sup> The Act also allows deportation of aliens suspected of terrorism without providing the deportees access to the information used in making the deportation decision,<sup>854</sup> and expedites the deportation process by removing certain defenses to deportation.<sup>855</sup>

In addition, Congress amended the Fair Credit Reporting Act in 1996 to require a consumer reporting agency to furnish to the FBI for counterintelligence purposes the names and addresses of all financial institutions at which a consumer maintains or has maintained an account.<sup>856</sup> Before the FBI may request such information, the Director or his designee must certify that the "information is necessary for the conduct of an authorized foreign counterintelligence investigation,"<sup>857</sup> and that there are "specific and articulable" facts giving reason to believe that the consumer is a foreign power or agent of a foreign power.<sup>858</sup> The consumer reporting agency must then furnish information to the FBI upon demand,<sup>859</sup> and a court may issue an *ex parte* order directing the

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851. See 8 U.S.C. § 1227(a)(4)(B) (1994 & Supp. V 1999) ("Any alien who has engaged . . . in any terrorist activity . . . is deportable."); see also *id.* § 1182(a)(3)(B)(iii)-(iv) (defining the term "terrorist activity").

852. See Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 708 (1998) (discussing the broad associational standard for deportation).

853. See *id.* at 699-705 (arguing that the AEDPA severely restricts First Amendment rights to speech and association).

854. See 8 U.S.C. § 1534(e)(3)(A) (Supp. V 1999) (restricting access and only permitting judge *in camera* review). Although a special court was created by 8 U.S.C. § 1532 to address the problems with access to confidential materials, this court was never used because its function was replaced with the *in camera* review process which occurs during the actual deportation hearing. See *id.* § 1532 (providing for the structure and makeup of the court); *id.* § 1534(e)(3)(A) (prescribing the process for judicial examination of classified materials); see also DEMPSEY & COLE, *supra* note 622, at 127, 138 (discussing the fact that although the Terrorist Removal Act has not been used, one of its procedural powers is the use of secret evidence).

855. See 8 U.S.C. § 1534(e)(1) (Supp. V 1999) (making inapplicable otherwise required notice to the defendant that the government intends to use FISA-derived information in "alien terrorist" removal proceedings, and denying the defendant an opportunity to suppress FISA evidence if illegally obtained).

856. Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, 109 Stat. 974 (codified at 15 U.S.C. § 1681u (Supp. V. 1999)).

857. 15 U.S.C. § 1681u(a)(1) (Supp. V 1999).

858. *Id.* § 1681u(a)(2).

859. See *id.* § 1681u(a).

release of such information provided the request was proper.<sup>860</sup> The agency must follow confidentiality requirements regarding any public or private disclosure about the FBI inquiry.<sup>861</sup> Furthermore, the FBI must restrict dissemination of the information.<sup>862</sup> Additionally, the Attorney General must report to the Intelligence Committees semiannually concerning all requests made pursuant to this authority.<sup>863</sup>

Finally, in addition to the pen register and trap and trace Titles added to FISA in 1998,<sup>864</sup> Congress revisited a Clinton administration request that it had rejected in 1996 and granted expanded authority for roving wiretaps,<sup>865</sup> or wiretaps that follow a target from telephone to telephone. As a practical matter, the change eases the requirements for obtaining a roving wiretap.<sup>866</sup> Before the 1998 amendment, investigators had to demonstrate to a judge's satisfaction that a target was changing phones purposefully to avoid interception.<sup>867</sup> Now agents must only show that the effect of the target's actions may be to evade interception.<sup>868</sup> Under the 1998 amendment, the tap may remain for as long as it is reasonable to presume that the target "is or was reasonably proximate" to the tapped telephone.<sup>869</sup>

#### D. Fitting "Primary Purpose" to Current Needs

The Rockefeller Commission first employed the "primary purpose" concept, settling upon the phrase simply as a descriptor of properly

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860. See *id.* § 1681u(c).

861. See *id.* § 1681u(d).

862. See *id.* § 1681u(f) (restricting the use of this information to internal FBI inquiries or other federal foreign counterintelligence investigations).

863. See *id.* § 1681u(h).

864. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601-605, 112 Stat. 2396, 2404-13 (1998) (to be codified at 50 U.S.C. §§ 1841-1846) (adding Title IV to FISA); see also *supra* notes 616-23 and accompanying text (discussing "pen registers" and "trap and trace" techniques).

865. See Pub. L. No. 105-272, § 604, 112 Stat. 2396, 2413 (amending 18 U.S.C. § 2518(11)(b) (1994)) (revising the criteria for granting a roving wiretap).

866. Compare 18 U.S.C. § 2518(11)(b)(ii) (1994) (requiring law enforcement to show that the suspect was operating with the clear purpose to "thwart interception by changing facilities"), with 18 U.S.C. § 2518(11)(b)(ii) (Supp. V 1999) (amended by Pub. L. No. 105-272) (requiring only a showing that the persons "could have the effect of thwarting interception").

867. See DEMPSEY & COLE, *supra* note 622, at 143 (discussing the separate standards for establishing a roving wiretap).

868. See *supra* notes 866-67 (discussing the alteration under the 1998 amendment).

869. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2413 (1998) (codified as amended at 18 U.S.C. § 2518(11)(b)(iv) (Supp. V 1999)).

directed intelligence gathering.<sup>870</sup> Before *Truong*,<sup>871</sup> the Third Circuit relied upon the primary purpose standard in *Butenko*<sup>872</sup> in upholding electronic surveillance without a warrant, although the court also noted that the surveillance was “solely for the purpose of gathering foreign intelligence information . . . [and that] the accumulation of evidence of criminal activity was incidental.”<sup>873</sup>

The extent to which the nation’s intelligence community may assist law enforcement remains a question of practical importance today.<sup>874</sup> Although this question is difficult to answer in the abstract, a few parameters may be set out. The intelligence community may only collect foreign intelligence, and it may only rarely assist law enforcement entities solely on the basis of a request for support of a law enforcement function.<sup>875</sup> Yet some criminal activity is also clearly foreign intelligence,<sup>876</sup> and most foreign intelligence investigations are potentially criminal investigations.<sup>877</sup> Thus, the primary purpose criterion must be applied to determine whether the traditional law enforcement warrant requirement applies. According to the Fourth Circuit, an investigation crosses over to primarily law enforcement when “the government had begun to assemble a criminal prosecution” and the Criminal Division of the Justice Department had “taken a central role in the investigation.”<sup>878</sup> In *Truong*, the court properly excluded evidence obtained without a warrant after the

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870. See ROCKEFELLER COMMISSION REPORT, *supra* note 231, at 62 (“If the principal purpose of the activity is the prosecution of crimes or protections against civil disorders or domestic insurrection, then the activity is prohibited. . . . [I]f the principal purpose relates to foreign intelligence or to protection of the security of the Agency, the activity is permissible . . .”).

