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Circumventing the Constitution for National Security: An Analysis of the Evolution of the Foreign Intelligence Exception to the Fourth Amendment's Warrant Requirement

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STUDENT NOTE

Circumventing the Constitution for National Security: An Analysis of the Evolution of the Foreign Intelligence Exception to the Fourth Amendment's Warrant Requirement

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Abstract

Though few are even aware of its existence, the foreign intelligence exception to the Fourth Amendment's warrant requirement affects the lives of nearly every American. Recent leaks of top-secret National Security Administration documents depict how the government has morphed the exception into a massive catch all that allows intelligence agencies to perform invasive searches without a warrant and in complete disregard of the Constitution. The foreign intelligence exception began as a narrow tool to shield sensitive national security investigations, but its application has reached an alarming breadth.

This note explores the creation and expansion of the foreign intelligence exception, tracing its history from George Washington's secret surveillance efforts during the Revolutionary War to the modern framework for warrantless intelligence surveillance created by the Patriot Act. The Supreme Court has long recognized the necessity of exceptions to the Fourth Amendment's ordinarily strict warrant and probable cause requirements. However, this history illustrates the foreign intelligence exception's glaring disregard for the protections afforded to all Americans by the Fourth Amendment.

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Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware 'the abridgement of freedom of the people by gradual and silent encroachments by those in power,' would be aghast.[1]
- The Honorable Richard J. Leon, on the constitutionality of the NSA's bulk data collection

I. INTRODUCTION

On June 6, 2013, *The Guardian* newspaper published a series of documents leaked by Edward Snowden, a contractor previously employed by the National Security Agency (hereinafter "the NSA").[2] The documents detailed the NSA's top-secret massive data collection program known as PRISM, which collected and stored the Internet communications of millions of people worldwide.[3] In a response to the uproar over the leaks, a senior government official cited the Foreign Intelligence Surveillance Act (hereinafter "FISA") as a solid foundation for the NSA's actions, and justified the programs by referring to the repeated congressional and judicial approval of FISA's procedures for collecting and disseminating foreign intelligence information.[4] As evidenced by the widespread acceptance of heightened security and intelligence gathering after the terrorist attacks of September 11, 2001, Americans have long been willing to accept a tradeoff of increased security for diminished liberties in times of crisis.[5] However, Snowden's leaks lead to many concerns regarding the constitutionality of the application of FISA and the government's now-sweeping foreign intelligence collection programs, which only continued to expand as the War on Terror deescalated in recent years.

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[1] Klayman v. Obama, 957 F. Supp. 2d 1, 42 (2013) (quoting James Madison, Speech in the Virginia Ratifying Convention on Control of the Military (June 16, 1788), *in* THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, WITH SOME ACCOUNT OF EMINENT VIRGINIANS OF THAT ERA WHO WERE MEMBERS OF THE BODY (Vol. 1) 130).

[2] Glenn Greenwald & Ewen MacAskill, *NSA PRISM Program Taps in to User Data of Apple, Google and Others,* THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

[3] *See Id.*

[4] *See Id.*

[5] *See generally* Justin F. Kollar, *USA PATRIOT Act, the Fourth Amendment, and Paranoia: Can They Read This While I'm Typing?*, 3 J. HIGH TECH. L. 67, 67 at note 3 (2004) (discussing the historical tradeoff between security and liberty in times of "perceived peril").

Snowden's leaks shed new light on the extent of the NSA's surveillance both at home and abroad and ignited a fiery debate on the limitations of the government's national security powers. This debate essentially centers around what has become known as the "foreign intelligence exception," which allows the government to circumvent ordinary Fourth Amendment warrant and probable cause requirements in certain situations involving concerns of national security. Most Americans are blissfully unaware of the magnitude of the foreign intelligence exception and pondered how the government had the authority for the expansive surveillance revealed by Snowden's leaks. While many reeled from the perceived affront on their constitutional rights and lauded Snowden as a hero, many others decried Snowden as a traitor and danger to the security of the United States (hereinafter "the US").[6] This wide range of reactions is illustrative of the difficulty the US government has faced since its inception, of properly balancing national security interests with the privacy and liberty rights afforded by the Constitution.

This note will explore how the creation and expansion of the foreign intelligence exception have significantly eroded the traditional constitutional protections of the Fourth Amendment and do little to realistically further the goal of fairly and justly balancing citizens' civil liberties with the duties of law enforcement and interests of national security in the spirit of the Fourth Amendment. Part II sketches the legal framework for the foreign intelligence exception. A history of Fourth Amendment search jurisprudence and the varied exceptions it inspired serves to illustrate the foreign intelligence exception's glaring departure from the customarily narrow exceptions and the Supreme Court's (hereinafter "the Court") prior definitions of which actions fell outside the scope of the Fourth Amendment's warrant and probable cause requirements. Part III details the development and application of the exception up to the enactment of FISA. Parts IV and V, respectively, analyze FISA and the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (hereinafter "the Patriot Act") to determine the significance of their impact on the foreign intelligence exception. Part VI explores the

[6] *See, e.g., Post-ABC Poll: NSA Surveillance and Edward Snowden*, WASH. POST, July 24, 2013, *available at* http://www.washingtonpost.com/politics/polling/postabc-poll-nsa-surveillance-edward-snowden/2013/06/19/699571a8-d8cf-11e2-b418-9dfa095e125d_page.html.

potential for abuses of the foreign intelligence exception and suggests possible limitations that may help prevent such misuses.

II. LEGAL FRAMEWORK FOR THE EXCEPTION

Though many were shocked by Snowden's revelations of the NSA's secret actions, there is in place a legal framework within which the NSA's programs have developed. This note argues that the NSA and applications of the foreign intelligence exception exceeded the boundaries of that framework, and this section discusses the structure of the laws and precedents on which the NSA alleges PRISM and other such programs are based.

The collection of intelligence information, generally through electronic surveillance and wiretapping, has long been considered a search within the meaning of the Fourth Amendment, and is therefore, in theory, governed by the requirements of the Fourth Amendment.[7] Fourth Amendment protections are nebulous and adaptive. As technology, conflict, and security have evolved, so too have interpretations of the Fourth Amendment. The foreign intelligence exception, certainly not contemplated by the Founding Fathers, has developed within this framework of fluid and shifting Fourth Amendment analysis.

A. Development of Exceptions to the Fourth Amendment

i. Fourth Amendment Protections in General

In light of the tyrannies experienced at the hands of the oft-abused general warrants exercised by their British colonial overlords, the Founding Fathers viewed unwarranted intrusions into private lives and homes to be a chief evil against which the Constitution should offer citizens protections.[8] The drafters of the Constitution crafted the

[7] In Katz, the Court conceded that "the Fourth Amendment protects people and not simply 'areas'." Therefore a search analysis turns on a defendant's reasonable expectation of privacy rather than his location. This assertion also means that the Fourth Amendment extends to the recording of oral and written statements, the action most often involved in intelligence collecting. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

[8] *See, e.g.,* Boyd v. United States, 116 U.S. 616, 625-628 (1886) (discussing the

Fourth Amendment to ensure that Americans could not be subjected to such tyranny.[9] Since its inception, two distinct clauses of the Fourth Amendment have shaped the interpretation of the protection it affords.

a. The Search and Seizure[10] Clause and the Requirement of Reasonableness

The text of the Fourth Amendment provides little guidance for defining what is meant by "searches," and the Court has gone through several distinct phases of interpretation of the term. In the embryonic years of the US, "the need for protections against search and seizure was articulated in the context of physical entry into the home."[11] The Court gradually moved from this property rights analysis to a test focusing on the defendant's expectation of privacy. This test was solidified by the 1967 *Katz* decision, in which Justice Harlan's concurrence laid out the rule used for the next several decades: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."[12] From *Katz* onward, reasonableness formed the basis of Fourth Amendment search analyses.

