
Katz and the War on Terrorism

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This Article argues that the Katz test is not applicable to searches conducted in support of armed conflict operations or for national security matters. We argue the lower courts have struck the proper balance between constitutional rights and national security by not requiring a warrant for national security searches. This Article asserts the courts have correctly distinguished between domestic law enforcement activities and national security against foreign threats. This distinction is all the more important as the nation fights an unprecedented threat against international terrorism and the need for enhanced intelligence gathering is greater than ever before. Katz should, however, remain a vital part of the law enforcement system as a provision of judicial oversight over surveillance activities to detect crime. But, as Justice Byron White anticipated in the Katz case, the need for rapid decision-making and intelligence gathering in national security matters are best left to the Executive Branch.

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Forty years ago, the United States Supreme Court decided the landmark case *Katz v. United States*.¹ *Katz* called on the courts to balance the needs of law enforcement against society's expectations of privacy. Overruling *Olmstead v. United States*,² *Katz* established that the Fourth Amendment's reach requires a warrant to protect society's reasonable expectation of privacy.³ Specifically, the *Katz* Court held the electronic surveillance of a public telephone booth without a warrant constituted an illegal search under the Fourth Amendment.⁴

In a subsequent case, *United States v. United States District Court for the Eastern District of Michigan* ("Keith"), the Supreme Court extended the *Katz* holding to the context of national security.⁵ The Court held that wiretaps put in place to protect against security threats required a warrant, just as would electronic surveillance of a regular domestic crime. The Court, however, expressly limited its analysis to security threats from domestic sources. It reserved the question whether the *Katz* warrant requirement applied to national security threats that were foreign in nature, rather than domestic. In the years since *Keith*, lower courts have found that the government retains the authority to engage in electronic surveillance without the use of a warrant in the national security context.

This Article argues the lower courts have reached the proper balance between constitutional rights and national security by not requiring a warrant for national security searches. In fact, this is the only way to view the Foreign Intelligence Surveillance Act of 1978 ("FISA")⁶ and the USA PATRIOT ACT ("the Act")⁷ as constitutional. Rather than meeting the Constitution's warrant requirement, FISA orders simply follow the principle of "reasonableness" at the core of the Fourth Amendment. This Article argues that the courts have correctly distinguished between domestic law enforcement activities and national security against foreign threats. This distinction is more important than ever today as the United States engages in the unprecedented war against al Qaeda, which places central importance

¹ 389 U.S. 347 (1967).

² 277 U.S. 438 (1928) (holding use of evidence of private telephone conversations intercepted by means of wiretapping without warrant was not violation of Fourth Amendment).

³ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁴ *Id.* at 356-57.

⁵ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

⁶ 50 U.S.C. §§ 1801-1862 (2000 & Supp. IV 2004).

⁷ Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 272.

on the collection of intelligence. Courts have not applied, and should not apply, the *Katz* test to matters of national security. Extending *Katz* to national security searches would harm the protection of the United States in the fight against international terrorism. Finally, this Article concludes with a discussion of the National Security Agency's Terrorist Surveillance Program to illustrate the problems inherent in applying a warrant requirement to national security operations.

I. AN OVERVIEW OF THE KATZ TEST

In 1967, the Supreme Court in *Katz* examined the legitimate needs of law enforcement, individual privacy concerns, and the Fourth Amendment's original meaning. It took into account the advances in communications technology, specifically the newfound ability to listen in on private conversations. The case involved a gambler, Charles Katz, using a public telephone to conduct illegal gambling activities.⁸ The police placed an electronic device on the public phone to listen to and record his calls.⁹ Katz claimed the police's actions violated his Fourth Amendment right to be free from government searches.¹⁰ Two questions arose on appeal: (1) whether a public telephone booth is a constitutionally protected area; and (2) whether the warrantless interception of electronic communications, without a physical search and seizure, violates the Fourth Amendment.¹¹

The Court established that the Fourth Amendment warrant requirements are triggered when: government conducts a search or seizure;¹² the search was an intrusion into an area with a reasonable expectation of privacy;¹³ or the search was conducted as a quest for evidence or for an officer's safety purposes.¹⁴ In its analysis, the Court emphasized an individual's "reasonable expectation of privacy."¹⁵ This expectation is ascertained both subjectively and objectively. Under the subjective part of the analysis the Court asks, "Does the offended

⁸ *Katz*, 389 U.S. at 354.

⁹ *Id.* at 348.

¹⁰ *Id.*

¹¹ *See id.* at 349-50.

¹² *Id.* at 353.

¹³ *See id.* at 359.

¹⁴ *Id.* at 358 n.20.

¹⁵ *See id.* at 352 (stating that "a person in a telephone booth *may rely upon* the protection of the Fourth Amendment . . . [O]ne who occupies it . . . is *surely entitled to assume* that . . . he . . . will not be broadcast to the world" (emphasis added)); *id.* at 359 (explaining that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures").

citizen believe this is an area where he has privacy?”¹⁶ Under the objective part of the analysis the Court asks, “Does society reasonably view this area as one where privacy from governmental intrusion exists?”¹⁷ If both prongs are met, then the Fourth Amendment requires the government to obtain a search warrant from the judiciary.¹⁸ Although it would later back away from this position, the Court suggested that the Fourth Amendment required a warrant in almost all circumstances.¹⁹ According to the *Katz* court, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”²⁰

The *Katz* Court did not accept the argument that technological change alone justified searches without a warrant: “Omission of such authorization . . . ‘bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.’”²¹ The Court was particularly concerned that, without a warrant requirement, the discretion available to law enforcement officers regarding when and how to conduct a search would threaten constitutional values. In *Katz*:

[Law enforcement officers] were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.²²

¹⁶ *See id.* at 361 (Harlan, J., concurring).

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Id.* at 357 (majority opinion).

²⁰ *Id.* (emphasis added).

²¹ *Id.* at 358.

²² *Id.* at 356-57.

Katz continues to govern searches and seizures in the domestic law enforcement context. The Court shows no signs of replacing *Katz* as the lodestar for application of the warrant requirement in the context of electronic surveillance. Cases such as *Kyllo v. United States* continue to address the emergence of new technology by balancing privacy against legitimate law enforcement needs.²³ Cell phones, laptop computers, pagers, PDAs, and the like are all now part of everyday American life. They are also a means by which criminals organize and conduct crimes. Since *Katz*, however, the Court has developed several important exceptions to the general requirement for a warrant. A warrant is not required for searches incident to arrest,²⁴ in exigent circumstances,²⁵ with the suspect's consent and for a non-law enforcement purpose.²⁶

Katz, however, did not address the important difference between crime and war. While criminal enterprises may have consequences to society, they generally do not implicate national security. A criminal enterprise is normally profit-driven and individualized. The criminal activity is usually sporadic amidst a long-term scheme, but it harms society at a relatively low level. When the nation is at war or a terrorist attack is being planned, however, governmental interests change. The increased potential harm to society changes the outcome of *Katz*'s "reasonableness" analysis; the imperatives of national security make a warrant requirement unworkable. In his concurrence in *Katz*, Justice White observed that the warrant requirement should not apply to matters of national security:

Wiretapping to protect the security of the Nation has been authorized by successive Presidents We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.²⁷

²³ See generally *Kyllo v. United States*, 533 U.S. 27 (2001) (considering Fourth Amendment issues raised by law enforcement use of thermal imaging technology).

²⁴ See, e.g., *Chimel v. California*, 395 U.S. 752 (1969) (reviewing search of alleged burglar's residence following his arrest).

²⁵ See, e.g., *Illinois v. McArthur*, 531 U.S. 326 (2001) (restricting defendant's access to his home while search is conducted does not run afoul of Fourth Amendment).

²⁶ See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (reviewing voluntariness of consent to search).

²⁷ *Katz*, 389 U.S. at 363-64 (White, J., concurring).

Justice White relied upon the President to ensure compliance with the reasonableness standard of the Fourth Amendment in cases involving national security. He was presciently aware of the need for a distinction when the country's safety is in question from covert threats abroad as opposed to local, discrete criminal acts. Since September 11, 2001, the needs for such flexibility in national security searches are greater than ever.

II. ELECTRONIC SURVEILLANCE FOR NATIONAL SECURITY PURPOSES: AN EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT

As the three branches of government have recognized, national security decision-making requires a different analysis from evaluation of law enforcement applications.²⁸ This becomes clear through an analysis of the FISA²⁹ and the amendments made to it by the Patriot Act. FISA followed a long practice of warrantless presidentially ordered wiretapping to protect against national security threats.³⁰ This practice, FISA, and the Patriot Act reflect the understanding of the political branches of government that reasonableness, rather than the Fourth Amendment's warrant requirement, should guide the analysis of electronic surveillance to protect against national security threats. Judicial approval of this regime, so far, signals that the courts agree.³¹

FISA regulates most electronic surveillance of foreign intelligence within the United States. FISA created a foreign intelligence surveillance court ("FISC"), made up of Article III district judges drawn from around the country, which may issue a warrant to conduct a search for foreign intelligence information.³² Upon application by the Justice Department, the FISC may issue a warrant that authorizes electronic surveillance to "obtain foreign intelligence information" if "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power" and that "each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a

²⁸ See JOHN YOO, WAR BY OTHER MEANS 70-98 (2006) (describing background and significance of USA PATRIOT Act).

²⁹ 50 U.S.C. §§ 1801-1862 (2000 & Supp. IV 2004).

³⁰ E.g., Exec. Order No. 8985, 6 Fed. Reg. 6625 (Dec. 19, 1941) (World War II order); Exec. Order No. 2604 (Apr. 28, 1917) (World War I order).

³¹ See *infra* text accompanying notes 42-47, 114-17.