871. See *United States v. Truong Dinh Hung*, 629 F.2d 908, 911 (4th Cir. 1980) (upholding the espionage conviction of Vietnamese persons and indicating the admissibility of materials gathered in intelligence investigations).

872. See *United States v. Butenko*, 494 F.2d 593, 606, 608 (3d Cir. 1974) (affirming the conviction of a Soviet national despite the fact that some evidence was obtained without warrants).

873. *Id.* at 606.

874. See, e.g., Kevin Fisher, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U. J. INT’L L. & POL. 353, 372-74 (1984) (noting the increasing overlap between traditional law enforcement, military, and federal intelligence agencies).

875. See, e.g., 50 U.S.C. § 403-3(d)(1) (1994) (establishing that the Central Intelligence Agency “shall have no police, subpoena, or law enforcement powers or internal security functions”). The Intelligence Authorization Act for Fiscal Year 1996 gave elements of the intelligence community the authority to collect information outside the United States about individuals who are not U.S. persons, at the request of a law enforcement agency. See 50 U.S.C. § 403-5a (1994 & Supp. IV 1998) (granting authority to assist law enforcement upon request).

876. See Elliff, *supra* note 534, at 793-94 (discussing federal criminal investigations as relating to communist and revolutionary groups).

877. See *id.* (noting the overlap and occasional identity of foreign intelligence investigations and some criminal investigations).

878. *United States v. Truong Dinh Hung*, 629 F.2d 908, 916 (4th Cir. 1980).

investigation became primarily law enforcement.<sup>879</sup>

One way to clarify the primary purpose inquiry may be to ask who is collecting the information, and pursuant to whose request. If the collector is the CIA and the requester is the President, it may be reasonable to presume that the information is foreign intelligence.<sup>880</sup> If the CIA is investigating at the behest of FBI, the same presumption may apply, noting that the investigation could change to a law enforcement matter.<sup>881</sup> If FBI is the investigator, the initial purpose could be either intelligence collection or law enforcement.<sup>882</sup>

The government reliably believed that Truong was compromising sensitive government information before any warrantless surveillance was authorized.<sup>883</sup> Although an informant advised the government which documents were ultimately being delivered, the government did not know the source of the leak.<sup>884</sup> However, through the informant Krall, agents knew that the materials related to the negotiations with the North Vietnamese and that, given Truong's access to classified materials, he could have been transmitting classified information unlawfully.<sup>885</sup> It was thus persuasive for the government later to maintain that its primary purpose in opening Truong's packages was to halt Truong's ability to compromise the peace negotiations, most decidedly an intelligence concern.<sup>886</sup>

A qualitative standard such as "primary purpose" invites after-the-fact subjective judgments made in evidentiary hearings, where judges are inclined to defer to decisions of intelligence professionals.<sup>887</sup> In the early stages or even in the midst of an investigation, the need for speedy action, along with problems of coordination among the intelligence and law enforcement agencies, mean that there are no boundaries for the inquiry into the purpose of the surveillance.<sup>888</sup>

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879. *See id.*

880. *See, e.g.,* Chagnon v. Bell, 642 F.2d 1248, 1254 (D.C. Cir. 1980) (discussing, in a companion case to *Truong Dinh Hung*, the presumption under which the Attorney General operates when conducting an investigation).

881. *See, e.g., id.* (observing the necessity of altering the surveillance when the scope of the investigation changes, even though the CIA or FBI is still the party conducting the surveillance).

882. *See, e.g., id.* at 1253 (noting the FBI's dual role in intelligence and criminal investigation of one of Truong's friends).

883. *See Truong Dinh Hung*, 629 F.2d at 911-12, 916 (describing Truong's actions and the resulting government surveillance).

884. *See id.* at 912.

885. *See id.*

886. *See id.* at 916-17.

887. *See, e.g.,* United States v. Humphrey, 456 F. Supp. 51, 55-57 (E.D. Va. 1978) (demonstrating the district court judge's deference to conclusions and decisions made by intelligence personnel in surveillance of Truong).

888. *See* Brown & Cinquegrana, *supra* note 28, at 118-19 (discussing the need for rapid action in intelligence gathering and the application of FISA).

Although the *Truong* requirements for warrantless searches will “preclude application of this powerfully intrusive technique to all but a very few members of the general population,”<sup>889</sup> it is faith in the judgments of intelligence professionals that justifies omitting the magistrate from the process, along with the chance that a criminal prosecution could be thwarted by evidence illegally obtained.<sup>890</sup> Although it remains possible that a lawsuit for damages could be successfully brought for wrongful official conduct involving warrantless surveillance, the barriers to recovery are formidable.<sup>891</sup>

E. *A Case Study: Palestinian Activists and the Popular Front for the Liberation of Palestine (PFLP)*

1. *The story*

During the mid-1980s, a group of Palestinian activists from the Los Angeles area drew the attention of federal officials for alleged ties to the Popular Front for the Liberation of Palestine (PFLP).<sup>892</sup> One of the activists, Khader Hamide, allegedly had asked for contributions at a function “for the combatants in Lebanon and on the West Bank. The revolution requires support.”<sup>893</sup> On January 26, 1987, the FBI, INS, and Los Angeles police department began a joint anti-terrorism operation against the PFLP in the Los Angeles area.<sup>894</sup> That morning, authorities arrested eight people, known as the L.A. Eight.<sup>895</sup>

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889. *Id.* at 145.

890. *See, e.g.*, *United States v. Ajlouny*, 629 F.2d 830, 841-42 (2d Cir. 1980) (discussing the exclusionary rule in light of a subjectively deferential standards to the agents and the interest in criminal prosecution).

891. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394-95 (1971) (recognizing a right of recovery against individual agents for unconstitutional seizures); *Hobson v. Wilson*, 737 F.2d 1, 55-56 (D.C. Cir. 1984) (holding that in order to obtain damages against an officer personally, plaintiffs must show that the officer acted intentionally to disrupt lawful organizations).

892. *See* Michael J. Ybarra, *Domestic Dilemma: Long Effort to Deport Terror Suspects Raises Difficult Rights Issues*, WALL ST. J., Nov. 11, 1991, at A1. The PFLP is a Syria-based splinter group of the Palestine Liberation Organization and known sponsor of international terrorism that has been tied to bombings, assassinations, and the high profile 1976 airline hijacking foiled by Israeli commandos at Entebbe in Uganda. For a discussion of the group, see Frank Trejo, *Lives on Hold: Palestinians Accused of Terrorism Fight to Stay in U.S.; Noncitizens Rights Seen as Key to Case*, DALLAS MORNING NEWS, Dec. 29, 1992, at 1A.

893. David G. Savage, *The Great Alien Lockout: Can Congress Bar Courts from Hearing Deportation Challenges?*, 84 A.B.A. J. 34 (1998).

894. *See* Trejo, *supra* note 892, at 1A.

