

# THE “SURVEIL OR KILL” DILEMMA: SEPARATION OF POWERS AND THE FISA AMENDMENTS ACT’S WARRANT REQUIREMENT FOR SURVEILLANCE OF U.S. CITIZENS ABROAD

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*In July 2010, Nasser Al-Aulaqi, the father of suspected terrorist leader and U.S. citizen Anwar Al-Aulaqi, filed a lawsuit alleging that his son had been placed on a targeted killing “hit list” by the U.S. government. In dismissing the suit, Judge John D. Bates pointed out an extraordinary aspect of the current law of counterterrorism: Prior judicial consideration is required under the FISA Amendments Act of 2008 to target suspected terrorists like Anwar Al-Aulaqi abroad for surveillance, but it is unnecessary under U.S. law to seek judicial authorization to target such individuals for assassination. This apparent antilogy in the law creates a “surveil or kill” dilemma for the government. On the one hand, current law burdens the President’s ability to engage in foreign intelligence surveillance of suspected threats; on the other, it incentivizes aggressive counterterrorism interventions like the CIA’s drone strike program. Indeed, the U.S. government ultimately killed Al-Aulaqi, along with another U.S. citizen suspected of aiding al Qaeda in the Arabian Peninsula, without ever receiving judicial approval or making public any formal charges against them.*

*In this Note, I explore the constitutionality of the current legal regime established by the FISA Amendments Act of 2008. Specifically, I argue that the statute’s protections for U.S. citizens abroad, while a laudable extension of civil liberties, constitute an unconstitutional infringement of the President’s inherent authority to engage in warrantless foreign intelligence surveillance overseas. By imposing statutory limitations on the President’s power in this context that go beyond the baseline requirements of the Constitution, Congress has encroached upon inherent executive authority and therefore has violated a formal understanding of separation of powers.*

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\* Copyright © 2011 by Anthony M. Shults. J.D., 2011, New York University School of Law; B.A., 2008, Binghamton University. I am sincerely indebted to my editors, Mark McDonald and Philip Kovoor, for their dedication and feedback throughout the production process. I wish to thank Kirti Datla, Meredith Borner, Angela Herring, Chris Kochevar, and all the members of the *New York University Law Review* for their helpful comments, expert editing, and unparalleled mastery of *The Bluebook*. I am deeply grateful to Professor Samuel Rascoff for the invaluable guidance he provided, as well as to my friends Dan Passeser, Sam Raymond, and Kirstin Kerr O’Connor for their time and insight. I dedicate this Note to my parents, who probably now know enough about foreign intelligence surveillance to get a warrant from the U.S. Foreign Intelligence Surveillance Court.

## INTRODUCTION

In a recent controversial decision dismissing a challenge to President Obama's drone strike program,<sup>1</sup> federal Judge John D. Bates described a "unique and extraordinary" situation: Under current law, "judicial approval is *required* when the United States decides to target a U.S. citizen overseas for *electronic surveillance*, but . . . judicial scrutiny is *prohibited* when the United States decides to target a U.S. citizen overseas for *death*."<sup>2</sup> This apparent antilogy in the law of counterterrorism, which I refer to as the "surveil or kill" dilemma, implicates fundamental principles of due process and separation of powers and raises questions about the extent to which the government is restrained in prosecuting the war on terror.

The dilemma identified by Judge Bates dates back to July 9, 2008, when Congress enacted the FISA Amendments Act of 2008 (FAA or New FISA) to modify the decades-old statutory regime for foreign intelligence surveillance established by the Foreign Intelligence Surveillance Act (FISA or Traditional FISA). The FAA was passed in a time of constitutional uncertainty regarding the Bush Administration's implementation of a widespread warrantless surveillance program inside the United States as part of the war on terror. The new legislation responded to criticisms of Traditional FISA as slow, unwieldy, and overly narrow in focus by establishing a statutory mechanism through which the executive may receive judicial approval to engage in programmatic electronic surveillance—i.e., surveillance not targeted at particular individuals based upon individualized showings of cause or suspicion.<sup>3</sup>

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<sup>1</sup> The drone strike program is a covert CIA operation, implemented by the U.S. government as part of the war on terror, through which members of al Qaeda and associated terrorist organizations are targeted for killing abroad by use of armed unmanned aerial vehicles. See generally Hakim Almasmari, Margaret Coker & Siobhan Gorman, *Drone Kills Top Al Qaeda Figure*, WALL ST. J., Oct. 1–2, 2011, at A1 (describing drone strike on Anwar Al-Aulaqi); Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2010*, NEW AM. FOUND. (Feb. 24, 2010), [http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergen\\_tiedemann2.pdf](http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergen_tiedemann2.pdf) (analyzing drone strikes in northwest Pakistan from 2004 to 2010).

<sup>2</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) (emphases added). Judge Bates ultimately held that the political question doctrine, among other reasons, precluded judicial scrutiny of President Obama's alleged targeting of suspected terrorist, and U.S. citizen, Anwar Al-Aulaqi for death. *Id.* at 52.

<sup>3</sup> See William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1644–46 (2010) ("The FISA Amendments Act of 2008 . . . authorized . . . sweeping and suspicionless programmatic surveillance . . . [T]he FAA does not limit the government to surveillance of particular, known persons . . . , but instead authorizes so-called 'basket warrants' for surveillance and eventual data mining."); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 639 (2010) ("Central to the FISA Amendments Act of 2008 is a provision that gives the [Foreign Intelligence

Some critics condemned the New FISA regime as an unconstitutional expansion of executive authority that intrudes upon individual liberty and privacy.<sup>4</sup> However, New FISA also contains a significant civil liberties giveback: The legislation extends statutory protection to U.S. citizens located overseas—a class of persons completely unprotected under the Traditional FISA regime—from unilateral warrantless surveillance undertaken by the executive for foreign intelligence purposes. While litigation over New FISA’s programmatic surveillance regime and its potential violation of individual rights is currently pending,<sup>5</sup> this Note examines potential constitutional concerns with the legislation from a different perspective. Specifically, this Note argues that the provisions in New FISA that establish special protections for U.S. citizens abroad constitute an unconstitutional infringement of the President’s inherent authority to engage in warrantless foreign intelligence surveillance overseas.

I use the term “inherent authority” to refer to the “core” of executive power directly delegated to the President in the Constitution. Under Article II, “[t]he executive Power shall be vested in [the] President of the United States of America,”<sup>6</sup> who “shall be Commander in Chief.”<sup>7</sup> This exclusive grant of authority means that the President possesses certain inherent powers over matters that, in Justice Robert Jackson’s words, are “within his domain and beyond control by Congress.”<sup>8</sup> I argue that the President’s power to surveil individuals (including U.S. citizens) overseas for foreign intelligence purposes falls within this exclusive domain of executive authority and is therefore restricted only by the limits imposed directly by the Constitution—specifically, the Fourth Amendment’s requirement that such surveillance be “reasonable.”<sup>9</sup> If Congress were to impose limitations that go beyond the Fourth Amendment’s requirement of reason-

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Surveillance Court] authority to issue what amounts to a ‘programmatic’ or ‘basket’ warrant for an entire intelligence program.”).

<sup>4</sup> See, e.g., *Why the FISA Amendments Act Is Unconstitutional*, ACLU (Feb. 5, 2008), <http://www.aclu.org/national-security/why-fisa-amendments-act-unconstitutional> (arguing that the FAA permits unconstitutional interception of communications involving U.S. persons).

<sup>5</sup> See *Amnesty Int’l v. Clapper*, 638 F.3d 118 (2d Cir. 2011) (vacating dismissal for lack of standing).

<sup>6</sup> U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

<sup>7</sup> *Id.* § 2, cl. 1.

<sup>8</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring). *But see id.* (explaining that where the President relies on inherent executive authority, his “power [is] most vulnerable to attack and in the least favorable of possible constitutional postures”).

<sup>9</sup> 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, shall not be violated . . .”).

ableness, it would impermissibly encroach on inherent presidential authority and violate a formal understanding of the separation of powers established by the constitutional design.<sup>10</sup>

This Note proceeds in three parts. Part I sets forth the statutory framework governing foreign intelligence surveillance both inside the United States and abroad. It explores the history of and motivations for the Traditional and New FISA regimes and examines their relevant provisions. Part II introduces the constitutional framework governing intelligence gathering, focusing on the general applicability of the Fourth Amendment to electronic surveillance, judicial recognition of a "foreign intelligence exception" to the Fourth Amendment's Warrant Requirement, and extraterritorial application of the Warrant Requirement to surveillance of U.S. citizens abroad. Applying a formal separation-of-powers approach, Part III analyzes the President's inherent authority under the Constitution to engage in warrantless surveillance for foreign intelligence purposes and the potential infringement by Congress through the FAA of the executive's core Article II powers regarding foreign intelligence gathering.

## I

### STATUTORY FRAMEWORK: FISA AND THE FAA

#### A. *Traditional FISA: The Foreign Intelligence Surveillance Act of 1978*

The Foreign Intelligence Surveillance Act of 1978<sup>11</sup> is the central statutory regime for foreign intelligence surveillance within the United States.<sup>12</sup> FISA sets out the procedures that govern the use of electronic surveillance by the government for the purpose of gathering foreign intelligence information, and establishes substantive and procedural protections for the targets of such surveillance.

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<sup>10</sup> The purpose of this Note is not to argue that the statutory protections for U.S. citizens abroad established by the FISA Amendments Act (FAA) are per se unconstitutional under current separation-of-powers doctrine developed by the federal courts. As a theoretical matter, I argue that the protections violate a formal understanding of separation of powers that has been hinted at but never truly adopted by the Supreme Court. From a more practical perspective, I examine whether the executive branch might plausibly argue that it could not be restrained by the provisions of the FAA in a given emergency scenario under current law.

<sup>11</sup> 50 U.S.C. §§ 1801–1885c (2006 & Supp. III 2010).

<sup>12</sup> "Foreign intelligence" generally refers to information about threats to national security, including military attack, sabotage, espionage, and terrorism, that are connected to a foreign power or its agents. "Foreign intelligence surveillance" refers to the acquisition of such information and may occur inside the United States or abroad. See *infra* Part I.A.2 (discussing foreign intelligence surveillance in the context of the Foreign Intelligence Surveillance Act (FISA)).

### 1. *FISA's History and Motivation: The Keith Decision and the Church Committee*

In the decades preceding FISA's enactment, the executive branch engaged in widespread electronic surveillance inside the United States for national security purposes without obtaining warrants or any form of judicial approval.<sup>13</sup> In fact, prior to 1978, the field of foreign intelligence surveillance was substantially unregulated by statute and unsupervised by courts. Traditional FISA represents a congressional response to this lack of clear regulation of national security intelligence gathering inside the United States. Specifically, FISA was enacted to address three central concerns: (1) confusion over the application of the Fourth Amendment's Warrant Requirement in the context of foreign intelligence gathering; (2) congressional unease regarding abuses of warrantless electronic surveillance within the United States; and (3) a perceived need to provide the executive with appropriate means to investigate national security threats.<sup>14</sup>

Confusion regarding application of the Fourth Amendment's Warrant Requirement in the foreign intelligence context stemmed from the Supreme Court's 1972 decision in *United States v. United States District Court*,<sup>15</sup> commonly known as the *Keith* decision. In *Keith*, the Court rejected the government's argument for a general "national security exception" to the Warrant Requirement and held that warrantless electronic surveillance of domestic individuals and organizations violated the Fourth Amendment.<sup>16</sup> However, the *Keith* Court limited its holding to the surveillance of purely *domestic* threats and expressed no judgment on the application of the Warrant Requirement to investigations of the "activities of foreign powers or their agents."<sup>17</sup> Thus, the *Keith* opinion left open the possibility that

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<sup>13</sup> See Matthew A. Anzaldi & Jonathan W. Gannon, *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act: Judicial Recognition of Certain Warrantless Foreign Intelligence Surveillance*, 88 TEX. L. REV. 1599, 1601–05 (2010) (describing the history of warrantless surveillance by the executive prior to FISA's enactment); Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 275 (2009) ("[P]residents ha[ve] conducted electronic surveillance for national security purposes without a warrant . . . at least since . . . 1940.").