³² 50 U.S.C. § 1803 (2000).

foreign power or agent of a foreign power.”³³ The definition of “foreign power” includes international terrorist organizations.³⁴

FISA permits an ex ante search warrant not based on a showing that a target was involved with criminal activity, but on probable cause that the target was linked to a terrorist organization.³⁵ Such FISA proceedings are held ex parte in a closed hearing so the government may present classified information to the FISC. At the same time, the warrant permits a search whose fruits may be used in a subsequent prosecution.

In the wake of the September 11 terrorist attacks on the World Trade Center and the Pentagon, Congress passed the Act, which amended several provisions of FISA.³⁶ Almost all of these provisions amounted to evolutionary improvements in pre-existing law enforcement powers. The Act updated FISA for modern communications, expanded its effectiveness, and removed barriers to cooperation between intelligence and law enforcement agencies. For example, the Act expanded the scope of FISA warrants nationwide, rather than limiting them to individual judicial districts, and permitted the granting of FISA warrants for a single person and a variety of communications devices, rather than by individual phone number.³⁷

Two provisions of the Act, in particular, have raised concerns. The first changed the standard for granting a warrant. Before the passage of the Act, the government was required to certify that “the purpose” of the search was to gather foreign intelligence information.³⁸ This standard had led both the FISC and the Justice Department to erect a

³³ *Id.* § 1805(a)(3) (2000).

³⁴ FISA defines a foreign power, in part, as “a group engaged in international terrorism or activities in preparation therefore” and “a foreign-based political organization, not substantially composed of United States persons.” *Id.* § 1801(a)(4), (5) (2000).

³⁵ For targets who are U.S. persons, the standard is higher and approaches that of a Fourth Amendment warrant. *In re Sealed Case*, 310 F.3d 717, 737-42 (FISA Ct. Rev. 2002). FISA requires that the information sought, if concerning a U.S. person, is related 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 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.” 50 U.S.C. § 1801(e)(1) (2000). As the FISA Court of Review observed, this showing is functionally similar to probable cause that the target is engaged in criminal activity.

³⁶ USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 282, 286, 295-96.

³⁷ See 50 U.S.C. § 1805(c)(2)(B) (2000 & Supp. IV 2004).

³⁸ *Id.* § 1802(a)(1)(A) (2000 & Supp. IV 2004); see also Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783, 1786, 1790.

wall between intelligence and law enforcement agents that prevented them from sharing information gained from FISA warrants on terrorists.³⁹ Through the Act, Congress amended FISA to require only that the government certify that a “significant purpose” of the search is to collect foreign intelligence. Congress enacted this amendment to correct a misinterpretation among the FISC and the Justice Department that FISA was meant to preclude cooperation between the foreign intelligence and law enforcement communities.⁴⁰ The federal courts responded to this change by eliminating the wall between foreign intelligence and law enforcement and moving the FISA system toward a more flexible approach. In its first decision ever, the FISA Court of Appeals reversed the FISC’s attempt to keep law enforcement and foreign intelligence separate after September 11, even though it indicated this had returned FISA to its original meaning and that the Act amendment was unnecessary.⁴¹

The FISA Court of Appeals’s first decision is important and instructive. The court noted that the FISC initially erected a barrier between searches conducted for intelligence gathering and law enforcement through the “primary purpose” test, which required that the primary purpose of a FISA search was to collect foreign intelligence, rather than the investigation of ordinary crime.⁴² The FISC enforced this approach by limiting contact between intelligence and domestic law enforcement personnel to prevent the disclosure of intelligence gathered through a FISA warrant to law enforcement agents and prosecutors.⁴³ The judiciary’s wall of separation between foreign intelligence and law enforcement represented an attempt to contain a warrantless national security approach from intermingling with the criminal justice system.

It is doubtful that this interpretation of FISA was correct. Although FISA required that in order to receive a FISA warrant, a national

³⁹ See YOO, *supra* note 28, at 71-74, 79-80 (noting that artificial “wall” in place for decades between information gathered for intelligence and information gathered for law enforcement purposes hindered government’s ability to piece together intelligence which could have stopped September 11 attacks).

⁴⁰ See USA PATRIOT Act of 2001 § 206; see also 50 U.S.C. § 1806(k)(1) (2000).

⁴¹ *In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 611 (FISA Ct. 2002).

⁴² See *In re* Sealed Case, 310 F.3d 717, 725-27 (FISA Ct. Rev. 2002).

⁴³ *Id.* at 720-21. As the appeals court observed, however, the idea for the wall of separation between intelligence and law enforcement appears to have originated in the Justice Department in 1995, apparently in response to circuit court decisions that demanded that FISA investigations be for the “primary purpose” of collecting foreign intelligence information. *Id.* at 727-36.

security official had to certify that “the purpose” of the surveillance was to collect foreign intelligence,⁴⁴ this ultimately has little to do with the uses to which that intelligence is put. In other words, if the Executive Branch wanted to collect intelligence because it represented a foreign threat to national security, its purpose is consistent with FISA, even if it decides that the most effective use of that information is criminal investigation and trial.⁴⁵ Furthermore, the definition of foreign intelligence information includes evidence of conduct (such as espionage, sabotage, and terrorism), which constitute federal crimes. As the FISA Court of Review concluded, Congress’s understanding when it enacted FISA was that criminal prosecution could help in the prevention of foreign threats to national security.⁴⁶ “Indeed, it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes, most importantly because, as we have noted, the definition of an agent of a foreign power — if he or she is a U.S. person — is grounded on criminal conduct.”⁴⁷

Section 215 of the Act was also criticized for allegedly violating the Fourth Amendment.⁴⁸ Section 215 allows the FISC to grant FISA warrants for tangible items, such as business records and papers, held by third parties.⁴⁹ As with the primary purpose test, constitutional concerns raised by civil libertarians about section 215 may be exaggerated. Individuals generally do not have Fourth Amendment rights in records that are no longer in their possession and are in the hands of third parties.⁵⁰ Once an individual has voluntarily given information to a third party, he no longer has a reasonable expectation of privacy in that information.⁵¹ The Supreme Court, for example, applied this reasoning to find that warrants were not necessary for the

⁴⁴ 50 U.S.C. § 1804 (2000 & Supp. IV 2004).

⁴⁵ *See id.*

⁴⁶ *In re Sealed Case*, 310 F.3d at 723-24.

⁴⁷ *Id.* at 723.

⁴⁸ USA PATRIOT Act section 215 amends Title V of the FISA of 1978 by striking sections 501 through 503 and inserting section 501 (access to certain business records for foreign intelligence and international terrorism investigations) and section 502 (Congressional oversight). 50 U.S.C. § 1861 (2000 & Supp. IV 2004), *amended by* USA PATRIOT Act of 2001 § 215, 115 Stat. 272, 287.

⁴⁹ *See* FISA § 501, 115 Stat. 272, 287 (2001) (providing for access to certain business records for foreign intelligence and international terrorism investigations).

⁵⁰ *See, e.g.,* *Smith v. Maryland*, 442 U.S. 735, 743-46 (1979); *United States v. Miller*, 425 U.S. 435, 441-43 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2000).

⁵¹ *Smith*, 442 U.S. at 743-46.

use of pen registers, because the phone user had voluntarily given the phone numbers to the phone company.⁵²

In fact, section 215 provides more protection for individual privacy than prior regulations and laws. Grand juries have long been able to subpoena documents related to a criminal investigation.⁵³ Thus, a grand jury investigating the September 11 attacks could subpoena from third parties the same tangible items to which section 215 permits access. Section 215, unlike grand juries, requires the FISC to conduct an *ex ante* review of a law enforcement request to search for tangible items.⁵⁴

Civil libertarian concerns about the Act are exaggerated. The Act's changes to FISA represent a reasonable compromise between civil liberties and the demands of national security that falls well within the Constitution's requirements. The federal government and the Executive Branch have at their disposal sources of constitutional authority to protect the national security that do not require a warrant in order to engage in electronic surveillance.⁵⁵ The Fourth Amendment, moreover, does not textually demand a warrant requirement in such circumstances.⁵⁶ FISA does not set the maximum reach of the government's surveillance and search powers to combat foreign threats.⁵⁷ A review of the constitutional regime governing national security searches shows that FISA, and the Act's amendments to it, represent reasonable compromises rather than extreme efforts to expand government power at the expense of civil liberties.

It is clear that the Fourth Amendment's warrant requirement need not always apply to surveillance undertaken to protect the national security from external threats. Surveillance of terrorists can be undertaken within two distinct legal regimes. The first is the regular criminal justice system, in which the government must seek a warrant to conduct surveillance of a terrorist suspect's voice or electronic communications by presenting sufficient evidence of probable cause to an Article III judge.⁵⁸ Surveillance undertaken in this manner would

⁵² *Id.* at 743-44.

⁵³ *See, e.g.,* *United States v. R. Enters., Inc.*, 498 U.S. 292, 294 (1991) (illustrating grand jury subpoenaed documents relating to criminal investigation).

⁵⁴ FISA § 215.

⁵⁵ *See supra* note 30 and accompanying text.

⁵⁶ *See infra* notes 82-86 and accompanying text.

⁵⁷ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

⁵⁸ 18 U.S.C. §§ 2510-2522 (2000 & Supp. II 2002); Omnibus Crime Control and Safe Streets Act of 1968 tit. 111, 42 U.S.C. § 3789(d) (1968).

be no different than that used against organized crime groups or drug cartels operating within the United States.

In the second regime, during times of war, the government and the military need not obtain warrants to conduct surveillance to protect national security from foreign threats.⁵⁹ During armed conflict the military engages in searches and surveillance without a warrant. The Constitution does not require the armed forces to seek a warrant when it conducts visual or electronic surveillance of enemy forces or of a battlefield, or when it searches buildings, houses, and vehicles for the enemy.⁶⁰ These rules would apply even if combat occurred within the territorial United States, as it has at times in American history.⁶¹

Military operations within the United States generally have received the same legal freedom to protect national security as they would outside the country.⁶² No warrants applied to the Union's military operations against the Confederacy during the Civil War.⁶³ If enemy forces were to actually invade and operate on the territory of the United States, the Constitution should not require a search warrant for the military to conduct surveillance of the enemy. If al Qaeda forces organize and carry out attacks within the United States, surveillance of terrorists would be a military necessity and therefore should not be considered typical law enforcement activity. In such circumstances, when the government is not pursuing an ordinary criminal law enforcement objective, the Fourth Amendment requires no search warrant.⁶⁴

The principle that searches undertaken to protect national security are not subject to the warrant requirement has been recognized by the lower federal courts,⁶⁵ if not yet by the Supreme Court.⁶⁶ When the

⁵⁹ See *supra* note 30.