895. *See* Ybarra, *supra* note 892, at A1. Awakened by loud knocks on his door, Khader Hamide, a permanent resident alien and aspiring U.S. citizen, along with Hamide's wife, Julie, opened the door. The authorities arrested, handcuffed, and whisked them away in separate cars. Both were told that they were terrorists. An eighth suspect was later arrested while taking a college chemistry exam. *See id.*

For twenty-three days, six of the L.A. Eight sat in maximum security cells.<sup>896</sup> FBI Director William Webster admitted two months after their arrests that no member of the L.A. Eight had been found to have engaged in terrorist activities.<sup>897</sup> He also conceded that, if the Eight had been U.S. citizens, “there would have been no basis for their arrest.”<sup>898</sup> Nevertheless, Webster maintained that the FBI conducted the investigation according to FBI Guidelines.<sup>899</sup>

After a lengthy FBI investigation, in December 1986, the INS began deportation proceedings against the L.A. Eight, claiming that they were members of the PFLP, and that Hamide “was the California head of an active but furtive recruiting and support system for the PFLP.”<sup>900</sup> Specifically, the INS charged them under the Cold War-era McCarran-Walter Act with being deportable as aliens belonging to an organization that advocates the “doctrines of world communism.”<sup>901</sup>

In April 1987, the L.A. Eight and several civil rights organizations brought suit to challenge the constitutionality of the “world communism” provisions facially and as-applied.<sup>902</sup> A few days before a hearing to decide the provision’s constitutionality of the ideological grounds, the INS withdrew the original charges and reinstated deportation proceedings against the nonimmigrant aliens for routine visa violations, and against the permanent residents for being “members of an organization that advocates or teaches the unlawful destruction of government property.”<sup>903</sup> INS later added a charge

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896. *See id.*

897. *See Hearings Before the Senate Select Committee on Intelligence on Nomination of William H. Webster to be Director of Central Intelligence*, 100th Cong. 94-95 (1987).

898. *See id.*

899. *See id.*

900. Ybarra, *supra* note 892, at A1.

901. *See id.* The original proceedings against the permanent residents were brought pursuant to the ideological deportation grounds of the McCarran-Walter Act, which permitted deportation of those who advocated world communism. *See* Immigration and Nationality (McCarran-Walter) Act, ch. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1251(6)(D)-(H) (1994 & Supp. V 1999)). After Congress limited those provisions in 1987, and then repealed them in 1990, the INS brought new charges for exclusion and deportation on the grounds that the individuals engaged in terrorist activity. *See* Immigration and Naturalization Act of 1990, 8 U.S.C. § 1227(a)(4)(B) (Supp. V 1999) (formerly 8 U.S.C. § 1251(a)(4)(B) (1994) (amending the McCarran-Walter Act after a federal judge declared the act unconstitutional). In fact, six of the eight entered the United States on student or visitor visas between 1975 and 1983, while the other two, Michel Shehadeh and Hamide, were permanent residents. *See* Trejo, *supra* note 892, at A1. The L.A. Eight maintained, however, that they only raised money for humanitarian projects (such as clinics and hospitals in the Gaza Strip and West Bank), conducted seminars, and distributed Palestinian magazines. *See id.*

902. *See American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1053 (9th Cir. 1995) [hereinafter *American-Arab II*] (reviewing the factual and procedural background of the legal battle between the L.A. Eight and the government).

903. *Id.* (citing 8 U.S.C. § 1251(a)(6)(F)(iii) (now 8 U.S.C. § 1227(a)(6)(F)(iii))

that the two resident aliens “were associated with a group that advocate[d] the unlawful assaulting or killing of government officers.”<sup>904</sup> The new charges were a tactical maneuver—the INS regional counsel intended to deport the eight because of their alleged association with the PFLP.<sup>905</sup> After Congress repealed the 1952 McCarran-Walter Act’s “world communism” provision, the INS brought new charges against the permanent residents for “terrorist activities” under the Immigration Act of 1990.<sup>906</sup>

During the INS proceedings, some of the aliens requested that the immigration judge order the government to affirm or deny the existence of electronic surveillance directed against them or their lawyers.<sup>907</sup> The government responded that it would not present evidence gathered by electronic means in the deportation proceedings that had been gathered by electronic surveillance, “without stating whether any such surveillance had occurred.”<sup>908</sup> After the immigration judge granted a motion requesting the government to affirm or deny that such surveillance had occurred, the government responded that there had been some video surveillance, and that the FBI had placed a pen register on the telephone of one of the parties.<sup>909</sup> In addition, the government’s affidavit admitted that some of the named aliens had been subject to electronic surveillance approved by the Foreign Intelligence Surveillance Court (FISC).<sup>910</sup>

Anticipating the aliens’ next move, the government sought a determination of the legality of the surveillance from the federal district court in California,<sup>911</sup> citing section 1806(f) of FISA for its authorization.<sup>912</sup> The Attorney General submitted an affidavit requesting an *ex parte, in camera* review of the surveillance records, alleging that their disclosure, or even an adversary hearing about

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as the basis for the INS’s new charges).

904. *Id.* (citing 8 U.S.C. § 1251(a)(6)(F)(ii) (now 8 U.S.C. § 1227(a)(6)(F)(ii)) for the INS’s legal authority for this charge).

905. *See id.*

906. *See id.* at 1054. The Immigration Act of 1990 authorizes deportation for “[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity.” Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1227(a)(4)(B) (Supp. V 1999), formerly at 8 U.S.C. § 1251(a)(4)(B) (1994)).

907. *See* United States v. Hamide, 914 F.2d 1147, 1148 (9th Cir. 1990). Hamide first learned that a significant investigation of his activities had occurred when he asked one of the arresting agents why he looked familiar. The agent told Hamide that he had been his neighbor for nine months. *See* Trejo, *supra* note 892, at A1.

908. *Hamide*, 914 F.2d at 1149.

909. *See id.*

910. *See id.*

911. *See id.* at 1149.

912. *See id.*; *see also* Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1829, 1841-1846, 1861-1863 (1994 & Supp. 1998).

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them, “would harm the national security of the United States and [would expose] intelligence sources and methods.”<sup>913</sup> The district court judge complied with the Government’s request and, after the *ex parte, in camera* review, determined that the FISA surveillance was lawful.<sup>914</sup> The aliens appealed to the Ninth Circuit, and, while their appeal was pending, they brought a civil action challenging the surveillance in the district court for the District of Columbia.<sup>915</sup>

Based on the declaration submitted by the Justice Department in their deportation proceedings, the alien plaintiffs sought a declaratory judgment that the admitted surveillance was unlawful, and, based on “information and belief,” they sought to enjoin any ongoing surveillance against them.<sup>916</sup> Their claims for relief included violations of FISA, as well as their First, Fourth, and Fifth Amendment rights.<sup>917</sup> In essence, the plaintiffs argued that they were singled out for surveillance solely on the basis of their political beliefs and associations as advocates for Palestinian causes.<sup>918</sup> They claimed the government violated FISA and the Constitution because it had no basis for believing that the surveillance targets were agents of a foreign power.<sup>919</sup> In addition, the two resident aliens alleged that the “agent of foreign power” determination was made “solely on the basis of activities protected by the first amendment” and thus violated the FISA proscription against such surveillance directed at permanent residents.<sup>920</sup>

While the government acknowledged overhearing them in the course of FISA-authorized surveillance, it never admitted that any of the plaintiffs were *targets* of the past surveillance.<sup>921</sup> Thus, the government answered that plaintiffs may have been overheard incidentally, and that the existence of ongoing surveillance could not be confirmed or denied.<sup>922</sup> The government then moved to dismiss the action for failure to state a claim. The district court granted the motion to dismiss.<sup>923</sup>

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913. *Hamide*, 914 F.2d at 1149.