<sup>14</sup> *United States v. Rosen*, 447 F. Supp. 2d 538, 542–43 (E.D. Va. 2006); see also S. REP. NO. 95-604, at 7 (1977) ("[FISA] is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused."); William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 74–76 (2000) (describing the impetus for FISA); Blum, *supra* note 13, at 275–76 (same).

<sup>15</sup> *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972).

<sup>16</sup> *Id.* at 320.

<sup>17</sup> *Id.* at 308–09, 321–22.

warrantless surveillance—whether conducted within the United States or abroad—might be constitutionally permissible in cases involving *foreign* threats to national security.<sup>18</sup> In the time between the *Keith* decision and the passage of FISA, every federal court of appeals to address that issue held that warrantless electronic surveillance to obtain foreign intelligence information was indeed permissible under the Fourth Amendment.<sup>19</sup> I discuss the development of what has come to be known as the “foreign intelligence exception” to the Warrant Requirement further in Part II.A and B.

In response to allegations of severe wrongdoing by executive agencies charged with gathering intelligence within the United States, the Senate in 1975 established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the Church Committee.<sup>20</sup> With the Watergate scandal fresh in the minds of the American public, the Church Committee made startling revelations of executive violations of individual liberties by use of warrantless electronic surveillance and physical searches.<sup>21</sup> The executive branch implemented the suspect intelligence-gathering programs without judicial approval—due in part to the Supreme Court’s

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<sup>18</sup> See *id.* at 322 n.20 (noting, without adopting, the view that “warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved”); see also Blum, *supra* note 13, at 274 (“[T]he Supreme Court [in *Keith*] left open the possibility that the president may have authority to conduct warrantless surveillance of foreign powers and their agents.”).

<sup>19</sup> See *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (holding that warrantless electronic surveillance for foreign intelligence purposes is permissible under the Fourth Amendment); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (same); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (same); see also Blum, *supra* note 13, at 274 (“[A]fter *Keith*, every federal appeals court to address the issue . . . concluded that the president has the inherent authority to conduct warrantless surveillance to gather foreign intelligence.”).

<sup>20</sup> See Anzaldi & Gannon, *supra* note 13, at 1604 & n.38 (providing an overview of the Church Committee); Banks & Bowman, *supra* note 14, at 33–34 (describing findings of the Church Committee).

<sup>21</sup> For example, the Committee found that the FBI maintained over 500,000 domestic intelligence files on persons in the United States; the CIA and FBI engaged in widespread mail-opening campaigns; the CIA maintained files on 300,000 individuals and over 100 domestic groups; the National Security Agency (NSA) entered into a secret agreement with telegraph companies in order to gain access to millions of private telegrams; and the U.S. Army maintained nearly 100,000 files on American citizens suspected of political unorthodoxy and opposition to the Vietnam War. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES (CHURCH COMM.), INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II, S. REP. NO. 94-755, at 6–7 (1976) [hereinafter CHURCH COMM. REPORT]; see also Loch K. Johnson, *NSA Spying Erodes Rule of Law*, in INTELLIGENCE AND NATIONAL SECURITY: THE SECRET WORLD OF SPIES 410, 411 (Loch K. Johnson & James J. Wirtz eds., 2008) (detailing findings of the Church Committee); Banks & Bowman, *supra* note 14, at 33–34 (same); Blum, *supra* note 13, at 275 (same).

narrow holding in *Keith* and the subsequent development of the foreign intelligence exception to the Warrant Requirement<sup>22</sup>—or adequate congressional oversight. While much of the warrantless surveillance at issue began with reasonable national security objectives, the lack of oversight and accountability resulted in significant mission creep and intrusion on individual privacy. In many cases, surveillance extended to “citizens who were not readily identifiable as reasonable sources of foreign intelligence information, who appeared to pose little threat to the national security, and who were not alleged to be involved in any criminal activity.”<sup>23</sup> In the opinion of the Church Committee, the lack of clear judicial standards and congressional legislation regarding foreign intelligence surveillance was a fundamental contributing factor in overreaching by the executive.<sup>24</sup> Confronted with calls for legislative action, Congress began crafting a statutory regime to govern foreign intelligence surveillance in the United States, ultimately resulting in the passage of FISA in 1978.

## 2. *FISA’s Operation and Mechanics*

FISA establishes a detailed process that executive agencies must follow in order to obtain judicial approval to use electronic surveillance to collect “foreign intelligence information” inside the United States.<sup>25</sup> By mandating *ex ante* judicial authorization, FISA incorporates into the foreign intelligence surveillance context the central check on the executive’s surveillance power generally: the Fourth Amendment’s requirement of a warrant based on probable cause. The

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<sup>22</sup> See *infra* Part II.B (explaining the development of the foreign intelligence exception to the Warrant Requirement).

<sup>23</sup> 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, 807 (1989); see also Anzaldi & Gannon, *supra* note 13, at 1604 (“While [often beginning] with legitimate national security concerns, the investigations ‘descended a slippery slope, beginning with efforts to counter foreign threats to national security and evolving to gather information about peaceful domestic groups lobbying for political change, such as equal rights for racial minorities and women.’” (quoting DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 2:2 (2007))).

<sup>24</sup> See CHURCH COMM. REPORT, *supra* note 21, at 186 (“Congress and the Supreme Court have both addressed the legal issues raised by electronic surveillance, but the law has been riddled with gaps and exceptions.”); see also Banks & Bowman, *supra* note 14, at 34 (“The [Church] Committee believed control and accountability were lacking . . . . Most importantly, they determined that intelligence efforts had violated the Constitution and that the reason was lack of legislation. The remedy, they asserted, was to have Congress prescribe rules for intelligence activities.”); Cinquegrana, *supra* note 23, at 807 (“The Church Committee reported that the abuses of executive discretion resulted from the absence of clear congressional or judicial standards and the unsettled state of the law in this area.”).

<sup>25</sup> *United States v. Rosen*, 447 F. Supp. 2d 538, 543 (E.D. Va. 2006) (describing FISA’s purpose and operation).

Act’s definition of “foreign intelligence information” generally covers activities by foreign powers or their agents that concern “actual or potential attack or other grave hostile acts,” “sabotage or international terrorism,” or “clandestine intelligence activities.”<sup>26</sup> FISA allows the government to surveil aliens in the United States based on an individualized showing of probable cause to believe that the target is an agent of a foreign power (e.g., a foreign government or international terrorist organization).<sup>27</sup> The government may also surveil U.S. persons—meaning citizens and permanent residents—with a similar connection to a foreign power, but the required showing of probable cause is higher. When the target of the surveillance is a U.S. person, the government must also demonstrate probable cause to believe that the target “knowingly” engaged in activity that “involve[s] or may involve a violation of the criminal statutes of the United States.”<sup>28</sup> In addition, such probable cause cannot be based solely on activities pro-

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<sup>26</sup> 50 U.S.C. § 1801(e) (2006). The full definition of “foreign intelligence information” is as follows:

(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 hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or agents 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.*

<sup>27</sup> *Id.* § 1805(a)(3)(A).

<sup>28</sup> § 1801(b)(2)(A). For a U.S. person to be considered an agent of a foreign power, there must be probable cause to believe that he

(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, for or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

§ 1801(b)(2).



tected by the First Amendment.<sup>29</sup> Thus, unlike surveillance of nonresident aliens, surveillance of U.S. persons under FISA requires some prior suspicion of illegal activity—a mere relationship with a foreign power is not sufficient.<sup>30</sup> Importantly, however, FISA as originally enacted did not apply to surveillance abroad, including surveillance of U.S. persons.<sup>31</sup>

Applications for FISA warrants are reviewed *ex parte* by a specially constituted court of Article III judges established by FISA, known as the Foreign Intelligence Surveillance Court (FISC). Appeals from the FISC are decided by the Foreign Intelligence Surveillance Court of Review (FISCR).<sup>32</sup> In order to grant an order for surveillance, the FISC must find: (1) probable cause to believe the target is a foreign power or its agent, and, if the target is a U.S. person, the requisite suspicion of illegal activity; (2) probable cause to believe that the target is using or will use the communication device to be monitored; (3) the existence of appropriate minimization procedures; (4) certification from the government of a need for surveillance procedures beyond normal investigative techniques; (5) approval by the Attorney General of the application; and (6) certification by a high-ranking intelligence official that gathering foreign intelligence information is a significant purpose of the surveillance.<sup>33</sup> Importantly, FISA allows the government to use evidence obtained during foreign intelligence surveillance in any resulting criminal prosecution, provided that the government fulfills the substantive and procedural requirements of the statute.<sup>34</sup>

In an attempt to prevent future intelligence-gathering abuses by the executive under the guise of national security, Congress intended to ensure that FISA constituted the exclusive means by which electronic surveillance for foreign intelligence purposes could be con-

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<sup>29</sup> § 1805(a)(2)(A) (“[N]o 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.”).

<sup>30</sup> See Blum, *supra* note 13, at 276–77 (“[W]hile suspicion of illegal activity is not required in the case of aliens who are not permanent residents . . . [.] for U.S. persons there must be the additional linkage to knowingly engaging in activity that may be a crime.”).

<sup>31</sup> See *id.* at 299 (“[T]raditional FISA offers no statutory protection for U.S. persons abroad.”).

<sup>32</sup> The Chief Justice of the United States is responsible for selecting the members of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR), who serve fixed seven-year terms. See 50 U.S.C. § 1803 (establishing selection criteria). The FISC is made up of eleven U.S. District Court judges, and the FISCR is staffed by three judges who may be selected from either the federal district or appellate courts. *Id.*

<sup>33</sup> *Id.* §§ 1801(h), 1804(a), 1805(a); see also Blum, *supra* note 13, at 277 (outlining the requirements for a FISC warrant).

<sup>34</sup> 50 U.S.C. § 1806.

ducted within the United States.<sup>35</sup> A provision of FISA, known as the “exclusivity provision,” thus established that “the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic [foreign intelligence] surveillance . . . may be conducted.”<sup>36</sup>

FISA does, however, provide for exceptions to its requirements in two relevant situations. First, the Attorney General may authorize warrantless foreign intelligence surveillance for fifteen days following a declaration of war by Congress.<sup>37</sup> Second, FISA allows for emergency warrantless surveillance when the Attorney General determines that a FISA warrant cannot reasonably be obtained in the timeframe necessary to address a specific threat.<sup>38</sup> Under the latter scenario, the Attorney General must still conclude that a “factual basis” exists for the issuance of a FISA warrant and must obtain approval from the FISC no later than seven days after initiating the emergency surveillance.<sup>39</sup>

As a final rebuke to the warrantless surveillance abuses exposed by the Church Committee, Congress used FISA to modify Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III),<sup>40</sup> the statutory regime for the regulation of *domestic* electronic surveillance. Title III originally contained a provision that disclaimed any congressional intent to legislate in the context of national security or “limit the constitutional power of the President” to gather foreign intelligence information.<sup>41</sup> Congress repealed this disclaimer when it passed FISA in 1978, demonstrating an implicit purpose to alter the

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<sup>35</sup> See S. REP. NO. 95-604, at 8 (1977) (“[FISA was intended] to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.”).

<sup>36</sup> 18 U.S.C. § 2511(2)(f) (2006).

<sup>37</sup> 50 U.S.C. § 1811.

<sup>38</sup> *Id.* § 1805(e)(1).

<sup>39</sup> § 1805(e) (“[T]he Attorney General may authorize the emergency employment of electronic surveillance if [he] . . . reasonably determines that the factual basis for the issuance of an order . . . exists [and] . . . makes an application . . . not later than 7 days after the Attorney General authorizes such surveillance.”).

<sup>40</sup> 18 U.S.C. §§ 2510–2522 (1976).

<sup>41</sup> *Id.* § 2511(3) (1976) (repealed 1978). Specifically, Congress stressed that it had no intent in passing Title III to limit

the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to . . . take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means.