⁶⁰ Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990) (concluding Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside sovereign territory of United States, because of serious consequences for use of armed forces abroad).

⁶¹ See *infra* note 80.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ This conclusion is supported by the Supreme Court's recent "special needs" cases, which allow reasonable, warrantless searches for government needs that go beyond regular law enforcement. Cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (finding random drug testing of student athletes consistent with Fourth Amendment); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990) (stopping drunk drivers); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 n.15 (1976) (noting border control checkpoints consistent with Fourth Amendment).

⁶⁵ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (stating that "[t]he *Truong* court, as did all the other courts to have decided the issue, held that the

Supreme Court first applied the Fourth Amendment to electronic surveillance, it specifically refused to extend its analysis to include domestic searches conducted for national security purposes.⁶⁷ In *Keith*, the Court held the warrant requirement should apply to cases of terrorism by purely domestic groups.⁶⁸ The Court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or outside the country.⁶⁹ After *Keith*, lower courts found that when the government conducts a search of a foreign power or its agents for national security reasons, it need not meet the same requirements that would normally apply in the context of criminal law enforcement. In *United States v. Truong Dinh Hung*, for example, the U.S. Court of Appeals for the Fourth Circuit observed that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities."⁷⁰

Several reasons led the Fourth Circuit in *Hung* to find that the warrant requirement did not apply to searches for foreign intelligence information:

- (1) "[A] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations . . ."
- (2) "[T]he executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the

President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information" (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980)).

⁶⁶ *United States v. United States Dist. Court (Keith)*, 407 U.S. 297, 322-23 (1972).

⁶⁷ See *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967); see also *Mitchell v. Forsyth*, 472 U.S. 511, 531 (1985) (citing *Katz*, 389 U.S. at 358 n.23).

⁶⁸ *Keith*, 407 U.S. at 321.

⁶⁹ *Id.* at 308.

⁷⁰ 629 F.2d 908, 913 (4th Cir. 1980).

‘probable cause’ to demonstrate that the government in fact needs to recover that information from one particular source . . .” and

- (3) The executive branch “is also constitutionally designated as the pre-eminent authority in foreign affairs.”⁷¹

A hypothetical may illustrate why these factors support warrantless, but reasonable, searches in the national security context. For instance, suppose intelligence sources discover that an al Qaeda cell operating outside of Buffalo, New York has planned an “imminent” attack the next day on the New York City subway system. No further information is possible as the source has disappeared. Federal agents have information on who the people are, where they live, and the potential to monitor their phones, computers, and cell phones immediately. If *Katz* governed, the FBI agents would have to seek a warrant from a neutral and detached judge. Under normal criminal investigation circumstances, such judicial involvement is appropriate under the Fourth Amendment. But in wartime, a warrant requirement becomes impractical. The heightened magnitude of harm and need for swift action must distinguish these national security threats from typical crimes. This situation marks a clear difference and explains why Justice White distinguished national security matters from domestic law enforcement operations. Considering terrorist organizations now have the potential to attack the United States on a massive scale, and reports of their desire to obtain weapons of mass destruction (“WMD”), the need for swift action is critical in preventing an attack.⁷²

If *Katz* were to govern, this hypothetical could result in a catastrophe. If, on the other hand, the national security decision is left to the Executive Branch, the government will be able to respond quickly and obtain the necessary information it needs to prevent the attack. This is the reality that federal law enforcement and the military face everyday.

To summarize, the Fourth Circuit held in *Hung* that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators, since such cases are “most likely to call into play difficult and subtle judgments about foreign and military affairs,” and (2) “when the surveillance is conducted ‘primarily’ for foreign intelligence

⁷¹ *Id.* at 913-14.

⁷² See THE 9/11 COMMISSION REPORT 1-14, 190, 381 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

reasons . . . because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”⁷³ Several other circuits have employed a similar logic, and no other federal appeals court has taken a different view.⁷⁴

These decisions recognize that the government’s right to conduct warrantless searches and surveillance for national security purposes is fully consistent with the Court’s recent approach to the Fourth Amendment. The Fourth Amendment declares, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated.”⁷⁵ The Amendment also declares, “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.”⁷⁶ As Professor Akhil Amar has explained, the Framers did not originally understand the Fourth Amendment to impose a warrant requirement on all searches.⁷⁷ Rather, juries would review whether a search was “reasonable,” usually in the context of a civil action for damages for an allegedly illegal search.⁷⁸

III. THE FRAMERS’ UNDERSTANDING OF THE FOURTH AMENDMENT

It is difficult to believe that the Founders understood the Fourth Amendment as a tool to decrease national security from foreign attack. During the writing of the Constitution, some Framers believed that the President needed to manage intelligence because only he could keep secrets.⁷⁹ Several Supreme Court cases have recognized that the President’s role as commander-in-chief and the sole organ of the nation in its foreign relations must include the power to collect intelligence.⁸⁰ Thomas Jefferson, a critic of Washington’s exercise of

⁷³ *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980).

⁷⁴ *See also* *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Clay*, 430 F.2d 165, 170-72 (5th Cir. 1970).

⁷⁵ U.S. CONST. amend. IV (emphasis added).

⁷⁶ *Id.*

⁷⁷ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 770-71 (1994).

⁷⁸ *Id.*

⁷⁹ THE FEDERALIST NO. 64, at 435 (John Jay) (Jacob E. Cooke ed., 1961).

⁸⁰ *See, e.g., Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948);

executive power, believed that intelligence collection should be the province of the executive and feared massive “leaks” if Congress became too involved.⁸¹ The thought of judicial involvement in these affairs never entered the Founders’ minds. Federalists agreed that intelligence rests with the President because the office’s structure allows it to act with unity, secrecy, and speed.⁸²

The Fourth Amendment’s passage was a response to the experience of the British occupation of towns and cities throughout the colonies.⁸³ It sought to prevent the government from raiding people’s homes and effects without a neutral magistrate reviewing whether probable cause existed for a search.⁸⁴ It does not appear that they believed the warrant requirement would apply to military operations to protect against a foreign threat.⁸⁵ The Founders could have never anticipated the technological change of the last 200 years, which allows for instant communications and small weapons that can cause mass casualties. Al Qaeda’s refusal to follow the rules of war, and to covertly infiltrate operatives into domestic society to launch surprise attacks on civilians, makes swift action by the government far more necessary than in the eighteenth century. The Framers, even then, understood there were legitimate needs for searches in the absence of a warrant, thus their inclusion of the prohibition against “unreasonable” searches and seizures.⁸⁶ There appears to be no evidence that the Fourth Amendment was intended by the Founders to apply to the national security arena.

War’s unpredictability and unique nature demands decisive and often secret action. Philosopher John Locke first observed that a constitution ought to give the foreign affairs power to the executive because foreign threats “are much less capable to be directed by

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In a post-Civil War case, recently reaffirmed, the Court ruled that President Lincoln had the constitutional authority to engage in espionage. The President “was undoubtedly authorized during the war, as Commander-in-Chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy.” *Totten v. United States*, 92 U.S. 105, 106 (1875). On *Totten*’s continuing vitality, see *Tenet v. Doe*, 544 U.S. 1, 8-11 (2005).

⁸¹ See Letter from Thomas Jefferson, President of the United States, to Albert Gallatin, Secretary of Treasury (Feb. 19, 1804); see also THE FEDERALIST NO. 64, *supra* note 79, at 434 (John Jay).

⁸² See *Halperin v. CIA*, 629 F.2d 144, 161 (D.C. Cir. 1980).

⁸³ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 327-28 (2001).

⁸⁴ *Id.* at 352; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 578-83 (1999).

⁸⁵ Davies, *supra* note 84, at 655 n.299.

⁸⁶ *Id.* at 576-83.

antecedent, standing, positive laws,” and the executive can act to protect “security and interest of the public.”⁸⁷ Legislatures were too slow and their members too numerous to respond effectively to unforeseen situations.⁸⁸ As Locke noted, “Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the public good and advantage shall require . . .”⁸⁹

The Framers rejected extreme republicanism, which favored a strong legislature, by creating an executive with its own independent powers to manage foreign affairs and address emergencies, which, almost by definition, cannot be addressed by existing laws.⁹⁰ Alexander Hamilton, one of the Constitution’s most influential Framers, believed that the executive should have the power to act with full discretion in order to ensure national security.⁹¹ The power to protect the nation, Hamilton wrote, “ought to exist without limitation” because “it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.”⁹² It would be foolhardy to limit the constitutional power to protect the nation from foreign threats. As Hamilton recognized, “the circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”⁹³

IV. MODERN FOURTH AMENDMENT DOCTRINE

This understanding of “reasonableness” as the touchstone for review of searches and seizures has come to inform the Supreme Court’s approach to non-law enforcement activity. In *Vernonia School District 47J v. Acton*, the Court observed that “[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”⁹⁴ When law enforcement

⁸⁷ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 383-84 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

⁸⁸ *Id.*

⁸⁹ *Id.* at 392-93.

⁹⁰ See U.S. CONST. art. II, § 2.

⁹¹ THE FEDERALIST NO. 23, *supra* note 79, at 147 (Alexander Hamilton).

⁹² *Id.* (emphasis omitted).