In light of the infinite number of situations from which a Fourth Amendment case may arise, the Court recognized the need for a flexible standard of reasonableness. Accordingly, the Court in *Harris* explained, "[t]he test of reasonableness cannot be stated in rigid and

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history of the Fourth Amendment).

[9] The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

[10] Though the Fourth Amendment protects against both searches and seizures, this note will focus only on searches, as foreign intelligence collection is rarely considered a seizure.

[11] Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, SUP. CT. REV., 2012 (forthcoming Sept. 2012) (manuscript at 7), *available at* http://ssrn.com/abstract=2154611 (explaining that the Court's early Fourth Amendment analysis often centered around physical trespass).

[12] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

absolute terms. 'Each case is to be decided on its own facts and circumstances.'"[13] This fact-intensive approach ensures a fair analysis of the specific facts of each case rather than application of a general rule more easily subject to abuses because of its generality. While the determination of reasonableness encompasses numerous factors, the Court has emphasized the context, which includes the defendant's expectation of privacy, and the intrusiveness of the search as the lynchpins of the analysis.[14]

b. The Warrant Clause and the Requirement of Probable Cause

Intrinsically tied to the requirement of reasonableness is the necessity of a warrant. A search conducted without prior judicial approval (via a warrant) is considered presumptively unreasonable.[15] This insertion of a neutral and detached magistrate between the suspect and law enforcement is a safeguard mandated by both the language and purpose of the Fourth Amendment and ensures that constitutional protections are not tainted by overzealous police investigation.[16]

The unbiased magistrate is tasked with determining whether

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[13] Harris v. United States, 331 U.S. 145, 150 (1947) (citing Go-Bart Importing Company v. United States, 282 U.S. 344, 357 (1931)).

[14] For example, the Court's decisions examining whether a dog sniff constituted a Fourth Amendment search highlight the focus on intrusiveness. *See, e.g.,* United States v. Place, 462 U.S. 696, 706-707 (1983) (emphasizing the fact that luggage sniffed by the dog remains closed, which "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (highlighting the facts that a dog sniff "does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics.").

[15] *See* Katz, 389 U.S. at 357 (citing Jones v. United States, 357 U.S. 493, 497-499 (1958); Rios v. United States, 364 U.S. 253, 261 (1960); Chapman v. United States, 365 U.S. 610, 613-615 (1961); Stoner v. California, 376 U.S. 483, 486-487(1964)).

[16] *See* McDonald v. United States, 335 U.S. 451, 455 (1948). *See also* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

sufficient probable cause exists to issue a warrant. Like reasonableness, probable cause is a fluid concept that takes into account the totality of the circumstances in each individual case so as to allow law enforcement sufficient room to conduct an investigation.[17] In general, "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that belief of guilt must be particularized with respect to the person to be searched or seized."[18] However, the requirements of probable cause and a warrant are occasionally relaxed and are not the sole means of legitimizing a search as reasonable.[19]

ii. The Court Recognizes Exceptions

Nearly as old as the Fourth Amendment itself are the exceptions to its warrant requirement. Because the Fourth Amendment denounces only "unreasonable" searches, a search that meets the reasonableness requirement even though it may lack a warrant is constitutionally permissible as an exception to the general requirement of a warrant. As Justice Stewart announced in *Katz*, the warrant requirement is "subject only to a few specifically established and well-delineated exceptions."[20] However, as Fourth Amendment jurisprudence has developed, it is not entirely clear that these exceptions truly are as "well-delineated" as Justice Stewart proclaimed.[21]

Though their boundaries may be ambiguous, the exceptions to the warrant requirement can be classified into four distinct types.[22]

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[17] *See* Maryland v. Pringle, 540 U.S. 366, 370 (2003).

[18] *Id.* at 371 (citing Brinegar v. United States, 338 U.S. 160, 175 (1949); Ybarra v. Illinois, 444 U.S. 85, 91, (1979)).

[19] *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[20] Katz v. United States, 389 U.S. 347, 357 (1967).

[21] *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 (1985) ("In fact, these exceptions are neither few nor well-delineated. There are over twenty exceptions to the probable cause or the warrant requirement or both.").

[22] "(1) exceptions based on a perception that exigent circumstances make obtaining a warrant impossible or impractical; (2) exceptions resting on a finding that the police action does not impinge upon a substantial privacy interest; (3) "special needs" situations where warrants might frustrate legitimate purposes of the government other than crime control; and (4) situations where magistrates are

The category of exceptions most analogous to the foreign intelligence exception is likely the "special needs" exception, which allows law enforcement to relax both the probable cause and warrant requirements in situations where such strictures would frustrate important goals not related to law enforcement (i.e. national security goals in the context of the foreign intelligence exception).[23] First enunciated in the 1985 decision *N.J. v. T.L.O.,* [24] which upheld the warrantless search of a student's purse in a public school, the special needs exception has since been applied to a number of varying circumstances. For example, the Court used the special needs exception to justify the warrantless drug testing of customs officials,[25] railway workers,[26] and student athletes.[27] Though it does not seem a far stretch from special needs cases to foreign intelligence cases, in which national security is arguably an incredibly compelling non-law enforcement goal, the Court has emphasized that the special needs decisions rested on the administrative nature of the searches in question, which lessens the intrusion involved.[28] Accordingly, the

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considered unnecessary because other devices already curb police discretion." Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18-19 (1991).

[23] *See generally* United States v. Kincade, 379 F.3d 813, 821 (2004) (describing cases in which the Supreme Court has applied the special needs exception).

[24] N.J. v. T.L.O., 469 U.S. 325, 333 (1985). Though the majority did not expressly create a special needs exception in its opinion, Justice Blackmun clarified the majority's balancing test analysis in his concurrence by saying that "[o]nly in those exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).

[25] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989).

[26] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)).

[27] Vernonia Sch. Dist 47J v. Acton, 515 U.S. 646, 653 (1995) ("[S]uch "special needs"… exist in the public school context. There, the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures….'" (citing *T.L.O.*, 469 U.S. at 340)).

[28] *See* Slobogin, *supra* note 22, at 26 ("The fact that the government investigators in these special needs situations typically are looking for proof of something other than crime, or at least evidence of something other than serious crime, is used by

Court declined to extend the exception to uphold random police checkpoints aimed generally at interdicting illegal drugs because such checkpoints' "primary purpose was to detect evidence of ordinary criminal wrongdoing," a law enforcement goal ill-suited for protection under the special needs exception.[29]

Special needs and other such exceptions help the Court balance the privacy interest of individuals against the concern that beefing up the warrant requirement may unduly hamper the job of law enforcement. This reasoning, on which most exceptions (including the foreign intelligence exception) rest, has led the Court to develop a balancing test to be used to determine whether an exception applies. This balancing requires the Court the weigh the government's interest (generally expressed as the need for effective and efficient law enforcement [30]) against the individual's constitutional rights.[31] When crafting an exception, the Court continually emphasizes that each exception is meant to be construed as narrowly as possible.[32] However, the proliferation of exceptions to the warrant requirement begs for an answer to the question: Is the requirement for a warrant truly implicit in the Fourth Amendment, or is there simply a general requirement for reasonableness?