*Id.* (emphasis added).

constitutional balance in the context of foreign intelligence gathering.<sup>42</sup>

### B. *New FISA: The FISA Amendments Act of 2008*

The FISA Amendments Act of 2008, signed into law by President George W. Bush on July 10, 2008, amended Traditional FISA by establishing procedures for the targeting of persons reasonably believed to be *outside* the United States in order to obtain foreign intelligence information.<sup>43</sup> The FAA was motivated by a perceived need to establish procedures for programmatic and proactive surveillance unencumbered by the procedural and substantive strictures of Traditional FISA, which requires an individualized, *ex ante* showing of a nexus to a foreign power and, for surveillance of U.S. persons, suspicion of possible criminal activity.<sup>44</sup>

#### 1. *The FAA's History and Motivation: The Terrorist Surveillance Program and Protect America Act*

In the years following the terrorist attacks of September 11th, 2001, the executive branch determined that the requirements of FISA were overly burdensome with regard to the proactive identification of terrorist threats. As a result, President Bush authorized the National Security Agency to engage in warrantless interception of electronic communications into and out of the United States where “one party to the communication [was] outside the United States” and the government had a “reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.”<sup>45</sup> This secret wiretapping program, which

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<sup>42</sup> Pub. L. No. 95-511, § 201(c), 92 Stat. 1783, 1797 (1978); *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 831–32 & nn.20–23 (2006) (testimony of David S. Kris, Vice President, Time Warner, Inc.) [hereinafter Kris Testimony] (noting Congress's intent to alter the constitutional framework of foreign intelligence surveillance by amending Title III in FISA). David Kris was an Associate Deputy Attorney General for National Security during the early years of the Bush Administration and later became an Assistant Attorney General for the National Security Division under the Obama Administration.

<sup>43</sup> See, e.g., Office of Senator Kit Bond, *FISA Amendments Act of 2008*, WALL ST. J. (June 19, 2008), <http://online.wsj.com/article/SB121391360949290049.html>.

<sup>44</sup> See *supra* Part I.A.2 (describing the operation and mechanics of Traditional FISA).

<sup>45</sup> Press Briefing, Att'y Gen. Alberto Gonzales & Gen. Michael V. Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005) [hereinafter Press Briefing], available at <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-dni01.htm>; see also Blum, *supra* note 13, at 283–84 (detailing the contours of the NSA surveillance program); Letter from William E. Moschella, Assistant Att'y Gen., to the Hon. Pat Roberts, Chairman, Senate Select Comm. on Intelligence et al. (Dec. 22, 2005) [hereinafter Moschella Letter], available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf> (laying

became known as the Terrorist Surveillance Program (TSP), was justified by the President as a legitimate exercise of the executive's inherent authority under Article II to engage in warrantless foreign intelligence surveillance<sup>46</sup> as supplemented by the Authorization for Use of Military Force (AUMF)<sup>47</sup>—the statute passed by Congress authorizing the President to use military power against the nations, organizations, and persons responsible for the September 11th attacks.<sup>48</sup> The Administration further argued that the surveillance was "consistent" with FISA by citing a provision of the statute that prohibited electronic surveillance outside of FISA's established procedures "except as authorized by statute" and claiming that the AUMF was an appropriate statutory authorization as recognized by FISA.<sup>49</sup> Finally, the Administration asserted that the TSP was consistent with the Fourth Amendment, as it fell within the established exception to the Warrant Requirement where "special needs, beyond the normal need for law enforcement," justify departure from normal warrant procedures.<sup>50</sup>

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out the constitutional bases for the NSA program). The purpose of this surveillance program was to "establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States." Moschella Letter, *supra*, at 1. For the purposes of this Note, I assume that the Terrorist Surveillance Program (TSP) involved "electronic surveillance" as defined in FISA.

<sup>46</sup> See *infra* Part III.A (discussing inherent executive authority).

<sup>47</sup> See generally Memorandum from the U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 2–4, 6–13 (Jan. 19, 2006) [hereinafter DOJ Memo], available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> (discussing the AUMF as one of several legal bases for the NSA program); Moschella Letter, *supra* note 45 (same).

<sup>48</sup> The Authorization for Use of Military Force (AUMF) states:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). The Bush Administration argued that the AUMF authorized the use of warrantless surveillance as a "fundamental incident to the use of military force." Moschella Letter, *supra* note 45, at 2–4.

<sup>49</sup> Moschella Letter, *supra* note 45, at 3 (quoting 50 U.S.C. § 1809(a)(1) (2006)); see also Blum, *supra* note 13, at 285–86 (laying out the argument for statutory authorization of FISA surveillance under the AUMF); DOJ Memo, *supra* note 47, at 20–28 (same).

<sup>50</sup> Moschella Letter, *supra* note 45, at 4 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (internal citation omitted)); see also DOJ Memo, *supra* note 47, at 36–41 (arguing that the NSA's activities were reasonable under the Fourth Amendment because they served the special need of advancing the important public interest in national security). Critics of the TSP did not accept the Administration's proffered justifications for the surveillance regime and instead argued that the program violated FISA and, perhaps, the Constitution. See generally Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS, Feb. 9, 2006, at 42, available at <http://www.nybooks.com/articles/>

In response to the executive's asserted need for a flexible surveillance regime in the war on terror, and with the constitutionality of the TSP largely unsettled, Congress passed the Protect America Act (PAA) in 2007.<sup>51</sup> The PAA, which was a temporary measure, amended FISA to establish procedures whereby the government could engage in surveillance similar to that undertaken through the TSP.<sup>52</sup> Under the PAA, the government could engage in warrantless surveillance of communications between persons in the United States and parties abroad, provided that the target of the surveillance was "reasonably believed to be located outside the United States."<sup>53</sup> The surveillance could be authorized for periods up to one year upon certification by the Attorney General, and the only role of the FISC was to "review and approve the procedures used by the government in the surveillance after it ha[d] been conducted,"<sup>54</sup> not to grant *ex ante* approval. Thus, the PAA, like the TSP, enabled the government to engage in proactive and programmatic surveillance without the traditional requirements of individualized predication under FISA. When the

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archives/2006/feb/09/on-nsa-spying-a-letter-to-congress/ [hereinafter Professors' Letter] (outlining the argument that the TSP violates federal law). Specifically, critics argued that the broad language of the AUMF could not reasonably be interpreted to displace by implication the detailed and specific statutory regime established by FISA, nor could it be reconciled with FISA's express exclusivity provision. *Id.*; see also 18 U.S.C. § 2511(2)(f) (2006) ("[FISA] shall be the exclusive means by which electronic surveillance . . . may be conducted."); Blum, *supra* note 13, at 286 (discussing intelligence-gathering authority and the AUMF); *supra* notes 35–36 and accompanying text (explaining FISA's exclusivity provision). According to some critics, reading the "exception" for surveillance "authorized by statute" contained in FISA's criminal penalty provision broadly to allow any later statute—and not only statutes listed in or directly amending FISA's exclusivity provision—to authorize surveillance outside of FISA would allow the exception to "swallow [ ] the rule." Kris Testimony, *supra* note 42, at 834. The executive's unilateral authorization of surveillance outside of FISA procedures, it was argued, was also inconsistent with the exceptions established by Congress for emergency warrantless surveillance. Professors' Letter, *supra*, at 43. Furthermore, interpreting the AUMF to authorize warrantless surveillance inside the United States without adequate safeguards "would raise serious questions" under the Fourth Amendment. *Id.*

<sup>51</sup> Blum, *supra* note 13, at 295–96.

<sup>52</sup> Protect America Act of 2007, Pub. L. No. 110-55, § 105B(a), 121 Stat. 552 (2007) (repealed 2008) (establishing procedures whereby "the Director of National Intelligence and the Attorney General, may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States").

<sup>53</sup> *Id.*; see also Blum, *supra* note 13, at 296 ("[The PAA] allowed warrantless surveillance of electronic communications between people *on* U.S. soil, including U.S. citizens, and people 'reasonably believed to be overseas,' without a court's order or oversight." (quoting James Risen, *Bush Signs Law To Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1 (internal quotation marks omitted))).

<sup>54</sup> Risen, *supra* note 53; see also Blum, *supra* note 13, at 296 ("[T]he FISC did not scrutinize the cases of the individuals being monitored [under the PAA].").

PAA expired in 2008, Congress passed the FISA Amendments Act of 2008 to establish a more permanent regime for such surveillance.

## 2. *The FAA's Operation and Mechanics*

The FISA Amendments Act of 2008 built upon the TSP and PAA to establish procedures for programmatic foreign intelligence surveillance targeting persons outside the United States. The FAA also implemented additional mechanisms for oversight by Congress and the FISC and, as a political concession to proponents of civil liberties, established new protections for U.S. persons located overseas.<sup>55</sup>

Under the FAA's new programmatic regime, the government may target "persons reasonably believed to be located outside the United States to acquire foreign intelligence information."<sup>56</sup> Upon certification by the Attorney General and the Director of National Intelligence, such surveillance may be authorized for a period of up to one year, provided that it does not intentionally target (1) "any person known at the time of acquisition to be located in the United States"; (2) "a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States"; or (3) "a United States person reasonably believed to be located outside the United States."<sup>57</sup> Moreover, to engage in such surveillance under the FAA, the government must receive *ex ante* judicial approval from the FISC (absent exigent circumstances similar to those under FISA's emergency provisions), establish adequate minimization procedures, and certify that a "significant purpose" of the surveillance is to obtain foreign intelligence information.<sup>58</sup> Unlike with Traditional FISA, however, the FAA authorizes wholesale surveillance, and the government "does not need to specifically identify surveillance targets" in order to obtain a warrant.<sup>59</sup>

Most important for the purposes of this Note, the FAA contains a significant civil liberties giveback: The FAA amends Traditional FISA to require that the government obtain "individual FISA Court orders based on probable cause for targeting Americans, not only when they are inside the U.S. but also, for the first time, when they are outside of

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<sup>55</sup> See, e.g., Blum, *supra* note 13, at 297 ("[T]he FAA borrowed several provisions from the PAA but added additional oversight mechanisms and more judicial review.").

<sup>56</sup> 50 U.S.C. § 1881a(a) (Supp. II 2009).

<sup>57</sup> § 1881a(b)(1)–(3).

<sup>58</sup> 50 U.S.C. § 1881a(g)(2) (Supp. III 2010).

<sup>59</sup> Jonathan D. Forgang, Note, "*The Right of the People: The NSA, the FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas*," 78 *FORDHAM L. REV.* 217, 238 (2009).

the United States.”<sup>60</sup> In addition, the FAA modifies FISA’s exclusivity provision to provide added clarity and ensure that FISA serves as “the exclusive means by which electronic surveillance . . . may be conducted.”<sup>61</sup> The new provision states that “[o]nly an express statutory authorization for electronic surveillance or . . . an amendment to [the exclusivity provision] . . . shall constitute an additional exclusive means” of electronic surveillance.<sup>62</sup> Under the New FISA regime, the government may not target a U.S. person located abroad to obtain foreign intelligence information under circumstances where “the targeted United States person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States” without obtaining a warrant from the FISC or establishing that a FISA-like emergency exception applies.<sup>63</sup> In order to obtain approval for surveillance of a U.S. person abroad, the government must utilize Traditional FISA procedures and establish that there is probable cause to believe that the person is an agent of a foreign power.<sup>64</sup> This finding of probable cause cannot be based solely on activities protected under the First Amendment.<sup>65</sup> Unlike the provisions of the FAA authorizing programmatic surveillance of non-U.S. persons, then, surveillance of U.S. persons overseas—as under Traditional FISA—requires an individualized showing before a court of a nexus to a foreign power.<sup>66</sup>

## II

### FOREIGN INTELLIGENCE SURVEILLANCE AND THE FOURTH AMENDMENT

In this Part, I set out the constitutional framework of intelligence gathering and explore the potential limits on executive authority to conduct such surveillance. While the surveillance of U.S. persons overseas for foreign intelligence purposes is, like all government searches, subject to the Fourth Amendment’s Reasonableness Requirement, I argue that the Warrant Requirement does not apply in this context because of both the nature and location of the surveillance at issue. Under a formal approach to inherent presidential

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<sup>60</sup> Office of Senator Kit Bond, *supra* note 43.

<sup>61</sup> 50 U.S.C. § 1812(a) (Supp. II 2009).

<sup>62</sup> § 1812(b).

<sup>63</sup> § 1881c(a)(2).

<sup>64</sup> § 1881c(c)(1).

<sup>65</sup> § 1881c(c)(2).

<sup>66</sup> See Blum, *supra* note 13, at 300 (“As Senator Diane Feinstein noted, ‘This bill does more than Congress has ever done before to protect Americans’ privacy regardless of where they are, anywhere in the world.’” (quoting 154 CONG. REC. 13,813 (2008))).

authority, Congress can impose limitations on core executive powers only to the extent that such limitations are derived from "applicable provisions of the Constitution."<sup>67</sup> Therefore, Congress's ability to impose a FISA warrant procedure through the FAA would be circumscribed if the Fourth Amendment's Warrant Requirement did not itself apply to foreign intelligence surveillance conducted overseas.