⁹³ *Id.*

⁹⁴ 515 U.S. 646, 652 (1995).

undertakes a search to discover evidence of criminal wrongdoing, reasonableness generally requires a judicial warrant. When the government's conduct is not focused wholly on law enforcement, however, a warrant may not be necessary. The Court noted that a warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."⁹⁵

Under this analysis, the Court has found certain warrantless searches, such as random employee drug testing, drunk driving checkpoints, and temporary stops to search for weapons, are reasonable and consistent with the Fourth Amendment.⁹⁶ In these cases, the government's purpose is not ordinary criminal law enforcement, but other important policy objectives, such as reducing deaths on the nation's highways or maintaining safety among railway workers. Even though such conduct might constitute a violation of the Fourth Amendment warrant requirement, the significant non-law-enforcement purpose and the method by which the searches were conducted, made these warrantless searches reasonable and consistent with the Fourth Amendment.

In creating these exceptions to the Fourth Amendment's warrant requirement, the Court has still required that the search be reasonable under the circumstances. In the context of warrantless searches, the Court asks whether, under the totality of the circumstances, the "importance of the governmental interests" has outweighed the "nature and quality of the intrusion on the individual's Fourth Amendment interests."⁹⁷ If so, the government's search is reasonable under the Fourth Amendment.⁹⁸

Searches undertaken for national security should pass the Court's "reasonableness" criteria for warrantless searches. The factors favoring warrantless searches for national security reasons are

⁹⁵ *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

⁹⁶ *See, e.g.*, *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (upholding warrantless automobile searches); *Vernonia*, 515 U.S. at 664-65 (upholding warrantless drug testing of athletes); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990) (noting warrantless drunk driver checkpoints consistent with Fourth Amendment); *Treasury Employees v. Von Raab*, 489 U.S. 656, 677 (1989) (upholding drug testing federal customs officers); *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602, 632 (1989) (upholding warrantless drug testing of railroad personnel); *United States v. Place*, 462 U.S. 696, 702 (1983) (upholding baggage search); *Terry v. Ohio*, 392 U.S. 1, 31 (1968) (upholding warrantless stop and search).

⁹⁷ *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

⁹⁸ *Id.*

compelling under the current circumstances created by the War on Terror. Since the attacks of September 11, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order — the need to defend the nation from direct attack.⁹⁹ The Court noted that “it is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”¹⁰⁰ Thus, the Court has recognized that national security is a compelling government purpose.

The compelling nature of the government’s interest may be better understood in light of the Founders’ express intention to create a federal government “clothed with all the powers requisite to the complete execution of its trust.”¹⁰¹ Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in *The Federalist No. 23*, “the circumstances which may affect the public safety” are not “reducible within certain determinate limits,” therefore “it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.”¹⁰² Intelligence gathering is an essential tool to enable the President to carry out that authority.¹⁰³ The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the presidency rather than Congress.¹⁰⁴

⁹⁹ *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

¹⁰⁰ *Haig v. Agee*, 453 U.S. 280, 307 (1981).

¹⁰¹ THE FEDERALIST NO. 23, *supra* note 79, at 147 (Alexander Hamilton).

¹⁰² *Id.* at 147-48.

¹⁰³ See, e.g., THE 9/11 COMMISSION REPORT, *supra* note 72 (highlighting essentiality of intelligence gathering to provide effective security).

¹⁰⁴ As Alexander Hamilton explained, “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” THE FEDERALIST NO. 74, *supra* note 79, at 500 (Alexander Hamilton). James Iredell (later Associate Justice of Supreme Court), in the North Carolina Ratifying Convention, argued, “From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person.” James Iredell, *Debate in the North Carolina Ratifying Convention*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathon Elliot ed., 2d ed. 1987); cf. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1485 (1833) (finding in military matters, “[u]nity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power”).

Judicial decisions since the beginning of the republic confirm the President's constitutional power to repel attacks on the United States and to take measures to prevent the recurrence of an attack.¹⁰⁵ It is the President's duty to respond to an unforeseen attack on the territory and people of the United States, or to any other immediate, dangerous threat to American interests and security.¹⁰⁶ Congress's current recognition of the President's authority to use force in response to a direct attack on the American homeland has only added to this calculus in favor of reasonable, warrantless searches for national security purposes.¹⁰⁷ The government's interest has changed from merely conducting foreign intelligence surveillance as counter-intelligence operations by other nations to one of preventing terrorist attacks against American citizens and property within the United States.¹⁰⁸

It is against this backdrop that the amendments to FISA should be understood and interpreted. Both the Executive Branch and the courts have recognized that national security searches against foreign powers and their agents need not be subjected to the same Fourth Amendment requirements that apply to domestic criminal investigations.¹⁰⁹ FISA embodies the idea that the Fourth Amendment applies differently to national security activity.¹¹⁰ FISA represents a statutory procedure that, if used, creates a presumption that the surveillance is reasonable under the Fourth Amendment.¹¹¹ FISA is not an authorization for national security searches, but a safe harbor that helps support the reasonableness of executive surveillance actions.¹¹²

This approach is the best way to understand the FISA Court of Appeals's discussion of whether FISA warrants are warrants under the Fourth Amendment. It seems clear that they are not. Fourth

¹⁰⁵ See *Halperin v. CIA*, 629 F.2d 144, 156-58 (D.C. Cir. 1980).

¹⁰⁶ See U.S. CONST. art. II, § 2.

¹⁰⁷ See Authorization for Use of Military Force (AUMF) § 102, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

¹⁰⁸ The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. Here, the right to self-defense is not that of an individual, but that of the nation and its citizens. *Cf. In re Neagle*, 135 U.S. 1, 53-54 (1890); *The Big Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 671 (1862). If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.

¹⁰⁹ *E.g., In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

Amendment warrants require a showing of probable cause that “the evidence sought will aid in a particular apprehension or conviction’ for a particular offense” and “must particularly describe the “things to be seized’ as well as the place to be searched.”¹¹³ FISA warrants require only that the government show that probable cause exists to believe that the target of the surveillance is an agent of a foreign power.¹¹⁴ When the target is a U.S. person (anyone on U. S. soil, or a U.S. citizen or permanent resident alien abroad), the Fourth Amendment and FISA standards for probable cause are similar, because the conduct a U.S. person needs to engage in to fall within FISA would also fall within federal criminal statutes.¹¹⁵ Nonetheless, even in such cases, FISA appears to require a lesser showing of probable cause than would apply in domestic criminal cases.¹¹⁶ FISA warrants, therefore, are not “warrants” as that term is used in the Fourth Amendment. FISA warrants only require that the government action is “reasonable.”¹¹⁷

In light of FISA’s statutory structure, it is clear that both FISA and the Act’s amendments are a compromise. Under the current interpretation of the Fourth Amendment, the government can conduct surveillance without a warrant to identify foreign threats to national security.¹¹⁸ FISA is a compromise in that it requires the executive to go to a court to get a warrant; in the past, the Executive Branch could engage in a search for national security reasons without having to get a judge’s permission.¹¹⁹ Courts have recognized that the Executive Branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment.¹²⁰ This deferential approach recognizes that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a constitutional duty to protect national security, courts should not attempt to constrain his authority to conduct warrantless intelligence searches. The FISA process is simply a process, agreed upon by the President

¹¹³ *Dalia v. United States*, 441 U.S. 238, 255 (1979).

¹¹⁴ See S. REP. NO. 95-604(I), at 20-22 (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3921-23.

¹¹⁵ See 50 U.S.C. § 1801(b)(2)(A), (C) (2000 & Supp. IV 2004).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *supra* notes 97-100 and accompanying text.

¹¹⁹ John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 586-603 (2007).

¹²⁰ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

and Congress, for national security searches, but it is not the constitutional baseline for such a process.

It is also not unconstitutional or unreasonable to establish a standard for FISA applications that may be less demanding than the domestic criminal standard, because the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the terrorist attacks upon the continental United States, the government's interest has reached its most compelling level — that of defending the nation from assault. This upward shift in governmental interest has expanded the class of reasonable warrantless searches under the Fourth Amendment. Thus, some surveillance that might not have satisfied the national security exception for warrantless searches before September 11, might do so today. As national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the Executive Branch have expanded, while judicial competence has correspondingly receded.¹²¹ In this context, FISA and the Act's amendment, which impose some constraints on government searches, represent a compromise compared to the government's broader power under the current Fourth Amendment regime to conduct surveillance without any warrants.

Amendments to FISA by the Act are consistent with the Fourth Amendment because they adapt the statutory structure for a new type of counter-intelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which should be governed by more flexible standards, and domestic law enforcement, which are subject to the Fourth Amendment's requirement of probable cause.¹²² Even at the time of the Act's passage in 1978, however, there was a growing realization that “[i]ntelligence and criminal law enforcement tend to merge in [the] area” of foreign counter-intelligence and counter-terrorism.¹²³ September 11's events demonstrate the old distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, have lived in the United States for substantial periods of time, received training within the

¹²¹ See *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (noting competence of judiciary in reviewing foreign intelligence is limited).

¹²² See *Sealed Cases*, 310 F.3d at 722-26.

¹²³ S. REP. NO. 95-701, at 11 (1978), as reprinted in 1978 U.S.C.C.A.N. 3973.

country, and killed thousands of civilians by hijacking civilian airliners.¹²⁴ The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counter-intelligence, also has a significant domestic component, which may involve domestic law enforcement. The Fourth Amendment doctrine, based as it is ultimately upon reasonableness, must take into account that national security threats in the future cannot be so easily cordoned off from domestic criminal investigation.

V. THE TERRORIST SURVEILLANCE PROGRAM (“TSP”) AND THE SEPARATION OF POWERS

The previous parts argue that electronic surveillance for national security purposes has long been understood by all three branches of the government to be an exception to the Fourth Amendment’s warrant requirement. Instead, as the original understanding suggests, such searches must instead meet the Fourth Amendment’s overarching principle that all searches be “reasonable.” This part addresses a separate and distinct question: Which branch of the government has the authority to carry out national security searches? Even if the Terrorist Surveillance Program (“TSP”) meets the Fourth Amendment, the separation of power issue remains as to whether the President and Congress must agree together to conduct such surveillance or whether the President can decide the policy alone, and what happens when Congress attempts to block President-ordered surveillance.