914. *See id.* at 1150 (finding the electronic surveillance legal because a “court of competent jurisdiction’ had authorized it).

915. *See* ACLU Found. of S. Cal. v. Thornburgh, Civ. No. 89-2248, mem. op. (D.D.C. June 26, 1990) (unpublished opinion) (cited in ACLU Found. of S. Cal. v. Bass, 952 F.2d 457 (D.C. Cir. 1991)).

916. *See id.* at 1-2.

917. *See id.*

918. *See id.* at 2-3.

919. *See id.* at 2.

920. *See id.*

921. *See id.*

922. *See id.*

923. *See id.*

On appeal, the D.C. Circuit ruled that the legality of any past surveillance was finally determined by the district court in California.<sup>924</sup> However, the court refused to sustain the dismissal of the plaintiffs' complaint for failure to state a claim regarding ongoing surveillance.<sup>925</sup> While past surveillance in no way proves ongoing surveillance, noted the court, plaintiffs had to have a chance to prove their claims.<sup>926</sup> On remand, the plaintiffs would have to show that the government intentionally targeted them and intended to disrupt their lawful activities, and that the two resident aliens were targeted "solely" on the basis of protected expressive activities.<sup>927</sup> Because the government is not obligated to affirm or deny any facts pertaining to FISA surveillance, information and belief would not provide the necessary support that there was some genuine dispute about the material facts.<sup>928</sup> The plaintiffs would be required to meet this burden without the benefit of discovery.<sup>929</sup> Because FISA obliges the reviewing court to prevent disclosure of information relating to FISA surveillance in adversary proceedings, the traditional discovery rules do not apply.<sup>930</sup> Thus, the government could seek and obtain summary judgment even before they answer the complaint. The plaintiffs may not even obtain an *ex parte* hearing on the legality of the surveillance.<sup>931</sup>

Eventually, the L.A. Eight sued to enjoin their deportation proceedings on constitutional grounds.<sup>932</sup> In essence, they argued

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924. See *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991) (noting that the judge's order "conclusively determine[d] the disputed question of the surveillance's legality" (quoting *United States v. Hamide*, 914 F.2d 1147, 1151 (9th Cir. 1990))).

925. See *id.* at 467 (holding that a court may not dismiss a claim merely because it is unlikely that the plaintiff will prevail).

926. See *id.* (stating the rule that "surveillance in the past does not prove current surveillance").

927. See *id.* at 469 (noting that plaintiffs carry the burden of proving ongoing surveillance).

928. See *id.* at 468 n.13 ("[U]nder FISA [the government] has no duty to reveal ongoing foreign intelligence surveillance").

929. See *id.* (finding that plaintiffs in FISA cases are not entitled to any materials related to surveillance until and unless the district court, in an *ex parte*, in camera proceeding, determined that the surveillance was not "lawfully authorized and conducted").

930. See *id.* (stating that "the normal discovery rules must be harmonized with FISA and its procedures . . . designed to prevent disclosure of information relating to surveillance").

931. See *id.* at 469.

932. *American-Arab Anti-Discrimination Comm. v. Reno*, 883 F. Supp. 1365, 1370 (C.D. Cal. 1995) [hereinafter *American-Arab I*] (noting that plaintiffs attacked § 1182(a)(28)(F) as a violation of the First Amendment on its face because it penalizes constitutionally protected associations), *aff'd*, 70 F.3d 1045 (9th Cir. 1995) [hereinafter *American-Arab II*], *aff'd on remand*, 119 F.3d 1367 (1997) [hereinafter *American-Arab III*], *vacated*, 525 U.S. 471 (1999) [hereinafter *American-Arab IV*].

that INS singled them out for selective enforcement of the immigration laws in retaliation for the exercise of constitutionally protected associational activities.<sup>933</sup> After two rounds in the district court and court of appeals, the Ninth Circuit in 1997 affirmed a district court decision that the deportation proceedings of the resident and non-resident plaintiffs should be preliminarily enjoined on First Amendment grounds.<sup>934</sup> The court found that INS sought deportation on the basis of the plaintiffs' mere membership in the PFLP.<sup>935</sup> There was no evidence in the record that any of the plaintiffs had any specific intent to further the unlawful aims of the PFLP.<sup>936</sup>

Meanwhile, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>937</sup> The Act contains a provision restricting judicial review of the Attorney General's decision to commence proceedings against any alien, leaving until a final order of deportation is issued any opportunity for judicial review of even constitutional rights violations associated with deportation.<sup>938</sup> Although the Ninth Circuit found jurisdiction to review the plaintiffs' claims under an exception for pending cases in the 1996 Act, in *American-Arab*,<sup>939</sup> the Supreme Court interpreted the 1996 provision to deprive federal courts of jurisdiction over such lawsuits and thus reversed the Ninth Circuit decision and ordered that the injunction be vacated.<sup>940</sup>

## 2. *Applying the legal authorities*

The L.A. Eight have maintained throughout their immigration proceedings that none of them is a member of the PFLP, much less a

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933. See *American-Arab II*, 70 F.3d at 1054-59 (discussing plaintiff's selective enforcement claims).

934. See *American-Arab III*, 119 F.3d at 1374-76 (affirming the decision that plaintiffs sufficiently demonstrated that the government had targeted them because of their associations despite new evidence that plaintiffs participated in fundraising activities for the PFLP).

935. See *id.* at 1376 (noting that "the government has not challenged the factual finding made by the district court that the INS targeted the plaintiffs for their mere association with the PFLP").

936. See *id.* at 1375.

937. Pub. L. No. 104-208, div. c, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

938. See *id.* § 242 (codified at 8 U.S.C. § 1252(g) (1994 & Supp. V 1999)) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General . . .").

939. See *American-Arab III*, 119 F.3d at 1372 (finding that the language of 8 U.S.C. § 1252(g) "contemplates an exception to the statute's general prohibition of judicial review of Attorney General decisions").