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the Court to minimize the individual interests involved and, at the same time, bolster the government interest in dispensing with a warrant.").

[29] City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000).

[30] In arguing for exceptions to the warrant requirement, the government often contends that in certain situations the strictures of the Fourth Amendment impede effective law enforcement. *See, e.g.,* Johnson v. United States, 333 U.S. 10, 15 (1948). In a dissent, Justice Frankfurter argued that these claims were grossly exaggerated by the government and only in rare cases merited an exception. *See* Harris v. United States, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting).

[31] *See, e.g.,* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983).

[32] *See, e.g.* Thompson v. Louisiana, 469 U.S. 17, 21 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (explaining that exceptions to the warrant requirement are 'jealously and carefully drawn'… (quoting Jones v. United States, 357 U.S. 493, 499 (1958))); McDonald v. United States, 335 U.S. 451, 454 (1948) ("A search without a warrant demands *exceptional* circumstances…") (emphasis added).

B. The Executive's National Security Powers

The foreign intelligence exception cannot be looked at in the isolated context of Fourth Amendment exceptions. When dissecting the development of the foreign intelligence exception, an analysis of the evolution of the Executive's national security powers is equally important. Together, these two foundations have created the legal framework within which the foreign intelligence exception has flourished.

i. Constitutional National Security Powers

Article II, section 2 of the Constitution grants the Executive the well-known Commander-in-Chief power over the country's armed forces. This, combined with the President's authority to appoint and receive foreign officials, has long been understood as making the Executive the gatekeeper of national security and foreign relations.[33] The Court has recognized that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[34] Traditionally, the Executive has been afforded wide latitude to conduct the nation's foreign affairs. This has often come into conflict with other constitutional provisions and has led to the question of whether the Executive can effectively perform its national security duties within the confines of the Fourth Amendment. The foreign intelligence exception endeavors to address this problem by granting the Executive sufficient flexibility to deal with foreign intelligence without the ordinary barriers of the Fourth Amendment.

ii. Judicial Interpretations

The murkiness of the boundaries of the Executive's national security power is due in large part to the customary deference of the judiciary in all matters of national security.[35] Courts have widely

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[33] *See, e.g.,* United States v. Curtiss-Wright Export Corp., 209 U.S. 304, 319 (1936).
[34] *Id.*
[35] In describing this traditional deference of the judiciary, the United States Court of Appeals for the Second Circuit said, "the Supreme Court has stated in no uncertain terms that '[i]t is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation.'" United States v. Ghailani, 2013 U.S.

embraced the notion that the Executive is the preeminent authority in the area of foreign affairs and has much greater expertise in such matters, so his decisions should not be questioned or even scrutinized.[36] Even the Supreme Court is hesitant to define or even address the Executive's national security powers, often declaring the issue to be a non-justiciable political question that cannot be resolved by the Court.

In a rare case in which the Court even mentioned national security, it hinted that national security would be a sufficient justification that could shield executive actions from oversight by the courts.[37] During the Watergate scandal, President Nixon was served a subpoena requesting that he divulge tape recordings made in the White House.[38] Citing executive privilege, a rare defense used to guard the secrecy of presidential communications, and the traditional deference of the judiciary to the executive, Nixon refused to comply with the subpoena.[39] In their rejection of Nixon's claim of privilege, the Court declared that, "[a]bsent a claim of need to protect military, diplomatic, or *sensitive national security secrets*, we find it difficult to accept [Nixon's] argument…."[40] Later lower court decisions attempted to qualify this suggestion that national security concerns were an absolute shield for executive action by announcing some minimal restrictions, such as the United States Court of Appeals D.C. Circuit's assertion that "courts may not simply accept bland assurances by the Executive that a situation did, in fact, represent a national security problem requiring electronic surveillance."[41] However, no court has created any bright-line rule regarding the Executive's authority to act within the realm of national security.

App. LEXIS 21597 at 37 (2103) (citing Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

[36] *See Ghailani*, 2013 U.S. App. LEXIS 21597 at 37.

[37] *See* United States v. Nixon, 418 U.S. 683, 686 (1974).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 706

[41] Smith v. Nixon, 606 F.2d 1183, 1188 (D.C. Cir. 1979). However, the D.C. Circuit did not provide any suggestion as to how or to what degree the Executive's assertions should be corroborated.

iii. The Fourth Amendment in Matters of National Security

In light of this judicial deference, it is unsurprising that the scope of Fourth Amendment protections in the context of national security is equally unclear. The executive branch has continually engaged in activities such as surveillance and wiretapping, which implicate Fourth Amendment protections, in the name of national security with impunity.

a. History of Executive Wiretapping

In a 2006 memorandum describing the legal foundations for the NSA's extensive intelligence collection programs, the Department of Justice (hereinafter "the DOJ") traced the history of Executive secret intelligence gathering all the way back to George Washington, explaining that nearly every president since the very first has engaged in such activity.[42] Falling naturally in line with this storied history, "[e]lectronic surveillance – the interception of communications as they travel on a wire – began shortly after the development of electronic communications."[43] Electronic surveillance by the government has grown, largely unimpeded, since the genesis of the technology that allows it.

b. Executive Authority for Wiretapping & Judicial Regulation

The power to conduct secret surveillance and intelligence collection has long thought to be implicit in the Executive's constitutional duty to defend and protect the nation. The Court endorsed this notion on several occasions.[44] Even though *Katz*

[42] *See* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, at 15 (January 19, 2006) (hereinafter "DOJ memo"), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv39.pdf.

[43] 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, 1602 (2010).

[44] *See* DOJ memo, *supra*, note 42 ("In accordance with these well-established principles, the Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g.,* Totten v. United States*,* 92 U.S. 105, 106

reversed the holding from *Olmstead* that electronic surveillance did not raise Fourth Amendment concerns,[45] the government continued to operate under the idea that the Executive had implied authority for such actions and was therefore not subject to the ordinary strictures of the Fourth Amendment's warrant and probable cause requirements in matters implicating national security. This position was not completely without support, though.

The majority in *Katz* made clear that it did not intend for its holding to resolve the question of the scope of Fourth Amendment protections in cases of national security,[46] and Justice White's concurring opinion urged the Court to exempt wiretapping for national security purposes from the warrant requirement.[47] The Court left considerable room for the Executive to flex its intelligence collecting muscle, and it did so with great veracity and little oversight or regulation.[48] Because of the wide holes left open by the few and limited Supreme Court cases on the issue, no court before FISA held that wiretapping ordered by the Executive and justified on the basis of national security violated the Fourth Amendment.[49]

(1876) (recognizing President's authority to hire spies); Tenet v. Doe, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *See also* Chicago & S. Air Lines v. Waterman S.S. Corp*.,* 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); United States v. Curtiss-Wright Export Corp*.,* 299 U.S. 304, 320 (1936))").

[45] *See* Katz v. United States, 389 U.S. 347, 353 (1967); Olmstead v. United States, 277 U.S. 438, 466 (1928).

[46] *Katz*, 389 U.S. at 358 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security is a question not presented by this case.").

[47] *Id.* at 363 (White, J., concurring).

[48] Section IV. A., *infra*, will discuss the government's taking advantage of the lax regulations and the abuses that became the impetus for the creation of FISA.