More often than not in today’s debates about the proper role of courts within the context of national security, critics misunderstand the Constitution’s allocation of war-making powers between the three branches.¹²⁵ The Constitution vests in the President the authority and

¹²⁴ See THE 9/11 COMMISSION REPORT, *supra* note 72, 215-41; see also *Three Decades of Terror*, FIN. TIMES, Feb. 7, 2003, available at <http://www.ft.com/cms/s/e5470480-d0d5-11d8-9597-0003ba5a9905.html>.

¹²⁵ A letter to Congress from law professors and former government officials, many of them longtime critics of the Bush Administration’s war on terrorism or opponents of presidential war powers, concluded that there is no “plausible legal defense” of the NSA program, and President George Bush should have sought an amendment to the Patriot Act to allow it. They argued, “[T]he President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable.” Letter from Beth Nolan et al. to the Members of the United States Congress (Feb. 9, 2006), available at <http://www.nybooks.com/articles/18650>. A similar conclusion is reached by the Congressional Research Service. See 152 CONG. REC. S744, 758-61 (daily ed. Feb. 7, 2007) (statement of Sen. Russ Feingold regarding President’s Warrantless

the responsibility to prevent future attacks against the United States, a power reaffirmed by Congress in the wake of the September 11 attacks in the Authorization for the Use of Military Force ("AUMF").¹²⁶ For much of the nation's history, Presidents and Congresses have understood that the Executive Branch's constitutional authority includes the power to begin military action abroad.¹²⁷ The Constitution does not create a legalistic process of making war, but rather gives to the President and Congress different powers that they can use in the political process to either cooperate or compete for primacy in policy.¹²⁸ To exercise that power effectively, the President must have the ability to engage in electronic surveillance that gathers intelligence on the enemy's activities.

Almost certainly, the information gained from the TSP has led to the successful prevention of al Qaeda plots against the United States.¹²⁹ According to General Michael Hayden, President Bush's nominee to head the CIA and leader of the NSA during much of the TSP's existence, "this program has been successful in detecting and preventing attacks inside the United States."¹³⁰ When pressed by reporters whether it had succeeded where no other method would have, he said, "I can say unequivocally that we have gotten information through this program that would not otherwise have been available."¹³¹ Attorney General Alberto Gonzales informed the press that the NSA program was perhaps the most classified program in the

Wiretapping Program, available at <http://feingold.senate.gov/~feingold/statements/06/02/20060207.html> [hereinafter Wiretap Press Briefing]; Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, to various congressional clients (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>; U.S. Senator Russ Feingold, News Conference on His Resolution To Censure President Bush (Mar. 16, 2006), available at <http://feingold.senate.gov/~feingold/statements/06/03/2006316.html>; cf. U.S. CONST. art. II, § 4; George F. Will, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27 (emphasis omitted).

¹²⁶ AUMF § 102, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹²⁷ See generally Yoo, *supra* note 119, at 592-604.

¹²⁸ See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 143-81 (2005).

¹²⁹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also Press Release, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (describing use of information obtained via wiretap to arrest suspect who plotted to destroy Brooklyn Bridge).

¹³⁰ Press Release, *supra* note 129.

¹³¹ Lowell Bergman, Eric Lichtblau, Scott Shane & Don Van Natta, Jr., *Domestic Surveillance: The Program*, N.Y. TIMES, Jan. 17, 2006, at A1.

U.S. government, and that it had helped obtain information that had prevented attacks within the United States.¹³²

It is important to explain why the TSP is necessary. First, an intelligence search, as Judge Richard Posner has described it, “is a search for a needle in a haystack.”¹³³ Rather than focus on foreign agents who are already known, counter-terrorism agencies must search for clues among millions of potentially innocent connections, communications, and links. “The intelligence services,” Posner wrote, “must cast a wide net with a fine mesh to catch the clues that may enable the next attack to be prevented.”¹³⁴ The most useful information about al Qaeda will be scattered and difficult to gather, and government agents need to be able to follow many leads quickly.

Second, electronic surveillance that goes beyond the FISA framework can yield crucial information. Members of the al Qaeda network can be detected by examining phone and email communications, as well as evidence of joint travel, shared assets, common histories or families, and meetings. As the time for an attack nears, “chatter” on this network will increase as al Qaeda operatives communicate to coordinate plans, move and position assets, and conduct reconnaissance of targets. As the United States has engaged in the Afghanistan and Iraq wars, it has captured al Qaeda leaders as well as their laptops, cell phones, financial documents, and other signs of modern life. These captures yielded crucial electronic information on dozens or hundreds of email addresses, telephones, bank and credit account numbers, and residential and office addresses used by their network. When intelligence agents successfully locate or capture an al Qaeda member, they must be able to move quickly to follow new information to other co-conspirators before news of the capture causes them to disappear.

The law enforcement mentality, on the other hand, as embodied in *Katz*, creates several problems in national security applications. FISA requires “probable cause” to believe that someone is an agent of a foreign power before one can get a warrant to collect phone calls and emails. An al Qaeda leader could have a cell phone with 100 numbers

¹³² Eric Lichtblau & David E. Sanger, *Administration Cites War Vote In Spying Case*, N.Y. TIMES, Dec. 20, 2005, at A1.

¹³³ See Richard Posner, *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16. See generally RICHARD POSNER, PREVENTING SURPRISE ATTACKS (2005); Richard Posner, *The Reorganized U.S. Intelligence System After One Year*, NAT'L SECURITY OUTLOOK, (Am. Enter. Inst. for Pub. Policy Research, Washington, D.C.), Apr. 11, 2006, available at http://www.aei.org/publications/pubID.24213/pub_detail.asp [hereinafter Posner, *U.S. Intelligence System*].

¹³⁴ Posner, *U.S. Intelligence System*, *supra* note 133.

in its memory, ten of which are in the United States and thus require a warrant. Would a FISA judge have found probable cause to think the users of those ten numbers are al Qaeda too? Probably not.¹³⁵ Would intelligence agencies even immediately know who was using those numbers at the time of a captured al Qaeda leader's calls? The same is true of his email, as to which it will not be immediately obvious what addresses are held by U.S. residents. Applying *Katz*, without any distinction between law enforcement and national security cases, would greatly impede the ability of the government to protect national security, without any significant gain in privacy.

In this world of rapidly shifting email addresses, multiple cell phone numbers, and Internet communications, FISA imposes cumbersome procedures on foreign intelligence and law enforcement officers. These laborious checks are based on criminal justice goals, which are retroactive, as opposed to national security operations, which are forward-looking in order to prevent attacks on the United States. FISA requires a lengthy review process, in which special Federal Bureau of Investigation ("FBI") and Department of Justice ("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, such as the President's National Security Advisor or the Director of the FBI, must certify that the information sought is for foreign intelligence.¹³⁶ It takes time and a great deal of work to prepare the warrant applications, which can run a hundred pages long. While there is an emergency procedure that allows the Attorney General to approve a wiretap for seventy-two hours without a court order, it can only be used if there is no time to obtain an order from the court, and if the Attorney General can find that the wiretap satisfies FISA's other requirements.¹³⁷ The Attorney General could not use the emergency procedure if the probable cause standard is not met.¹³⁸

This underscores the real problem with warrant requirements and *Katz*. Searches and wiretaps must target a specific individual already believed to be involved in criminal activity.¹³⁹ However, catching al Qaeda members who have no previous criminal record in the United

¹³⁵ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 97 (2006).

¹³⁶ 50 U.S.C. § 1804(a) (2000 & Supp. IV 2004).

¹³⁷ *Id.* § 1805(f) (2000 & Supp. IV 2004).

¹³⁸ *Id.*

¹³⁹ 50 U.S.C. § 1805(a)(3) (2000 & Supp. IV 2004); see also POSNER, *supra* note 133, at 97-102.

States requires more than that individualized suspicion (which requires that the government already has some evidence that a target may have committed a crime). Foreign intelligence should devote surveillance resources where there is a reasonable chance that terrorists will appear, or communicate, even if they do not know their specific identities. What if the government knew that there was a fifty percent chance that terrorists would use a certain communications pipeline, like emails using a popular Pakistani website, but that most of the communications on that channel would not be linked to terrorism? A FISA-based, judicial oversight approach would prevent computers from searching through that channel for the keywords or names that might suggest terrorist communications, because the government would have no specific al Qaeda suspects, and thus no probable cause. Rather than individualized suspicion, searching for terrorists will depend on probabilities, just as with roadblocks or airport screenings. The private owner of the website has detailed access to that information every day to exploit for his own commercial purposes, such as selling lists of names to spammers, or gathering market data on individuals or groups. Is the government's effort to find violent terrorists a less legitimate use of such data?

While a law enforcement approach to terrorism requires individualized suspicion, a national security approach does not. Armies do not meet a probable cause requirement when they attack a position, fire on enemy forces, or intercept enemy communications. The purpose of the criminal justice system is to hold a specific person responsible for a discrete crime that has already happened. Individualized suspicion does not make sense when the purpose of intelligence is to take action, such as killing or capturing members of the enemy, to prevent future harm to the nation.

FISA and the criminal justice warrant system sacrifice speed and breadth of information in favor of individualized suspicion, while providing a path for using evidence in a civilian criminal prosecution.¹⁴⁰ If the President chooses to rely on his constitutional authority alone to conduct warrantless searches, then he should generally only use the information for military purposes.¹⁴¹ As General Hayden stated in 2005, the primary objective of the NSA program is to “detect and prevent” possible al Qaeda attacks on the United States, whether another attack like September 11, or a bomb in apartment buildings, bridges, transportation hubs such as airports, or

¹⁴⁰ § 1805(a)(3).