940. See *American-Arab IV*, 525 U.S. at 481 (interpreting the exclusive jurisdiction clause of 8 U.S.C. § 1252(g) as "nothing more or less than a limit on injunctive relief").

supporter of terrorism.<sup>941</sup> Assume, contrary to their sworn statements, that Hamide and Shehadeh were believed by the FBI to be engaged in fundraising for the PFLP. The PFLP is a “foreign power” under FISA, based on the historical facts that it is a “group[] engaged in international terrorism.”<sup>942</sup> The FISA definition of “international terrorism” encompasses the PFLP’s “violent acts . . . that . . . appear to be intended . . . to influence the policy of a government by intimidation or coercion.”<sup>943</sup> The fact that the PFLP has also been designated a “foreign terrorist organization” by the Secretary of State<sup>944</sup> only confirms what would be stated in the FISA application. Agents would be seeking “foreign intelligence information . . . that relates to . . . the ability of the United States to protect against . . . international terrorism by a foreign power . . .”<sup>945</sup> But the Popular Front does not maintain offices or any official place in the United States. FISA surveillance of Hamide and the other seven could only be authorized if each target is an “agent of a foreign power,” defined to include one who “knowingly engages in . . . international terrorism . . . , or knowingly aids or abets any person in the conduct of [such] activities.”<sup>946</sup> Did Hamide “knowingly aid” the PFLP’s terrorist activities when he urged attendees at a fundraising luncheon to contribute money “for the combatants in Lebanon and on the West Bank”? Moreover, was his speech protected by the First Amendment and, if so, was the application for FISA surveillance based “solely” on those protected activities?

The legislative history of FISA does not clarify what is meant by “knowingly” engaging or aiding in acts of international terrorism.<sup>947</sup> However, when the immigration exclusion provisions were

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941. See David G. Savage, *Ruling Eases Way for Deportation of Illegal Immigrants*, L.A. TIMES, Feb. 25, 1999, at A11.

942. 50 U.S.C. § 1801(a) (1994); see also Ybarra, *supra* note 892, at A1 (stating that the PFLP is a Marxist splinter group of the Palestine Liberation Organization). The L.A. Eight maintained that the PFLP was not primarily a military organization, and its efforts were mostly dedicated to operating youth clubs, hospitals, schools, and day care centers. The L.A. Eight said that they supported those peaceful efforts. See Savage, *supra* note 941, at A1.

943. 50 U.S.C. § 1801(c) (1994).

944. See 62 Fed. Reg. 52,650 (1997) (noting the Secretary of State’s unilateral designation of thirty organizations, including the PFLP, as terrorist organizations); 62 Fed. Reg. 55,112 (1999) (renewing the designation of the PFLP as a terrorist organization).

945. 50 U.S.C. § 1801(e) (1994).

946. *Id.* § 1801(b)(2).

947. See generally S. REP. NO. 95-604, 3-65 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3904-73 (discussing the proposed legislation without defining “knowingly”); S. REP. NO. 95-701, 5-73 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3973-4042 (same); H.R. CONF. REP. NO. 95-1720, 19-35 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 4048-64 (same).

comprehensively revisited in 1990, Congress added “terrorist activity” as a ground for deportation.<sup>948</sup> Pursuant to the INA, the deportable alien “engage[s] in terrorist activity” if he or she undertakes any “act which the actor knows, or reasonably should know, affords material support to any individual organization, or government in conducting terrorist activity,” including “soliciting funds . . . for any terrorist organization,” and “solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.”<sup>949</sup>

The objective of FISA surveillance is foreign intelligence information, not information that may permit deportation of surveillance targets by the INS.<sup>950</sup> In the case of the L.A. Eight, however, the context strongly suggests that the FBI was working toward deportation proceedings from some early point in their investigation.<sup>951</sup> Deportation may be a legitimate goal of an investigation, if the legal requirements are met. However, at the time, there were no criminal sanctions for fundraising for, much less membership in, a foreign organization.<sup>952</sup> No publicly released material has ever suggested that the L.A. Eight ever planned to participate in terrorist activities in the United States or elsewhere.<sup>953</sup> No criminal acts were ever charged, and those arrested were released once the deportation proceedings were initiated.<sup>954</sup> It is at least arguable, then, that obtaining “foreign intelligence information” was not the primary purpose of the investigation, long before INS deportation proceedings were initiated.

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948. See 8 U.S.C. § 1182(a)(3)(B) (1994 & Supp. V 1999) (excluding aliens who have engaged in, or are likely to engage in, terrorist activity from admission into the United States).

949. *Id.* § 1182(a)(3)(B)(iii).

950. See S. REP. NO. 95-604, at 3, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3905 (stating that Senator Kennedy introduced the bill “to provide a statutory procedure for the authorization of applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information”) (emphasis added); S. REP. NO. 95-701, at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3974 (same).

951. See Ybarra, *supra* note 892, at A1 (reporting that the INS arrested Mr. Hamide, one of the L.A. Eight, during the same week they told him he could become a U.S. citizen after several years of delay).

952. See 8 U.S.C. § 1182(a)(3)(B) (1994 & Supp. V 1999) (amending FISA to include the solicitation for and membership in a terrorist organization as grounds for excluding aliens).

953. See Karima Bennoune, *Usual Suspects: FBI Arrest of One Arab-American and Seven Resident Aliens for “Pro-Libya Actions”*, THE NATION, Sept. 26, 1988, at 225 (stating that the government arrested the eight on the “pretext” of terrorist activity but that the INS based their charges on only literature the eight had carried and distributed).

954. See Trejo, *supra* note 892, at A1 (noting that the charges were all civil proceedings, and that the judge released them on little or no bail).

It may thus be reasonable to construe FISA in light of the INA with respect to future surveillance applications where immigration proceedings are a fairly predictable outcome of the surveillance. Combining FISA and the 1990 INA permits FISA-authorized surveillance only if it is asserted that a foreign agent “knows, or reasonably should know” that he is providing financial support for terrorist activities.<sup>955</sup> In the abstract, the Constitution does not stand in the way of surveillance of supporters of any terrorist organization, for the purpose of learning whether the targets plan unlawful violence.<sup>956</sup> Problems arise, however, at the intersection of First and Fourth Amendment interests, where protected expression may be chilled by surveillance of groups or individuals selected on the basis of advocacy of unpopular views, or where individuals are associated with a terrorist group on the basis of religious, ethnic, or national affiliation.<sup>957</sup> Under FISA and the Guidelines, the investigators would have to demonstrate foreign agency and, with respect to U.S. persons, that the surveillance is not justified “solely” on the basis of protected expressive activities.<sup>958</sup>

If someone in a similar situation to Hamide and his colleagues sought support for humanitarian or other non-violent activities of Palestinian organizations and expressed no support of the violent aims of any group, overtly or covertly,<sup>959</sup> targeting him for FISA surveillance may violate the statute and the First Amendment.<sup>960</sup> As a

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955. See 8 U.S.C. § 1182(a)(3)(B) (1994 & Supp. V 1999) (providing that aliens are inadmissible as citizens if they commit an act that the “know or reasonably should know” affords material support to terrorist activity).