### A. *General Fourth Amendment Doctrine*

The Fourth Amendment to the U.S. Constitution protects "the people" against "unreasonable searches and seizures" undertaken by the government.<sup>68</sup> Under prevailing doctrine, searches are usually considered to be unconstitutionally "unreasonable" whenever they are "conducted outside the judicial process, without prior approval by judge or magistrate."<sup>69</sup> Thus, the Warrant Requirement of the Fourth Amendment generally informs the understanding of the overarching requirement of "reasonableness." However, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" the Warrant Requirement does not necessarily apply in all contexts, and warrantless searches can indeed pass constitutional scrutiny in some circumstances.<sup>70</sup> The Reasonableness Requirement, on the other hand, is subject to no exception and applies whenever the government carries out a Fourth Amendment search or seizure.

In the watershed 1967 case of *Katz v. United States*,<sup>71</sup> the Supreme Court held that the requirements of the Fourth Amendment, including the Warrant Requirement, apply to electronic surveillance by the executive.<sup>72</sup> The constitutional framework of foreign intelligence surveillance remained muddled, however, because the *Katz* Court expressly declined to extend its holding to the national security context. In a footnote, the Court noted that "[w]hether safeguards *other than prior authorization by a magistrate* would satisfy the Fourth

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<sup>67</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

<sup>68</sup> U.S. CONST. amend. IV. The full text of the Fourth Amendment is as follows: 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.

*Id.*

<sup>69</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>70</sup> *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *see also id.* ("[T]he warrant requirement is subject to certain exceptions.").

<sup>71</sup> 389 U.S. 347.

<sup>72</sup> The Court also expressed the now fundamental principle that warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 357.



Amendment in a situation involving the national security is a question not presented by this case.”<sup>73</sup>

Five years later in *Keith*,<sup>74</sup> the Court rejected the government’s argument, which was built upon the opening in *Katz*, for a general national security exception to the Warrant Requirement.<sup>75</sup> Though it credited the “pragmatic force” of the government’s position, the Court reasoned that the “convergence of First and Fourth Amendment values,” the significant potential for abuse, and the demonstrated ability of the judiciary to deal competently and discreetly with complex issues militated against any such general exception.<sup>76</sup> As in *Katz*, however, the *Keith* Court limited its constitutional holding in a crucially important way. First, the Court reasoned that, while the fundamental Warrant Requirement did apply, “the same type of standards and procedures” required for warrants in the ordinary criminal context were not “necessarily applicable to . . . domestic security surveillance” because of the unique dangers and difficulties involved.<sup>77</sup> Second, the *Keith* Court limited its holding to the context of purely *domestic* threats and expressed no judgment on the application of the Warrant Requirement to investigations involving “activities of foreign powers or their agents.”<sup>78</sup> The opinion thus left open the possibility that warrantless surveillance might be constitutionally permissible in cases involving foreign threats to national security.<sup>79</sup> The

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<sup>73</sup> *Id.* at 358 n.23 (emphasis added).

<sup>74</sup> 407 U.S. 297 (1972); see *supra* Part I.A.1 (discussing the *Keith* decision).

<sup>75</sup> The government argued that the Warrant Requirement was inapplicable to domestic security surveillance because of several factors, including the executive’s duty to protect domestic security; the intelligence-gathering purpose of the surveillance, which was used primarily to collect information regarding “subversive forces” and not to develop criminal evidence; the relative institutional incompetence of courts in dealing with the “complex and subtle” problems of national security; and the essential need for secrecy in intelligence-gathering cases. *Id.* at 318–20; see also Banks & Bowman, *supra* note 14, at 49–52 (discussing the *Keith* decision).

<sup>76</sup> *Keith*, 407 U.S. at 313, 319–21; see also Banks & Bowman, *supra* note 14, at 51–52 (“The [*Keith*] Court . . . determined that the potential for abuse of the surveillance power . . . , 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 [national security] exception.”).

<sup>77</sup> *Keith*, 407 U.S. at 322. The Court stated:

[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of “ordinary crime.” The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify . . . . Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

*Id.*

<sup>78</sup> *Id.* at 308–09, 322.

<sup>79</sup> See *id.* at 322 n.20 (noting sources that support the view that “warrantless surveillance, though impermissible in domestic security cases, may be constitutional where for-

Supreme Court has not addressed the issue since *Keith* was decided in 1972.

### B. *The Foreign Intelligence Exception to the Warrant Requirement*

As noted above, the Supreme Court has never directly addressed the question of whether the Warrant Requirement of the Fourth Amendment applies to foreign intelligence surveillance in cases involving the activities of foreign powers or their agents. The courts that have directly addressed the issue—including the FISC acting in a post-FISA constitutional landscape—have held that the Warrant Requirement *does not* apply in this context.<sup>80</sup> Together, these decisions have established the doctrine that has come to be known as the “foreign intelligence exception” to the Warrant Requirement.

In general terms, the foreign intelligence exception stands for the proposition that the executive branch has the inherent authority under the Constitution to engage in foreign intelligence surveillance, including inside the United States, without prior judicial approval.<sup>81</sup> In order to ensure that such warrantless surveillance is not abused, the exception applies only if the government demonstrates that the sur-

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foreign powers are involved”); *see also* Anzaldi & Gannon, *supra* note 13, at 1604 (“[T]he *Keith* Court expressly reserved the question of whether the Warrant Clause applied to foreign intelligence surveillance and discussed several sources supporting the ‘view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.’” (quoting *Keith*, 407 U.S. at 322 n.20)); Blum, *supra* note 13, at 274 (“[T]he Supreme Court [in *Keith*] left open the possibility that the president may have authority to conduct warrantless surveillance of foreign powers and their agents.”).

<sup>80</sup> *See* Blum, *supra* note 13, at 274 (“[A]fter *Keith*, every federal appeals court to address the issue, including the FISC, has concluded that the president has the inherent authority to conduct warrantless surveillance to gather foreign intelligence.”); *supra* note 19 (listing cases). *But cf.* *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975) (plurality opinion) (holding that a warrant is necessary for domestic surveillance, even if related to foreign intelligence). In the D.C. Circuit’s plurality opinion in *Zweibon v. Mitchell*, the court concluded in dicta that “an analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional.” *Id.* at 613–14. The court’s actual holding, however, was limited to domestic surveillance.

<sup>81</sup> *See, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908, 914–16 (4th Cir. 1980) (describing contours of the foreign intelligence exception and holding that warrantless surveillance of a suspected foreign spy in the United States was constitutional); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (holding that “prior judicial authorization was not required” for foreign intelligence surveillance of individuals in the United States suspected of espionage on behalf of a foreign government); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (“[T]he President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence [inside the United States].”). The decisions in *Butenko* and *Brown* were handed down prior to FISA’s enactment in 1978; and, although the appellate decision was handed down in 1980, the *Truong* case involved the application of pre-FISA law.

veillance at issue was undertaken “for the purpose of gathering foreign intelligence.”<sup>82</sup> In such circumstances, the constitutional authority of the executive is limited only by the Fourth Amendment’s requirement of reasonableness. It should be noted, moreover, that information obtained through surveillance under the exception can be used by the government in any subsequent criminal prosecution, provided that the surveillance was not initially undertaken with a primarily prosecutorial—as opposed to intelligence-gathering—purpose.

The Supreme Court’s holding in *Keith* firmly establishes that the executive lacks the authority to engage in unilateral surveillance of domestic threats;<sup>83</sup> however, owing to the unique threat posed by foreign powers and their agents, “[r]estrictions upon the President’s power which are appropriate in cases of domestic security”—including the requirement of “some form of prior judicial approval”—can “become artificial in the context of the international sphere.”<sup>84</sup> Although imposing a warrant requirement would have “salutary effects,” such as *ex ante* judicial scrutiny to ensure “that the Executive was not using the cloak of foreign intelligence information gathering to engage in indiscriminate surveillance of domestic political organizations,” it would burden the executive’s duty to “secretly and quickly” obtain foreign intelligence information.<sup>85</sup> Such a result would “seriously fetter the Executive in the performance of his foreign affairs duties.”<sup>86</sup> The procedural hurdles imposed by a requirement of prior judicial approval are thus inconsistent with the needs for secrecy, speed, and flexibility when countering foreign threats to national

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<sup>82</sup> *Brown*, 484 F.2d at 426; *see also Truong*, 629 F.2d at 915 (“[T]he executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”); *Butenko*, 494 F.2d at 605 (finding that prior judicial authorization was not required where the executive engaged in electronic surveillance “for the purpose of gathering foreign intelligence information” (quoting *United States v. Butenko*, 318 F. Supp. 66, 73 (D.N.J. 1970) (internal quotation marks omitted), *aff’d*, 494 F.2d 593 (3d Cir. 1974))).

<sup>83</sup> *See Keith*, 407 U.S. at 322 n.20 (“[W]arrantless surveillance . . . [is] impermissible in domestic security cases . . . .”); *Brown*, 484 F.2d at 425 (“[T]he Supreme Court held [in *Keith*] that the President did not have the power to authorize electronic surveillance in internal security matters without prior judicial approval.”); *see also supra* Parts I.A.1 and II.A (discussing *Keith*).

<sup>84</sup> *Brown*, 484 F.2d at 426.

<sup>85</sup> *Butenko*, 494 F.2d at 605.

<sup>86</sup> *Id.*; *see also Truong*, 629 F.2d at 913 (“[A] uniform warrant requirement [in the foreign intelligence context] would, following *Keith*, ‘unduly frustrate’ the President in carrying out his foreign affairs responsibilities.” (quoting *Keith*, 407 U.S. at 315)); *Butenko*, 494 F.2d at 605 (“[F]oreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance.”).

security.<sup>87</sup> In establishing the foreign intelligence exception, the courts of appeals have stressed the executive's experience, resources, and "unparalleled expertise."<sup>88</sup> Above all else, however, the courts have justified application of the exception based on the constitutional pre-eminence and inherent authority of the President in foreign affairs.<sup>89</sup>

The foreign intelligence exception developed amongst the courts of appeals mostly prior to the passage of FISA in 1978.<sup>90</sup> As mentioned above, Congress used FISA to repeal the provision of Title III that disclaimed any congressional intent to limit the constitutional power of the executive to obtain foreign intelligence information, demonstrating its desire to alter the constitutional landscape of foreign intelligence gathering.<sup>91</sup> It is significant, then, that the FISCRC has shown a willingness to embrace the foreign intelligence exception even in the post-FISA constitutional framework. In its 2002 decision in *In re Sealed Case*,<sup>92</sup> the FISCRC took "for granted" that the executive had the inherent constitutional authority to conduct warrantless foreign intelligence surveillance<sup>93</sup> and held that foreign intelligence electronic surveillance under FISA complied with the Fourth Amendment without determining whether a FISA order served as a constitutionally valid warrant.<sup>94</sup> In effect, the FISCRC upheld the electronic surveillance at issue solely on reasonableness grounds, implicitly supporting the proposition that the Warrant Requirement did not apply.<sup>95</sup> Six years later in *In re Directives*,<sup>96</sup> the FISCRC expressly

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<sup>87</sup> *Truong*, 629 F.2d at 913 ("[A]ttempts to counter foreign threats . . . 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 . . ."). The Supreme Court ultimately denied certiorari in the defendant's appeal from the decision in *Truong*, 454 U.S. 1144 (1982).

<sup>88</sup> *Truong*, 629 F.2d at 913; cf. *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

<sup>89</sup> See *infra* Part III.A–B (discussing separation of powers and inherent authority).

<sup>90</sup> See *supra* note 81 (describing the cases that established the foreign intelligence exception).

<sup>91</sup> See *supra* notes 41–42 and accompanying text (discussing FISA's modification of Title III).

<sup>92</sup> 310 F.3d 717 (FISA Ct. Rev. 2002).

<sup>93</sup> *Id.* at 742.

<sup>94</sup> *Id.* at 741–42 ("[A] FISA order may not be a 'warrant' contemplated by the Fourth Amendment. . . . We do not decide the issue.").