¹⁴¹ Cf. U.S. CONST. art. II, § 2.

a nuclear, biological, or chemical attack.¹⁴² These are not hypotheticals; they are all al Qaeda plots, some of which intelligence and law enforcement agencies have already stopped. The President will want to use such information to deploy military, intelligence, and law enforcement personnel to stop the attack.

Intercepting enemy communications has long been part of waging war; indeed, it is critical to victory. Gathering intelligence has long been understood as a legitimate aspect of conducting war.¹⁴³ The military cannot successfully attack or defend unless it knows the location of the enemy. America has a long history of conducting intelligence operations to obtain information on the enemy. General George Washington used spies extensively during the Revolutionary War, and as President established a secret fund for spying that existed until the creation of the Central Intelligence Agency (“CIA”).¹⁴⁴ President Abraham Lincoln personally hired spies during the Civil War, a practice the Supreme Court upheld.¹⁴⁵ In both World Wars I and II, Presidents ordered the interception of electronic communications leaving the United States.¹⁴⁶ Some of America’s greatest wartime intelligence successes have involved Signals Intelligence (“SIGINT”), most notably the breaking of Japanese diplomatic and naval codes during World War II, which allowed the U.S. Navy to anticipate the attack on Midway Island.¹⁴⁷ SIGINT is even more important in this war than in wars of the last century. The primary way to stop al Qaeda attacks is to find and stop its operatives by intercepting their electronic communications, entering or leaving the country.

As commander-in-chief, the President has the constitutional power and the responsibility to wage war in response to a direct attack

¹⁴² Lichtblau & Sanger, *supra* note 132.

¹⁴³ In the 1907 Hague Regulations, one of the first treaties on the laws of war, the leading military powers agreed that “the employment of measures necessary for obtaining information about the enemy and the country is considered permissible.” Interception of electronic communications is known as SIGINT, or signals intelligence, as opposed to HUMINT, or human intelligence. Writers on the laws of war have recognized that interception of an enemy’s communications is a legitimate tool of war. According to one recognized authority, nations at war can gather intelligence using air and ground reconnaissance and observation, “interception of enemy messages, wireless and other,” capturing documents, and interrogating prisoners. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 326 (1959).

¹⁴⁴ *Halperin v. CIA*, 629 F.2d 144, 158 (D.C. Cir. 1980).

¹⁴⁵ *Totten v. United States*, 92 U.S. 105, 106 (1876).

¹⁴⁶ Exec. Order No. 8985, 3 C.F.R. 1047 (1938-1943) (World War II order); Exec. Order No. 2604 (Apr. 28, 1917) (noting World War I order).

¹⁴⁷ CHRISTOPHER ANDREW, *FOR THE PRESIDENT’S EYES ONLY* 124-25 (1995).

against the United States. In the Civil War, President Lincoln undertook several actions: raised an army, withdrew money from the treasury, and launched a blockade on his own authority in response to the Confederate attack on Fort Sumter.¹⁴⁸ Congress and the Supreme Court approved Lincoln's actions *ex post*.¹⁴⁹ During World War II, the Supreme Court similarly recognized that once war began, the President's authority as commander-in-chief and chief executive gave him the tools necessary to effectively wage war.¹⁵⁰ In the wake of the September 11 attacks, Congress agreed that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," which recognizes the President's authority to use force to respond to al Qaeda, and any powers necessary and proper to that end.¹⁵¹

Even legal scholars who argue against this historical practice concede that once the United States has been attacked, the President can independently respond with force.¹⁵² The ability to collect intelligence is intrinsic to the use of military force.¹⁵³ It is even more so now while fighting al Qaeda, a covert group that relies extensively on electronic communication in and outside of the United States to plan their attacks.¹⁵⁴ It is inconceivable that the Constitution would vest in the President the power of commander-in-chief and chief executive, give him the responsibility to protect the nation from attack, but then disable him by preventing him from gathering intelligence crucial to defeating the enemy. Evidence of the Framers' original understanding of the Constitution is that the government would have complete ability to face a foreign danger. As James Madison wrote in *The Federalist*, "security against foreign danger is one of the primitive objects of civil society."¹⁵⁵ Therefore, the "powers requisite for attaining it must be effectually confided to the federal councils."¹⁵⁶ As the Supreme Court declared after World War II, "this

¹⁴⁸ *The Big Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1863).

¹⁴⁹ *Id.*

¹⁵⁰ The President has the power "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," and to issue military commands using the powers to conduct war "to repel and defeat the enemy." *Ex Parte Quirin*, 317 U.S. 1, 28 (1942).

¹⁵¹ AUMF, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

¹⁵² See, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* 11 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 17 (1990). *But see* YOO, *supra* note 128, at 143-60.

¹⁵³ See *supra* notes 143-52 and accompanying text.

¹⁵⁴ See YOO, *supra* note 28, at 105-07.

¹⁵⁵ *THE FEDERALIST* NO. 41, *supra* note 79, at 269 (James Madison).

¹⁵⁶ *Id.*

grant of war power includes all that is necessary and proper for carrying these powers into execution.”¹⁵⁷

Covert intelligence is clearly part of the executive’s authority to wage war effectively. Presidents have long ordered electronic surveillance without any judicial or congressional participation. More than a year before the Pearl Harbor attacks and the entry of the United States into World War II, President Franklin D. Roosevelt (“FDR”) authorized the FBI to intercept any communications, whether wholly inside the country or international, of persons “suspected of subversive activities against the Government of the United States, including suspected spies.”¹⁵⁸ He was concerned that “fifth columns” could wreak havoc with the war effort.¹⁵⁹ “It is too late to do anything about it after sabotage, assassinations and ‘fifth column’ activities are completed,” FDR wrote in his order.¹⁶⁰ FDR ordered the surveillance even though a Supreme Court decision and a federal statute at the time prohibited electronic surveillance without a warrant.¹⁶¹ Even after Congress rejected proposals for wiretapping for national security reasons, FDR continued to authorize the interception of electronic communications.¹⁶² Presidents have believed that they did not need congressional authorization to carry out such surveillance, or at least FDR believed he had the authority to do so even when prohibited by judicial precedent and congressional action.

Until FISA, Presidents continued to monitor the communications of national security threats on their own authority, even in peacetime.¹⁶³ If Presidents in times of peace could order surveillance of spies and terrorists, executive authority is only greater now after the events on September 11.¹⁶⁴ Courts have never opposed a President’s authority to

¹⁵⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950).

¹⁵⁸ *United States v. U.S. Dist. Court*, 444 F.2d 651, 669-70 (6th Cir. 1971).

¹⁵⁹ *Id.* at 670.

¹⁶⁰ *Id.*

¹⁶¹ See *Nardone v. United States*, 302 U.S. 379, 382 (1937) (interpreting section 605 of Federal Communications Act of 1934 to prohibit interception of telephone calls); Federal Communications Act of 1934, ch. 651, 48 Stat. 1064, 1104 (1934) (codified as amended at 47 U.S.C. § 605 (2000)).

¹⁶² See ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68-69 (2003).

¹⁶³ *Foreign Intelligence Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Comm. on Intelligence*, 95th Cong. 15 (1978) (statement of Griffin Bell, U.S. Att. Gen. of the United States).

¹⁶⁴ The Justice Department has held this view under several administrations. The Clinton Justice Department held a similar view of the Executive Branch’s authority to conduct surveillance outside the judicial framework. Most notably, President William

engage in warrantless electronic surveillance to protect national security. When the Supreme Court first considered this question in 1972, it held that the Fourth Amendment required a judicial warrant if a President wanted to conduct surveillance of a purely domestic group, but refused to address surveillance of foreign threats to national security.¹⁶⁵ In the years since, those federal appeals courts that have addressed the question, including the FISA Appeals Court, have “held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.”¹⁶⁶ The FISA Appeals Court found the issue straightforward.¹⁶⁷ It took the President’s power to do so “for granted,” and observed that “FISA could not encroach on the President’s constitutional power.”¹⁶⁸

Congress also implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States. Congress’s AUMF is sweeping; it has no limitation on time or place; it only requires that the President pursue al Qaeda.¹⁶⁹ Although the President did not need, as a constitutional matter, Congress’s permission to pursue and attack al Qaeda after the attacks on New York City and the Pentagon, its passage shows that the President and Congress fully agreed that such military action would be appropriate. Congress’s approval of such force and action logically includes the ability to conduct necessary surveillance and in a manner most conducive to war.

The Framers entrusted the responsibility to respond to a national emergency and war in the Presidency because of its ability to act with unity, speed, and secrecy. In *The Federalist No. 70*, Hamilton observed that “[d]ecision, activity, secrecy, and dispatch will generally characteri[z]e the proceedings of one man, in a much more eminent

Jefferson Clinton’s Deputy Attorney General Jamie Gorelick testified before Congress that the Justice Department could carry out physical searches for foreign intelligence purposes, even though FISA, at the time, did not provide for them. *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103d Cong. 61 (1994). Clinton’s OLC issued a legal opinion that the President could order the sharing of electronic surveillance gathered through criminal wiretaps between the Justice Department and intelligence agencies, even though this was prohibited by statute. Memorandum from Office of Legal Counsel to Counsel Office of Intelligence Policy & Review (Oct. 17, 2000), 2000 WL 33716983, at *9.

¹⁶⁵ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322 (1972).

¹⁶⁶ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ AUMF § 2, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

degree, than the proceedings of any greater number.”¹⁷⁰ “Energy in the executive,” said Hamilton, “is essential to the protection of the community against foreign attacks.”¹⁷¹ He further noted, “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”¹⁷² Wartime, the most unpredictable and dangerous of human endeavors, therefore ought to be managed by the President.