[49] *See, e.g.,* United States v. Ehrlichman, 546 F2d 910, 924 (D.C. Cir. 1976), *cert den*., 429 U.S. 1120 ("Since 1940 the "foreign affairs" exception to the prohibition against wiretapping has been espoused by the Executive Branch as a necessary concomitant to the President's constitutional power over the exercise of this country's foreign affairs, and warrantless electronic surveillance has been upheld by lower federal courts on a number of occasions."); *But see* Halperin v. Kissinger, 606, F.2d 1192, 1201 (D.C. Cir. 1979) (restricting the national security powers of the Executive by declaring that situations in which they may be exercised "must be limited to instances of immediate and grave peril to the nation").

c. A National Security Exception?

Despite the seeming total deference to the Executive in matters labeled as national security, before FISA, there was no consensus on the issue of whether a general and absolute national security exception to the Fourth Amendment existed. However, most courts agreed that national security is a sufficient justification for abandoning the Fourth Amendment's warrant requirement when a *foreign* agent or power is involved.[50] The Court solidified the distinction between foreign and domestic targets in the case that has become known as "*Keith.*"[51] In *Keith*, the Court once again failed to reign in the Executive's expansive and ever-growing foreign intelligence powers by reserving the question of whether the warrant requirement applied to foreign intelligence surveillance for a later decision.[52] Though the holding made clear that the warrant requirement could not be circumvented in investigations of *domestic* security threats[53], the *Keith* decision also implied that not adhering to the warrant requirement "may be constitutional where foreign powers are involved."[54] The Court's balancing test to determine the

[50] *See, e.g.* United States v. Smith, 321 F. Supp. 424, 425-26 (D.D. Cal. 1971) (emphasis added).

[51] United States v. United States District Court (Keith), 407 U.S. 297 (1972). The defendants in *Keith* were charged with the bombing of a Central Intelligence Agency building in Ann Arbor, Michigan, and information garnered through warrantless wiretaps formed the foundation of the indictment against them.

[52] *Id.* at 321-22 ("[T]his case involves only the *domestic* aspect of national security. We have not addressed…the issues which may be involved with respect to activities of foreign powers or their agents.") (emphasis added).

[53] *Id.* at 320. *See also* Amicus Curiae Brief of Former Members of the Church Committee and Law Professors in Support of Petitioners at 26, In re Electronic Privacy Information Ctr., No. 13-58 (2013) ("The 'inherent vagueness of the domestic security concept,' and the significant possibility that it be abused to quash political dissent, underscored the importance of the Fourth Amendment—particularly when the government was engaged in spying on its own citizens. (citing *Keith*, 407 U.S. at 323)").

[54] *Keith*, 407 U.S. at 322, note 20. Though the Court claimed that it "expressed no opinion" as to national security and foreign powers, note 20 of the opinion endorses the idea that "warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved" by listing a number of cases in support of that assertion. On the other hand, the Court provided no authority for the position that the warrant requirement also applied to cases involving foreign powers.

reasonableness of the search weighed the privacy of citizens against the concern that a warrant requirement would "unduly frustrate" the efforts of the government to protect itself from national security threats. The balance underscored the considerable weight given to the government's need to guard against potential national security threats.

III. THE STATE OF THE EXCEPTION BEFORE FISA

A. *The "Birth" of the Exception*

Because Executives since the dawn of the US proceeded under the assumption that they could act with almost unilateral authority, not bound by any Fourth Amendment requirements, in the area of intelligence collecting, it is challenging to pinpoint the "birth" of the foreign intelligence exception. One could say that the exception was born the instant George Washington put his intelligence-gathering network into action with no regard for the Fourth Amendment and no objection from Congress or the judiciary. Judicial deference in the area bolstered the appeal and applicability of the exception, and early cases such as *Olmstead* and *Katz* failed to take any stance on the role of the Fourth Amendment in national security investigations, implicitly underwriting the Executive's perceived preeminence and authority in the area. Though few ordinary citizens were aware of its existence, nearly every president relied on the foreign intelligence exception in undertaking some form of surveillance without first obtaining a warrant.[55] Prior to *Katz*, the Court made it clear that the Fourth Amendment was not even a consideration when dealing with electronic surveillance.[56] However, even after *Katz* described the reasonableness test and mandated that it be applied in cases involving electronic surveillance, the Executive continued to undertake massive warrantless surveillance of both foreign and domestic targets on the

[55] *See, e.g.,* the assertion by the D.C. Circuit in *Ehrlichman*, discussed *supra* note 49, that Executives since 1940 have espoused, with the support of the courts, a "foreign affairs" exception. *See also Keith*, 407 U.S. at 311, note 10 (describing the pervasive use of electronic surveillance by Executives since President Truman authorized his Attorney General to wiretap phones without a warrant in the name of domestic security in a 1946 memo).

[56] *See* Olmstead v. United States, 277 U.S. 438, 466 (1928).

basis of national security.

B. *Title III of the Omnibus Crime Control and Safe Streets Act*

The reluctance to limit the Executive in the area of foreign intelligence gathering did not rest with the judiciary alone. Congress similarly squandered opportunities to regulate the Executive's expansive intelligence collection. When Congress responded to *Katz* by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "Title III"), which laid out the procedures for obtaining a wiretap, it expressly avoided the regulation of foreign intelligence surveillance.[57] The new rules for law enforcement were aimed at ensuring citizens' reasonable expectations of privacy were respected as the holding of *Katz* required, but their application to only domestic law enforcement implied that different, though not at all elucidated, standards governed intelligence surveillance when a foreign agent was somehow involved. The foreign intelligence exception continued to evolve into a powerful investigatory tool with no oversight from Congress.

C. *Judicial Interpretations of the Exception after Katz*

The ambiguous boundary between foreign and domestic intelligence surveillance was only exacerbated by further judicial interpretations of the application of the Fourth Amendment to the Executive's national security powers after the passage of Title III. One of the first cases after *Katz* and Title III involving warrantless surveillance justified on the grounds of national security never even mentioned the Fourth Amendment.[58] There seemed to be a pervasive acceptance of the inability of the Court to challenge the Executive's assertion of a need, which would be significantly frustrated by a warrant requirement, for certain surveillance justified on the grounds of national security.[59]

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[57] *See Keith*, 407 U.S. at 306. *See also* The Omnibus Crime Control and Safe Streets Act, codified at 50 U.S.C. § 2511(3) (1968); explanation *infra* note 84 (discussing Title III's non-application for foreign intelligence and national security).

[58] *See* United States v. Clay, 430 F.2d 165 (5th Cir. 1970).

[59] *See, e.g.,* United States v. Enten, 388 F. Supp. 97 (D.D.C. 1971) (The court did "not believe the judiciary should question the decision of the executive department that

Keith seemed to be a step in the right direction toward curbing this unfettered executive power, with the Court requiring the government to comply with the warrant requirement and receive prior judicial approval for domestic security claims. It appeared as if privacy rights had won the balancing test battle, trumping the Executive's concerns of domestic security. However, *Keith's* limited holding and potentially ambiguous application left open a void the government was ready to fill.[60] By declining to detail the procedures necessary to obtain a domestic surveillance warrant that the Court now required and failing to thoroughly define "foreign" power and the relationship the foreign power must have to the surveillance, *Keith* simply invited the Executive to continue as it had been, so long as it could claim some vague relationship to a foreign agent in each case.