956. See *Keith*, 407 U.S. 297, 320-22 (1972) (requiring a search warrant for domestic intelligence gathering but declining to extend the holding to foreign intelligence surveillance); see also *United States v. Truong Dinh Hung*, 629 F.2d 908, 912-14 (4th Cir. 1980) (adopting foreign intelligence exception to the warrant requirement).

957. See *Keith*, 407 U.S. 297, 313 (1972) (“National security cases, moreover, often reflect a convergence of First and Fourth Amendments values not present in “ordinary” crime. Though the investigative duty of the executive may be stronger in such cases, so also is there a greater jeopardy to constitutionally protected speech.”).

958. See *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991) (noting that 8 U.S.C. § 1805(a)(3)(A) directed the court not to base any finding that a person is a foreign power solely on a person’s First Amendment activities); see also *Foreign Intelligence Surveillance Act of 1978: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. On the Judiciary*, 95th Cong. 23 (1977) (statement of Attorney General Griffin Bell), quoted in S. REP. NO. 95-604, at 4 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3905-06 (noting the delicate balance between national security and civil liberty).

959. The fact that a potential target of FISA surveillance is an avowed supporter of the non-violent activities of an international terrorist organization does not deny the possibility that the target’s covert activities could establish the facts necessary for a foreign agency determination.

960. See *American-Arab II*, 70 F.3d 1045, 1063 (9th Cir. 1995) (finding that the government must establish a specific intent to further the illegal aims of the

district court judge noted in reviewing the use of FISA surveillance evidence in a criminal case,

“requiring the FISA judge to find that the target is involved in these acts of international terrorism as part of its finding of probable cause to believe that the target is an agent of foreign power, serves to limit the generality of the terms ‘agent of a foreign power’ and ‘international terrorism.’”<sup>961</sup>

In *American-Arab*, the Ninth Circuit asserted that fundraising by aliens for foreign terrorist organizations could only be the subject of deportation if the accused has a specific intent to further the terrorist activities of the organization.<sup>962</sup> Although the 1996 Anti-Terrorism Act also criminalizes “support” for “foreign terrorist organizations” by U.S. citizens,<sup>963</sup> it remains unclear whether the criminal provision would be construed to extend to fundraising, say, for day care centers or hospitals on the West Bank, or to mere payments associated with membership in a designated organization.<sup>964</sup> It is also unclear whether FISA surveillance and deportation could be undertaken on the basis of activities proscribed by the ban on fundraising. Arguably, if specific intent is required for deportation of permanent residents, the same standard should govern the predicate for conducting surveillance of such persons pursuant to the 1996 “support” crime. Taking advantage of a special procedure to identify a target of surveillance outside traditional Fourth Amendment processes should not occur absent some indication that the target supports the terrorist aims of the foreign power.<sup>965</sup> The constitutional rights provisions that are applied to limit deportation because of the severity of the sanction should also extend to the surveillance that provides the information upon which deportation is sought.

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associated organization or the deportation would violate the First Amendment) (citing *Healy v. James*, 408 U.S. 169, 186 (1972)).

961. *United States v. Falvey*, 540 F. Supp. 1306, 1315 (E.D.N.Y. 1982). The Falvey court thus found that FISA was not overbroad. *See id.*

962. *See American-Arab II*, 70 F.3d at 1063 (requiring a finding of specific intent to further illegal aims to avoid violating the First Amendment).

963. *See* 18 U.S.C. § 2339B (Supp. V 1999) (“whoever . . . knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than ten years, or both”).

964. A different panel of the Ninth Circuit upheld the criminal prohibition on “support” for terrorist organizations in a suit brought by organizations and individuals who wanted to give aid to Kurdistan and Tamil organizations. *See Humanitarian Law Project v. Reno*, 203 F.3d 1130 (9th Cir. 2000), *cert. denied sub nom.*, *Humanitarian Law Project v. Ashcroft*, 121 S. Ct. 1126 (2001).

965. *See, e.g.*, 50 U.S.C. § 1804(a) (1994) (requiring that an application for an order approving electronic surveillance include a statement by the applicant to justify his belief that “the target . . . is a foreign power or an agent of a foreign power”).

Indeed, constitutional logic implies that any process that furthers deportation should be attended by greater protections than those associated with admission to the United States.<sup>966</sup> It may be that FISA itself should be construed to incorporate a specific intent element in the foreign agency finding.<sup>967</sup> Upholding the constitutionality of FISA surveillance that helped make a case to support arms smuggling charges against alleged IRA members, one court opined that “to obtain a FISA surveillance order, the Government must provide the FISA judge with something more than the target’s sympathy for the goals of a particular group.”<sup>968</sup> In *Falvey*, the federal district court found implicit in FISA a requirement that the agent of a foreign power be engaged in or conspiring with others who are engaged in terrorism.<sup>969</sup> Following this interpretation of FISA, if some of the cash raised by the L.A. Eight supported terrorist activities, FISA would require the Attorney General to demonstrate that the fundraising Palestinian-American had a specific intent to “aid[] or abet[]” in “activities that are in preparation” for terrorism.<sup>970</sup> Additional support for a narrowing construction of FISA comes from the FCI Guidelines.<sup>971</sup> In defining the “international terrorism” that would unleash the most intrusive and classified forms of FBI surveillance of foreign powers and their agents, the Attorney General identified “violent acts dangerous to human life,”<sup>972</sup> not advocacy or fundraising.

The six non-“U.S. persons” of the L.A. Eight could be subject to surveillance pursuant to FISA even on the basis of activities that are “solely” protected expression.<sup>973</sup> If, however, FISA is construed to include a specific intent requirement for the foreign agency finding, raising funds for the PFLP would permit a finding of foreign agency

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966. *Cf.* *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”).

967. *See* *United States v. Falvey*, 540 F. Supp. 1306, 1313 (E.D.N.Y. 1982) (opining that implicit in FISA is a requirement to establish intent on the part of the target).

968. *Id.* at 1314 (addressing the IRA’s First Amendment argument that FISA provides the government the opportunity to selectively use politically-motivated surveillance).

969. *See id.* at 1313 (describing how the FISA standard for probable cause to believe a target is an agent of a foreign power meets Fourth Amendment requirements).

970. 50 U.S.C. § 1801(b)(2) (1994). *Cf.* *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (holding that advocacy of violence short of incitement is protected by the First Amendment).