<sup>95</sup> As explained by Matthew A. Anzaldi and Jonathan W. Gannon, attorneys in the Department of Justice's National Security Division:

Although [the FISCRC] avoided an express holding that a foreign intelligence exception exists, such a holding was implicit: had the Warrant Clause applied, the Court of Review would have had to have determined whether a FISA electronic surveillance order was a warrant. Because it upheld the lawfulness of the

adopted the foreign intelligence exception to the Warrant Requirement by upholding surveillance under the PAA. Specifically, the FISC held that “a foreign intelligence exception to the Fourth Amendment’s Warrant Requirement exists [at least] when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”<sup>97</sup> Indeed, the FISC has stressed that the government’s compelling interest in protecting the nation from foreign threats is “particularly intense”<sup>98</sup> and constitutes a special need “distinguishable from ‘ordinary crime control.’”<sup>99</sup>

### C. *Extraterritorial Application of the Warrant Requirement*

The foreign intelligence exception stands for the proposition that the Fourth Amendment’s Warrant Requirement should not apply to a particular *type* of surveillance—that is, surveillance for foreign intelligence purposes. An equally important consideration is whether the Warrant Requirement applies to surveillance in a particular *location*. Importantly, unlike Traditional FISA, the FAA involves application of FISA warrant procedures to surveillance of U.S. persons *abroad*. Until 2008, however, no federal court had directly addressed the issue of whether the Warrant Requirement of the Fourth Amendment itself applies to surveillance of U.S. citizens overseas.

While the Supreme Court has never considered the application of the Warrant Requirement abroad, it has addressed the extraterritorial application of various other constitutional provisions. In *Reid v. Covert*, a plurality of the Court rejected the general assertion “that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”<sup>100</sup> In extending the trial rights guaranteed by the Fifth and Sixth Amendments to a citizen located abroad, the plurality refused to adopt the position that only certain “fundamental” consti-

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electronic surveillance order on Fourth Amendment reasonableness grounds without the warrant determination, the court implicitly held that no warrant was required.

Anzaldi & Gannon, *supra* note 13, at 1620.

<sup>96</sup> *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008).

<sup>97</sup> *Id.* at 1012.

<sup>98</sup> *Id.* at 1011 (“[T]he purpose behind the surveillance[ ] . . . goes well beyond any garden-variety law enforcement objective. . . . Moreover, this is the sort of situation in which the government’s interest is particularly intense.”).

<sup>99</sup> *Sealed Case*, 310 F.3d at 746 (“FISA’s general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from ‘ordinary crime control.’”).

<sup>100</sup> 354 U.S. 1, 5 (1957) (plurality opinion).

tutional rights should apply overseas.<sup>101</sup> Justice Harlan's concurrence, however, advocated a more cautious approach. In his view, the correct position was "of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."<sup>102</sup> Justice Harlan envisioned circumstances in which "the particular local setting, the practical necessities, and the possible alternatives" at issue might render application of a given constitutional provision "impractical and anomalous."<sup>103</sup> This view has come to serve as an important guidepost for the subsequent development of the Supreme Court's extraterritoriality jurisprudence.<sup>104</sup> For example, in *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment *in its entirety* was inapplicable to searches of *non-U.S.* persons abroad.<sup>105</sup> Importantly, the Court asserted that the historical purpose of the Fourth Amendment "was to restrict searches and seizures which might be conducted by the United States *in domestic matters*,"<sup>106</sup> and that, unlike with the trial rights of the Fifth or Sixth Amendments, any potential Fourth Amendment violations would occur entirely abroad.<sup>107</sup> In addition, the Court reasoned that application of the Fourth Amendment to aliens overseas would result in "significant and deleterious consequences for the United States."<sup>108</sup>

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<sup>101</sup> The *Reid* plurality could "find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on . . . the Federal Government by the Constitution and its Amendments" to limit application of the Constitution abroad to only certain "fundamental" rights. *Id.* at 9.

<sup>102</sup> *Id.* at 74 (Harlan, J., concurring in result).

<sup>103</sup> *Id.* at 75.

<sup>104</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) (relying on "[p]ractical considerations and exigent circumstances" in holding that foreign nationals held by the U.S. military in Guantanamo Bay have constitutional habeas corpus rights); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) (noting the influence of Justice Harlan's practical approach to extraterritoriality).

<sup>105</sup> 494 U.S. at 261.

<sup>106</sup> *Id.* at 266 (emphasis added).

<sup>107</sup> *Id.* at 264.

<sup>108</sup> *Id.* at 273. Specifically, the Court observed that extending the Fourth Amendment in this manner would potentially disrupt the ability of the government to use the armed forces to protect national security or respond to foreign situations; serve as the basis for aliens lacking any substantial connections to the United States to bring civil damages claims against the U.S. government; require the government to obtain a warrant to effect a search or seizure abroad that would effectively be "a dead letter outside the United States"; and, even if a warrant were not required, force U.S. officials "to articulate specific facts giving them probable cause to undertake a search or seizure" in a foreign land. *Id.* at 273-74. In his concurrence, Justice Kennedy adopted the reasoning of Justice Harlan in *Reid* and asserted that application of the Fourth Amendment in this circumstance would indeed be "impracticable and anomalous," though he did emphasize that the Court was not addressing the potential application of the Fourth Amendment to U.S. citizens abroad. *Id.* at 278 (Kennedy, J., concurring).

Building upon this general approach to extraterritoriality, the Second Circuit decided as a matter of first impression that the Warrant Requirement of the Fourth Amendment does not govern searches (including surveillance) of U.S. citizens abroad. In the 2008 case of *In re Terrorist Bombings*,<sup>109</sup> the court stressed that only the Reasonableness Requirement applies to such surveillance.<sup>110</sup> If, in fact, the Warrant Requirement does not apply *at all* to surveillance abroad, Congress's ability to impose a FISA warrant requirement on the executive in this context becomes increasingly problematic, considering that the legislative branch lacks the power, short of amending the Constitution, to alter the meaning or applicability of a constitutional right.<sup>111</sup>

The Second Circuit offered four principal justifications for its holding in *Terrorist Bombings*. First, the court found that there was no history or precedent to support the contention that a warrant was required for searches overseas.<sup>112</sup> Second, the court noted that requiring U.S. officials to obtain warrants from foreign courts was completely unsupported by history.<sup>113</sup> Third, after discussing the Supreme Court's reasoning in *Verdugo*, the Second Circuit asserted that search warrants issued by U.S. judges and intended to have extraterritorial effect would have "dubious legal significance, if any, in a foreign nation."<sup>114</sup> Finally, the court stressed that the question of whether judges in the United States could be authorized to issue warrants with extraterritorial effect was unsettled.<sup>115</sup>

The *Terrorist Bombings* decision seems to follow the approach to extraterritoriality evinced by the Supreme Court in *Verdugo*. As an initial point, any potential violations of the Warrant Requirement in the *Terrorist Bombings* case occurred entirely outside the territory of the United States.<sup>116</sup> More fundamentally, if the Supreme Court is correct in its assertion that the central purpose of the Fourth Amendment is to restrict government searches "in domestic matters,"<sup>117</sup> then surveillance conducted overseas—and especially surveil-

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<sup>109</sup> *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157 (2d Cir. 2008).

<sup>110</sup> *Id.* at 167. As of publication, *Terrorist Bombings* remains the only court of appeals decision on this issue.

<sup>111</sup> See *infra* note 157 (discussing the relation between Congress's legislative power and inherent executive authority); cf. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (setting limits on Congress's authority to enforce constitutional rights beyond the scope attributed to them by the judiciary).

<sup>112</sup> *Terrorist Bombings*, 552 F.3d at 169.

<sup>113</sup> *Id.* at 170.

<sup>114</sup> *Id.* at 171.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 159–60 (describing surveillance of the defendant in Kenya).

<sup>117</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

lance for foreign intelligence purposes—would seem to be beyond the scope of the Warrant Requirement’s application.<sup>118</sup>

Although the district court in the *Terrorist Bombings* case relied on the foreign intelligence exception to uphold the searches at issue,<sup>119</sup> the Second Circuit found that applying the exception was unnecessary to the resolution of the case.<sup>120</sup> In the view of the Second Circuit, questioning the purpose of the government’s surveillance was not required because the Warrant Requirement simply did not apply overseas.<sup>121</sup> The Second Circuit’s refusal to tie its holding in *Terrorist Bombings* to the foreign intelligence exception has a crucial effect: Whereas warrantless surveillance under the exception is expressly limited to cases involving foreign intelligence, the Second Circuit’s holding applies in all overseas contexts, including ordinary criminal cases not related to the activities of foreign powers or their agents.<sup>122</sup> As will be explored below, this fact has important implications for the constitutionality of the added protections for U.S. persons abroad established in the FAA.<sup>123</sup>

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<sup>118</sup> The full extent of the Supreme Court’s holding in *Verdugo*—that the Fourth Amendment does not apply *at all* to searches of non-U.S. persons abroad—is inapplicable to searches of U.S. persons. The *Verdugo* Court’s decision was premised upon the view that the Fourth Amendment’s protection of “the people” extends only “to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” 494 U.S. at 265. Naturally, U.S. persons fulfill this “national community” test, whether they are located within the United States or abroad.

<sup>119</sup> *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277–82 (S.D.N.Y. 2000), *aff’d sub nom. Terrorist Bombings*, 552 F.3d 157.

<sup>120</sup> The foreign intelligence exception is premised on a finding by the judiciary that the search or surveillance at issue was conducted for the purpose of obtaining foreign intelligence information. *See supra* Part II.B (discussing the foreign intelligence exception).

<sup>121</sup> *Terrorist Bombings*, 552 F.3d at 172 (“[T]he purpose of the search has no bearing on the factors making a warrant requirement inapplicable to foreign searches . . . . Accordingly, we cannot endorse the view that the normal course is to obtain a warrant for overseas searches involving U.S. citizens unless the search is ‘primarily’ targeting foreign powers.”).

<sup>122</sup> The provisions of the FAA do not apply in this context because surveillance for ordinary crimes not related to foreign intelligence gathering does not constitute “electronic surveillance” under FISA. *See supra* Part I.A.2 (discussing the operation and mechanics of FISA).

<sup>123</sup> The U.S. District Court for the Northern District of Illinois’s decision denying a motion to suppress evidence in *United States v. Stokes*, 710 F. Supp. 2d 689 (2009), is helpful in illustrating the full impact of the *Terrorist Bombings* decision. In *Stokes*, the defendant was an American citizen living in Thailand who was suspected of engaging in a sexual act with a minor. Acting on a tip, U.S. and Thai officials engaged in surveillance of the defendant and searched his house in Thailand, finding evidence of criminal activity. *Id.* at 692–95. While the agents did obtain a warrant from a Thai court for the search, they did not obtain prior judicial approval from any U.S. magistrate. In analyzing the defendant’s Fourth Amendment challenge, the district court in *Stokes* examined *Verdugo* and quoted extensively from the opinion in *Terrorist Bombings*, finding its reasoning to be “persua-



### III

#### A FORMAL SEPARATION-OF-POWERS APPROACH TO THE CONSTITUTIONALITY OF THE FAA'S WARRANT REQUIREMENT FOR SURVEILLANCE OF U.S. PERSONS ABROAD

Following the passage of the FAA in 2008, the executive branch is now required for the first time to obtain prior judicial approval from the FISC in order to target U.S. persons abroad for foreign intelligence surveillance.<sup>124</sup> While it represents a laudable extension of civil liberties, this expansion of FISA protections stands in sharp contrast to Judge Bates's observation that, under current law, U.S. citizens may be targeted for *assassination* abroad—without *any* prior judicial authorization—based on a unilateral executive designation of enemy combatant status.<sup>125</sup> In effect, because of Congress's imposition of an *ex ante* warrant requirement in the FAA, the President can himself make the decision to kill suspected terrorists like Anwar Al-Aulaqi but not to tap their phones. When the Second Circuit's holding in *Terrorist Bombings* is considered, the situation becomes even more bizarre: The President would be able to surveil Al-Aulaqi abroad without judicial approval if he were suspected only of *ordinary crimes*, but not if the government's purpose was to fulfill its "special need" to gather information about international terrorism or potential military attack. This Part explores potential separation-of-powers issues implicated by these counterintuitive aspects of the current doctrine.<sup>126</sup>

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sive." *Id.* at 698–700. As a result, the court held that the Warrant Requirement did not apply to the search of the defendant's residence abroad, even though the defendant was a U.S. citizen with no alleged ties to a foreign power and the crime at issue was entirely unrelated to national security. *Id.* at 699.