Keith and Title III did little to alter the legal landscape in which the foreign intelligence exception had developed and thrived. In applying *Keith*, District Courts of Appeal almost unanimously recognized the existence of the foreign intelligence exception in upholding warrantless government wiretaps.[61] In 1973, the Fifth Circuit Court of Appeals declared that the President's authorization of warrantless wiretaps for the purpose of gathering foreign intelligence did not violate the Fourth Amendment.[62] Reaffirming the dichotomy

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such surveillances are reasonable and necessary to the protection of the national interest.").

[60] "In the end, [*Keith*] left open the vacuum created by prior reluctance to regulate foreign intelligence surveillances, continued uncertainty as to the proper application of the Fourth Amendment, and the unabated exploitation of warrantless foreign intelligence surveillances on the basis of the President's inherent national security powers." David Hardin, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 301 (2003).

[61] *See, e.g.,* Stephanie Kornblum, *Winning the Battle While Losing the War: Ramifications of the Foreign Intelligence Surveillance Court of Review's First Decision*, 27 SEATTLE UNIV. L. R. 623, 634 (2003) ("Virtually *every* court that addressed the issue prior to the enactment of FISA concluded that the President had the inherent power to conduct warrantless electronic surveillance for the purpose of collecting foreign intelligence information, and any such surveillance constituted an exception to the warrant requirement of the Fourth Amendment." (citing United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426-27 (5th Cir. 1973); United States v. Clay, 430 F.2d 165 (5th Cir. 1970)) (emphasis added).

[62] *See Brown*, 414 F.2d at 426.

between domestic and foreign intelligence, the Fifth Circuit reasoned that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."[63] Importantly, the Fifth Circuit also required nothing more than the Attorney General's bare assertion that the surveillance was conducted for the purpose of gathering foreign intelligence.[64] This ensured that the government could continue electronic surveillance so long as they could somehow creatively attach the label of "foreign," which, like *Keith,* only encouraged further abuses of the constitutional requirements of probable cause and a warrant.

Though few courts expressly declared the existence of a foreign intelligence exception, and the "Supreme Court generally remained silent on the question of Fourth Amendment protections and foreign intelligence gathering,"[65] it was clear that such an exception was alive and well.[66]

D. *The "Primary Purpose" Test*

Despite its widespread acceptance and application, the foreign intelligence exception did not develop entirely without regulation and restraint. The most significant legal guideline created alongside the foreign intelligence exception came to be known as the "primary purpose test." Designed as a response to *Keith* and solidified by the Fourth Circuit in *Truong Dinh,*[67] the primary purpose test declared any warrantless search to be constitutionally reasonable and permissible so long as the primary purpose of the surveillance was the collection

[63] *Id.; See also* Elizabeth Gillingham Daily, *Beyond "Persons, Houses, Papers, and Effects": Re-Writing the Fourth Amendment for National Security Surveillance*, 10 LEWIS & CLARK L. REV. 641, 653 (2006) ("[A] warrant requirement [for foreign surveillance] would unduly frustrate the President in protecting national security from foreign threats. First, foreign intelligence surveillance requires 'the utmost stealth, speed, and secrecy.' Second, the judiciary is largely inexperienced in analyzing foreign intelligence information. And third, the Executive Branch is constitutionally imbued with preeminent authority to conduct foreign affairs." (citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)).

[64] *Brown*, 414 F.2d at 426.

[65] Anzaldi & Gannon, *supra*, note 43, at 1603.

[66] *See supra* note 61 (listing courts upholding a foreign intelligence exceptions).

[67] United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

of foreign intelligence information.[68]

At the foundation of the primary purpose test is the notion that while a search aimed at finding evidence to be used in a criminal prosecution can run afoul of the Fourth Amendment if conducted without a warrant, a search whose primary goal is intelligence collection does not violate the Fourth Amendment. The origins of this belief are difficult to trace. Though the primary purpose test is most often associated with the foreign intelligence exception, the Court applied a similar analysis in previous Fourth Amendment warrant exception jurisprudence.[69] It is important to note that the Court used primary purpose language when examining the intrusiveness of administrative searches that spawned the special needs exception.[70] However, the language of the Fourth Amendment makes no distinction between criminal and any other type of investigation, so this assumption is troubling and rests on a constitutional foundation that is shaky at best.[71]

The minimal prerequisite required by the primary purpose test cemented the second dichotomy that shaped the foreign intelligence exception before the enactment of the Patriot Act – the separation between intelligence collection and criminal investigation. As warrantless investigative techniques became an indispensible tool in the government's security operations, executive branch officials self-imposed what one author calls "the pure intelligence rule" as an acknowledgement of the protections of the Fourth Amendment.[72] This pure intelligence rule permitted warrantless investigation but barred the evidence gathered through such techniques from being used in criminal prosecutions to ensure that warrantless intelligence searches remained within the bounds of reasonableness prescribed by

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[68] *See Id.* at 915. *See also* United States v. Butenko*,* 494 F.2d 593, 606 (3d Cir. 1974).

[69] *See, e.g.,* City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000) (declining to apply the special needs exception where the primary purpose of the investigation was general law enforcement, rather than a compelling non-law enforcement administrative goal, such as public health or safety).

[70] *Id.*

[71] *See supra* note 9 (text of the Fourth Amendment).

[72] *See* L. Rush Atkinson, *The Fourth Amendment's National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1362 (2013) (describing the "pure intelligence rule" as a prophylactic self-imposed by the FBI and other intelligence agencies to protect criminal prosecutions from being tainted by warrantless intelligence surveillance).

the Fourth Amendment.[73]

By separating national security investigations from criminal investigations by deeming them minimally intrusive intelligence searches rather than traditional evidentiary searches, the executive branch attempted to place national security investigations outside the realm of the Fourth Amendment and its warrant and probable cause requirements.[74] The judiciary's tacit approval of a national security exception to the Fourth Amendment only promulgated the use of warrantless surveillance and perpetuated the application of the pure intelligence rule as a justification for circumventing the warrant requirement. Like the national security exception, the primary purpose test did little to set clear boundaries for the government or curtail the use of warrantless surveillance.

IV. FISA

The enactment of FISA is arguably the most significant event in the storied history of the evolution of the foreign intelligence exception. Until FISA, Congress had remained relatively mute as to the executive branch's powers in the realm of national security.[75] However, the increasing sense in the early 1970's that the government was spinning out of control forced Congress's hand. FISA moved Congress out of the shadows and into the forefront of the debate concerning limitations to be placed on the government, namely its surveillance programs, in order to protect citizens and ensure compliance with the Constitution. For the first time, Congress was poised to exercise its power to check and balance the executive branch and demand accountability.

A. *The Church Committee & the Creation of FISA*

In response to the overwhelming unpopularity of the Vietnam War and public outrage over the Watergate scandal and numerous media

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[73] See *Id.*

[74] See *Id.*

[75] *See, e.g.,* Kollar, *supra* note 5, at 76 ("[F]or decades prior to the passage of FISA, Congress imposed no constraints on the executive with regards to gathering any information that fell under the aegis of national security." (citing United States v. United States District Court (Keith), 407 U.S. 297, 310-11 (1972)).

reports detailing the rampant abuses of law and power by the Executive and intelligence agencies,[76] Congress assembled the predecessor of the Senate Select Committee on Intelligence and charged it with investigating the illegality of actions by the FBI and other intelligence agencies. Headed by Senator Frank Church, a sixteen-year veteran of the Committee of Foreign Relations, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (hereinafter "the Church Committee") published fourteen reports between 1975 and 1976 that analyzed the scope and history of US intelligence operations.