971. FCI AGG, *supra* note 526, § III, at 6.

972. FCI AGG, *supra* note 526, § II.N, at 4.

973. *See* 50 U.S.C. § 1805(a)(3)(A) (1994) (providing that U.S. persons may not be “considered . . . an agent of a foreign power solely upon the basis of activities protected by the first amendment,” but making no similar provision for non-U.S. persons).

only if it is determined that the target “knowingly” aided the organization.<sup>974</sup> Even if the FISA threshold is met, or if FISA does not contain an intent requirement, it is possible that the FISA-authorized surveillance was conducted in violation of the Constitution. Membership and activities in support of an organization that advocates even the violent overthrow of the government of the United States are protected by the First Amendment, absent a showing that the person specifically intends to further the organization’s unlawful objectives.<sup>975</sup> Congress also recognized that FISA surveillance could not be based on mere association with terrorist groups.<sup>976</sup>

#### CONCLUSIONS

The law of national security surveillance remains today a work in progress. Its development has been uncertain because the law depends for its content and focus on actions that have little, if any, counterpart to common crime, where centuries of experience guide us. In a simpler era, when national security meant fending off foreign aggression, the President was free to engage espionage agents, send military forces into harm’s way and even take extraordinary measures within our own borders.<sup>977</sup> Congress provided funding, but little else, and was content to leave the national security arena to the executive.<sup>978</sup>

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974. *See id.* § 1801(b)(2). The foreign agency determination could, of course, be based upon activities other than the fundraising. *See id.* (defining “agent of a foreign power” as “any person who knowingly engages in clandestine intelligence gathering activities for . . . a foreign power,” or “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor”).

975. *See Healy v. James*, 408 U.S. 169, 187-88 (1972) (finding that where a state-funded college president denied recognition to a local chapter of Students for a Democratic Society, a group with a reputation for violence and disruption, the college “may not restrict speech or association simply because it finds the views expressed . . . to be abhorrent”); *see also Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974) (rejecting, where the state denied the Communist Party of Indiana a place on the ballot because it failed to submit an acceptable loyalty oath, the notion that “any group that advocates violent overthrow as abstract doctrine must be regarded as necessarily advocating unlawful action”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (holding that, where a faculty member’s failure to provide certification that he or she was not a Communist resulted in termination, “mere party membership, even with knowledge of the party’s unlawful goals, cannot suffice to justify criminal punishment”).

976. *See S. REP. NO. 95-604*, at 24, 28-29 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3993, 3997-98 (noting that “mere sympathy . . . for the goals of a foreign group, even a foreign terrorist group” is not sufficient basis for FISA surveillance).

977. *See supra* notes 109-24 and accompanying text (discussing the nature of intelligence activities in which early presidents engaged, which rarely concerned the lives of ordinary citizens).

978. *See supra* notes 109-15 and accompanying text (referring to congressional deference to the president in intelligence matters).

In those early years, foreign aggression existed both at a distance and at home. It was probably only natural that, until well into the twentieth century, executive prerogative in national security matters was exercised both at home and abroad. Domestic security and national security were then virtually synonymous, a fact critical to understanding the development of national security law in United States.

Despite discrete appropriations and the occasional enactment of laws approaching national security issues, the second branch of government to become significantly involved with national security law issues was not Congress, but the judiciary. Judicial involvement developed reluctantly. When confronted with surveillance questions, the courts clung to arcane visions of redcoats breaching the sanctity of home and hearth. Nevertheless, the ancient British right against unreasonable search and seizure increasingly merged with extended notions of personal liberty to augment Fourth Amendment concepts.

Still, it was not until 1967 that the Supreme Court abandoned the view that a Fourth Amendment search necessarily involved a physical intrusion. *Katz* was a watershed case with respect to the Fourth Amendment, and it was a powerful voice for societal interests in privacy. However, *Katz* did nothing directly to prescribe presidential prerogatives in national security.

For perhaps the first time in U.S. history, the *Keith* court focused on the dichotomy of "domestic security." Although the criminal actions generating the case were threats to the government, the perpetrators were Americans. Moreover, the threat was primarily one of common crime. Although couched more elegantly, the Court essentially concluded that the planned attack on a CIA facility was ordinary crime for which ordinary legal procedure is adequate. There was no external threat, the judicial processes of government could respond to the problem, and U.S. persons merited the protections of the Constitution.

In *Keith*, the Court left open the possibility of extraordinary measures in support of national security exigencies, but did not prescribe the parameters of more intrusive authorities. After *Keith*, the lower courts found that the executive could be exempted from traditional Fourth Amendment procedures and could authorize surveillance to gather foreign intelligence,<sup>979</sup> but not without a nexus

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979. See *United States v. Butenko*, 494 F.2d 593, 608 (3d Cir. 1974) (concluding that American defense needs justified electronic surveillance of a Russian national and, thus, did not violate the Fourth Amendment).

to a foreign power, against U.S. persons.<sup>980</sup> With the proper foreign nexus, the executive can conduct surveillance of U.S. persons for intelligence purposes, but not to acquire criminal evidence.<sup>981</sup>

Congress eventually was goaded into action by public sentiment, by the fourth estate<sup>982</sup> and, according to Senator Church, by a sense of responsibility. Early in the century, Congress enacted laws permitting censorship, mail openings and restrictions on the right of assembly. These measures, however, were more the product of fear and xenophobia than concern for national security matters or citizens' rights. Congressional involvement in national security matters continued to be sparse and remote well into the twentieth century.

Popular interest came only in the post-war years. With prosperity and relative freedom from fears of foreign aggression, the public began to assume that the rights of privacy, assembly and speech should receive higher degrees of protection. The public awakening was prodded by the occasional judicial opinion, but more than anything, technology drove the policies. The development of modern telecommunications placed more and more personal information in jeopardy of exposure. In an era when there were few law enforcement agents and fewer telephones, the telephone wiretap was not a societal threat. Furthermore, when international telegrams were confined to commerce and foreign policy, intercepted telegrams did not greatly affect individuals. As the world grew smaller, however, electronic communications became affordable and ubiquitous, and as a result, the potential exposure of private information grew in geometric proportions.

Following the crafting of legislative and regulatory guidance for national security surveillance, the unresolved questions concern individual rights. Neither FISA nor the FBI Guidelines follow traditional Fourth Amendment procedures. For example, FISA appears to permit surveillance in certain circumstances without previous identification of the target,<sup>983</sup> a process that would be

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980. See *Zweibon v. Mitchell*, 516 F.2d 594, 652-55 (D.C. Cir. 1975) (holding that a warrant is necessary for a wiretap on a domestic organization that is not acting for or together with a foreign power).