If ever there were an emergency that Congress and the courts could not anticipate, it was the September 11 attacks. Congress and the President agreed on FISA when the primary threat to American national security was the Soviet Union, and the chief problem was Soviet spies working under diplomatic cover. *Katz*, on the other hand, was decided purely in response to domestic law enforcement activities. Neither situation anticipated war with an international terrorist organization wielding the destructive power of a nation. The Presidency was the institution best able to respond quickly to the September 11 attacks and to take measures to defeat al Qaeda’s future attacks. The success of the NSA surveillance program depends on secrecy and agility, two characteristics Congress and the judiciary lack.

But, some will respond, Congress still prohibited the President from using electronic surveillance without its permission. FISA allows for temporary wiretaps without a warrant in emergency and war situation, but requires that congressional authorization still be sought after a short period. Why shouldn’t Congress’s view here, as in other domestic contexts, prevail? It is simply not the case that the President must carry out every law enacted by Congress. The Constitution is the supreme law of the land, and neither an act of Congress nor an act of the President can supersede it. If Congress passes an unconstitutional act, such as a law ordering the imprisonment of those who criticize the government, the President must give force to the higher law, that of the Constitution. President Jefferson did just that in 1798 when Congress passed the Alien and Sedition Acts during an undeclared naval war with France. He took the position that he, “believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the constitution.”¹⁷³ That does not mean that the President “is above the

¹⁷⁰ THE FEDERALIST NO. 70, *supra* note 79, at 472 (Alexander Hamilton).

¹⁷¹ *Id.* at 471.

¹⁷² *Id.* at 500.

¹⁷³ President Andrew Jackson expressed the same view in 1832, vetoing a bill that he regarded as unconstitutional even though the Supreme Court had upheld it as constitutional. “It is as much the duty of the House and Representatives, of the

law,” but it clearly affirms that the Constitution is above the Congress, the Judiciary, and the President.¹⁷⁴

If such critics were right, then Presidents are bound to obey any and all acts of Congress and judicial oversight, even those affecting the power of the commander-in-chief. Congress or the Supreme Court could have ordered FDR not to attempt an amphibious landing in France in World War II, Truman to attack China over the Korean War, or John F. Kennedy (“JFK”) to invade Cuba in 1962.¹⁷⁵ But these Presidents believed that they had the constitutional right to take action and to follow their interpretation of the Constitution rather than the views of Congress or the Supreme Court, especially in their role as commander-in-chief.

Decades of American constitutional practice reject the notion of an omnipotent Congress or judiciary in the field of national security. While Congress has the sole power to declare war, neither presidents nor Congresses have acted under the belief that a declaration of war must come before military hostilities abroad. The nation has used force abroad more than 100 times, but has declared war only five times: the War of 1812, the Mexican-American and Spanish-American Wars, and World Wars I and II.¹⁷⁶ Without declarations of war or any other congressional authorization, Presidents have sent troops to oppose the Russian Revolution, intervene in Mexico, fight Chinese Communists in Korea, remove Manuel Noriega from power in

Senate, and of the President to decide upon the constitutionality of any bill or resolution . . . it is the duty of the Supreme Judges when it may be brought before them for judicial decision.” Andrew Jackson, *Veto Message* (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 582 (James D. Richardson ed., 1897). Abraham Lincoln famously announced in his first inaugural that thenceforth, he would not follow the rule that a slave would not be free once in northern territory though he chose to obey the Supreme Court’s order in the *Dred Scott* case itself. See President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), available at <http://www.yale.edu/lawweb/avalon/president/inaug/lincoln1.htm>. President Franklin Roosevelt evaded Congress’s Neutrality Acts and provided aid and comfort to the allies before Pearl Harbor. See Franklin D. Roosevelt Presidential Museum and Library, Franklin D. Roosevelt, Biography, <http://www.fdrlibrary.marist.edu/fdrbio.html> (last visited Oct. 30, 2007).

¹⁷⁴ Cf. Charlie Savage, *Three Democrats Slam President Over Defying Statutes*, BOSTON GLOBE, May 2, 2006, at A2; Press Release, Am. Civil Liberties Union, ACLU Sues to Stop Illegal Spying on Americans, Saying President is Not Above the Law (Jan. 17, 2006), available at <http://www.aclu.org/safefree/nsaspying/23486prs20060117.html>.

¹⁷⁵ See YOO, *supra* note 128, at 30-45; John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178-80, 191-92 (1996) [hereinafter Yoo, *Continuation of Politics*]; John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1679-81 (2002).

¹⁷⁶ See Yoo, *Continuation of Politics*, *supra* note 175, at 177.

Panama, and prevent human rights disasters in the Balkans.¹⁷⁷ Other conflicts, such as both Persian Gulf Wars, received “authorization” from Congress but not declarations of war.¹⁷⁸ American history shows that congressional authority is not required for military action.

Both the President and Congress generally agree that the legislature should not interfere in the Executive Branch’s war decisions.¹⁷⁹ Congress’s powers ought to be at their height at the decision to start a war, before troops have been committed and treasure or blood spent. Congress attempted to prevent Presidents from using force abroad through the War Powers Resolution in the Nixon era, which prohibited the insertion of troops into hostile environments abroad for more than sixty days without legislative approval.¹⁸⁰ Both sides of the war powers debate agree that the Resolution has been a dead letter that has not prevented Presidents from using force abroad.¹⁸¹ Presidents and Congresses alike have realized that the War Powers Resolution made little practical sense and instead represented congressional overreaching into presidential expertise and constitutional authority in foreign affairs.¹⁸²

Presidential leadership has always included control over the goals and means of military campaigns.¹⁸³ As the Supreme Court has observed, the President has the authority “to employ [the armed forces] in the manner he may deem most effectual to harass and

¹⁷⁷ *Id.*

¹⁷⁸ For representative works arguing that Congress has sole control over when to begin wars, see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 47-103 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 203 (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990). *But see* YOO, *supra* note 128, at 143-81.

¹⁷⁹ *Cf.* Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 *IND. L.J.* 1319, 1321 (2006) (finding that “[m]any scholars clearly believe that the President has some exclusive CINC power because they admit that Congress cannot regulate tactical decisions involving the retreat and advance of soldiers”).

¹⁸⁰ See War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (2000).

¹⁸¹ See, e.g., John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 *COLUM. L. REV.* 1379 (1988).

¹⁸² *Id.* at 1380-81.

¹⁸³ *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2092 (2005) (stating that “in various nineteenth- and twentieth-century decisions upholding the validity of presidential actions during war, various members of the Supreme Court suggested, usually in dicta or dissents, that in the absence of express congressional restriction, the only limitations on presidential power during wartime were the laws of war”).

conquer and subdue the enemy.”¹⁸⁴ Lincoln did not seek authorization from Congress over whether to defend Washington, D.C.; FDR did not ask Congress whether he should make the war in Europe a priority over the war in the Pacific; Truman did not seek legislative permission to drop nuclear bombs on Japan.¹⁸⁵ Many of the wars fought since World War II, ranging from Korea to Panama to Kosovo, never received any congressional authorization.¹⁸⁶ While Presidents should not ignore congressional leaders, a wise President, acting within his constitutional authority, will consult with them at the politically appropriate moment. The Constitution does not force the President to get a letter from Congress or seek permission from the judiciary every time he makes an important decision about wartime strategy or tactics.¹⁸⁷

Nor is Congress defenseless. It has total control over funding and the size and equipment of the military.¹⁸⁸ If it does not agree with a war or a strategy, it can cut off funds, reduce the size of units, or refuse to provide material for it.¹⁸⁹ War would be impossible without Congress’s cooperation, or at least acquiescence.¹⁹⁰ This is even more true in the age of modern warfare, which requires material, high-technology weapons systems, and massive armed forces dependent upon constant congressional budgetary support.¹⁹¹

Some critics now assert the judiciary ought to review military operations in order to prevent military adventurism, to check the executive, and to foster political consensus.¹⁹² This neglects the need for executive action during time of imminent foreign threat, and downplays the checks inherent in the other branches’ administrative

¹⁸⁴ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

¹⁸⁵ See Interview by Jerry N. Hess with President Richard Nixon, in Bethesda, Md. (Oct. 21, 1970), available at <http://www.trumanlibrary.org/oralhist/nixon5.htm>.

¹⁸⁶ See generally John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 804-06 (2004) (arguing congressional pre-approval of use of force abroad is not mandatory and evaluating American uses of force with and without formal declarations of war).

¹⁸⁷ See *United States v. Smith*, 27 F. Cas. 1192, 1199 (C.C.D.N.Y. 1806) (stating that “[c]ongress [has] the power of declaring war; and when that is done, the president is to act under it, and may authorize any military or hostile measure against the enemy”).

¹⁸⁸ See U.S. CONST. art. I, § 8, cl. 11-12.

¹⁸⁹ *Id.*

¹⁹⁰ E.g., Ann Scott Tyson, *Congress Approves \$70 Billion For Wars in Iraq, Afghanistan*, WASH. POST, Sept. 30, 2006, at A08.

¹⁹¹ *Id.*

¹⁹² See Wiretap Press Briefing, *supra* note 125.

impediments, such as delay, inflexibility, and lack of secrecy. World War II demonstrated that unfettered presidential initiative has been critical to the protection of American national security. When Europe plunged into war, Congress enacted a series of Neutrality Acts designed to keep the United States out of the conflict.¹⁹³ In 1940 and 1941, FDR recognized that America's security would be threatened by German control of Europe, and he and his advisers gradually attempted to bring the United States to the assistance of Great Britain and the Soviet Union.¹⁹⁴ He was not required, nor was it thought prudent, to seek judicial blessings or congressional authorization when acting to prevent "potential" attacks on the United States. In fact, FDR stretched his authority to cooperate closely with Great Britain in protecting convoys in the North Atlantic, and providing the British with fifty "obsolete" destroyers, among other things.¹⁹⁵ American pressure on Japan to withdraw from China helped trigger the Pacific War, without which American entry into World War II might have been delayed by at least another year, if not longer.¹⁹⁶

The Cold War is another example where consistent presidential leadership proved better for national security than seeking judicial permission. Through proxies, and often in secret, the United States and the Communist bloc fought throughout the world, yet Congress only authorized one specific war — the Vietnam War.¹⁹⁷ The judiciary did not intervene, understanding that this is an area best left to the executive decision-making process.¹⁹⁸ America and its allies fought Soviet proxies in Korea, Vietnam, Angola, and Nicaragua.¹⁹⁹ The Soviet Union fought against American-backed forces in Afghanistan, and the two very nearly came into direct conflict during the Cuban Missile Crisis; JFK, notably, did not ask Congress for permission to

¹⁹³ Neutrality Act of 1939, ch. 2, 54 Stat. 4 (codified at 22 U.S.C. §§ 441, 444-45, 447-451, 453-457 (2000)).