The Church Committee's investigation involved one hundred twenty-six full committee meetings, forty subcommittee hearings, more than eight hundred witness interviews, and extensive review of more than one hundred ten thousand documents.[77] Their final report, published on April 29, 1976, included a litany of abuses and concluded that "[i]ntelligence agencies have undermined the constitutional rights of citizens primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."[78] The scathing report beseeched all branches of the government to take action to "ensure that the pattern of abuse of domestic intelligence activity does not recur." [79]

[76] Congress was spurred into action largely by a *New York Times* article published in 1974 that exposed a domestic spying operation the CIA had undertaken for nearly ten years in direct violation of the agency's charter. *See* Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, December 22, 1974, *available at* http://www.documentcloud.org/documents/238963-huge-c-i-a-operation-reported-in-u-s-against.html.

[77] Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Book III, S. REP. NO. 94-755, at III (1976), *available at* http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf.

[78] *Id.* at 302.

[79] *Id.* at 21.

B. *Legislative Intent*

The reports of the Church Committee highlighted the failures of the judiciary to curtail intelligence abuses and emphasized the dire need "for *statutory restraints* coupled with much more effective oversight from all branches of the Government." [80] Rather than continue to rely on the courts, which were hesitant to even address national security issues, let alone create workable rules for intelligence investigations, Congress designed FISA to act as clear guidelines that would safeguard Americans from intelligence agencies that had long exploited conflicting interpretations of ambiguous limits.[81] FISA represented Congress's attempt to strike the appropriate balance between the nation's obligation to protect the security of its citizens and borders and the constitutional rights and civil liberties guaranteed to all Americans through the Constitution.[82]

C. *Relevant Changes to Existing Framework*

Congress's attempt to strike this balance was arguably a massive failure that did little to curb the excess and abuses that inspired FISA's creation. Instead of eliminating or reigning in the foreign intelligence exception, Congress essentially codified the exception. FISA gave law enforcement a roadmap detailing just how to use the foreign intelligence exception to thwart the civil liberties that the Fourth Amendment was expressly designed to protect. Federal agents now knew just how to tweak warrant applications to get whatever they wanted with no regard for the Constitution. By creatively attaching the label of "foreign" to a surveillance target, the government was now exempt from establishing probable cause, obtaining a warrant, or limiting its investigations in any significant way.[83]

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[80] *Id.* at 289 (emphasis added).

[81] *See* S. REP. NO. 95-604, pt. 1, at 3 (1977), *available at* http://www.cnss.org/data/files/Surveillance/FISA/Cmte_Reports_on_Original_Act/SJC_FISA_Report_95-604.pdf ("[FISA is] designed to clarify and make more explicit the statutory intent, as well as to provide further safeguards for individuals subjected to electronic surveillance….").

[82] *See Id.* at 4.

[83] For an example of how the government was able to craftily use the label of "foreign" to circumvent the constitutional rights of Americans, *see* Amicus Curiae Brief of Former Members of the Church Committee and Law Professors in Support

i. The Fate of the Primary Purpose Test

While the more stringent requirements of Title III continued to govern warrant procedures for surveillance of domestic security targets,[84] FISA filled the void courts had left by failing to prescribe any restrictions for foreign intelligence gathering. Acknowledging the legal framework pre-FISA courts attempted to forge by establishing the primary purpose test, FISA made the primary purpose test an integral part of the foreign intelligence exception.

In order for a federal officer (usually an NSA or FBI agent) to obtain a warrant for foreign intelligence surveillance under FISA, he or she needs to first obtain approval from the Attorney General, who must certify that "the target of the electronic surveillance is a foreign power or an agent of a foreign power."[85] After obtaining this approval, the officer submits the application to the Foreign Intelligence Surveillance Court (hereinafter "FISC"). The proceedings of FISC are conducted entirely in secret, with only a representative of the government present, and are subject only to minimal review. For review by FISC, a FISA application must also include a certification from "an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense" that "*the* purpose of the surveillance is to obtain foreign intelligence information."[86] FISA therefore

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of the Petitioners, In re Electronic Privacy Information Ctr at 8, 2013 U.S. C. Ct. Briefs LEXIS 3326 (No. 13-58) (Aug. 12, 2013) ("The government now argues that *all* telephone calls in the United States, including those of a wholly local nature, are 'relevant' to foreign intelligence investigations.").

[84] Though Title III was clearly aimed at domestic surveillance, its application to surveillance in the name of national security was quite ambiguous. As originally drafted, Title II stated that, "Nothing contained in this chapter…shall limit the constitutional power of the President to take such measures he deems necessary to protect the Nation against actual or potential attack…." 18 U.S.C. § 2511(3) (1968). This provision was deleted when FISA was enacted and was replaced with a reference to FISA's foreign intelligence gathering procedures. 18 U.S.C. § 2511(2)(f) (2000). *See also* Jessica M. Bungard, *The Fine Line Between Security and Liberty: The "Secret" Court Struggle to Determine the Path of Foreign Intelligence Surveillance in the Wake of September 11th*, 4 PGH J. TECH. L. & POL'Y 6, 7 (2004).

[85] 50 U.S.C. § 1804(a)(3)(A) (2014).

[86] 50 U.S.C. § 1804(a)(6)(B) (1978) (emphasis added); "'Foreign intelligence information' means-- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against-

completely embraces the primary purpose test as the appropriate determination of the reasonableness of the application of the foreign intelligence exception.

Though the primary purpose test seems to be a demanding requirement, the application approval rates of FISC certainly suggest otherwise. In the period between FISC's creation and September 11th (1978-2001), FISC granted more than thirteen thousand FISA warrant applications but denied not one single application.[87] Though Congress denied that FISA was used to subvert constitutional rights,[88] in reality, FISA and FISC morphed the primary purpose test from a strict protection into a rubber stamp condoning any and all government surveillance. The weakening of the primary purpose test is due in large part to the widespread acceptance of the idea that the executive branch is the preeminent national security authority and its bare assertion of a foreign intelligence objective is sufficient to invoke the foreign intelligence exception and do away with the imperatives of probable cause and a warrant.[89] FISA welcomed this notion by providing that the certification that the purpose of the surveillance is foreign intelligence collection may not be reviewed by FISC unless the surveillance targets a US citizen.[90]

US Circuit Courts of Appeals also widely endorsed the primary purpose test as implicit in FISA and the appropriate standard of

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(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to-- (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e) (2014).

[87] Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Court Orders 1979-2012*, *available at* http://epic.org/privacy/wiretap/stats/fisa_stats.html.

[88] S. COMM. ON INTELLIGENCE, S. REP. NO. 98-665, at 36 (1984) *available at* http://www.intelligence.senate.gov/pdfs98th/98665.pdf (stating that the sharp increase in the approval of FISA warrant applications 'does not reflect any relaxation in strict protections for the privacy of US persons.').

[89] *See supra* note 59.