<sup>124</sup> See *supra* Part I.B.2 (discussing the operation and mechanics of the FAA). In addition, the amended exclusivity provision clearly indicates Congress's intent to make the New FISA regime the "exclusive means" by which foreign intelligence surveillance of U.S. persons abroad may be conducted. 50 U.S.C. § 1812(a), (b) (Supp. III 2010).

<sup>125</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

<sup>126</sup> Of course, many argue that the correct response to this "surveil or kill" dilemma is that the President should not have the authority to kill *or* surveil U.S. citizens abroad without some prior judicial authorization. There are several potential responses to this point. As a practical matter, it is difficult to imagine that the doctrine regarding the President's drone strike program will change in the near future, especially considering Judge Bates's firm and well-supported conclusion in the *Al-Aulaqi* case that the political question doctrine—and perhaps the state secrets doctrine, as well—precludes judicial involvement in the President's battlefield decision-making process. *Id.* at 52. Furthermore, even if the *Terrorist Bombings* decision regarding the extraterritorial application of the Warrant Requirement were not followed, the foreign intelligence exception remains entrenched in the post-FISA constitutional landscape and would clearly encompass surveillance for the purpose of gathering "foreign intelligence information," 50 U.S.C. § 1801(e) (2006), under FISA and the FAA. More important, the decision to target suspected terrorists or enemy combatants for surveillance or military attack represents an essential, core

In analyzing the constitutionality of the FAA’s imposition of a warrant requirement for surveillance of U.S. persons abroad, I adopt a formal separation-of-powers approach. While I recognize that government powers are not “fixed” under the Constitution, the executive, like the legislature and judiciary, possesses certain “core” or “inherent” powers that may not be infringed by a coordinate branch. If warrantless surveillance for foreign intelligence purposes falls within this sphere of inherent authority, there is at least a colorable argument that the FAA constitutes an impermissible and unconstitutional intrusion by Congress on the executive.

*A. Inherent Executive Authority To Conduct Warrantless Foreign Intelligence Surveillance Abroad*

As stated by Alexander Hamilton in *The Federalist No. 70*, “[A] vigorous Executive . . . is essential to the protection of the community against foreign attacks. . . . The ingredients which constitute energy in the executive [include] . . . competent powers.”<sup>127</sup> Accordingly, under Article II of the Constitution, the President is made Commander in Chief of the military and is charged with representing the nation in foreign affairs.<sup>128</sup> Even within the United States and during peacetime, the President has the “fundamental duty”—and corresponding authority—under Article II to “preserve, protect and defend the Constitution of the United States”<sup>129</sup> and the nation as a whole. The President is therefore responsible for defending the United States against nations, groups, and individuals that present a viable threat to national security.<sup>130</sup>

As stressed by the Supreme Court in *Keith*, the President “may find it necessary to employ electronic surveillance to obtain intelli-

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function of the President as Commander in Chief, *see infra* Part III.A (discussing inherent presidential authority to conduct warrantless surveillance), who alone possesses the expertise, speed, and dispatch to make key national security decisions quickly and efficiently. The benefits of added due process protections established through legislation like the FAA must be weighed against the real-world costs to national security and any violation of the separation of powers established by the Constitution.

<sup>127</sup> THE FEDERALIST NO. 70, at 384–85 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>128</sup> U.S. CONST. art. II, §§ 2, 3; *see also, e.g.*, *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) (describing “the exclusive power of the Executive over conduct of [foreign] relations”); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“Governmental power over external affairs is . . . vested exclusively in the national government. . . . [T]he Executive ha[s] authority to speak as the sole organ of that government [in matters of foreign affairs].”).

<sup>129</sup> *Keith*, 407 U.S. 297, 310 (1972) (quoting U.S. CONST. art. II, § 1, cl. 8).

<sup>130</sup> *Id.* (“Implicit in [the President’s duty to defend the Constitution] is the power to protect our Government against those who would subvert or overthrow it by unlawful means.”).

gence information”<sup>131</sup> in order to fulfill this solemn duty. Indeed, the *Keith* Court recognized that the President’s authority to engage in electronic surveillance for national security purposes was implicit in the executive oath of office established in Article II’s Oath Clause.<sup>132</sup> It was in this context that the Court chose to reserve the question of the scope of inherent presidential authority to conduct warrantless surveillance of foreign, as opposed to purely domestic, threats.<sup>133</sup>

Following *Keith*, but before FISA’s passage, the circuit courts that addressed the issue “uniformly . . . concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant.”<sup>134</sup> Indeed, it was this recognition of “core” executive authority that supplied the central basis for judicial development of the foreign intelligence exception to the Warrant Requirement.<sup>135</sup>

In *United States v. Brown*, for example, the Fifth Circuit held that the executive’s “inherent power” compelled the conclusion that the President may authorize electronic surveillance for foreign intelligence purposes without seeking *ex ante* judicial approval.<sup>136</sup> To support its decision, the Fifth Circuit cited the Supreme Court’s recognition in *Chicago & Southern Air Lines v. Waterman Steamship Corp.* that

[t]he President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose

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<sup>131</sup> *Id.*; see also *Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam) (“It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.”).

<sup>132</sup> See *Keith*, 407 U.S. at 310 (“In the discharge of [his] duty [to ‘preserve, protect and defend the Constitution of the United States’], the President . . . may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.” (quoting U.S. CONST. art. II, § 1, cl. 8)); *Banks & Bowman*, *supra* note 14, at 51 (“[The *Keith* Court] found that the authority for the surveillance [of threats to national security] was implicit in the President’s Article II Oath Clause.”).

<sup>133</sup> *Keith*, 407 U.S. at 308 (“[T]he instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.”); see also *Blum*, *supra* note 13, at 274 (“[T]he Supreme Court [in *Keith*] left open the possibility that the president may have authority to conduct warrantless surveillance of foreign powers and their agents.”).

<sup>134</sup> DOJ Memo, *supra* note 47, at 8; see *supra* note 81 (detailing circuit cases).

<sup>135</sup> See *supra* Part II.B (describing the foreign intelligence exception to the Warrant Requirement).

<sup>136</sup> 484 F.2d 418, 426 (5th Cir. 1973) (“[B]ecause 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, we [hold] . . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.”).

reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>137</sup>

In addition, the *Brown* court highlighted a common theme expressed in the *Federalist Papers* that the President is responsible for safeguarding the nation’s security and very existence from “encroachment” by foreign powers and their agents.<sup>138</sup>

Similarly, the Third Circuit held in *United States v. Butenko* that the President’s authority to conduct foreign affairs and authorize warrantless foreign intelligence surveillance is implicit in Article II of the Constitution.<sup>139</sup> This reasoning was echoed by the Fourth Circuit in *United States v. Truong Dinh Hung*, which stressed that “the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.”<sup>140</sup> Though Congress changed the constitutional landscape of foreign intelligence gathering by passing FISA, the FISC has confirmed that the President retains inherent power in this context under current doctrine.<sup>141</sup> In *Sealed Case*, the FISC suggested that “FISA could not encroach on the President’s constitutional power” and survive judicial scrutiny.<sup>142</sup>

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<sup>137</sup> 333 U.S. 103, 111 (1948), cited in *Brown*, 484 F.2d at 426; cf. *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).

<sup>138</sup> *Brown*, 484 F.2d at 426 (“Our holding . . . is buttressed by a thread which runs through the *Federalist Papers*: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations.”).

<sup>139</sup> 494 F.2d 593, 603 (3d Cir. 1974).

<sup>140</sup> 629 F.2d 908, 914 (1980); see also *id.* (“[T]he executive branch not only has superior expertise in . . . foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President . . . [is] charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace.” (internal citations omitted)).

<sup>141</sup> *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (“[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority . . .”).

<sup>142</sup> *Id.*

### B. Separation of Powers and Infringement on Inherent Authority

Separation-of-powers concerns arise when the actions of one branch of government infringe upon the constitutional authority of another.<sup>143</sup> In the context of the FAA, the imposition of a FISA warrant requirement on surveillance of U.S. persons abroad potentially encroaches upon the inherent authority of the President to conduct warrantless surveillance overseas for foreign intelligence purposes. The relevant question for the purpose of this analysis is whether congressional action in enacting the FAA “is unconstitutional in restricting that authority.”<sup>144</sup>

It is a fundamental principle of constitutional law that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>145</sup> As stated by Justice Jackson in his renowned concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” and such actions are entitled to “the strongest of presumptions and the widest latitude of judicial interpretation” regarding their constitutionality.<sup>146</sup> On the other hand, actions taken by the President that are “incompatible with the expressed or implied will of Congress” can be sustained only by denying Congress any authority to legislate in the particular subject area at issue.<sup>147</sup> In the latter scenario, the powers of the President are said to be at their “lowest ebb.”<sup>148</sup>

Through FISA’s exclusivity provision, extended by the FAA to surveillance of U.S. persons abroad, Congress intended to “foreclose the President’s constitutional power to conduct foreign intelligence

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<sup>143</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685 (1988) (framing the separation-of-powers inquiry as whether an action of a coordinate branch “impermissibly interferes with the President’s exercise of his constitutionally appointed functions”); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (describing separation of powers “as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”).

<sup>144</sup> Kris Testimony, *supra* note 42, at 837; see also William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1157 n.41 (2003) (“[I]n theory, Congress cannot legislate to deny surveillance authority that is part of a core Article II power of the executive.”).

<sup>145</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (“Justice Jackson’s concurring opinion [in *Youngstown*] elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case.”).

<sup>146</sup> *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

<sup>147</sup> *Id.* at 637–38 (“Courts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject.”).

<sup>148</sup> *Id.* at 637.

'electronic surveillance' without statutory authorization."<sup>149</sup> If the executive engaged in foreign intelligence surveillance of U.S. persons abroad without following the provisions of the FAA, the President would be acting in a manner "incompatible" with the express will of Congress. Indeed, FISA's legislative history reveals Congress's stated intent to place presidential powers regarding foreign intelligence surveillance at their "lowest ebb" under the standard elucidated by Justice Jackson in his *Youngstown* concurrence.<sup>150</sup> However, while Congress has the authority to limit the scope of presidential powers generally (e.g., by refusing to entrust congressional powers to the executive), it cannot limit the inherent presidential authority granted by the Constitution.<sup>151</sup> As Justice Jackson noted in his opinion for the Court in *Waterman*, though Congress may choose whether or not to delegate its powers over foreign affairs to the executive, "[t]he President also possesses *in his own right* certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."<sup>152</sup> In other words, while Congress has the ability to shift the level of executive power from its constitutional maximum to its constitutional minimum, it lacks the authority to circumscribe the scope of that constitutionally mandated minimum of executive power. Thus, even when his powers are at their lowest ebb, the President retains the entirety of his "core" power under Article II,

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<sup>149</sup> Kris Testimony, *supra* note 42, at 831.

<sup>150</sup> H.R. REP. NO. 95-1720, at 35 (1978); *see also* S. REP. NO. 95-604, at 16 & n.28 (1978) (asserting congressional authority to impose procedural safeguards in order to limit the President's power over foreign intelligence surveillance); Kris Testimony, *supra* note 42, at 831-32 (examining the legislative intent of Congress in enacting FISA).

<sup>151</sup> *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."); *cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would . . . reserve in Congress control over the execution of the laws.").

<sup>152</sup> *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948) (emphasis added). As the Supreme Court has noted,

[The President's constitutional duty to] "take care that the laws be faithfully executed" . . . [is not] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms* [but rather] include[s] the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied . . . under the constitution[.]