981. See *Truong Dinh Hung*, 629 F.2d 908, 915-16 (4th Cir. 1980).

982. The press is commonly referred to as "the fourth estate."

983. See 50 U.S.C. § 1804 (1994). The appearance may be more problematic than the practice. For example, it would be impossible to effect telephone surveillance without identifying the target with sufficient particularity for a judge to authorize the surveillance. Moreover, it would be impossible for the communications carrier to effect the tap without precise identification of the telephone and its subscriber, whether wire or wireless. Finally, it would be impossible for a judge to authorize a seizure, without returning to the general warrant, unless the judge knew what was to be seized.

inconsistent with the Fourth Amendment's insistence that the place to be searched and the person and things to be seized be described with particularity in a sworn statement. Similarly, the *ex parte* review of the warrant application and the extent to which the minimization procedures of FISA fall short of traditional Fourth Amendment rules has given rise to criticism of the scheme. Additionally, unlike magistrates reviewing a law enforcement warrant request, FISC judges have no discretion to deny an application for surveillance if the requirements of FISA are met.<sup>984</sup> Finally, the FISA and Guidelines standards for probable cause are less strict, the intrusions permitted are longer, and the showing required before surveillance is authorized does not require even a suspicion that laws are being broken.<sup>985</sup>

In general, all "persons" in the United States are entitled to protections of the Constitution<sup>986</sup> and justifications for treating non-U.S. persons or non-citizens differently than other residents should be decided individually on the basis of the circumstances of each case.<sup>987</sup> However, FISA presumes that persons not permanently affiliated with the United States are not loyal to the United States and that any such person who acts on behalf of a foreign power that conducts secret intelligence activities is an agent of that foreign power. Putting the Constitution aside, the implicit judgments reflected in this set of presumptions are questionable. On the other hand, a person acting on behalf of a foreign power must register as a foreign agent under U.S. law.<sup>988</sup> If such a person eschews that requirement, the presumption is not unreasonable.

One answer to most of these criticisms is that the Fourth Amendment does not apply to foreign powers. While surveillance of

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984. *See id.* § 1805(a) (mandating that the judge enter an *ex parte* order approving the electronic surveillance, if the requestor meets certain conditions under FISA).

985. *See id.* § 1805(a),(d); FCI AGG, *supra* note 526 (providing standards for probable cause).

986. *See generally* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996) (exploring the role of constitutional values in U.S. immigration policy).

987. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country.").

988. *See* 18 U.S.C. § 951(a) (1994 & Supp. V 1999) ("Whoever . . . acts in the United States as an agent of a foreign government without prior notification to the Attorney General . . . shall be fined under this title or imprisoned"); 22 U.S.C. § 612 (1994) (requiring public disclosure by person engaging in propaganda activities and other activities for or on behalf of foreign governments); 50 U.S.C. § 85 (1994) ("every person who has knowledge of, or has received instruction or assignment in, the espionage, counterespionage, or sabotage service or tactics of a government of a foreign country . . . shall register").

a foreign government will necessarily concern individuals, the intelligence operation is nonetheless directed at the foreign power, not the persons.<sup>989</sup> Likewise, FISA surveillance is permitted for intelligence gathering purposes, not for law enforcement. Thus, Fourth Amendment rules are most protective when criminal sanctions are possible.

In dealing with U.S. citizens and permanent resident aliens, the only legal authority for the investigation of suspected terrorists that goes beyond traditional law enforcement methods and rules is the FISA authorization for electronic surveillance or physical search if the U.S. person is believed to be assisting in international terrorism as an agent of a foreign power.<sup>990</sup> Even then, FISA prohibits making the “agent of a foreign power” determination for a U.S. person “solely upon the basis of activities protected by the first amendment [sic].”<sup>991</sup> Likewise, the FCI Guidelines expand the Bureau’s use of electronic surveillance and physical search techniques only when the target group is acting “for or on behalf of a foreign power.”<sup>992</sup> For domestic security investigations, “the facts or circumstances” must “reasonably indicate” that two or more persons are conspiring to further political or social goals “through activities that involve force or violence and a violation of the criminal laws of the United States.”<sup>993</sup> Beyond this threshold, First and Fourth Amendment limits still constrain any surveillance that the Bureau wishes to perform.

Several factors complicate surveillance of would-be terrorists in the United States. Unlike the Cold War formula for homeland defense, the modern threat is more diffuse and potentially more calamitous. Weapons of mass destruction today include nuclear, biological, and chemical variants, and each is capable of covert deployment in unconventional ways.<sup>994</sup> The perpetrators are no longer only sovereign states, but may include sub- and non-state actors, as well as homegrown malcontents.<sup>995</sup>

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989. See 50 U.S.C. § 1805(a)(3)(A) (1994) (requiring that “the target . . . is an agent of a foreign power”). In addition, collection activities that target non-U.S. persons abroad do not raise justiciable constitutional issues. See *Verdugo-Urquidez*, 494 U.S. at 267.

990. See 50 U.S.C. §§ 1802, 1822 (1994 & Supp. IV 1998) (providing for electronic surveillance and physical search authorization).

991. *Id.* § 1805(a) (providing requirements needed for a judge’s approval of electronic surveillance).

992. FCI AGG, *supra* note 526, at 7.

993. See *Criminal AGG*, *supra* note 522.

994. See *supra* notes 713-20 (providing authority on covert attacks with weapons of mass destruction).

995. See *id.* (emphasizing the emergence of other perpetrators beside the “classic political terrorist”).

The government may abuse FISA in situations like that involving the L.A. Eight, when intrusive electronic surveillance is undertaken based on political activities, rather than on support for terrorist activities. Yet it is possible that FISA surveillance has been approved in such instances based on covert activities, not on the target's public persona. While the government has abused the Guidelines, most notably in the 1980s FBI investigation of the Committee in Solidarity with the People of El Salvador (CISPES),<sup>996</sup> the Senate Intelligence Committee has found "a pattern of adherence to established safeguards for constitutional rights."<sup>997</sup>

Members of the intelligence community should strive to focus on the violent acts of terrorism, not on the ideologies that motivate terrorists. The dangers of ideologically motivated investigations have been demonstrated throughout our history. Aside from the symbolic intolerance of differences among people and groups that such a policy advertises, the stereotyping that accompanies the policy simultaneously harms innocent people and risks missing the changing character of terrorism. Targeting groups for investigation based on their political activities also may prevent healthy venting of public dissent, central to our nation's stability. Finally, investigating identifiable group members based on group affiliation or characteristics may only stiffen the resolve of the groups to harm the United States.<sup>998</sup>

Apart from constitutional concerns with the 1996 prohibition on support for foreign organizations found to support terrorist activity, the current posture of the intelligence community regarding terrorism in the United States appears to balance reasonably the need to protect political dissent with the importance of monitoring groups that urge violent political acts. To be sure, the monitoring itself constitutes a threat to uninhibited expression. However, the price is not too high when the monitoring follows a considered policy of preventing catastrophic terrorism.

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996. See generally *Senate Select Comm. on Intelligence Inquiry Into The FBI Investigation of the Comm. in Solidarity with the People of El Salvador (CISPES), Hearings Before the Select Comm. on Intelligence of the United States Senate, S. Hrg. 100-151*, 100th Cong. (1988) (addressing alleged lack of sufficient evidence of illegal or terrorist activity for the FBI to have continued investigation of a group engaged in political dissent).

997. *Id.* at 64.

998. See DEMPSEY & COLE, *supra* note 622, at 14-15 (arguing that the FBI's tactic of focusing on political or religious ideologies, rather than on a group's violent acts, is an "imprecise and inefficient" approach, and stating that "politically focused investigations are likely to be counterproductive and may actually contribute to violence").