[90] 50 U.S.C. § 1805(a)(4) (2014). Even if the target of the surveillance is a US citizen, the certification is reviewable only under the minimal standard of clear error. *Id.*

constitutional reasonableness in FISA cases. "[T]he circuit courts have ruled that FISA provides for a justifiable imposition on private rights where the 'primary purpose' of the warrants has been to gather foreign intelligence information in the interest of national security, and not to further a criminal prosecution."[91] In upholding the primary purpose test, the circuit courts also affirmed the importance of the dichotomy between foreign intelligence gathering and criminal investigation and prosecution.

ii. The FISA "Wall"

The government's efforts to comply with the primary purpose test led to the formation of the "FISA wall." Though the legislative history of FISA indicates Congress's recognition that foreign intelligence collection and criminal law investigation and enforcement will inevitably and necessarily overlap,[92] the consistent interpretation of FISA by federal courts reading the primary purpose test as implicit in FISA forced the government to maintain a clear divide between the two in order to comply with the Fourth Amendment's mandate of reasonableness. This quickly led to a concern that consultations and interactions between intelligence agents and prosecutors would severely diminish the assertion that intelligence collection was truly

[91] Kornblum, *supra* note 61, at 627 (citing United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Badia, 827 F.2d 1458 (11th Cir. 1987); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991)). *See also* United States v. Megahey, 553 F. Supp. 1180, 1188 (E.D.N.Y. 1982) (affirming that surveillance conducted pursuant to a FISA warrant fits within the recognized foreign intelligence exception to the Fourth Amendment's warrant requirement and that application of this exception is reasonable when the primary purpose of the surveillance is foreign intelligence, which is a requirement "clearly implicit in the FISA standards"); United States v. Falvey, 540 F. Supp. 1306, 1314 (E.D.N.Y 1982) (holding a search conducted pursuant to a FISA warrant to be reasonable because its primary purpose was foreign intelligence information).

[92] *See* S. REP. NO. 95-604, at 6 (1978), *available at* http://www.cnss.org/data/files/Surveillance/FISA/Cmte_Reports_on_Original_Act/SJC_FISA_Report_95-604.pdf. *But see*, 50 U.S.C. § 1801(h)(1)(2014) (Congress did attempt to put in place limitations on information sharing when crafting FISA. Each application for a FISA warrant is required to contain a description of "minimization procedures" designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information" garnered through foreign intelligence surveillance.).

for the purpose of obtaining foreign intelligence and not evidence of criminal wrongdoing.[93]

In response to this apprehension and in order to limit any appearance of coordination between intelligence agents and prosecutors, the DOJ designed formal procedures to restrict the flow of information from intelligence surveillance to law enforcement. Laid out in a 1995 memorandum authored by Attorney General Janet Reno, these procedures forbid "either the fact or the appearance of the Criminal Division's directing or controlling the [foreign intelligence] investigation toward law enforcement objectives".[94] The DOJ explicitly accepted and implemented the dichotomy between foreign intelligence objectives and criminal prosecution as required by the circuit courts' interpretations of FISA. However, the effect of this division was an entirely ineffective measure that had devastating results. "The [1995] procedures essentially cleaved the FBI into two different bodies- intelligence and law enforcement- and restricted the flow of information between the two."[95] The FISA wall further perverted the standard of reasonableness mandated by the Fourth Amendment by enforcing a useless and illusory dichotomy that led to intelligence failures that could arguably have prevented the terrorist attacks of September 11, 2001.[96]

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[93] *See* David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 498 (2006) (explaining that although it was decided under pre-FISA standards, *Truong Dinh* was extremely influential on later judicial interpretations of FISA; in determining that foreign intelligence was in fact the primary purpose of the investigation in *Truong Dinh*, the court examined the number and length of consultations between the intelligence agents that conducted the surveillance and the prosecutor that eventually charged Truong (citing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)). *See also* Daily, *supra* note 63, at 658 ("If courts thought that agents were using FISA surveillance primarily for criminal prosecution, it would jeopardize the DOJ's ability to use evidence obtained in FISA surveillance in a later prosecution.").

[94] Memorandum from Janet Reno, Attorney Gen., to the Assistant Attorney Gen. of the Criminal Div., Procedures for Contacts Between the FBI Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations, part A, subsection 6 (July 19, 1995), *available at* http://www.fas.org/irp/agency/doj/fisa/1995procs.html.

[95] Atkinson, *supra* note 72, at 1390, note 240.

[96] *See generally* THE 9/11 COMMISSION REPORT (2004), *available at* http://www.911commission.gov/report/911Report.pdf.

V. THE USA PATRIOT ACT

In the wake of September 11th and the numerous allegations that the DOJ's FISA walls prevented information sharing that could have thwarted the deadly attacks, Congress was in an uproar over the disastrous failures of the once-lauded FISA. However, rather than take the opportunity to reexamine the now overwhelming breadth of the foreign intelligence exception and reevaluate the protections of the Fourth Amendment in light of modern technology and threats, Congress acted hastily to tear down the wall and expand the Executive's power. Enacted just forty-five days after September 11th, the Patriot Act greatly broadened the latitude of the foreign intelligence exception, which further eroded the constitutional protections the government vows to uphold and defend.

A. *The Wall Comes Down*

Before September 11th, FISA survived numerous constitutional challenges because courts consistently reiterated that the separation FISA maintained between law enforcement and intelligence investigation ensured that searches conducted pursuant to FISA were sufficiently reasonable so as to satisfy the requirements of the Fourth Amendment.[97] After the Patriot Act, the sound constitutional foundation on which FISA and the foreign intelligence exception seemed to rest was called into question. The increased information sharing allowed by the Patriot Act destroyed the FISA walls that the executive branch had so carefully erected to comply with judicial restrictions on the government's national security powers.[98] These shattered walls demanded a new interpretation of what made a search sufficiently reasonable so as to pass constitutional muster.

B. Significant Purpose v. The Purpose

By the time Congress passed the Patriot Act, the Fourth Amendment prerequisites of probable cause and a warrant had long been abandoned in favor of a loose, fluid standard of reasonableness

[97] *See supra* note 91.
[98] *See, e.g.,* USA PATRIOT Act, codified at 50 U.S.C. §§ 1804-1806.

in cases in which national security was involved. Decades of judicial recognition of the paramount obligation of the government to protect the nation's security effectively shut out any arguments against the recognition of the national security and foreign intelligence exceptions.[99] Combined with the increasing willingness of the judiciary to accept without question government insistences that national security was being threatened, the Patriot Act's diminishing of the primary purpose test was all but inevitable. As unreasonable as the total forsaking of the primary purpose standard of reasonableness was, it should not have come as a surprise to anyone.

Two weeks after September 11th, a DOJ memorandum responded to the question of whether diminishing the primary purpose test would violate the Fourth Amendment with a resounding no.[100] One month later, the Patriot Act was signed into law, and, with the addition of two short words, completely changed the landscape of foreign intelligence investigation, shattering what minimal Fourth Amendment protections still remained in the area. The most momentous consequence of the Patriot Act's amendments to FISA is likely the dilution of the foreign intelligence purpose requirement from "the purpose" to a merely "a significant purpose."[101] With no guidance regarding how significant this purpose needed to be,[102] the DOJ quickly seized the opportunity to formulate an interpretation that would allow it to conduct foreign intelligence surveillance even where criminal prosecution was a primary aim of the investigation.[103]

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[99] *See supra* notes 61 and 91.

[100] *See* Memorandum for David S. Kris, Associate Deputy Attorney Gen., from John C. Yoo, Deputy Assistant Attorney Gen., Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches (September 25, 2001), *available at* http://www.justice.gov/opa/documents/memoforeignsurveillanceact09252001.pdf.

[101] 50 U.S.C. § 1804(a)(6)(B) (2001).