*In re Neagle*, 135 U.S. 1, 63-64 (1890) (quoting U.S. CONST. art. II, § 3).

including the powers of Commander in Chief,<sup>153</sup> limited only by other “applicable provisions of the Constitution.”<sup>154</sup>

In perhaps its broadest statement of the scope of executive power, the Supreme Court in *United States v. Curtiss-Wright Export Corp.* asserted that the authority of the President over foreign affairs is a “very delicate, plenary and exclusive power . . . [,] which does not require as a basis for its exercise an act of Congress,” but remains limited by other “applicable provisions of the Constitution.”<sup>155</sup> When Congress passed FISA, it assumed that “even if the President has an inherent constitutional power to authorize foreign intelligence surveillance,” the legislature had the authority to “regulate this activity.”<sup>156</sup> Such regulation, however, cannot encroach upon the core of the President’s constitutional authority to conduct warrantless foreign intelligence surveillance without impermissibly intruding upon the “central prerogatives” of the executive.<sup>157</sup>

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<sup>153</sup> See *Loving*, 517 U.S. at 772 (“The President’s duties as Commander in Chief . . . [are] assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply ‘where the entity exercising the delegated authority itself possesses independent authority over the subject matter.’” (quoting *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975))).

<sup>154</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). Some commentators have argued that such an approach is tantamount to establishing a regime of unchecked executive power inconsistent with the constitutional design. See Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terror*, 40 U.C. DAVIS L. REV. 1 (2006); see also Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Cong. Research Serv. Legislative Attorneys, Am. Law Div., Presidential Authority To Conduct Warrantless Electronic Surveillance To Gather Foreign Intelligence Information 4 (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (questioning the Bush Administration’s assumptions regarding inherent executive authority to conduct foreign intelligence surveillance).

<sup>155</sup> 299 U.S. 304, 320 (1936). For a criticism of the Court’s reasoning in *Curtiss-Wright* and an assertion that the Court has not fully implemented the philosophy espoused by Justice Sutherland’s majority opinion, see, for example, Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973). Though it is perhaps true that the President has not—or indeed should not—be accorded the full scope of authority described in *Curtiss-Wright*, it is clear that he retains *some* residuum of inherent executive power under Article II. Thus, it is reasonable to assert that the specific and narrowly defined authority to conduct warrantless foreign intelligence surveillance falls within this “core” of executive power, even if the President’s power of foreign affairs as a whole is not considered to be plenary. This seems especially true when such surveillance is undertaken abroad and for national security purposes.

<sup>156</sup> Forgang, *supra* note 59, at 234; see also H.R. REP. NO. 95-1283, at 24 (1978) (“[E]ven if the President has the inherent authority . . . to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted.”).

<sup>157</sup> *Loving*, 517 U.S. at 757; see also *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (finding that “FISA could not encroach on the President’s constitutional power” “to conduct warrantless searches to obtain foreign intelligence information” (citing *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980))); DOJ Memo, *supra* note 47, at

In analyzing the scope of the “core of plenary Presidential power,”<sup>158</sup> the Supreme Court has tended to rely on two general (and vague) inquiries. First, the Court has applied a “formal” test<sup>159</sup> to determine whether “one branch of the Government [has intruded] upon the central prerogatives of another.”<sup>160</sup> Under this standard, the Supreme Court has invalidated various congressional actions that impermissibly arrogated powers of the executive to the legislative branch, including Congress’s attempts to remove executive officers without impeachment,<sup>161</sup> enact laws without presentment to the

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30 (“[I]t is clear that some presidential authorities in this context are beyond Congress’s ability to regulate.”); cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 59–60 (1991) (Scalia, J., dissenting) (“Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired.”). It should be noted that the Supreme Court refused to embrace a claim of inherent executive authority in the 2006 case of *Hamdan v. Rumsfeld*, 548 U.S. 557. In *Hamdan*, a majority of the Court determined that the military commission convened by the President to try Salim Ahmed Hamdan, an alleged member of the Taliban who was captured during hostilities in Afghanistan, “lack[ed] power to proceed” because it conflicted with the Geneva Conventions and the procedures established by Congress in the Uniform Code of Military Justice (UCMJ). *Id.* at 567. The *Hamdan* Court determined that Congress rightfully exercised its legislative authority to limit the President’s power to establish military tribunals. *See id.* at 613 (“The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with [relevant principles of international law], including, *inter alia*, the four Geneva Conventions.”). In so holding, the Court implicitly rejected the premise that the President’s Article II Commander-in-Chief power gives him the plenary authority to try enemy combatants for alleged crimes against the laws of war, at least in the absence of clear military necessity.

The constitutional dynamic underlying the Court’s decision in *Hamdan* can be distinguished, however, from the framework of foreign intelligence surveillance at issue here. The *Hamdan* Court relied to a great extent on the text of Article I, stressing that the Constitution “vests in Congress the power[ ] . . . ‘To make Rules for the Government and Regulation of the land and naval Forces.’” *Id.* at 591 (quoting U.S. CONST. art. I, § 8, cl. 14). Thus, in circumscribing the President’s authority to establish military commissions, Congress can rely on its express constitutional authority to make rules governing the armed forces. On the other hand, FISA and the FAA are not limited to regulation of the military but instead apply to all surveillance conducted by the executive for foreign intelligence purposes. Unlike with the regulations at issue in *Hamdan*, there is no clear Article I hook for Congress to rely upon in its regulation of foreign intelligence surveillance. Rather, the Fourth Amendment—which is limited in its scope by, *inter alia*, the foreign intelligence exception and the *Terrorist Bombings* extraterritoriality principle—supplies the relevant basis for Congress’s legislative authority in the foreign intelligence surveillance context. *See* Wilson R. Huhn, *Congress Has the Power To Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President’s Terrorist Surveillance Program Is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 564–69 (2007) (arguing that Traditional FISA is justified by Congress’s implied power to enforce the provisions of the Fourth Amendment against the federal government).

<sup>158</sup> Kris Testimony, *supra* note 42, at 837.

<sup>159</sup> *Id.* at 838.

<sup>160</sup> *Loving*, 517 U.S. at 757.

<sup>161</sup> *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).



President,<sup>162</sup> and undo presidential pardons.<sup>163</sup> Second, the Supreme Court has applied a “functional” test<sup>164</sup> to determine if a branch has impermissibly “impair[ed] another in the performance of its constitutional duties.”<sup>165</sup> Stated differently, a congressional statute may not “impede the President’s ability to perform” duties delegated by the Constitution to the executive branch.<sup>166</sup> As will be discussed below, Congress’s imposition of procedural and substantive requirements on the executive in the context of foreign intelligence surveillance abroad arguably constitutes such an impermissible burden.

Though the constitutionality of traditional, domestic FISA rests on firmer grounds,<sup>167</sup> the FAA goes above and beyond Traditional FISA by imposing substantive and procedural requirements on the executive for foreign intelligence gathering *outside the United States*. It seems much more likely that the President’s power over foreign intelligence surveillance would be considered “plenary” where he was exercising his authority to investigate threats to national security overseas.<sup>168</sup> This seems especially true considering that, under current con-

<sup>162</sup> *INS v. Chadha*, 462 U.S. 919, 954–59 (1983).

<sup>163</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871).

<sup>164</sup> *Kris Testimony*, *supra* note 42, at 838.

<sup>165</sup> *Loving*, 517 U.S. at 757.

<sup>166</sup> *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

<sup>167</sup> Crucially, Traditional FISA applies only inside the territorial United States. This has at least three important ramifications for its constitutional status. First, the President’s inherent authority over foreign affairs seems lessened in the context of surveillance conducted within the United States, even when conducted for foreign intelligence purposes. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (“That military powers of the Commander in Chief were not to supersede representative government of *internal affairs* seems obvious.” (emphasis added)); *id.* at 635 n.2 (citing *Mackenzie v. Hare*, 239 U.S. 299, 321–22 (1951), for the proposition that internal and external affairs are in separate categories and that the limits that apply to the power of “the President over internal affairs do[ ] not apply with respect to . . . power in external affairs”). Second, Traditional FISA applies entirely within the scope of the Fourth Amendment’s geographical application, so the *Terrorist Bombings* concern does not apply at all to domestic FISA. Finally, while the foreign intelligence exception to the Warrant Requirement (seemingly) retains viability in the domestic context, the Supreme Court has never confirmed its existence nor defined its potential scope. Therefore, the possibility remains that FISA can be justified as a legitimate exercise of Congress’s power to enforce the guarantees of the Fourth Amendment within the United States. *Cf. United States v. Truong Dinh Hung*, 629 F.2d 908, 914 n.4 (4th Cir. 1980) (“[T]he complexity of [FISA] . . . suggests that the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, should be left to the intricate balancing performed in the course of the legislative process by Congress and the President.”).

<sup>168</sup> As noted by Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit,

Th[e] distinction between domestic and foreign surveillance, imprecise though it may be, bears a solid connection to the Structural Constitution. The Executive’s most explicit mandate in Article II is in the realm of foreign affairs. . . . The executive branch is . . . on firmest ground when its claims of

stitutional doctrine, the executive is not required to obtain *any* prior judicial approval from a U.S. court in order to surveil citizens abroad suspected of ordinary crimes.<sup>169</sup> According to the Second Circuit's opinion in *Terrorist Bombings*, the Warrant Requirement of the Fourth Amendment simply does not apply abroad and therefore does not constitute an "applicable provision[ ] of the Constitution"<sup>170</sup> to limit executive power in this geographical context.<sup>171</sup> Indeed, the current framework of surveillance law creates a uniquely perverse state of affairs: To get *increased* Fourth Amendment protections through the FAA, a target of surveillance abroad can argue that the government's purpose was to gain foreign intelligence information, not simply to investigate ordinary criminal activity. Congress's authority to impose a substantive and procedural warrant requirement abroad through New FISA—no matter how "reasonable"—seems tenuous, then, especially considering that the interests of the executive in foreign intelligence surveillance are "particularly intense"<sup>172</sup> and constitute a "special need" above and beyond normal law enforcement.<sup>173</sup> Even if the *Terrorist Bombings* opinion is not followed as constitutional doctrine, the foreign intelligence exception to the Warrant Requirement would clearly apply to the type of surveillance at issue under the FAA, which, by definition, is undertaken for the purpose of gathering foreign intelligence. While it remains true that the Reasonableness Requirement of the Fourth Amendment retains

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national security or executive privilege are anchored in the explicit structural mandates of Article II.

J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1698–99 (2004).

<sup>169</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that the Fourth Amendment's Warrant Requirement does not apply to ordinary law enforcement searches of U.S. citizens conducted abroad by U.S. agents); *supra* Part II.C (describing extraterritorial application of the Warrant Requirement).

<sup>170</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

<sup>171</sup> *Cf. City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Legislation which alters the meaning of [a constitutional right] cannot be said to be enforcing [that right]. Congress does not enforce a constitutional right by changing what the right is. . . . [Congress does not possess] the power to determine what constitutes a constitutional violation."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>172</sup> *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008).

<sup>173</sup> See *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) ("FISA's general programmatic purpose, to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from 'ordinary crime control.'"). Notably, even the most vocal critics of the warrantless TSP program "d[id] not dispute that, absent congressional action, the President might have inherent constitutional authority to collect 'signals intelligence' about the enemy abroad." Professors' Letter, *supra* note 50, at 43.

vitality overseas under either scenario, the requirements of the FAA arguably cannot be equated with mere “reasonableness.”

C. *The FAA Imposes Burdens on the Executive  
Beyond Mere Reasonableness*

Even if the inherent authority of the President to conduct foreign intelligence surveillance abroad is recognized, any exercise of this power must be made in accordance with the Fourth Amendment’s overarching requirement of reasonableness. In assessing the reasonableness of a search, courts “examine the ‘totality of the circumstances’ to balance ‘on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”<sup>174</sup> Under this balancing inquiry, “[t]he more important the government’s interest, the greater the intrusion that may be constitutionally tolerated,”<sup>175</sup> and it is widely accepted that the government’s interest in protecting national security is “of the highest order of magnitude.”<sup>176</sup> Importantly, courts have stressed that the Fourth Amendment’s requirement of reasonableness involves a distinct inquiry that does not equate with the requirements imposed by the Warrant Clause. In other words, surveillance can satisfy the Reasonableness Requirement *without* prior judicial approval based on a finding of probable cause.<sup>177</sup>

Considering the government’s strong interest in this context, the FAA’s imposition of procedural and substantive limitations on the executive’s inherent authority to conduct warrantless surveillance arguably violates formal separation-of-powers principles. In effect, Congress has assumed the authority to limit executive power to con-

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<sup>174</sup> *In re Terrorist Bombings*, 552 F.3d at 172 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

<sup>175</sup> *In re Directives*, 551 F.3d at 1012.

<sup>176</sup> *Id.*; see also *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”).