¹⁹⁴ For a standard historical source on the period see ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932-1945 (1979).

¹⁹⁵ See Arrangement Respecting Naval and Air Bases, U.S.-Gr. Brit., Sept. 2, 1940, 54 Stat. 2405, 2405.

¹⁹⁶ Marc Trachtenberg, *The Bush Strategy in Historical Perspective*, in NUCLEAR TRANSFORMATION: THE NEW U.S. NUCLEAR DOCTRINE 9, 15 (James Wirtz & Jeffrey Larsen eds., 2005).

¹⁹⁷ See Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384, 384 (1964).

¹⁹⁸ See Yoo, *Continuation of Politics supra* note 175, 182-86.

¹⁹⁹ See Yoo, *supra* note 186, at 803-04 (arguing that congressional pre-approval of use of force abroad is not mandatory and evaluating American uses of force with and without formal declarations of war).

throw a blockade around Cuba.²⁰⁰ Again, there was no discussion of the judiciary injecting itself into JFK's decisions regarding intelligence gathering of activities between the Soviet Union and Cuba, or even the "quarantine" of Cuba itself.²⁰¹

Judicial deliberation can often breed consensus on constitutional issues, but it also can stand in the way of speed and decisiveness, a critical area of national security. Terrorist attacks are more difficult to detect and prevent than those posed by conventional armed forces and nations.²⁰² Moreover, new technology in weaponry, such as WMD, allow covert enemies to inflict devastation that once only could have been achievable by a nation-state.²⁰³ To defend itself from this threat, the United States will have to utilize aggressive, novel intelligence gathering techniques, and use force earlier and more often than during times past when nations generated the primary threats. In order to forestall a WMD attack, or to take advantage of a window of opportunity to strike at a terrorist cell, the President needs flexibility to act quickly. By acting earlier, perhaps before WMD components have been fully assembled or before an al Qaeda operative has left for the United States, the Executive Branch might also be able to engage in a more limited, more precisely targeted, use of force. Such actions are clearly distinguishable from the needs of domestic law enforcement desires and actions.

Critics of the TSP want to overturn American historical practice in favor of a new and untested theory about the wartime powers of the President, the judiciary, and Congress.²⁰⁴ They want the system for protecting American national security to mirror the system for making domestic policy, in which Congress has the initiative and the courts review executive actions. The NSA confronts the unprecedented challenges of al Qaeda.²⁰⁵ Seeking to inject the judiciary into wartime policy renders the government's tactics against al Qaeda less, rather than more, effective. It will slow down decisions, make sensitive policies and intelligence public, and most importantly, encourage risk aversion rather than risk taking. To require the President to seek judicial authorization ignores the reality of modern national security threats.

²⁰⁰ Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 485 PUB. PAPERS OF THE PRESIDENT 806, 807 (Oct. 22, 1962).

²⁰¹ *See id.*

²⁰² THE 9/11 COMMISSION REPORT, *supra* note 72, at 361-62.

²⁰³ *Id.*

²⁰⁴ *See sources cited supra* note 125.

²⁰⁵ *See sources cited supra* note 125.

Claims that the TSP amounts to presidential violation of the Constitution seem to be less about law and more about politics. They state that if the President is waging a war, and war has slipped into the United States itself, the government will centralize too much power in the President over domestic affairs.²⁰⁶ The TSP, however, does not signal any such change. Rather, it reflects changed tactics necessary to confront threats in a new international stage, where the primary threat is no longer from nation-states but from non-state actors using asymmetric tactics.

In addition, the other branches of government have powerful and important tools to limit the President, should his efforts to defeat terrorism slip into the realm of domestic oppression.²⁰⁷ Congress has total control over funding and significant powers of oversight.²⁰⁸ It could effectively do away with the NSA as a whole.²⁰⁹ The Constitution does not require that Congress create NSA or any intelligence agency. Congress could easily eliminate the surveillance program simply by cutting off all funds for it.²¹⁰ It could also condition approval of administration policies in related areas to agreement on changes to the NSA program.²¹¹ Congress could refuse to confirm Cabinet members, subcabinet members, or military intelligence officers unless it prevails over the NSA.²¹² It could hold extensive hearings that bring to light the NSA's operations and require NSA officials to appear and be held accountable.²¹³ It could even enact a civil cause of action that would allow those who have been wiretapped by the NSA to sue for damages, with the funds to pay for such damages coming out of the NSA's budget.²¹⁴ So far, Congress has not taken any of these steps; in fact, Congress has passed up an obvious chance when it confirmed General Hayden to head the CIA.²¹⁵

²⁰⁶ See sources cited *supra* note 125.

²⁰⁷ See U.S. CONST. art. I, § 8.

²⁰⁸ *Id.* The Framers clearly intended to replicate the British model of the executive, which was both in theory and practice hemmed in by the Parliamentary power of the purse. Pressed during the Virginia ratifying convention with the charge that the President's powers could lead to a military dictatorship, James Madison argued that Congress's control over funding would be enough of a check to control the executive. YOO, *supra* note 128, at 139-40.

²⁰⁹ See U.S. CONST. art. I, § 8.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* art. II, § 2, cl. 2.

²¹³ *Id.* art. I, § 8.

²¹⁴ *Id.*

²¹⁵ Charles Babington, *Hayden Confirmed as CIA Chief*, WASH. POST, May 27, 2006,

One should not mistake congressional silence for opposition to the President's terrorism policies.²¹⁶

Courts can exercise their own check on presidential power, albeit one that is not as comprehensive as Congress's. Any effort to prosecute an al Qaeda member or a terrorism suspect within the United States will require the cooperation of the federal courts.²¹⁷ If federal judges believe that the NSA's activities are unconstitutional, they can refuse to admit any information discovered by warrantless surveillance.²¹⁸ In fact, this judicial alternative would better recognize the principles of the Fourth Amendment. The NSA's activities should remain in the field of war, in order to prevent a direct attack, rather than to promote the objects of the law enforcement system. Federal courts can police this distinction simply by refusing to admit any NSA-related evidence at subsequent criminal trials.²¹⁹ The courts need to permit the flexibility inherent in the executive for national security affairs and not preempt them before they are implemented.

The President can structure the NSA program to enhance public confidence that its fruits will not be used for political or law enforcement goals. While he has the constitutional authority to carry out the searches in secret, it may be to the nation's advantage for the President to create a consultation process among the relevant cabinet officials, and then between the Executive and Legislative Branches. This would give the public more confidence that the NSA was not being used to carry out political vendettas. By his own account, President Bush had already put into place a primitive version of such a process before December 2005: each time he approved the NSA program, he asked the Cabinet officers responsible for defense and intelligence whether they believed it was necessary, and he submitted the operation to the review of White House and DOJ lawyers.²²⁰ An expanded version of this could mirror, or simply adopt, the National

at A2.

²¹⁶ "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," the Supreme Court has said. "Such failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

²¹⁷ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

²¹⁸ Cf. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1-45 (1997).

²¹⁹ *Id.*

²²⁰ *President George W. Bush, Radio Address* (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

Security Council (“NSC”) structure, but without the legions of staff. The NSC already includes the Vice President, the National Security Adviser, the Secretaries of State and Defense, and the head of the intelligence community, among others: It is responsible for approving all covert actions before they are sent to the President for approval.²²¹ Operation of the NSA program could come under the NSC’s purview, although perhaps with restrictions on staff involvement to prevent leaks of sensitive information.

The Constitution creates a forceful and independent presidency in order to repel serious threats to the nation.²²² Instead of specifying a legalistic process to begin war, the Framers wisely created a fluid political process in which legislators would use their funding, legislative, and political power to balance presidential initiative.²²³ As the United States continues to confront international terrorism, potentially armed with WMD, it should be careful in adopting radical changes to traditional war powers and procedures.

CONCLUSION

Katz should remain a vital part of the law enforcement system as a provision of judicial oversight over surveillance activities to detect crime. However, such judicial involvement has not, nor should it, extend to the conduct of surveillance to combat national security threats. Forty years ago, the threats of al Qaeda and international terror were not part of the American consciousness. Unfortunately, since September 11, the United States is now painfully aware that the landscape of national security has changed. The Founders created a flexible executive, embodied in Article II of the Constitution, to respond to just such threats.²²⁴ As Justice White anticipated in *Katz*, the need for rapid decision-making and intelligence gathering are best employed by the Executive Branch.²²⁵ Applying *Katz* to anti-terrorism surveillance can do nothing more than hinder, rather than promote, measures necessary to protect the national security of the United States.

²²¹ National Security Act of 1947, ch. 343, § 101, 61 Stat. 496 (establishing National Security Council), amended by National Security Act Amendments of 1949, ch. 412, 63 Stat. 578 (codified at 50 U.S.C. §§ 401-442 (2000 & Supp. IV 2004)); see also National Security Counsel, The White House: President George W. Bush, <http://www.whitehouse.gov/nsc/>.

²²² See U.S. CONST. art. II.

²²³ See discussion *supra* Part IV.

²²⁴ See discussion *supra* Part IV.

²²⁵ See *Katz v. United States*, 389 U.S. 347, 363-64 (1967).