[102] For a discussion of the ambiguity of the new purpose standard, s*ee, e.g.,* Hardin, *supra* note 60, at 323 ("In contrast to 'primary,'…the term 'significant' is void of any preferential connotation that would accord a greater value to one purpose over another…The difficulty in quantifying the term is apparent.").

[103] *See* Brief for the United States at 30-56, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001) (describing the DOJ's interpretation of the Patriot Act's purpose requirement). *See also* Memorandum from John Ashcroft, Attorney Gen., Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI (Mar. 6, 2002) *available at* https://www.fas.org/irp/agency/doj/fisa/ag030602.html (reworking the DOJ's

C. *FISA Court of Review Convenes for the First Time*

Despite the fact that FISA established an appellate court to review orders of FISC, the Foreign Intelligence Surveillance Court of Review (hereinafter "FISCR") did not convene a single time in the twenty-three years of its existence prior to the Patriot Act.[104] After FISC hesitated to fully embrace the DOJ's utter abandonment of the primary purpose test and FISA walls and instead limited the coordination sought by the FBI in a FISA warrant application by requiring heightened minimization procedures, the government filed the first ever appeal with FISCR.[105] Although no court or legislator by 2002 could question the existence of the foreign intelligence exception, the preconditions that a FISA warrant application must meet in order to conform to Fourth Amendment requirements were far from certain.[106] Just shy of the one-year anniversary of the September 11th attacks, the DOJ gave FISCR the opportunity to clearly prescribe these limitations. Nonetheless, FISCR frittered away yet another occasion to define the boundaries of the excessive powers of the executive branch to intrude into the private lives and homes of people around the globe.

In re Sealed Case[107] was the last nail in the coffin of the primary purpose test. FISCR's holding that the Patriot Act eliminated the primary purpose test chastised the circuit courts for their consistent reliance upon it for the previous three decades.[108] In abruptly reversing the course of nearly twenty-five years of well-established

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minimization procedures to permit exchange of a "full range of information and advice" between intelligence and law enforcement agents).

[104] *See* 50 U.S.C. § 1803(b)(1978) (establishing a three-judge court to review denials of FISA warrant applications). *See also* Kornblum, *supra* note 61, at 643 (discussing FISCR's failure to convene a single time before 2002).

[105] *See generally* William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1170 (2003) (detailing the events that led up to the first FISCR opinion in November 2002).

[106] *See, e.g.,* the strikingly different arguments regarding the constitutionality of the Patriot Act offered by the DOJ in its brief and the ACLU in its amici brief. *See* Brief for the United States at 30-56, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001); Brief for the American Civil Liberties Union as Amicus Curiae at 14-23, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (No. 02-001).

[107] In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

[108] *See Id.* at 726-28.

precedent, FISCR reasoned that the primary purpose test was not mandated by either the language of FISA, especially as amended by the Patriot Act, or the Constitution.[109] In light of the axe the Patriot Act took to the primary purpose test by diminishing the purpose requirement from "the" to "a significant," this statutory interpretation is not at all surprising. The contention that the Patriot Act's new purpose standard was, in fact, constitutionally sufficient is much more shocking. To support this tenuous assertion, FISCR concluded that the boundaries the courts sought to institute by creating the primary purpose test were "inherently unstable, unrealistic, and confusing" and "unstable because [they] generat[e] dangerous confusion and creat[e] perverse organizational incentives."[110]

While FISCR may have been correct in saying that the line between a criminal and intelligence investigation is often murky and impossible to clearly delineate, completely obliterating the only barrier between limitless executive authority and the private liberty of citizens was hardly the way to go about fixing this problem. FISCR's holding that the Patriot Act fit within the Court's special needs exception because "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'"[111] essentially removed the Constitution from consideration in cases where foreign intelligence plays any role. In the post-*In re Sealed Case* world, there remains no guarantee at all that FISA and other intelligence searches meet even the most minimal requirement of reasonableness.

D. *The Foreign Intelligence Exception Since the Patriot Act*

The utter disregard for the Fourth Amendment by the Patriot Act and FISCR does not rest entirely with FISCR and the legislature. The Court must also shoulder the blame for its failure to ensure that the Fourth Amendment maintained an important place in intelligence investigations. FISCR admitted that its decision treaded into unknown waters, and that the foreign intelligence exception was seemingly

[109] *Id.*
[110] *Id.* at 743.
[111] *Id.* at 746.

incapable of strict regulation after so many years of unimpeded growth.[112] All three branches of government have fallen short of their constitutional obligations and have let national security completely consume the rest of the Constitution.

Since 2002, forty-seven cases have cited *In re Sealed Case* to support the conclusion that warrantless foreign intelligence surveillance does not offend the Constitution.[113] Only one case criticized the conclusion that the President has the inherent authority to conduct warrantless intelligence surveillance entirely outside the bounds of the Fourth Amendment.[114] Combined with numerous revelations that the Executive has consistently abused this "inherent authority" and circumvented the constitutional rights of millions,[115] *In re Sealed Case* serves to underscore the dire need to restore the validity and power of the Fourth Amendment in matters of national security.

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[112] *See Id.* (admitting that "the constitutional question presented by this case- whether Congress's disapproval of the primary purpose test is consistent with the Fourth Amendment- has no definitive jurisprudential answer.").

[113] *See* Shepard's Report, In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

[114] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1040-1043 (D. Or. 2007), *vacated*, 599 F.3d 964 (2010).

[115] *See, e.g.,* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts,* N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0. *See also supra* note 2 (detailing Snowden's leaks that describe the NSA's massive data collection program that clearly violated to prohibition of warrantless and limitless domestic surveillance); *supra* note 83(describing how the NSA's data collection programs violate the constitutional rights of Americans).

VI. CONCLUSION

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[116]

- Justice Brandeis, on the scope of the Fourth Amendment

In a world where threats are evolving at a pace faster than the Executive could ever keep up with, the justification of national security protection is even more salient. It would be entirely unreasonable to subject the government to the ordinary warrant and probable cause requirements that govern more traditional criminal investigation and crime prevention in cases implicating national security concerns. However, the Fourth Amendment cannot be entirely forgotten. In fighting for what they seek to protect, the government should not at the same time destroy the values and liberties on which the nation was built. As FISCR stated in a later decision reviewing the now-repealed Protect America Act, "in carrying out its national security mission, the government must simultaneously fulfill its constitutional responsibility to provide reasonable protections for the privacy of United States persons."[117]

Because the security of the nation is such a compelling interest, the foreign intelligence exception appears to be here to stay. Forcing the government to pause a sensitive intelligence investigation to attain judicial approval would certainly frustrate national security aims in many instances. It does not seem feasible to reverse the course of history and stymie the evolution of the foreign intelligence exception. However compelling the justification of security may be, limitations must be placed on the foreign intelligence exception if the Fourth Amendment is to continue to have any meaning.

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[116] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[117] In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1016 (Foreign Int. Surv. Ct. Rev. 2008).

Like FISCR in *In re Directives*, significantly more focus should be placed on oversight and minimization procedures. The executive branch cannot be permitted to completely control foreign intelligence surveillance. Just as the Fourth Amendment inserted a detached and neutral magistrate to guard against overzealous law enforcement, some protections must be put in place to ensure that the overzealous executive is not able to subjugate constitutional rights under the guise of national security.

Eventually, the Supreme Court will be forced to step in. There must be a coordinated effort amongst all three branches of the government to zealously defend the Constitution by placing workable restrictions on the foreign intelligence exception and demanding accountability from those who seek to invoke it.