<sup>177</sup> For example, in its *In re Directives* opinion, the FISC rejected on reasonableness grounds an argument challenging the constitutionality of government surveillance under the PAA that was based on the assertion that the statute did not “contain protections equivalent to the three principal warrant requirements: prior judicial review, probable cause, and particularity.” *In re Directives*, 551 F.3d at 1013. After concluding that the foreign intelligence exception applied to PAA surveillance—and, therefore, that the Warrant Requirement of the Fourth Amendment did not—the court “decline[d] the . . . invitation to reincorporate into the foreign intelligence exception [and the reasonableness inquiry] the same warrant requirements that [it] already ha[d] held inapplicable.” *Id.*; cf. *Sealed Case*, 310 F.3d at 746 (“[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.”).

duct foreign intelligence surveillance overseas by imposing the checks established by the Fourth Amendment's Warrant Clause: ex ante judicial review and probable cause.<sup>178</sup> If, however, gathering foreign intelligence information abroad constitutes a "central prerogative[ ]"<sup>179</sup> of the executive to which the Warrant Requirement does not apply, any burden imposed by Congress that goes beyond the protections mandated by the Reasonableness Requirement—the only "applicable provision[ ] of the Constitution"<sup>180</sup> limiting executive authority—would constitute an impermissible encroachment.<sup>181</sup>

### 1. *The FAA as a Procedural Burden*

An important justification for the existence of the foreign intelligence exception to the Warrant Requirement is the recognition that "imposition of a warrant requirement . . . [can] be a disproportionate and perhaps even disabling burden on the Executive" in certain contexts.<sup>182</sup> In its *Truong* decision, the Fourth Circuit asserted that imposing "a uniform warrant requirement would . . . 'unduly frustrate' the President in carrying out his foreign affairs responsibilities," especially considering the executive's "compelling" need for "the utmost stealth, speed, and secrecy" in countering foreign threats.<sup>183</sup> In addition, the Fourth Circuit noted that the executive, and not the courts, possesses the necessary expertise and access to information to make time-sensitive and difficult decisions regarding foreign intelligence surveillance.<sup>184</sup> While it is true that the *Truong* court was acting at a time when the FISC was in its nascent stages, the fact remains that the

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<sup>178</sup> Indeed, the circuit courts that have addressed the question whether a Traditional FISA warrant satisfied the Fourth Amendment have uniformly concluded that the procedural and substantive requirements for obtaining a FISA surveillance order serve as "adequate substitutes for [a] traditional law enforcement warrant." Banks, *supra* note 144, at 1158; see also *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Ott*, 827 F.2d 473 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

<sup>179</sup> *Loving v. United States*, 517 U.S. 748, 757 (1996).

<sup>180</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

<sup>181</sup> *Cf. Banks*, *supra* note 144, at 1157 n.41 ("[I]n theory, Congress cannot legislate to deny surveillance authority that is part of a core Article II power of the executive."); *Chemerinsky*, *supra* note 154, at 145 ("[Under the broadest view of executive authority,] the President has inherent powers that may not be restricted by Congress[, and he] may act unless the Constitution is violated."). *But cf. Forgang*, *supra* note 59, at 259 (arguing that "requiring a warrant when the United States conducts foreign intelligence surveillance of U.S. persons overseas should not be a significant added burden" and is a necessary safeguard for constitutional rights).

<sup>182</sup> *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157 (2d Cir. 2008).

<sup>183</sup> *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (quoting *Keith*, 407 U.S. 297, 315 (1972)).

<sup>184</sup> *Id.* at 913–14.

executive branch retains a vastly superior ability to make decisions regarding the national security needs of the country.

Admittedly, the creation of the FISC and the streamlined FISA framework for review does mitigate the procedural burdens on the executive in undertaking foreign intelligence surveillance with judicial approval. Most relevant in this context is the FAA's provision allowing for emergency warrantless surveillance for up to seven days where "the Attorney General reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained."<sup>185</sup> Nevertheless, the requirements of the FAA, including the limited scope of the emergency provision, might still constitute impermissible intrusions, however slight, upon the President's inherent authority in a given case. In order to engage in emergency warrantless surveillance in accordance with the FAA, the executive must have reasonably determined *ex ante* that a "factual basis" existed for issuing a FISA order, including the substantive requirement of probable cause.<sup>186</sup> Moreover, the government must still complete a FISA application to present to the FISC within seven days, which is no easy task. In the words of former Director of National Intelligence Michael McConnell, "FISA applications resemble 'finished intelligence products' because they include 'detailed facts describing the target of the surveillance, the target's activities, the terrorist network . . . and investigative results or intelligence information that would be relevant to the Court's findings,' and are subjected to [layers] of review for legal and factual sufficiency."<sup>187</sup> If the government were unable to meet these requirements, but could demonstrate that it engaged in "reasonable" surveillance of a suspected foreign intelligence threat, it is at

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<sup>185</sup> 50 U.S.C. § 1805(e)(1)(B) (2006).

<sup>186</sup> § 1805(f)(2). If the government failed to meet the FAA's requirements, it would lose the ability to introduce evidence gained through the surveillance in a resulting prosecution. § 1806(e). Sacrificing the ability to prosecute a suspected threat to national security is a significant cost, as criminal prosecution remains an essential mechanism to disrupt and incapacitate terror suspects. This is especially true when the suspect is a U.S. citizen who may not be detained outside of the criminal process "except pursuant to an Act of Congress." Non-Detention Act, 18 U.S.C. § 4001(a) (2006).

<sup>187</sup> Blum, *supra* note 13, at 294 (omission in original) (quoting *Hearing on the Foreign Intelligence Surveillance Act and Implementation of the Protect America Act Before the S. Comm. on the Judiciary*, 110th Cong. 5 (2007) (statement of J. Michael McConnell, Dir. of Nat'l Intelligence)); see also John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 576 (2007) ("FISA requires a lengthy review process, in which special FBI and DOJ lawyers prepare an extensive package of facts and law to present to the FISC. The Attorney General must personally sign the application, and another high-ranking national security officer . . . must certify that the information sought is for foreign intelligence.").

least plausible that a court would find the procedural demands of the FAA to be unconstitutional infringements on the President's inherent authority to engage in emergency surveillance and investigate national security threats. This consideration is buttressed when the substantive requirements imposed by the FAA are considered.

## 2. *The FAA as a Substantive Burden*

In order to obtain a warrant under the FAA to target a U.S. person reasonably believed to be located outside the United States, the government must demonstrate probable cause that the person is an agent of a foreign power.<sup>188</sup> Demonstrating that a particular target is an agent of a foreign power is a difficult task: It is very likely that this determination itself would require information obtained through surveillance.<sup>189</sup> This seems especially likely when the intended target is located abroad, far outside the reach of conventional U.S. law enforcement efforts and often in hostile territory controlled by the very foreign power the government is seeking to investigate.<sup>190</sup> Broadly speaking, the "FISA [regime] operates from the assumption that foreign intelligence agents are working for a hostile nation-state, and that it is relatively simple to determine who those agents might be."<sup>191</sup> In this manner, the FAA's "assum[ption] that the government already has [probable cause] to believe that a target is the 'agent of a foreign power' before it even asks for a warrant" can impede the executive in developing important leads in national security investigations.<sup>192</sup> Considering the paramount needs of the President in the area

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<sup>188</sup> 50 U.S.C. § 1881c(c)(1) (Supp. II 2008); see also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 94 (2006) ("The government can't get a FISA warrant just to find out whether someone *is* a terrorist; it has to already have a reason to believe he's one."). Admittedly, the requirement of probable cause under the FAA is less than that for U.S. persons under Traditional FISA, which requires an additional showing of probable cause to believe that the target "knowingly" engaged in activity that "involve[s] or may involve a violation of the criminal statutes of the United States." 50 U.S.C. § 1801(b)(2)(A) (2006).

<sup>189</sup> See Blum, *supra* note 13, at 310 ("Some argue that the warrant requirement is unworkable in the national security context. For example, if the initial determination of an individual's status as a foreign power agent requires surveillance, then probable cause for such surveillance will rarely exist.").

<sup>190</sup> For example, U.S. citizen and suspected terrorist Anwar Al-Aulaqi evaded efforts to capture or kill him for many years by hiding in the remote highlands of Yemen under the protection of al Qaeda in the Arabian Peninsula. See Almasmari, Coker & Gorman, *supra* note 1 (describing the U.S. government's pursuit of Al-Aulaqi).

<sup>191</sup> Yoo, *supra* note 187, at 573.

<sup>192</sup> JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 104 (2006). Professor Yoo poses a famous hypothetical regarding the difficulty of establishing probable cause in the foreign intelligence context:

Suppose an al Qaeda leader has a cell phone with 100 numbers in its memory, 10 of which are in the United States. Surveillance of those 10 would normally

of foreign affairs and his constitutional duty to protect the nation, impairing the executive's ability to obtain necessary foreign intelligence information through imposition of an *ex ante* FISA warrant requirement seems problematic. Adding further support to this contention is the fact that the executive need not demonstrate *ex ante* probable cause *at all* to meet the constitutional requirement of reasonableness in cases involving crimes not related to foreign intelligence.

### CONCLUSION

The procedural and substantive requirements of the FAA, when considered in view of the inapplicability of the Warrant Requirement abroad for ordinary criminal cases and the exception to the Warrant Requirement for foreign intelligence surveillance generally, seem to create an antilogy in the law regarding inherent executive authority. A better approach would allow the President to engage in reasonable warrantless surveillance abroad for foreign intelligence purposes of all persons on a minimal showing of suspicion, subject to strict *ex post* reasonableness review in the courts.<sup>193</sup> This approach would prevent the government from detaining individuals based on information gathered from surveillance shown to be undertaken without reasonable suspicion and unjustified by exigent circumstances, while still permitting the executive to act with appropriate speed and dispatch in responding to perceived emergency threats. As a further limit on the executive's admittedly broad surveillance powers, officials might be prevented from using the information obtained from foreign intelli-

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require a warrant issued pursuant to FISA. Would a FISA judge find probable cause to think the users of those 10 numbers are "agents of a foreign power" . . . ? Probably not, because it is unlikely that our intelligence agencies would immediately know who answered the phone when the captured al Qaeda leader called the number, and a FISA Court would probably require such evidence. The same is true of the leader's e-mail, except it would not be immediately obvious what addresses are held by U.S. residents, making probable cause even more difficult to establish.

Yoo, *supra* note 187, at 575–76; *see also* Blum, *supra* note 13, at 291 (“[S]everal policy makers and lawyers argue that requiring probable cause that the target is an agent of a foreign power is too onerous and does not appreciate the complexities in detecting terrorist activity.”).

<sup>193</sup> For example, under the approach suggested by Judge Richard Posner, warrantless surveillance of Americans for foreign intelligence purposes would be allowed based on a limited showing of “reason to believe that the surveillance might yield clues to terrorist identities, plans, or connections.” POSNER, *supra* note 188, at 101. Instead of a strong *ex ante* judicial check, Judge Posner “would rely more on *ex post* review and reporting mechanisms to control abuse.” Blum, *supra* note 13, at 310.

gence surveillance for non-national security purposes, such as prosecution for ordinary crimes unrelated to terrorism.<sup>194</sup>

It is possible that allowing for such a regime would create potential for executive abuse similar to that revealed by the Church Committee in the years before FISA's enactment. However, mere "lament about the risk that government officials will not operate in good faith"<sup>195</sup> cannot serve to define how we understand the separation of powers established by the Constitution. An assertion that the executive has the authority to engage in certain activities in the defense of the nation is not a license for the abuse of that power. In our tripartite system, the judiciary remains as a constant check to ensure that the executive stays within its constitutional bounds, and the legislature retains the power to defund executive programs and bring any potential abuses to light. Even if the other branches of government fall short in their solemn duties, the ever-present Sword of Damocles that is the democratic process ensures that unreasonable intrusions on individual liberty will not be long tolerated by the American public.

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<sup>194</sup> See Richard A. Posner, Op-Ed., *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16 (arguing that a national security surveillance statute should "[f]orbid any use of intercepted information for any purpose other than 'national security'" and that such information could not be used in "prosecution for ordinary crime"); see also Blum, *supra* note 13, at 310 ("[Judge Posner] would also prevent law enforcement personnel from using information gleaned by warrantless surveillance for most non-national security related crimes.").

<sup>195</sup> *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1014 (FISA Ct. Rev. 2008).